Trusts - re: structure.

[2019]JRC246

ROYAL COURT
(Samedi)

19 December 2019

Before : J. A. Clyde-Smith OBE., Commissioner, and Jurats Blampied and Hughes.

Between	**Pinnacle Trustees Limited**	**Representors**
And	**A**	**First Respondent**
And	**B**	**Second Respondent**
And	**C**	**Third Respondent**
And	**F**	**Fourth Respondent**
And	**G**	**Fifth Respondent**
And	**H**	**Sixth Respondent**
And	**J**	**Seventh Respondent**
And	**K**	**Eighth Respondent**
And	**L**	**Ninth Respondent**
And	**M**	**Tenth Respondent**
And	**N**	**Eleventh Respondent**
And	**O**	**Twelfth Respondent**
And	**P**	**Thirteenth Respondent**

And	**Advocate Damian Evans as guardian *ad litem* of the minor beneficiaries (Q and R) and representing the interests of the unborn beneficiaries of the E Trust**	**Fourteenth Respondent**

IN THE MATTER OF THE REPRESENTATION OF PINNACLE TRUSTEES LIMITED

AND

AND IN THE MATTER OF THE D AND E TRUSTS

AND

IN THE MATTER OF ARTICLES 47G AND 47H OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

Advocate J. P. Speck for the Representor.

Advocate J. M. Sheedy for the First, Second, Third, Fourth, Fifth and Sixth Respondents.

Advocate A. Kistler for the Seventh and Eight Respondents

Advocate D. Evans for minor beneficiaries and unborn beneficiaries.

JUDGMENT

THE COMMISSIONER:

1. On 3rd December, 2019, the Court declared void certain resolutions and deeds of the representor ("the Trustee") by which in 2011 the assets of the D Trust and the E Trust (together "the Trusts") were transferred into a circular ownerless, and apparently unaccountable, corporate structure, terminating the Trusts.

Background to the application

2. By way of summary, the Trustee was from inception the sole trustee of the D Trust, which was a discretionary trust established by a declaration of trust dated 27th October, 2010, and governed by Jersey law. The class of beneficiaries of the D Trust comprised S, A and their son, C. S passed away in August 2019. Each of those beneficiaries were, and in the case of A and C, currently are, French tax residents, and all are adults. The main purpose of the D Trust, initially, was to hold indirectly shares in a valuable pharmaceutical company.

3. The Trustee was also from inception the sole trustee of the E Trust, which was a discretionary trust established by declaration of trust dated 16th April, 1999, and governed by Jersey law. The class of beneficiaries of the E Trust comprised the late S, A, their children B, C and J and their remoter issue, F, Q and R (the daughter and minor grandchildren of B), H and G (the children of C) and K (the daughter of J). Each of those beneficiaries were and currently are, French tax residents other than K, who is resident in the USA. The main purpose of the E Trust was to hold investments.

4. The bulk of the value of the assets was held within the D Trust, and although there were only three members of the family named as beneficiaries of the D Trust, we were shown a letter executed by S and A to the effect that it was their wish that all members of the family should benefit from its assets as well as from the assets of the E Trust, in the proportions set out in their letter.

5. During the latter part of 2011, the Trustee was advised to transfer the assets of the Trusts to companies incorporated in the BVI, in response to the introduction in France of French tax legislation, namely the Loi de Finances Rectificative ("the French Tax Legislation"), the impact of which upon the Trusts was uncertain.

6. The advice came from Mr John Dewhurst, an international tax specialist with Chown Dewhurst LLP, who had advised S, A and C since the 1980s, in relation to their general financial affairs and the structuring of their wealth. During the relevant period, his first point of contact was C, but apart from S and A he says he had no contact with other members of the family.

7. Mr Dewhurst explains in his affidavit of 4th July, 2019, that he had always been of the view that the Trusts (and the structure of which they form part) had acted as a legitimate form of French wealth tax sheltering and a means to avoid reporting obligations in respect of the Trusts or their assets in France. The value of the use of trusts for French tax residents in this regard had been reinforced by a number of decisions of the courts of France.

8. Mr Dewhurst first became aware of the French Tax Legislation in July 2011 and it was clear to him that this legislation, which was due to come into effect on 1st January, 2012, could lead to a sea change in the way in which foreign trusts could be fiscally treated in France. As a result, he sought to engage the services of a French tax specialist, Maître Jean-Marc Tirard, a French avocat, and a partner in the Paris law firm Tirard Naudin.

9. A meeting took place in Paris on 26th October, 2011, attended by Mr Dewhurst, Maître Tirard, C and T (chairman and founder of the Trustee). There was a general acknowledgement that the Trusts and the structures of which they formed part would be likely to come under attack in France

as a result of the French Tax Legislation, but at the same time, there was an acknowledgement from Maître Tirard that it was very uncertain at that point as to the options that were available to trustees of such trust structures, and how the French Tax Legislation would be interpreted. There was an element of doubt as to whether the French Tax Legislation was constitutional. Mr Dewhurst said that the only alternative that Maître Tirard could think of in the circumstances prevailing at that time was some form of corporate re-structuring. There is a very brief note of that meeting, taken by T, which reads in part.

> *"Eventually it seemed that the way forward was to put in place a number of new companies which would employ the services of [certain individual beneficiaries] as consultants so that funds could be repatriated to France in a tax efficient way. No decisions were made at the meeting but [Maître Tirard] thought that the new structures would work and said that he would consider the whole matter and refer back to [Mr Dewhurst]. It was therefore left that [Mr Dewhurst] and [Maître Tirard] would liaise and advise us as to the most efficient structure for the future."*

10. Mr Dewhurst goes on to say that he had further discussions with Maître Tirard during the course of November and December 2011, during which Maître Tirard made it clear to him that based on the law as it then appeared to be, the termination of the Trusts would not cause any adverse French tax issues. Mr Dewhurst therefore proposed the form of corporate structure which was ultimately used, namely two BVI companies which would own each other. He acknowledged that the downside of using such a structure was that the only way that the family could ever draw value from it was to charge fees for the provision of their services and pay taxes on them in the ordinary course. C agreed that implementing the BVI corporate structure should proceed and Mr Dewhurst relayed this to the Trustee, it would seem orally.

11. The Trustee then implemented the re-structuring, under which:-

    (i) The assets of the Trusts were transferred into newly incorporated holding companies, which were at that stage owned by the Trustee in its capacity as trustee respectively of each trust.

    (ii) Two BVI companies were formed which owned each other, which we will refer to as "the BVI Structure".

    (iii) On the 23rd December, 2011, the shares in the holding companies were transferred by the Trustee to one of the companies in the BVI Structure.

(iv) 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.

(v) Consultancy agreements were entered into with S and C.

Thus, the totality of the trust assets were transferred out of the Trusts into a circular ownerless corporate structure. We will refer to this as "the 2011 Re-structuring".

12. Apart from the brief note of the meeting on 26th October, 2011, taken by T, there appear to be no written communications or notes of meetings/telephone calls in the possession of the Trustee in relation to the 2011 Re-structuring. The minutes putting the 2011 Re-structuring into effect refer to *"tax advice"* from Chown Dewhurst, but do not say what that advice was and there is no record of any Jersey or BVI legal advice.

13. The same minutes refer to the *"discussions with the beneficiaries"*, which would seem to be a reference to the communications between Mr Dewhurst and C. There is no indication that any other members of the family, apart from S, were aware of the 2011 Re-structuring. Indeed, in C's affidavit of 25th September, 2019, he states that whilst he did not oppose the 2011 Re-structuring, he did not understand it fundamentally to change the essence of the arrangement with the Trustee which was an asset holding structure for the family. He says that neither he nor his parents nor the other beneficiaries were ever brought into the implementation of the 2011 Re-structuring.

14. Following the implementation of the 2011 Re-structuring, and based upon the advice it had received, 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. As a consequence it never filed any declarations with the French tax authorities.

15. The Trustee first became aware of the potential implications of the 2011 Re-structuring in 2017 and there followed a period of close liaison with C and tax advisers. The Trustee was informed that S and A had submitted personal tax declarations to the French tax authorities for the period 2012-2017, which included the asset values for the Trusts (referred to in their declarations as such) on the basis apparently of advice given by Maître Tirard that the French tax authorities would hopefully treat the Trusts as continuing, notwithstanding the 2011 Re-structuring.

16. Ultimately and without going into the intervening history, the Trustee obtained its own expert advice from a French tax lawyer and in his memorandum of 17th January, 2019, he advised that:-

(i) The Trustee had in 2011 and still has reporting obligations to the French tax authorities;

(ii) The 2011 Re-structuring would be viewed from a French tax viewpoint as having created a *de facto* or constructive new trust;

(iii) As the 2011 Re-structuring has been implemented by the Trustee, it would be deemed to be the trustee of the new trust;

(iv) The Trustee should have filed an "Event Disclosure" with the French tax authorities before 31st December, 2012, and disclosures each year from 2012;

(v) The settlors of the Trusts may be taxed on the assets originally transferred into the Trusts;

(vi) The inheritance tax on the death of the settlors would be higher than if no "new trust" had been created (and the rate of inheritance tax is 60%); and

(vii) The French tax authorities were likely to regard the 2011 Re-structuring as an artificial arrangement and might claim penalties up to 80% for "fraudulent manoeuvres".

17. Subsequently, in a memorandum of 28th February, 2019, the French tax lawyer indicated that if the transfer into the BVI Structure was set aside, he was inclined to think (although there is no authority in France to confirm this) that the reinstatement of the Trusts would be viewed by the French tax authorities more favourably than the BVI Structure, which would probably be viewed by the French tax authorities as an artificial arrangement implemented with a view to concealing the real owner of the underlying assets immediately after the entry into force of the French Tax Legislation, while on the contrary, the Trusts were in his view not seriously open to challenge by the French tax authorities since they are not in themselves an artificial arrangement.

18. On 3rd July, 2019, the Trustee received advice as to BVI law in relation to the BVI Structure to the effect that:-

(i) The structure raises an issue of public policy, because it ties 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.

(ii) 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.

19. Mr Dewhurst stated in his affidavit that contrary to his belief that the BVI Structure would act as an effective French wealth tax and reporting shelter, he accepts with the benefit of hindsight and on reviewing the files for the purposes of this application that Maître Tirard did not come to any conclusive view on this, or provide specific advice on the BVI Structure. He said that Maître Tirard did not therefore formally advise on the 2011 Re-structuring and, he now appreciates, only provided a general commentary in respect of certain aspects or relevant provisions of French law as they were understood at the time. He accepts that the tax advice given to the Trustee was not formally documented by him at the time it was provided, but he did confirm in a very short letter dated 24th June, 2013, that the BVI Structure was created in place of the original trust structure in order to avoid reporting requirements imposed by the French Tax Legislation, in cases where French assets were held in trust, or where assets were created by French residents or for the benefit of French residents.

The law

20. The Trustee originally sought relief under either Article 47G or Article 47H of the Trusts (Jersey) Law 1984 as amended ("the Trusts Law"). Essentially, Article 47G permits the donee of a power to apply for a declaration that the exercise of that power in relation to a trust is voidable on the grounds of mistake. Article 47H similarly permits such a *donee* to seek relief where it has failed to take into account any relevant considerations or has taken into account irrelevant considerations.

21. The Trustee has locus to apply for the relief sought as the trustee who exercised the powers concerned, pursuant to Article 47I(2). Article 47D makes it clear that Article 47G or Article 47H apply whether or not the exercise of the power concerned was made prior to the coming into force of Article 47G and Article 47H, pursuant to the Trusts (Amendment No 6)(Jersey) Law 2013.

22. Advocate Evans submitted, and the Court agreed, that the application was best dealt with under Article 47H of the Trusts Law, in that it was clear that a number of very relevant considerations were not taken into account by the Trustee when the assets were placed into the BVI Structure and the Trusts terminated. Article 47H is in these terms:-

"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."

Decision

23. It is not in issue that the Trustee, in its capacity as trustee, and therefore owing fiduciary duties to the beneficiaries, exercised the relevant powers under the trust deeds by which it transferred the assets into the BVI Structure and brought forward the trust periods, so as to terminate the Trusts. The requirements of Article 47H(1) are therefore met.

24. As to the circumstances in which the Court can declare the exercise of these powers voidable, as set out in Article 47H(3), we find as follows:-

    (i) The only relevant tax advice was French tax advice and Mr Dewhurst has confirmed that Maître Tirard did not formally advise on the French tax position, other than to give general commentary in respect of certain aspects of French law. He did not advise on the 2011 Re-structuring and the use of the BVI Structure. The Trustee therefore proceeded without considering the French tax implications of the 2011 Re-structuring.

    (ii) The Trustee proceeded without considering BVI law advice on the use of the BVI Structure or 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.

25. The Court has in the past made it clear that what may fall within the class of ***"aggressive tax avoidance schemes"*** may go to the exercise of the Court's discretion. For example in IFM Corporate Trustees Limited v Helliwell and others [2015] JRC 160, a case involving rectification of a trust, the Court said this at paragraph 13:-

> ***"13. Historically, the courts have always applied the principles of law rather than what are perhaps inchoate and uncertain ethical considerations in this area. 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."***

26. In the case of In the matter of the J Settlement [2019] JRC 111, a case brought under both Article 47G and Article 47H, the Court said this at paragraph 38(i):-

"(i) In this case there has been active disclosure to and communication with HMRC. We do not have any evidence to suggest that this case falls within the class of what has sometimes been called aggressive tax avoidance schemes. If any external tax authority were to bring such a contention before the Court in future, that is potentially a matter which might go to the exercise of the Court's discretion in such a case. We expressly do not say that even if it were to be an aggressive tax avoidance scheme, the discretion would not be exercised. We have not heard argument and we reserve it, noting only the potential for such a point to be taken."

27. As the French tax advisor said in his written advice to the Trustee, the French tax authorities might regard the 2011 Re-structuring as an artificial arrangement, but however the 2011 Re-structuring is characterised, the most egregious aspect of it, in our view, is the transferring away of these 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.

28. As Millett LJ said in Armitage v Nurse [1998] CH 241 at 253, the duty of a trustee to account to the beneficiaries is at the core of the trustee/beneficiary relationship. 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. As the BVI advice makes clear, there is a serious question mark over whether the directors of these 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 which was owned by the company of which they are directors. The power of the shareholders to appoint and remove directors again vests in a company which is owned by the company of which they are directors.

29. Furthermore, the beneficiaries under the Trusts had the added protection of the supervisory jurisdiction of this Court, but this Court has no supervisory jurisdiction over companies, and certainly not over BVI incorporated companies. There must be a serious doubt over whether the former beneficiaries of the Trusts would have the locus to apply to this Court, or to the BVI court, for relief other than to seek to set aside the structure itself. In other words, these assets had been transferred to a BVI Structure which was on the face of it unaccountable.

30. Thus the Court took the view that it could not allow these assets to be transferred away in this manner. C appears to be the only beneficiary with whom the structure was discussed, but it is clear from his affidavit that he did not understand there to be any change to the fundamental essence of the arrangement with the Trustee, which in his view was holding the assets for the benefit of the family. We cannot see how any beneficiary, properly informed and advised, could ever consider a

transfer to an unaccountable circular ownerless structure such as this, from which no distributions can be made, to be in their interests, whatever the tax considerations. There is no evidence that the other beneficiaries (other than the late S) even knew about the 2011 Re-structuring, and in our view, it would be unjust for this Court not to intervene on their behalf.

31. Accordingly, because of the failure of the Trustee to take these very relevant considerations into account and because there can be no question in our view that if it had taken those considerations into account it would not, indeed could not rationally, have exercised the relevant powers, we concluded that it was necessary to declare the transfers and the deed shortening the trust periods void. In doing so we were satisfied that everyone with an interest in the matter had been convened and we noted that the first to sixth respondents and fourteenth respondents were in support of the application, with the remaining respondents resting on the wisdom of the Court.

32. Being a circular corporate structure, no distributions have been made out of it since 2011; its sole functions had been to hold the shares in the relevant holdings companies, and so setting aside the transfers would not adversely affect the interests of any third party. Accordingly, the Court declared the exercise of the relevant powers void with effect from the date of their exercise, namely 23rd December, 2011.

33. Article 47H(4) says it does not matter whether the circumstances we have described occurred as a result of any lack of care or other fault on the part of the trustee exercising the power, or on the part of any person giving advice in relation to the exercise of the power, although in this case, it is difficult to escape the conclusion that there was a lack of care.

34. A number of financial adjustments were authorised by the Court to be made in relation to the companies now restored to the Trusts (which were convened to the application), all of which were internal to the structure and it is not necessary in this judgment to set them out. The position was simplified by the Trustee proposing to amend the beneficial class of the D Trust so that it is in the same terms and comprises the same beneficiaries as the E Trust, a proposal to which all of the respondents had agreed. The Trustee requested that the exercise of its powers in this respect should be the subject of an order of the Court and an order was made to that effect.

Authorities

Trusts (Jersey) Law 1984 (As Amended).

Loi de Finances Rectificative ("the French Tax Legislation")

Trusts (Amendment No 6)(Jersey) Law 2013

IFM Corporate Trustees Limited v Helliwell and Others [2015] JRC 160

In the matter of the J Settlement [2019] JRC 111

Armitage v Nurse [1998] CH 241 at 253