

JERSEY / JUDGMENT

The Representation of Q re The R Trust, The S Trust, The T Trust and The U Trust

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Trusts. [2021]JRC166 Royal Court (Samedi) 10 June 2021 Before : J. A. Clyde-Smith OBE, Commissioner, and Jurats Blampied and Austin-Vautier Between Q Representor And Lutea Trustees Limited and Lutea Hong Kong Limited First Respondents And Advocate Guillaume Staal, representing the unborn beneficiaries Second Respondent And W (guardian ad litem for the minor beneficiary) Third Respondent IN THE MATTER OF THE R TRUST, THE S TRUST, THE T TRUST AND THE U TRUST AND IN THE MATTER OF ARTICLES 11 AND 47E OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED) Advocate R. S. Christie for the Representor Advocate N. M. Sanders for the First Respondents Advocate G. C. Staal for the unborn beneficiaries and for the guardian ad litem of the minor beneficiary

judgment

the commissioner: 1. The Representor applies to set aside and declare to be of no effect and void ab initio four trusts settled by him in February 2009. We will refer to him as “the Settlor”.

Background

2. The Settlor’s domicile of origin is the U.K. He moved to work in Hong Kong in 1980, when he was 24 years old. He met his wife there in 1984, whose domicile of origin is also the U.K. They were married in 1987 and have three children, all born in Hong Kong in 1990, 1992 and 1994 respectively. After seven years in Hong Kong, the Settlor applied for, and was granted, permanent residency there. The Settlor’s position is that he had acquired a domicile of choice in Hong Kong. 3. In July 1996, the company the Settlor worked for in Hong Kong was acquired by a Malaysian company and as part of the sale agreement, he was required to move to work in Kuala Lumpur. In March 1998, the Settlor resigned from that employment, and the family moved to the U.K. for the purpose and duration of the children’s school and university education. The Settlor became U.K. resident for tax purposes and in his tax returns, he maintained his domicile of choice in Hong Kong. A home was acquired in the U.K., but he and his wife retained their home in Hong Kong, to which they intended to return. During this period of U.K. residence, the Settlor’s work was very much Hong Kong orientated. He and his wife returned to Hong Kong in March 2019 and have resided there ever since. 4. The Settlor was very successful in his field. He met Mr David Jenner of Lutea Trustees Limited (“Lutea”), a Jersey based trust company, in 1994/1995 who provided the

Settlor with tax and legal advice. A number of trusts were set up to protect the Settlor's tax position. Part of that advice was to test the Settlor's domicile of choice in Hong Kong with HMRC by settling a relatively small sum of money on a trust on 7th August 1995 and reporting it to HMRC on the basis that his domicile of choice was Hong Kong. On 6th March 1996, HMRC wrote accepting that the Settlor was not domiciled in the U.K. but saying that the position would be reviewed periodically. 5. In 2006, new non domicile rules in the U.K. were anticipated which were eventually incorporated into the Finance Act 2008. Mr Jenner advised that English tax counsel, Ms Emma Chamberlain, should be retained. They advised that the existing trusts the Settlor had established should be wound up. 6. In 2008, the Settlor's wife submitted a domicile form to HMRC claiming a domicile of choice in Hong Kong in response to a query from HMRC over her offshore bank accounts. They responded on 1st October 2008 in these terms: "Thank you for your client's completed Domicile form (OCG4). We have reviewed the information provided about your client's Domicile status, and have no further questions in respect of their offshore account(s) at present. HMRC reserve the right to review this position in the future and may ask your client to substantiate their claim. Your client may become domiciled within the UK if their personal circumstances and intentions towards remaining in the UK change. As long as they remain resident in the UK their domicile status should be reviewed each year and HMRC should be informed if you or your client consider they have become domiciled within the UK and it is relevant to their tax liability. Any foreign income that your client remits to the UK may affect their tax liability and HMRC should be informed immediately. Thank you for your cooperation. Please note that nothing in this letter constitutes HMRC's agreement to any claim to a particular status, allowance or relief." 7. Having wound up the existing trusts, the issue then arose as to whether new trusts should be established. There are very detailed and professional records of the extensive attendances upon Ms Chamberlain, the notes of which were routinely copied by Mr Jenner to the Settlor and discussed with him. 8. As the note of the attendance upon Ms Chamberlain on 15th October 2008 shows, it was critical in deciding whether new trusts should be established that the Settlor had retained his domicile of choice in Hong Kong. If his U.K. domicile had revived, there would be a substantial Inheritance Tax ("IHT") charge of 20% based on the value of the assets transferred into trust. 9. We are not concerned here with an analysis of that advice, but what the Settlor says he understood that advice to be and its effect upon the decisions he took. The final position was that Mr Jenner and Ms Chamberlain advised he should proceed with new trusts because they were satisfied that he had maintained his non-U.K. domiciled status, essentially because: (i) The family's residence in the U.K. was for the purpose of the children's education. It was the Settlor's declared intention (and that of his wife) to return to Hong Kong where they maintained a home once the children's education had been completed. (ii) HMRC had confirmed his change of domicile from the U.K. to Hong Kong in 1996. The burden would now be on HMRC to prove that this domicile of choice had been lost. (iii) HMRC had confirmed the non-domiciled status of the Settlor's wife in October 2008. Mr Jenner and Ms Chamberlain viewed the Settlor's position as being stronger than that of his wife.

10. Assuming his non domiciled status, there were a number of benefits to establishing new trusts, summarised in the attendance note of 22nd October 2008 as follows: (i) They would provide long term IHT protection, so that if the Settlor lost his foreign domicile or became domiciled in the U.K. the IHT protection would continue to exist. (ii) There would be no Capital Gains Tax on disposals of U.K. assets held in trust. (iii) Capital Gains realised by the trustees would not be taxed on the Settlor whilst he was not domiciled in the U.K. unless he received capital distributions which were then remitted to the U.K.. (iv) Such trusts would generally provide for easier succession, because there would be no need to have wills in various jurisdictions.
11. In February 2009, the Settlor proceeded to establish four Jersey proper law trusts (“the Trusts”) as follows: (i) The R Trust, established on 12th February 2009 to which transfers were made on 1st April 2009. (ii) The S Trust established on 11th February 2009, to which transfers made on 30th March 2009, 10th June 2010 and (in relation to a small amount) on 13th February 2013. (iii) The T Trust, established on 9th February 2009 to which transfers were made on 1st April 2009. (iv) The U Trust, established on 10th February 2009 to which transfers were made on 1st April 2009.
12. The initial funds settled into the Trusts were HK\$10 per trust, and in all, some £20 million was transferred into the Trusts thereafter. The trustees are Lutea and its associated company Lutea Hong Kong Limited (together “the Trustees”).
13. An HMRC investigation into the tax affairs of the Settlor began in 2013, but it did not encompass the Trusts until 2018. The Settlor deposes that the investigation has been intrusive, costly and incredibly time consuming for everyone involved. The position taken by HMRC in relation to the Trusts is that, notwithstanding the ruling in 1996, the Settlor never acquired a domicile of choice in Hong Kong. They state that if the Settlor was able to discharge what they describe as the “heavy burden” of proving that he had acquired a domicile of choice in Hong Kong, his domicile of origin had revived prior to 2009, as evidenced by his choice and actions in and after 1997. The issue of the Settlor’s domicile has yet to be resolved in so far as the Settlor disputes the finding of HMRC and may appeal to the Special Commissioners.
14. The financial implications of HMRC succeeding in establishing that the Settlor was U.K. domiciled when he settled the Trusts are very significant. He has been advised that the minimum IHT liability (comprising the entry charge, the ten year charge and the exit charge) will be £7.1 million, but with interest and penalties, the liability could match the value of the assets originally settled, although he is advised that the penalties are more likely to be at the lower end of the range.

15. The Settlor was advised that if HMRC succeed in determining that he was U.K. domiciled, the longer the Trusts lasted, the more tax would become due, and so the S Trust and the T Trust were terminated on 3rd July 2020. We understand that the other two trusts were not terminated, due to difficulties over agreeing the security to be given to the retiring trustees.
Evidence
16. The Court has affidavits from the Settlor, his wife, Mr Jenner, Mr Christian Brown of Lutea Hong Kong Limited and Ms Sonia Shah of Bedell Cristin. The application is supported by the Settlor's wife and their three children and by Advocate Staal, representing the unborn beneficiaries and the guardian ad litem of the minor beneficiary. HMRC have been notified of the application and do not wish to be joined as a party nor to make any representation, other than to be informed of the outcome.
17. The Settlor's affidavit is detailed and comprehensive, but we would summarise his evidence as follows: (i) He is not an expert in U.K. tax law and so delegated to and instructed those he thought were the best people in the business at the time. He took their advice at face value and did not second guess it. In practice, he said Ms Chamberlain dealt with the technical side of things and Mr Jenner translated the advice to him in telephone calls or during meetings. By 2006, Mr Jenner had been advising him and his family for over ten years and was intimately involved in his tax and financial affairs. (ii) He made it clear to Mr Jenner and Ms Chamberlain at the time that this was to be an exercise in removing risks. He had worked very hard for years and the purpose of the entire exercise was to preserve the assets he had accumulated for the benefit of his family. (iii) He remembers very limited discussions about his domicile and inheritance tax, which did not feature largely. (iv) He did not remember either Mr Jenner or Ms Chamberlain raising any real concerns about his domicile status. He remembered them telling him and it was his clear understanding that unless his intention to return to Hong Kong after the children finished their education had changed, his foreign domicile would not have changed, particularly in light of the 1996 ruling. He remembered leaving every single meeting or telephone call with the impression that he was "safe" on domicile.
- (v) Mr Jenner and Ms Chamberlain were at all times very keen to proceed with the resettlement of the assets into the Trusts. The clear advice they gave was that settling the Trusts was the best way forward for him and his family and he did not remember either Mr Jenner or Ms Chamberlain discussing with him any alternative structures or options. (vi) He did not remember either Mr Jenner or Ms Chamberlain explaining to him firstly that there was a real risk that HMRC would argue that he was U.K. domiciled in 2009, secondly the actual monetary ramifications that such an argument would lead to and thirdly, that there was any risk that he might never have lost his U.K. domicile of origin. If he had been told of these things, he would remember, and if they had been mentioned to him as a real risk, he would have told Mr Jenner and Ms Chamberlain to re-visit what they were proposing to do. He had no capacity to make his own judgement call about the level or types of risks which have now been identified with the benefit of hindsight; he relied entirely on the advice that he was

given at the time. (vii) Whilst it would be right to say that as a businessman, he took risks in his professional life, when it came to his family and their financial security, he was incredibly cautious. He would never have risked the possibility that at a minimum a quarter of the trust assets be paid away in tax. (viii) In conclusion, had he known that there was a real risk that HMRC might well take the position that they have in fact taken as concerns his domicile, and had he known the real level of risk that such a substantial proportion of the funds might be decimated by tax liabilities to HMRC, he would never have agreed to settle them. He would have asked Mr Jenner and Ms Chamberlain to explore alternative structures. They never mentioned there was a serious possibility of his being U.K. domiciled and indeed, the risk they mentioned wasn't even the right one. They simply recommended a structure which it now seems clear ought never to have been recommended. The applicable law

18. The Court's jurisdiction under the Trusts (Jersey) Law 1984 ("the Trusts Law") is engaged in two ways: (i) Under Article 11, the Trusts can be declared invalid to the extent that they were established by mistake. To the extent held invalid, then pursuant to Article 11(6) the property shall be held for the settlor absolutely or if dead, for his or her personal representatives. (ii) Under Article 47E, the Court can declare a transfer or other disposition of property to a trust voidable and having such effect as the Court may determine or having no effect from the time of its exercise. Pursuant to Article 47E(3), the circumstance in which such a declaration can be made is where the settlor made a mistake in relation to the transfer or other disposition of property to a trust, would not have made that transfer or other disposition but for that mistake and the mistake is of so serious a character as to render it just for the Court to make the declaration.
19. As the Court said in the case of *In the matter of L Trust* [2019] JRC 195, citing *In the matter of the S Trust* and *In the matter of the T Trust* [2015] JRC 259, the following are points of broad application: (i) Article 11 of the Trusts Law relates to the invalidity of a trust as a whole; (ii) In so far as transfers which were subject to the application included the transfer which immediately constituted the trust, Article 11 would seem to apply; (iii) In so far as the transfer is made to an existing trust, Article 47E would apply. (iv) For the purposes of Article 11 and 47E, it does not matter whether the asserted mistake was of fact or law, as to the effect or as to consequences. Accordingly, a mistake as to the tax consequences of a trust or a transfer to a trust is a mistake for these purposes.
20. The Court will look at the arrangements in the round as was stated in the case of *In the matter of the S Trust* and *In the matter of the T Trust* at paragraph 17: "It would seem to be inconceivable that the trusts themselves, constituted by the payment of £20 into the relevant trust on the date it was established, would have been made had there been any contemplation that the further dispositions later made into trust were not to be made".

21. Furthermore, as the Court said in *Robinson Annuity Investment Trust* [2014] JRC 133 at paragraph 27: “In many if not most cases, the transfer of property will occur at much the same time as the creation of the trust and the same mistake will be operating on the mind of the settlor both in relation to the creation of the trust and the transfer of the property to it.” Such an approach was taken by the Court in *Representation of A in the matter of the G Trust* [2018] JRC 159 at paragraphs 21 and 22.
22. In contrast, in the case of *In the matter of the C Trust* [2020] JRC 120 (at paragraphs 26-33), the Court did not take this approach, because in that case, it found that the mistake did not operate on the mind of the settlor in connection with the original purpose for which the trust was settled. It was only later transfers of cash into the trust which were made in a way which mistakenly gave rise to an unnecessary tax liability.
23. In the case before us, the Settlor established the Trusts with HK\$10 for the purpose of making the subsequent transfers, and we are satisfied that, assuming there was a mistake on his part, it operated upon his mind in relation to both the initial and subsequent transfers and, as contended by Advocate Christie, it is appropriate for the Court to apply Article 11.
24. Article 11(8) provides that an application under Article 11 can be made by any person referred to in Article 51(3), namely by the Attorney General, a trustee, a beneficiary or with the leave of the Court by any other person. The Settlor is a beneficiary of three of the trusts and we grant him leave to bring the application in relation to the fourth trust of which he is not a beneficiary, on the basis of his standing as settlor and his application being supported by the adult beneficiaries.
25. Under the test summarised in *Re Lochmore Trust* [2010] JRC 068 and settled in *Re S Settlement* [2011] JLR 375, and which is applicable to applications brought under Article 11 of the Trusts Law, the Court must ask itself the following questions: (i) Was there a mistake on the part of the settlor? (ii) Would the settlor not have entered into the transaction ‘but for’ the mistake? (iii) Was the mistake of so serious a character to render it unjust on the part of the donee to retain the property?
26. In the case of *In the matter of the S Trust* and in the matter of the T Trust, the Court said at paragraph 20 that: “... the judicial test, in requiring the Court to consider whether it is unjust on the part of the donee to retain the property, seems ... to contemplate that the court is measuring justice by reference to the position of the donee ... the focus of the statutory test, by contrast, is whether it is just for the Court to make a declaration that a disposition of property is voidable ... because of a mistake made by the donor.” and clarified that there might be a factual circumstance where the distinction is relevant, but that in most cases the result of the statutory and judicial tests will be the same. The present case is one where the application of the judicial or statutory test will yield the same answer. Decision

27. The Settlor has obtained an opinion from another English counsel, Mr Barrie Akin, dated 1st March 2021 and he said it was important to be aware of the way in which U.K. courts and tribunals were approaching domicile issues in the period immediately before February 2009, when the Settlor created the Trusts. The decision of the English Court of Appeal in *Gaines-Cooper*
- [2008] EWCA Civ 1502 had been released on 23rd October 2008 the principal significance of which was: (i) It reinforced the proposition that in judging whether a person had acquired a domicile of choice by a particular time, the fact-finding tribunal is entitled to consider evidence of later events. (ii) It also reinforced the point that the fact-finding tribunal was advised to examine all relevant facts to arrive at an objective assessment, with the statements of the propositus (the term used in domicile cases to denote the person whose domicile is in issue in a proceedings) being afforded little weight. (iii) HMRC had been able to cast sufficient doubt on the evidence of a living propositus to allow the special commissioners to conclude that he had not discharged the burden of proof which is on the balance of probabilities basis and to take more notice of surrounding circumstances.
28. Extracts from the Tax Journal illustrate that there was a serious concern on the part of taxation practitioners at the time that HMRC was becoming far more searching in its consideration of domicile claims and was becoming less inclined to accept the word of the taxpayer as to his or her intentions – at least where the amount of tax potentially at stake was large. There was every reason to believe then that HMRC would be more active in pursuing domicile inquiries than had hitherto been the case, given their success in the *Gaines-Cooper* case, and especially as Parliament had just enacted a considerable body of new law on the question of remittances by non domiciliaries.
29. In Mr Akin's view, there was a material risk at the time that HMRC would take the view that the Settlor was domiciled in the U.K. when he made the Trusts. At that time (2009), he and his family had been resident in the U.K. for some 11 years and it was some 22 years before they resumed residence in Hong Kong. That risk was substantially increased by HMRC's success in the *Gaines-Cooper* litigation and by the size of the amount settled by the Settlor. In his view, the most likely form of challenge by HMRC would be that the Settlor had never acquired a domicile of choice outside the United Kingdom, a tactically superior approach given what he described as the pervasive nature of domiciles of origin and the incidence of the burden of proof, which rests on the Settlor if he wishes to establish a domicile of choice in Hong Kong, but which he can pass back to HMRC if, once Hong Kong domicile is established, HMRC wish to allege a change of domicile back to the U.K.. Was there a mistake on the part of the Settlor?
30. The case of *In the matter of the G Trust*

- [2019] JRC 056 authoritatively explained at paragraphs 12-16 why it is inappropriate to make the distinctions made in English law as to incorrect conscious beliefs, incorrect tacit assumptions, or mere causative ignorance, because in the Court's view such distinctions are rather artificial. That was an Article 47E case, but these observations apply equally to an Article 11 case.
31. This application requires the Court to consider whether the Settlor was operating under a mistaken belief when he settled the Trusts. We find that he was on two grounds: (i) First, he believed that in so far as there was any risk as to domicile, it was a risk that he might develop a U.K. domicile at some later date. In fact, the actual risk was that HMRC would take the view that he had never lost his U.K. domicile, which was a completely different risk with the burden of proof upon the Settlor and therefore of a far more precarious nature. In our view, this part of the test is met on this ground alone. (ii) Second, by the time the Settlor settled the Trusts, his belief (in reasonable reliance on the advice he received) was that any risk in relation to domicile such as there was, was negligible. In fact, the risk was high. It will always be a matter of fact and degree, whether a belief in relation to a risk is so far removed from a realistic assessment of that risk that it can be described as mistaken. Whilst there will be grey areas in some cases, in this case, we conclude on the facts that the Settlor's belief in relation to the risk of a domicile problem arising did amount to a mistake.
 32. In relation to the second ground, there is no analysis in Jersey case law as to whether an operative mistake can exist notwithstanding that the relevant person was aware of some risk that his belief might be wrong. The position at English law is discussed in detail in Goff & Jones, *The Law of Unjust Enrichment*, 9th edition at 9-06 – 9-40. As to what amounts to a mistake in English law and the types of knowledge analysed in *Pitt v Holt* [2013] 2 AC 108 and rejected by the Royal Court in the case of *In the matter of the G Trust*, the approach taken by the English courts is unnecessarily rule driven and artificial and, in our view, tends to obscure rather than illuminate the process which the Court must undertake. In any event, on the test suggested in Goff & Jones, there was clearly an operative mistake in this case.
 33. The issue of the Settlor's domicile has not yet been determined, and he is still maintaining in the HMRC investigation that he was not U.K. domiciled at the material time. However, it is not necessary in our view for this application to succeed for the Court to conclude that the Settlor was definitely domiciled in the U.K. in 2009.
 34. In *A and B v C* [2018] JRC 174A, the position in relation to the initial tax advice (i.e. whether it was right or wrong) was disputed. The Court decided at paragraphs 18-19 that it did not have to express a conclusive view as to which tax advice was correct. Instead, the Court concluded at paragraph 19: "19. The Court does not feel it necessary at this point to express a view as to which tax advice is correct. We have seen copies of the various opinions or notes of conference settled by counsel, but those opinions have not been tested with live evidence and cross-examination. HMRC, who have been given notice of these proceedings in the usual way, have not expressed any view. However, whilst we do not feel able to say that the tax advice on which the Representors are now proceeding is necessarily right, it is certainly

not necessarily wrong either. For the purposes of this application only, we take it to be at least probably right. We think the position is that no reasonable trustees would be expected to have taken the steps which the Representors took in 2001 if they had known that the possible outcome of those steps was exposure to IHT in sums of approximately £800,000 and the exposure of the Settlor to capital gains tax on gains arising in the 2001 Trust. We are satisfied therefore that but for the tax advice which was received, the 2001 Transfers would not have been made. Accordingly, the mistake made was not so much that there necessarily was a tax problem, but rather that there was a probability that there was if the power were exercised in the way it was, and in our judgment, the Representors would not have exercised the power of appointment as they did but for that mistake.” (our emphasis)

35. In this case, HMRC has made its position absolutely clear that the Settlor never lost his U.K. domicile. If the Settlor had received advice in 2009 as to the likelihood that HMRC would adopt this position (and the consequences which would flow if HMRC were successful) we find that he would not have settled the Trusts. The current factual scenario is therefore quite sufficient for the Court to reach the conclusion that the Settlor was acting under a mistake. The alternative would be to suggest that the Settlor would have to fight the HMRC investigation to its conclusion and only make this application if he loses, which we accept cannot be right.
36. In the matter of the D, E and F Trusts [2016] JRC 166C, is another case in which a risk of tax exposure has been held to be sufficient to support a finding of a mistake. It was said at paragraph 24: “... he believed that in making the transfers to the trusts in that form he was not only achieving the U.S. tax objectives but also nullifying any risk which arose under the Swiss Tax issue. In fact he was wrong because with the trusts in the form they are, there is a risk of a substantial U.S. estate tax charge. The mistake was accordingly one which relates to the fiscal consequences or advantages of the transfer. ...”
37. The Court further stated at paragraph 27(i): “Although the risk may be thought to be far from certain of coming to pass ... the potential tax bill for their estates is huge.”
38. Accordingly, for the Court to conclude that a mistake has been made, it is sufficient that the mistake has led to a risk of a serious adverse tax consequence, even if it is far from certain whether that risk will actually come to pass. Would the Settlor not have entered into the transaction but for the mistake?
39. This is a purely factual question. The Settlor’s evidence is that if he had received the right advice as to the nature of the risk, and the level of the risk involved, he would have absolutely not have entered into the transaction. The evidence suggests that the Settlor was a careful man, who sought to pay what he believed were the best advisers available for the best advice. There is no reason at all to think that he would not have followed that advice, had it properly identified the nature and level of the risk.

40. This is not a case where the Settlor was entering into an artificial scheme to save large amounts of tax. The Trusts were relatively straightforward structures. Mr Akin describes the creation of the Trusts as a sophisticated but neither artificial nor aggressive response to the revised statutory regime and points out that if the application is successful, the Settlor will be exposed to tax on the income and gains realised by the Trustees since the start of the Trusts, as having been his income and gains.
41. We conclude, therefore, that the Settlor would not have created the Trusts “but for” the mistake. Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?
42. In the case of *In the matter of the G Trust* at paragraphs 17-22, the Court considered this third test which the Court must apply, and made the following observations: (i) The Court must first ask whether the mistake is of a serious character and then ask whether it is just for the Court to make the declaration. (ii) The seriousness of the mistake can be analysed by reference to the effect both on the transferor and potentially on the trustees and beneficiaries of the trust. (iii) As to the question of justice (summarising paragraphs 18-22), the Court might not step in to relieve settlors of the consequences of artificial or aggressive tax avoidance which has gone wrong.
43. As to seriousness, if HMRC were to prevail in the investigation process, the amount of tax due would be very substantial, and depending on the penalties, in the words of Advocate Christie, potentially catastrophic for the Settlor and his family.
44. As to justice, this is not a case where the Settlor has sought to enter into an aggressive or artificial scheme to avoid tax. There is nothing in the structure which moves the Court to withhold the exercise of its discretion. As to the beneficiaries, they support the application, and will not be prejudiced in any event, because the Settlor and his wife fully intend their wealth to go to their children and remoter issue in due course. Furthermore, no third parties will be prejudiced by the declarations sought.
45. The Courts have on a number of occasions considered how it affects the exercise of their discretion, if the seriousness of the mistake (i.e. the loss caused by it) could be mitigated by a claim in negligence against an advisor who gave the original tax advice. In the case of *In the matter of the E Settlement* [2018] JRC 143, the Court said at paragraphs 21(iii) to 22: “21. (iii) The alternative would be for action to be taken by one or more of the beneficiaries against the Trustee and/or S&W. This would not be clear cut ... in any event, the Court remains of the view expressed in *Re Onorati Settlement*
- [2013] (2) JLR 324 where the Court said at paragraph 44:- ‘More generally, we are not attracted by the proposition that beneficiaries should be left to a remedy of bringing litigation against trustees or professional advisers. The beneficiaries are usually not at fault and have already incurred loss by reason of unnecessary tax charges. To force them to incur further expense in what may be uncertain litigation when the law allows for the avoidance of a decision made in breach of the trustees’ duties seems unnecessary, undesirable and

unjust.’

22. Onorati was of course concerned with the Hastings-Bass principle rather than the law of mistake ... However, the sentiment expressed in the above passage from Onorati seems to us to be equally application to grant relief under Article 47G.”
46. The same conclusion was reached, after a longer discussion, in *A and B v C, D and E* [2019] JRC 111 at paragraphs 23-28 concluding at paragraph 28: “... for the reasons given we are not attracted to the proposition that the trustees should be left to bring proceedings in negligence against the tax adviser in circumstances such as these. Accordingly, we think it is just to grant relief in respect of the trustees’ mistake.” These observations apply, *mutatis mutandis*, to the facts of the current case.
47. Whilst the Trustees do not oppose the application, and have provided helpful information for the Court, they do not accept that any inadequate or insufficient or deficient advice was given to the Settlor and assert forcefully that there is no good claim in negligence. Any such proceedings would be likely to be expensive, time consuming and stressful and of course, whatever the view may be as to the merits, any litigation carries some litigation risk.
48. We conclude, therefore, that the mistake was of so serious a character as to render it unjust on the part of the Trustees to retain the property. Delay
49. The remedy is a discretionary one, and delay can be a ground for refusing relief – see *In re the B Trust* [2019] JRC 035 at paragraph 30. In *Mileham v Valla Limited* [2020] JRC 045, there was a very substantial delay of some four years before the applicants sought alternative legal advice to that given by Baxendale Walker, and then another two years elapsed before the representation was tabled. The Court said this at paragraph 30: “30 We do not think it would be right to punish the Representors for somewhat slow in bringing this application by rejecting it as a matter of discretion. The fact is that the adverse consequences for Mr and Mrs Mileham if the trust continues will be very considerable. They have been let down by advice from Baxendale Walker which has already cost them substantially and we think it would be rubbing salt in the wound by holding that, because they had taken some time to decide how best to proceed, they should be denied relief.”
50. In this case, whilst the HMRC investigation began in 2013, it did not encompass the Trusts until 2018, and the Settlor was not advised that a mistake application was even possible until November
2018. Advocate Michael Cushing of Appleby was instructed by Mr Jenner in late 2018 to consider the prospect of a claim for mistake, and he advised on 4th December 2018 that there were potential difficulties with such an application, given his understanding gained from his instructions that the Settlor was alive to the risks in settling the Trusts and was prepared to proceed notwithstanding those risks. Ms Chamberlain further advised against pursuing an application on the basis that it might prejudice the HMRC investigation. The Settlor accepted that advice.

51. In March 2019, the Settlor instructed Mr James Quarmby of Stephenson Harwood to provide a second opinion on his tax position, and initially, Mr Quarmby was predominantly occupied with the HMRC inquiry, and future wealth planning. In late August 2020, Ms Helena Berman, a litigation partner at Stephenson Harwood, was instructed to investigate the Settlor's options, and advice was taken from Mr Robert Ham QC, who provided his opinion on the merits of a mistake application on 17th January 2021.
52. We are satisfied that at every stage, the Settlor has followed and relied upon legal advice and in the circumstances this is not a case in which relief should be refused on the grounds of delay. Declaration in relation to the trusts already terminated
53. Two of the trusts were terminated in July 2020, and the question arises as to whether the Court has jurisdiction under Article 11 or Article 47E to make a declaration in respect of a trust that has terminated in that all of the trust property has been distributed.
54. No authority on the point has been found, but there is nothing in the wording of Article 11, or Article 47E, that precludes the Court from making a declaration in such circumstances, and we therefore find that the Court has jurisdiction to do so.
55. Although the trust property may have been distributed, the exercise of such jurisdiction is not futile, in that there remain liabilities arising out of the two trusts. There remains an IHT liability which primarily falls upon the Settlor in respect of the assets settled and secondly, upon the Trustees, who received those assets into trust. Even though trust property may have been distributed to beneficiaries, it remains subject to the trustees' equitable lien. For so long as such rights and liabilities continue to exist in respect of a trust whose assets have been distributed, the Court's jurisdiction under Article 11, or Article 47E, remains engaged.
56. The exercise of the Court's jurisdiction in these circumstances may give rise to problems in relation to the effect on the recipients of the property distributed on termination, but as Advocate Christie points out, that does not arise in this case, as the property was in each case distributed to the Settlor. In any event, the effect of a declaration upon beneficiaries or third parties is a factor the Court would always take into account in deciding whether to exercise its powers – see In the matter of the L Trust at paragraph 17.
57. The fact that a trust had terminated might also be relevant to the issue of delay, in terms of a failure to proceed promptly to court to seek a declaration following that termination, but in this case, the termination took place recently and, in our view, to the extent that there has been any delay, it is not a ground to refuse relief in this case.

Orders

58. We therefore make the following orders: (i) We declare that the Trusts are invalid on the grounds of mistake and are voided and of no effect from the date they were purportedly made pursuant to Article 11(2)(b)(i) of the Trusts Law. (ii) We declare that the trust assets have, from the dates upon which they were received, been held on bare trust for the Settlor

by the Trustees. (iii) The Trustees can retain the remuneration they have already charged and the reimbursement they have already received for expenses and liabilities reasonably incurred and can continue to charge their reasonable remuneration and reimburse themselves for all expenses and liabilities reasonably incurred up to this date. (iv) The Trustees are relieved from liability for any breach of the bare trust upon which they have held the trust assets, save to the extent that any breach of a bare trust would also have constituted a breach of the trusts for which the Trustees would have been liable had the trust assets not been declared to have been held on bare trust from the dates on which they were received.

59. A further discrete point arises in relation to the order of the Court made ex parte on 12th March 2021, permitting the Trustees to disclose documents in this case to their insurers, to Ms Chamberlain and her insurers and to their respective legal advisers. We direct the Trustees to disclose to the Settlor's legal representatives a copy of the written application upon which that order was made. Authorities Trusts (Jersey) Law 1984 (As Amended). In the matter of L Trust [2019] JRC 195. In the matter of the S Trust and the T Trust

[2015] JRC 259. The Representation of the Robinson Annuity Investment Trust [2014] JRC 133. Representation of A in the matter of the G Trust [2018] JRC 159. In the matter of the C Trust [2020] JRC 120. Re Lochmore Trust

[2010] JRC 068. Re S Settlement [2011] JLR 375. Gaines-Cooper [2008] EWCA Civ 1502 In the matter of the G Trust [2019] JRC 056 Goff & Jones, The Law of Unjust Enrichment, 9th edition at 9-06 – 9-40. Pitt v Holt [2013] 2 AC 108. A and B v C [2018] JRC 174A. In the matter of the D, E and F Trusts [2016] JRC 166C. In the matter of the E Settlement [2018] JRC 143. A and B v C, D and E [2019] JRC 111. In re the B Trust [2019] JRC 035. Mileham v Valla Limited

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