



No re-writing history: the flexibility of Jersey's remedies for mistake and inadequate deliberation

Service area / [Dispute Resolution and Litigation, Trusts and Private Wealth](#)

Location / [Jersey](#)

Date / [June 2020](#)

Re the G Trust, Royal Court of Jersey (MacRae, Deputy Bailiff, and Jurats Olsen and Austin-Vautier) 27 April 2020.

In an important new case, the Royal Court declared voidable the decision of the former trustee of the G Trust to irrevocably exclude a beneficiary, pursuant to Article 47H of the Trusts (Jersey) Law 1984 (as amended) (the Trusts Law).

However, rather than setting the exclusion aside entirely (as had previously been the remedy granted in such cases), the Court ruled that the exclusion would have effect as if it had been exercised in the manner which the former trustee should have contemplated and adopted at the time when it originally exercised its power.

In making the order, the Court made clear that it would not “re-write history”, “make a new decision which the [former] trustee wished it had made at the time” or “substitute a different transaction for that which was undertaken”, but would exercise its power to declare that the former trustee’s exercise of its fiduciary power would have such effect as the Court may determine.

The Court’s ruling demonstrates the flexibility of the remedies that the Court can grant in cases of mistake or inadequate deliberation in the exercise of a fiduciary power, so that a more beneficial outcome could be achieved for the Settlor and his Wife.

Background

The Settlor and his Wife were beneficiaries of a Jersey law trust (the Trust).

Changes were to be made to the UK IHT regime, taking effect from 6 April 2017, the effect of which was to bring UK property owned through an offshore company held by a trust within the estate of the settlor for UK inheritance tax (IHT) purposes, which would have meant that certain UK property held within a Cayman company wholly owned by the Trust would have become taxable at 40% upon the death of the Settlor. Prior to the changes coming into effect, the former trustee quite properly took tax advice on the options available to it to mitigate the effects of the change in law.

Exercise of power of exclusion

The former trustee was advised in early April 2017 that it had two options:

1. the Settlor and his Wife could be wholly excluded from benefitting under the Trust, so that they could not benefit from the Trust or be added back as beneficiaries; or
2. the company holding the UK property could be transferred to a new trust from which the Settlor and his Wife would be excluded from benefit, but they would still be able to benefit from the substantial assets remaining in the Trust.

Either step had to be taken prior to 6 April 2017, as otherwise the step would constitute a potentially exempt transfer for IHT purposes and IHT would be payable in the event that the Settlor were to die within a seven year period from the step being taken.

Despite understanding that there were two options available, the former trustee chose the first option and executed a deed of exclusion on that basis. The former trustee’s resolution recorded that the Settlor and his Wife had requested that the exclusion be in relation to the whole of the income and capital of the trust fund.

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However, the former trustee did not consult the Settlor and his Wife properly prior to exercising its power in this way, and evidence was placed before the Court that the Settlor was never told of the second option, and that his Wife was not consulted about her exclusion at all and would never have agreed to it.

The former trustee subsequently resigned as trustee of the Trust in favour of the Trustee.

The Trustee sought advice as to whether the exclusion of the Wife could be reversed and was advised that as a result of the irrevocable and complete nature of her exclusion, the only option was an application to the Royal Court. The Trustee was also advised that the former trustee could have excluded the Wife during the lifetime of the Settlor but not thereafter (option three).

Option three was clearly preferable. In practical terms, it would allow the Wife (who was younger than the Settlor) to benefit from the UK property and from the remaining assets of the Trust, which were substantial, if she were to survive the Settlor. English counsel subsequently advised that this solution would not offend the UK IHT reservation of benefit rules as the Wife (and therefore the Settlor) would enjoy no benefit from the UK property during the Settlor's lifetime.

The Wife's exclusion held voidable

The Trustee sought orders from the Royal Court pursuant to Articles 47G and 47H of the Trusts Law that the former trustee's exercise of power be set aside.

Article 47H provides that the Court has power to set aside a trustee's exercise of fiduciary powers where it would have acted differently had it not failed to take into account relevant considerations and/or not taken into account irrelevant considerations.

The Royal Court found that the following relevant considerations were not taken into account by the former trustee:

- the wishes of the Wife
- the needs of the Wife
- the effect of the exclusion upon the Wife
- that the second of the two options of which the former trustee was advised but which had even been discussed with the Settlor; and
- the availability of the third option, of which the former trustee had not been aware.

The Court also found that irrelevant considerations had been taken into account by the former trustee – firstly, that it could continue to benefit the Settlor and his Wife by making distributions to their children for them to pass on to their parents (which was not in fact possible as it would have been a breach of trust) and, secondly, that the Settlor and his Wife had requested that they be excluded in relation to the whole of the income and capital of the trust fund, which they had not done.

Unsurprisingly, the Royal Court concluded that the decision of the former trustee to exclude the Wife in the way that it did was flawed, voidable and should be set aside.

What consequential order should follow?

The novel aspect of the Trustee's application was in relation to the consequential orders that the Court was asked to make. Rather than simply setting aside the exclusion, leaving the Trustee to implement option three afresh if it thought fit, the Court was asked to consider exercising its powers to declare that the exclusion shall have effect as if the former trustee had at that time exercised its powers in the more limited way proposed by option three.

There were potentially substantial advantages to this. If the Trustee were to exercise the power of exclusion afresh, with effect from April 2020, the exclusion would be a potentially exempt transfer for IHT purposes (and therefore at risk of tax depending on how long the Settlor lived), whereas that would not be the case if the more limited exclusion were to be ordered to have effect from the date of the original exercise of power, i.e. prior to the changes on the law which took effect on 6 April 2017.

Two issues arose.

1. Was this within the powers of the former trustee under the terms of the Trust?

The power of exclusion did not expressly provide for a person to be excluded temporarily. The Court made two points. The general proposition is that the greater includes the less – that is to say, a power to exclude permanently would generally encompass a power to exclude for a lesser time unless expressly excluded. Furthermore, it is permissible for a trust to exclude a person by reference to a description, and a person may fall within or without that description from time to time. The Trust provided for exclusion by reference to a description. In this case, the description would be: *"the settlor's wife, during his lifetime"*.

The second issue was potentially more difficult.

2. Is the Court empowered to make such an order under Article 47H?

Crociani suggests flexibility...

In the decision of the Court of Appeal in *BNP Paribas Jersey Trust Corporation Limited v Crociani* [2018] JCA 136A, the Court considered the extent of its discretion to authorise appropriate remedies and consequential orders following a declaration that a transfer was voidable. It found that Article 47E (power to set aside a transfer or disposition of property to a trust due to mistake) provided a *"flexible framework"* and that *"there may be competing factors to be taken into account in identifying which, if any, of the effects of a transfer are to be declared to be retained"*.

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The Court took the view that similar principles apply to the exercise of the Court's powers under Article 47H – it has discretion to determine what effects, if any, of the exercise of the trustee's fiduciary powers are to be retained.

...but B Trust clarifies the limits

But that is not to say that the Court is entitled to re-write history or to make a new decision which a trustee wished it had made at the time.

In *Re the B Trust [2019] JRC 035*, the Royal Court had agreed that certain transfers into trust could be voided on the ground of mistake. However, as merely voiding them would mean that the assets would fall back into his estate, which would not be as tax efficient as he had intended, the representor asked the court to declare that instead, the transfers should take effect as if they had been gifts to his wife. The Court declined to do so, saying that it would require the Court to take a positive step to improve the representor's taxation outcome, which was not the business or the objective of the Court.

The Royal Court's decision

Where was the line to be drawn?

The Court found that the former trustee had intended to exclude the Wife and did so. However its decision was flawed. It had had a duty to consider her exclusion carefully and had it acted in accordance with that duty there could be no doubt that it would have excluded the Wife during the Settlor's lifetime only – that would have been the obvious course for it to take. For the Court to make an order having that effect would not be to substitute a different transaction for that which was undertaken but was squarely within the Court's power to declare that the former trustee's exercise of its fiduciary power shall have such effect as the Court may determine.

The Court accordingly declared that the exercise by the former trustee of its powers whereby the Wife was declared to be an Excluded Person be set aside, and shall have effect as if the former trustee had instead declared that, from the date of the exclusion but only during the lifetime of the Settlor, the Wife shall be an Excluded Person.

Andreas Kistler, Victoria Connolly and Dean Robson made the application to the Royal Court in this case.



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