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Recent Mistake Cases In The Jersey Court – Where Did It All Go Wrong?

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The Royal Court of Jersey has recently provided two helpful judgments in the area of Jersey's mistake law: *In the Representation of P and Others* [2021] JRC 157 and *In the matter of the Representation of The R, S, T and U Trusts* [2021] JRC 045 both concerned applications under Article 11 of the Trusts (Jersey) Law 1984 (T(J)L) and provide a helpful reminder of when it is just to make a declaration that a trust be declared invalid for mistake.

Of particular note is the discussion in *Re P and Others* in relation to the Court's jurisdiction under Article 9 and the more nuanced issue in *Re R, S, T and U* where the tax risks in question had been identified but nevertheless taken.

Background

Unsurprisingly the two cases have distinct facts, but as is very often the case with applications that are brought to seek orders to set aside trusts or dispositions into trust, at the heart of both was a complaint that the tax advice received was wrong and/or incomplete.

In *Re P and Others* the Representors were the settlors of beneficial interests in a number of English properties onto two materially identical Jersey law trusts (**the P Trusts**) in order to provide a tax efficient means of holding the properties for UK tax purposes (specifically to be exempt from UK Inheritance Tax). They were recommended by the trustee, Aqua Trust Company (**Aqua**), that this could be achieved by using what is known as a Qualifying Non-UK Pension Scheme (**QNUPS**) to hold the properties. They erroneously believed that Aqua's recommendation and the use and drafting of the P Trusts had been subject to specific legal and tax advice obtained by Aqua in advance. That turned out not to be the case; the structures were based on Aqua's informal recommendations alone and the P Trusts did not in fact qualify as QNUPS but formed part of the First Representor's estate. The transfers therefore equated to transfers of value which would be lifetime chargeable transfers attracting significant UK Inheritance Tax.

In *Re R, S, T and U* the Representor was the settlor of four Jersey law governed trusts (**the R, S, T and U Trusts**). It was submitted that those trusts had been established upon the proposition that advice that was obtained from the trustees and counsel in respect of the settlor's domicile was "*seriously deficient*" in not advising, or not properly advising, on the nature and level of risk associated with the settlor's claim to be Hong Kong domicile or the ramifications thereof, and that in light of the tax advice received the settlor was mistaken. In short, in 2013 a dispute had arisen between the Representor and HMRC about his domicile, which by 2018 encompassed the four trusts; at the time the trusts were settled in 2009, and on the basis of advice he had received from the co-trustee and counsel, the Representor believed that he was domiciled in Hong Kong, having previously lived there for around 16 years and received clearance from HMRC in or around 1996/7 that he was domiciled in Hong Kong. He since returned to the UK for the purpose of his children's education and he had declared his intention to move back to Hong Kong at the end of their schooling years.

Somewhat unusually in *Re R, S, T and U*, one of the parties that gave and/or facilitated the giving of tax advice was before the Court in its capacity as co-trustee of the trusts. The trustees made clear that they did not accept that they provided any inadequate or insufficient or deficient advice in connection with the establishment of the four trusts or otherwise, but did not oppose the relief sought by the Representor.



In both, HMRC had been given notice of the proceedings but had indicated it did not wish to take part or be represented.

Was there a Mistake?

In the case of *Re P and Others*, the Court held that it was quite clear that there was a mistake on the part of the Representors and that the three limbs of the test were clearly satisfied:

- First, the Representors mistakenly believed that they were transferring properties into Jersey trusts in a way that would be advantageous from a UK tax perspective on the basis that the P Trusts were qualifying QNUPS and would therefore not be subject to UK IHT;
- Second, the Representors would not have entered into the arrangements had they known the true consequences, particularly as the transaction could have been structured validly and effectively from a UK IHT perspective; and
- Third, the tax consequences were indisputably serious – there was a large IHT charge and there were likely to be other “anniversary” charges.

As to any factors militating against the grant of relief, that Court held that enough had been said by Aqua for the Representors to reasonably draw two conclusions: (a) that the structure was tax effective; and (b) that in the circumstances it was not necessary for the Representors to take their own tax advice. The Court therefore had little difficulty in finding that the P Trusts were invalid for mistake and of no effect.

In *Re R, S, T and U*, the mistake in question was rather more specific; the settlor’s argument was that he had not been advised as to the “*nature and level of the risk*”. The trustees and counsel had advised that there was a risk that HMRC could argue that his UK domicile had revived at the time of settling the trusts, and there would be substantial IHT consequences based on the value of the assets transferred into the trusts if HMRC were successful. In fact, HMRC’s position was that he had never acquired a domicile of choice in Hong Kong, notwithstanding their earlier ruling, and, in the event that he were able to establish that he had in fact acquired a domicile of choice in Hong Kong, that his domicile of origin had revived prior to 2009. As to the specific limbs:

1 - The Representor’s evidence was that he took the advice he received at face value and that the trustees and counsel were happy to proceed with the settlement. Specifically, he did not recall being advised (a) that there was a “real risk” HMRC would argue he was UK domiciled in 2009; (b) of the monetary ramifications; and (c) that there was any real risk that HMRC might argue he had never lost his UK domicile of origin. Advice had been received by the Representor for the proceedings which concluded that, at the time the trusts were settled, due to recent decisions in the English Courts, there was a material risk that HMRC would take the view that the Representor was domiciled in the UK in 2009 and that HMRC’s approach would be that the Representor had never acquired a domicile of choice. As such, the Court agreed as follows:

- (a) The Representor did not believe, and had not been advised, that there was a risk of HMRC declaring that he had never lost his UK domicile. The Court said that this part of the test was met on this ground alone.
- (b) Further, and in addition to the above, the Court held that the risk the Representor had been advised of – that HMRC may declare his domicile had reverted to his domicile of origin – was said to be negligible, whereas in fact the risk was high. It was noted that there was no analysis in Jersey as to whether an operative mistake can exist notwithstanding that the relevant person was aware of some risk. It was also noted that whilst the Settlor was maintaining in the HMRC investigation that he was not UK domiciled at the material time, and that there had as yet been no ruling in that investigation, it was not necessary for the Court to conclude what the Settlor’s domicile was one way or the other. Whilst the tax consequences had not yet bitten (there being no finding on domicile), the Court held that a risk of tax exposure was sufficient to support a finding of mistake (as per *In the matter of the D, E, and F Trusts* [2016] JRC 166C). In other words, and as per the decision in *A and B v C* [2018] JRC 174A, it was not necessary to determine whether the trustees and counsel’s advice was in fact correct. All that was required for the Representor to show, as he did, that there was an operative mistake was that there was a greater likelihood of the risks advised of coming to fruition than he had been alerted to. The Court therefore held that the Representor’s “*belief in relation to the risk of a domicile problem arising did amount to a mistake.*”



2 - In relation to the second ground, the Representor had said that if he had realised the risks, he would have told the trustees and counsel to revisit their proposals and would not have settled the trusts. The Court held that this was a purely factual question and that there was no reason not to believe the Representor's evidence that he would not have entered into the transaction had the advice properly identified the nature and level of the risk.

3 - It was not in dispute that, if HMRC were correct, the tax consequences were potentially catastrophic. The scheme was not aggressive or artificial, the other beneficiaries would not be prejudiced, and nor would any third parties; there were therefore no other justice grounds on which the Court felt it should withhold the exercise of its discretion. In addition, the Court confirmed that it was not an attractive proposition for beneficiaries to instead be left to a remedy of bringing litigation against trustees or professional advisers.

Points of Interest

One point of interest in *Re P and Others* was the application of Article 9 of the T(J)L in light of the fact that the transfers pursuant to which the beneficial interests in the properties were settled onto the P Trusts were governed by English law, and the assets in question were beneficial interests in English immovable property. Citing *Tait v Apex Trustees Limited* [2012] JRC 148, *CC Limited v Apex Trust Limited* [2012] 1 JLR 314 and *Representation of the Robinson Annuity Investment Trust* [2014] JRC 133, the Court confirmed that pursuant to Article 9(1) of the T(J) L, any question concerning the validity or effect of any transfer or other disposition or property to a trust is to be determined in accordance with the law of Jersey and therefore that notwithstanding that the various transfer and declarations were governed by English law, it is Jersey law which applies.

Of further particular note in *Re R, S, T and U* was the clarification that there is jurisdiction to set aside a trust for mistake even where the assets have been distributed. Two of the trusts had in fact been terminated the previous year to avoid further tax becoming due (the remaining two were not terminated as there were difficulties in reaching an agreement as to the security to be given to the retiring trustees). The Court held that "even though trust property may have been distributed to beneficiaries, it remains subject to the trustees' equitable lien". The Court's jurisdiction, under Article 11 or 47E, therefore remained engaged.

Nigel Sanders acted for the Representors in Re P and Others and for the trustee in Re R, S, T and U

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