



Trusts and Fiduciary Group

Rectification of a Jersey trust preferred to setting it aside for mistake

November 2010



**In the Matter of DD [2010] JRC 193, 21 October 2010
Commissioner Clyde-Smith, and Jurats Le Breton and Morgan**

This case concerned an application by the Settlor and New Trustee ("DD") to the Royal Court, for rectification of the trust deed and an associated declaration of trust or in the alternative that the trust be set aside on the basis of mistake.

Facts:

The Settlor was advised in 2003 that he would be considered non-domiciled in the UK for Capital Gains Tax ("CGT") purposes, but deemed domiciled for Inheritance Tax ("IHT") purposes. Prompted by the impending 2004 budget and a concern that this would change the rules in relation to non-domiciled persons becoming susceptible to CGT, the Settlor sought further advice from a specialist tax accountant and lawyer (referred to as "H" in the judgment). The Settlor was advised that a trust which provided him and his wife successive life interests would be the appropriate way to protect his assets from CGT charges and that a discretionary trust would not be a good idea.

The Settlor instructed H that he wished to proceed to transfer €7.5m of foreign securities into trust with the intention of protecting those assets from potential CGT charges whilst being IHT neutral. H instructed the original Trustee to proceed with a "*transfer to a discretionary trust*" in error. He should have referred to an interest in possession trust as that was what was in contemplation. The Settlor, with the assistance of the original trustee, successfully executed all the relevant trust documentation and set up a discretionary trust for the benefit of the Settlor and his family. The Settlor being unfamiliar with trust terminology did not notice the mistake. By establishing a discretionary trust, the Settlor became subject to an immediate 20% IHT charge.

Upon DD's appointment as trustee in place of the original trustee, DD conducted a file review and questioned the use of a discretionary trust in the Settlor's case. Advice was obtained from Jersey and English lawyers who advised that the Settlor and the Trustee were exposed to a tax liability of nearly £1.7 million together with various penalties and charges.

The Settlor and the new Trustee therefore brought the current application.

Law:

The Court considered the three stage test for rectification as set out in *In re Sanne Trust Company Limited* [2009] JRC 025B. Namely:

- i) the Court must be satisfied that there is sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intentions of the parties;
- ii) there must be full and frank disclosure; and

- iii) there should be no other practical remedy. The remedy of rectification remains a discretionary remedy.

Findings:

The Court was satisfied that a genuine mistake had been made, and that the trust did not carry out the true intentions of the parties.

The Settlor's intention was to protect his assets from future CGT charges while being IHT neutral, which on H's advice required an interest in possession trust, not a discretionary trust. The Settlor did not understand the difference between the two possible trusts, and relied on H to put his intentions into effect. H confirmed on oath that his reference to a discretionary trust in his instructions to the original trustee was an error.

The Court was satisfied that there had been full and frank disclosure and considered whether there were any other practical remedies available. The Court noted that whilst the Settlor could pursue a claim against H, it was not practical nor attractive to require the Settlor to engage in costly and risky litigation. The Court also considered that if the grounds for the discretionary remedy of setting aside the Trust for equitable mistake were made out (which the Court did not need to determine), the Court would have two discretionary remedies at its disposal. Importantly the Court noted, in view of its recent decisions "*the broader test for mistake that now applies under Jersey Law*". However, the Court considered that a remedy that preserved the trust (i.e. rectification) was preferable to one that would set it aside (i.e. mistake). Accordingly the Court ordered rectification of the trust and an associated declaration of trust by the Settlor so as to create successive life interests in favour of the Settlor and his wife.

Comment:

The preference for preservation of the trust to fulfil the true intentions of the parties is an example of the Royal Court of Jersey providing assistance to Trustees and beneficiaries in the most practical way. Setting aside a trust on the ground of mistake is not always the most appropriate remedy, although often available, in principle at least, on the same facts. The Court also openly recognised that there is a "broader test for mistake" in Jersey compared to that which appears to apply in England.

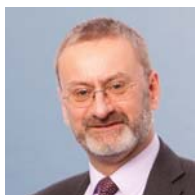
For further information please contact Robert MacRae, Andreas Kistler or Samantha Hoare (contact details on the next page).

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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