COMMONWEALTH OF THE BAHAMAS **2020/CLE/GEN/01077**

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

NICHOLAS JAMES RAU

Plaintiff

VS

(1) UBS TRUSTEES (BAHAMAS) LTD.

(in its capacity as Trustee)

(2) JEAN ROSEMARY RAU

(3) CLOVIS JAMES RAU

Defendants

Before The Hon. Mr. Justice Neil Brathwaite

Appearances: John Wilson, K.C. and Knijah Knowles for the Plaintiff

Sean McWeeney, K.C. and John Minns for the First Defendant

Franklyn Williams and Karine MacVean for the Attorney General as parens patriae

No appearances by or on behalf of the second and third named Defendants.

DECISION

Facts

1. Pursuant to a Letter of Application for a Trust and a letter of wishes, Mr. Rau established a trust on 17th June, 1999. A second letter of wishes was signed on 18th February, 2010. While the Beneficiaries of the Trust include Mr. Rau, his wife, children, remoter issue, parents and siblings, Mr. Rau is the only Beneficiary to have ever benefited from the Trust. The primary reasons for

establishing the Trust were to create a retirement fund for Mr. Rau and to provide for his wife Jean, his son Clovis and any grandchildren upon his death.

2. In his affidavit sworn on 4th December 2020 Mr. Rau states as follows:

> "13. When setting up the Trust in 1999, 1 assumed that the establishment and operation thereof would not have any tax consequences in addition to or different from the tax consequences which would apply to me if I had not established the Trust and continued to personally own the assets of the Trust. In particular, as the Trust was established during my lifetime, I assumed that the transfer by me of property into the Trust or distributions to me from the Trust (of which I am a Beneficiary) would not attract UK inheritance tax (hereinafter referred to as "IHT"). My incorrect assumption was based on the fact that the establishment of the Trust in 1999 was not connected to any particular event in my life (ie. no deaths or transfers of wealth to younger family members).
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> 14. The notion of settling a trust first came to my attention when I spoke with a representative of the First Defendant concerning my retirement planning. Accordingly, when I agreed to implement the trust structure, it was on the mistaken assumption that the establishment of the trust structure would not trigger adverse tax consequences and would not be detrimental to the retirement plans of me and my family.
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> 15. I have no experience in tax matters. While I took some comfort from the experience of the First Defendant in these matters, it was, with hindsight, foolhardy of me not to have obtained independent tax advice when establishing the Trust. I proceeded on a mistaken assumption of the true tax consequences of my actions in setting up the Trust, to the detriment of my family's retirement plans. However, as I assumed that the establishment of the Trust would not have any particular tax implications, I thought that it was unnecessary for me to obtain independent tax advice.

16. I did sign the Letter of Application, which contained a confirmation at paragraph K that I had taken independent tax advice. Unfortunately, I did not pay close attention to the various documents which I was required to sign on setting up the Trust as these were in standard form, and I assumed that they were more for the protection of the Trustee. Notwithstanding the confirmation at paragraph K, I had not obtained any independent tax advice.

17. To summarize, when setting up the Trust in 1999, I proceeded under the mistaken assumption that the establishment of the Trust for the purpose of creating a retirement fund for me and providing for my wife Jean, my son Clovis and any grandchildren upon my death did not have any negative tax implications. If I had known at the time of settling the Trust that the transfer by me of property into the Trust and the subsequent operation of the Trust would trigger immediate adverse IHT consequences, I would not have established the Trust but would have attempted to find another way to create a retirement find for me and provide for my family upon my death."

3. At paragraph 19 Mr. Rau states as follows:

"19. On 13th May, 2015 I signed the Trustee's Client Confirmation Letter, a true copy of which is attached hereto at TAB 6. In that document I confirmed, inter alia, that I had "... obtained independent legal, tax and other professional advice on my compliance with tax and or other applicable laws and regulations in my country of residence or in any other relevant jurisdiction ...". At the time of signing the Client Confirmation Letter I had been a Swiss tax resident for over 7 years. Accordingly, I signed the document on the basis of advice which I had received from my accountant in Switzerland regarding my tax position in Switzerland. I was not thinking about UK tax when signing the Client Confirmation Letter."

4. Mr. Rau goes on to indicate that he was first advised of a potential issue regarding his tax domicile in January 2019, and attended meetings with his private banker in Switzerland in June

and October 2019, when he was informed that the establishment and operation of the Trust attracted significant liabilities. Mr. Rau then obtained independent legal advice, which revealed as follows:

> "27. I understand that, pursuant to the Brown Opinion, the assets of the Trust are subject to the "relevant property" IHT charging regime for trusts on the basis that I was domiciled in the UK when the Trust was established. I have been advised that the consequences of that tax regime can be summarized as follows:
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> i) When the assets were transferred into the Trust in 1999, there was an immediate charge to IHT at 20%;
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> ii) On each ten-year anniversary of the creation of the Trust (ie. in 2009 and 2019) there was an IHT charge of up to 6% of the value of the relevant property comprised in the Trust; and
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> iii) There was an IHT charge of up to 6% of the value of the assets distributed from the Trust.
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> 28. I further understand that, pursuant to the Brown Opinion, the failure to pay those IHT charges could result in significant additional IHT, interest and penalties being payable under the Failure to Correct regime (hereinafter referred to as the "FTC Penalties").
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> 29. Pursuant to the Brown Opinion, the aggregate amount of the potential liability to IHT, interest and FTC Penalties as at l8th September, 2020 ranges from £2,950,000.00 to £3,900,000.00 (hereinafter referred to as the "Potential UK Tax").
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> 30. The sole asset held by the Trustee upon the terms of the Trust are the shares in the Company, which in turn is the holder of an account with UBS Switzerland AG. When comparing the Potential UK Tax with the value of the Trust Fund (CHF 5,207,482.00 as at 5th October, 2020), it is clear that the potential tax liability is a very large amount. In view of the

exchange rate between £ (Pound Sterling) and CHF of 1.1866 on 5th October, 2020, the Trust Fund would have been worth £4,388,574.08 on that date.

31. When deducting from that figure the highest estimate of the Potential UK Tax in the amount of £3,900,000.00, the Trust Fund would be reduced to £488,574.08 (ie. to approximately 11% of its value). Even when deducting from the value of the Trust Fund the lowest estimate of the Potential UK Tax in the amount of £2,950,000.00, the Trust Fund would be reduced to £1,438,574.08 (i.e. to approximately 33% of its value). In the worst case scenario, almost my entire retirement fund would be lost and, if this occurs, I will be unable to provide for myself and my wife in our retirement years, nor will I be able to leave any assets to my family upon my death."

5. By Originating Summons filed 28th October 2020, the Plaintiff seeks the following:

"(1) A Declaration, pursuant to the inherent jurisdiction of the Court, that the establishment of the Trust and the transfer of property into the Trust are voidable and of no effect and that the Trust be set aside ab initio on the ground of mistake and, if that Declaration is made, that the Court make such consequential Orders as it shall think fit, including Orders essentially in the terms that:

(a) the capital and income distributions out of the Trust Fund (as defined in the Trust Deed), which were made to the Plaintiff on the basis that he was a beneficiary of the Trust, are valid and that the Plaintiff may retain such distributions;

(b) the First Defendant may retain its reasonable remuneration, costs and expenses which to date have been taken out of the Trust Fund; and

(c) the First Defendant be relieved and excused from liability to any person in their capacity as a beneficiary of the Trust in respect of any and all of its acts or omissions which were preparatory to the creation of or otherwise in connection with the Trust, other than for acts or omissions which constituted

breaches of trust for which the First Defendant would be liable if action were taken against it. The First Defendant's exoneration under this clause is in addition and without prejudice to any other release or indemnity which the First Defendant may be entitled to under the Trust Deed.

(2) An Order that the file herein be sealed and that the application be heard in camera.

(3) An Order that the reasonable costs of all parties in connection with this application be paid on an indemnity basis out of the Trust Fund.

(4) Such further or other relief as the Court should think fit."

Plaintiff's Case

6. The Plaintiff begins by noting the provisions of section 91C of the Trustee Act as amended, which reads as follows: "91C (1):

> (1) A person may apply to the court to declare the exercise of a fiduciary power voidable.

However, the Plaintiff submits that this provision is not applicable, as Mr. Rau could not be said to be exercising a fiduciary power in setting up the trust. The Plaintiff therefore relies on the inherent jurisdiction of the court under the common law, and cites a number of authorities in support of the contention that the court has a common law jurisdiction to make the declarations sought.

7. The Plaintiff submits that, in the seminal case of **Pitt v Holt [2013] 2 AC 108** , the UK Supreme Court enunciated the following principles, as excerpted from paragraph 36 of **Kennedy and others v Kennedy and others [2014] EWHC 4129 (Ch)10,**

> "(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a 'misprediction' relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although

mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.

(2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.

(3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.

(4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."

8. The Plaintiff submits that the Supreme Court confirmed that "[t]he court's wider jurisdiction to rescind a transaction on the ground of mistake is not limited to transactions entered into by fiduciaries, and does generally require there to have been something that can be identified as an operative mistake".

9. With regard to the gravity of the mistake required to grant relief, the Plaintiff cites the following paragraphs from the Supreme Court in **Pitt v Holt**:

"126. ... The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus ... on the facts of the particular case. ...

127. . . . The fact that a unilateral mistake is sufficient means that the court may have to make findings as to the state of mind, at some time in the past, of a claimant with a lively personal interest in establishing that there was a serious causative mistake. ... "

10. The Plaintiff also cites the English High Court decisions of **Kennedy and others v Kennedy and others [2014] EWHC 4129 (Ch)**; and **Freedman v Freedman and others (2015] EWHC 1457 (Ch)**, both cases in which dispositions were set aside on the basis of equitable mistake.

11. The Plaintiff relies heavily on the case of **A v. Helm Trust Company Limited (2019] JRC 035** from Jersey in which an application was brought by the settlor of a Jersey trust, who was also one of the beneficiaries of the trust.

12. The settlor in that case contended that one of his mistakes was having misunderstood the UK inheritance tax treatment of the trust. He asserted that the sole reason for putting the property into trust was so that it would be held tax efficiently and that, had he known that the property would effectively always be subject to UK tax, he would not have settled assets into the trust, but would instead have used other methods, acceptable to HMRC, in order to reduce his UK inheritance tax bill. Accordingly, he sought a declaration, pursuant to Article 47E of the Jersey Trust Law, that the transfers into trust were voidable and of no effect from the times when they were made on the basis of his mistake.

13. Article 47E provides as follows:

"47E Power to set aside a transfer or disposition of property to a trust due to mistake

(1) In this paragraph, "person exercising a power" means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor.

(2) The court may on the application of any person specified in Article 47I(1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust

(a) by a settlor acting in person (whether alone or with any other settlor); or

(b) through a person exercising a power,

is voidable and -

(i) has such effect as the court may determine, or

(ii) is of no effect from the time of its exercise.

(3) The circumstances are where the settlor or person exercising a power -

(a) made a mistake in relation to the transfer or other disposition of property to a trust; and

(b) 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 a declaration under this Article."

14. The Article therefore codifies the common law jurisdiction relied upon by the Plaintiff. The Court noted that in Pitt v Holt the submission by HMRC that a mistake which related exclusively to tax could not in any circumstances be relieved was rejected by the Supreme Court (at paragraph 132) as being much too wide and unsupported by principle or authority.

15. The court noted that the question of mistake first arose on 20th May, 2017, but the application was not made until 1st June, 2018, and said the following on the issue of delay:

"30. ... Such a long delay does not work to the benefit of the [settlor}. It suggests that as far as he is concerned the mistake which was made may not have been quite so serious as he now needs to persuade the Court that it was - after all, if a serious mistake has been made, one would expect a very

> prompt application to correct it. ... Nonetheless we accept that where the mistake relates to a trust which has been in operation for 17 or 18 years, the consequences of the mistake may take some unravelling. In the present case, it does not appear to us that it ought to have been that difficult to do so, but we have exercised our discretion in favour of the settlor on this point notwithstanding that it seems to us to have been on these facts a delay at the margins of what was acceptable. One consideration in this respect is that the loss of approximately 25% of the trust fund shows the mistake to have been of a serious character."

16. On the question of whether it was just for the settlor to obtain relief, the Court stated, inter alia, as follows:

> "34. The contrary position would be - and no one was present to argue it- that the Court should not exercise its discretion to help a transferor who does get advice which should put him on notice but ignores it; is associated with a trust which deliberately hides his identity and his status as a beneficiary; and indeed who arguably demonstrated as late as February 2017, once he had realised there was a tax problem, a willingness to be less than frank with HMRC.
>
> "36. The Court's view is that the [settlor] accepted what he was told by [the trustee) because it was what he wanted to hear. We have no doubt that he is not to be treated as a particularly unsophisticated or naive man - his career in the oil industry shows him to be a man of business, albeit not one with technical skills in this area. On the other hand, he probably did not fully understand the question of domicile and the legal and taxation issues which arose out of it. He was in our judgment foolish and although it is a matter of fine margins, we think it would be just for the Court to make a declaration in this case. "

17. The last issue which the Court considered was whether the dispositions of property by the settlor into the trust should be voided from the time when they were made or from some other date. The Court concluded that, given the mistakes which it accepted had been made, the transfers of

the various sums by the settlor into the trust were voidable and of no effect from the dates on which each respective transfer was made. Notwithstanding this conclusion, the making of a capital distribution by the trustee in 2010 was declared to have been valid, and the Jersey Court ordered that the trustee was allowed to retain its reasonable remuneration, costs and expenses which had been taken out of the trust fund.

18. The Plaintiff therefore invites this court to be persuaded by the reasoning of the Jersey Court, notwithstanding the time that has passed since the settling of this trust, and to find that the settlor, who intended in setting up the trust to provide for himself and his successors upon his retirement, with no thought that the establishment of a trust during his lifetime would attract inheritance taxes, made a tacit assumption which constitutes a mistake of sufficient gravity so as to amount to a legal and causative mistake, the result of which is to risk the severe diminution of the assets, and which it would be unconscionable and unjust to leave undisturbed.

19. With respect to the appearance of the Attorney General in these proceedings as parens patriae in the interest of the charities which might benefit pursuant to the Second Letter of Wishes, the Plaintiff submits that the charities are not in fact named beneficiaries of the Trust. Rather, the Trustee is vested with a power to add charities generally on the termination of the trust period and, until such power is exercised, it is arguable that no charity is in fact a beneficiary of the Trust.

20. The Plaintiff further submits that the benefit to the charities who are identified in the Second Letter of Wishes is not binding on the Trustee nor on Mr. Rau, who would have the unfettered right to rescind expressly or by implication any expression of wishes while he is alive, including a wish to benefit any charity, which he has in fact done by moving this application. The Plaintiff therefore submits that the appearance of the Attorney General is no impediment to the granting of the reliefs sought, and note that the fact that charities were amongst the beneficiaries of the settlements in Freedman v. Freedman and the Jersey Case did not prevent the court from granting the relief sought by the plaintiff.

Trustee's Case

21. On behalf of the trustees, Mr. McWeeney KC indicated that the trustee took a neutral position, and noted that while it was ensured that the beneficiaries were aware of and understood the nature of the proceedings, and gave informed consent to the application, they were discretionary

beneficiaries, and had only a right to be considered, as the Letter of Wishes establishing the trust was not binding on the trustees. It was submitted that the settlor always had power by virtue of the Trust Deed to revoke the trust.

22. It was further submitted that the court had power to accede to the application, as the trend of the common law reflective and liberal, and seeks to assist settlors who made genuine mistakes. Mr. McWeeney KC submitted that this was a case of a tacit assumption, and submitted that Pitt v Holt supports the position that a tacit assumption can amount to a mistake of sufficient gravity to warrant judicial intervention. Reliance was placed on the Lewin on Trusts (20th Edition) at paragraph 5-078, where the learned authors said:

> "It is now clear that a mistake as to the fiscal effect (or the fiscal consequences) of a voluntary disposition may suffice to enable the court to rescind the disposition. Such was the result in Pitt v Holt itself.[335] Lord Walker rejected the Revenue's argument that a mistake relating exclusively to tax can never be relieved. [336] In a more recent decision, it was held that a failure to appreciate that a settlement would lead to an immediate charge to inheritance tax made it a fundamentally different transaction from that which was intended, and that it should be set aside. [337] However, Lord Walker gave the following warning in Pitt v Holt, the ramifications of which will no doubt be explored in future cases, that those involved in tax-avoidance schemes which go wrong need not necessarily expect the court to come to their assistance:
>
> In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy."

23. The trustees therefore remain neutral, but seek to assist the court by noting that there is power to grant the relief sought, on the basis that the actions of the settlor were based on a tacit assumption that amounts to a mistake.

Parens Patriae

24. The Attorney General was served, and represented by counsel, on the basis that charities might become beneficiaries under the trust, and therefore might lose that benefit if the relief sought by the Plaintiff is granted. However, it was accepted by counsel that there were no issues with nominated charities, as the Letter of Wishes naming charities was not binding. No position was therefore taken as parens patriae.

Analysis

25. As a starting point, I accept that the provisions of section 91C of the Trustee Act, as amended, do not apply, as they relate to the acts of a fiduciary. In my view could not be said to relate to decisions made in setting up the trust.

26. In **Pitt v Holt** the court clearly accepts that there is an equitable jurisdiction to vary a settlement on the ground of mistake. In the head note of the case the court said as follows:

> (2) Allowing the appeal in the first case, that the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief; that the test would normally be satisfied only when there was a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which was basic to the transaction; that a causative mistake differed from inadvertence, misprediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not as such a mistake, could lead to a false belief or assumption which the law would recognise as a mistake; that the gravity of the mistake had to be assessed by a close examination of the facts, including the circumstances of the mistake, its centrality to the transaction in question and the seriousness of its consequences, including tax consequences, for the disponor, and the court then had to make an objective evaluative judgment as to whether it would be unconscionable, or unjust, to leave the mistake uncorrected; that the court was entitled on the evidence to find that, in the first case, the first claimant had made a grave mistake through her conscious

> belief or tacit assumption that the trust would have no adverse tax consequences; that the maxim "equity does nothing in vain" did not bar the granting of relief which would serve no practical purpose other than saving inheritance tax; and that, accordingly, and since the trust could have complied with section 89 of the 1984 Act without any artificiality or abuse of the relief which Parliament had intended to grant, the test for rescission on the ground of mistake was satisfied and the trust would be set aside (post, paras 104, 105, 108, 109, 122-123, 126, 128, 133, 134, 136, 139, 141, 142).

At paragraph 122 the court the court goes on to say:

> .... But I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. If the Gibbon v Mitchell test is further widened in that way it is questionable whether it adds anything significant to the Ogilvie v Littleboy test. I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.

The court went on at paragraph 128 to say:

> More generally, the apparent suggestion that the court ought not to form a view about the merits of a claim seems to me to go wide of the mark. In a passage in Gillett v Holt [2001] Ch 210, 225, since approved by the House of Lords (see especially the speech of Lord Neuberger, with which the rest of the House agreed, in Fisher v Brooker [2009] 1 WLR 1764, para 63) I said in discussing proprietary estoppel that although its elements (assurance, reliance and detriment) may have to be considered separately they cannot be treated as watertight compartments:

". . . the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round."

In my opinion the same is true of the equitable doctrine of mistake. The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case."

27. The issue of equitable mistake was examined again in **Kennedy v Kennedy**, where the court at paragraph 36 extracted the following four principles from **Pitt v Holt**:

"36. I am satisfied that this is a case in which the claimants are entitled to rescission for equitable mistake. The principles applicable to rescission of a non-contractual voluntary disposition for mistake were comprehensively set out in the judgment of Lord Walker in Pitt v Holt [2013] UKSC 26, [2013] 2 AC 108, with which the other members of the Supreme Court agreed. They may be summarised as follows.

(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.

(2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.

(3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.

(4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."

28. In **Freedman v Freedman**, in considering the issue of equitable mistake as expounded in Pitt v Holt, the court at paragraphs 25 and 26 said the following:

"25. In Pitt v. Holt the Supreme Court disapproved the distinction between the effect (in the sense of legal effect, the legal character or nature: see [119]) and the consequences of a transaction, replacing it (see [122]) with the test of causative mistake of sufficient gravity. The Court also considered the distinction between on the one hand mere causative ignorance and on the other a mistaken conscious belief or a mistaken tacit assumption. Lord Walker said at [108],

"I would hold that mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from

drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference."

26. Miss Stanley asked rhetorically what the distinction was between ignorance and a tacit assumption. Ignorance meant that the person simply did not think about the consequences of an action. However, a tacit assumption does not involve a thought process involving a series of steps culminating in the thought, "I believe I will be able to comply with the loan agreement". That would be a conscious belief and there are some things that are simply taken for granted. Melanie's assumption is to be inferred because she proceeded on the basis of legal advice coupled with a belief that her father would not advise her to do something dangerous. Accordingly there was at the least a tacit assumption that entering into the settlement did not involve any impediment to compliance with her agreement to repay the loan."

29. In considering the cited authorities, I conclude that, while there is statutory jurisdiction to reverse a decision by a trustee in certain circumstances, there is also an equitable common law jurisdiction to reverse a decision or disposition in relation to a trust by a person who is not a trustee. In considering the exercise of that discretion, the court is required to examine the evidence to determine firstly whether there has been a causative mistake of sufficient gravity such as to make it unconscionable or inequitable to leave the transaction undisturbed. The court is also empowered, in reviewing the evidence, to determine whether a tacit assumption amounts to such a causative mistake.

30. In the instant case, the settlor, whose evidence I accept, has averred that he assumed that no inheritance tax would apply as the dispositions in question were not being made after death, which is when, in the normal course of events, issues surrounding inheritance could be expected to arise. I am further of the view that this does not amount to a situation of mere ignorance, where the settlor simply gave no thought to the issue, but of a tacit assumption, and one which was understandably held, that the issue did not arise because inheritance issues were not applicable at that time.

31. The settlor also avers that, had he known of the impact on the assets of disposing of them in this way, he would have dealt with them differently. Employing a simple but-for test to determine

whether this tacit assumption that no inheritance taxes were due amounts to a causative mistake, it is my view that the inference is inescapable that a person knowing that inheritance taxes would be applicable on the disposition of assets inter vivos, would immediately explore other avenues to safeguard their savings, and thus their future, and the future of any dependents.

32. Even if regard is had not to the current losses that the trust would face, but instead to the state of affairs at the initiation of the trust, the evidence is that at the initiation of the trust a tax of 20% became due. This means that, even at that time, the settlor faced the prospect of a loss of one fifth of his assets.

33. In the circumstances, I have no hesitation in drawing the inference that the tacit assumption that no inheritance tax was applicable at the institution of the trust, amounts to a causative mistake, which mistake also lead to other penalties and charges being applicable, and that but for this mistake, the settlor would have taken a different cause of action.

34. The next step for the court is to consider whether this mistake is of sufficient gravity as to require the intervention of the court. The evidence, which I accept, is that the settlor belatedly discovered, as a result of recent legal advice, that there are potential tax liabilities which would reduce the value of the trust to at best 33% of its value and at worst 11%. The settlor is at a stage of his life where his ability to earn income may be reduced, and the need to rely on the resources put aside during his working years is ever more important, both for himself and his family. The implications of significant, and indeed catastrophic, losses to those resources are dire. In the circumstances, I conclude that there exists in this case a causative mistake of sufficient gravity as to render unconscionable a failure to intervene.

35. Despite these conclusions, there exists in his case two issues which require special consideration. The first is delay, and the second is the question of any legal advice to the settlor at the time of the setting up of the trust.

36. The trust in question was settled in 1999. The Plaintiff avers that he acknowledged in the application forms, which were in standard form, that he had obtained independent advice, even thought he had not in fact done so. This was followed by a Client Confirmation letter in 2015, in which the Plaintiff again confirmed that he had obtained independent legal advice with respect to, among other matters, tax issues. The Plaintiff avers that, at that time, he had been a legal tax

resident of Switzerland for seven years, and did not consider the issue with respect to inheritance tax in England.

37. The Plaintiff goes on to indicate that he was first advised of the possibility of an issue in June 2019, and was advised of advice received by the Trustees in October 2019. He was then advised to obtain independent advice in January 2020, and received that advice in September 2020. An Originating Summons initiating this action was then filed in October 2020. There was therefore a delay of approximately sixteen months between being told that a problem might exist, and the initiation of proceedings.

38. A similar situation was considered in the Jersey case cited at paragraph 15 above. In that case, while noting that the delay was a serious issue, as it might adversely affect the court's view of the seriousness with which the settlor viewed the consequences of the matter, the court did not conclude that the delay was so serious as to require a refusal of relief, as matters relating to a trust that had been in existence for decades might require some unravelling.

39. It is my view that the same reasoning applies in this case, particularly where on the facts the settlor received independent advice in September 2020, and took action in October 2020. It is therefore clear that while some time was taken to obtain advice, as is to be expected in a matter which involved several jurisdictions, there was no delay in proceeding once that advice was obtained. I therefore do not consider the delay in this case to be an impediment to the grant of relief.

40. With respect to the indications by the settlor that he had obtained independent legal advice, when he had not in fact done so, I begin by noting that such indications as are in the application form and in the client confirmation letter appear regularly in application forms, and are essentially designed to offer a measure of protection to the trustees against allegations of negligence. It is thus reasonable and conceivable that the necessary indications were given, without the advice having been obtained. That is not to say that giving such an indication without in fact having obtained advice is not foolhardy and reckless. I also accept the indication in the affidavit of Mr. Rau that at the time of the signing of the client confirmation letter he was a tax resident of Switzerland, and had been so for some years. The failure in those circumstances to obtain advice with respect to the tax position in England is therefore in my view less egregious, although still foolhardy, as events have proven. The question is whether such failings should result in the refusal of relief.

41. In the Jersey case cited above at paragraph 11 the court said the following:

> **34. The contrary position would be - and no one was present to argue it - that the Court should not exercise its discretion to help a transferor who does get advice which should put him on notice but ignores it; is associated with a trust which deliberately hides his identity and his status as a beneficiary; and indeed who arguably demonstrated as late as February 2017, once he had realised there was a tax problem, a willingness to be less than frank with HMRC. In an email to the Respondent dated 1st February, 2017, he said this in relation to the tax position:-**
>
> **"Helm, the trustees, will revise all the paperwork relating to the B Trust such that the only beneficiaries of the B Trust are my children, C, D, E, F and G. To assist in the management of the B Trust the document will not show the names of F and E. Their names will be immediately restored after my demise."**
>
> **35. As we understand it those two children F and E had dual UK/US nationality at the relevant time.**
>
> **36. The Court's view is that the Representor accepted what he was told by Lincoln because it was what he wanted to hear. We have no doubt that he is not to be treated as a particularly unsophisticated or naïve man - his career in the oil industry shows him to be a man of business, albeit not one with technical skills in this area. On the other hand, he probably did not fully understand the question of domicile and the legal and taxation issues which arose out of it. He was in our judgment foolish and although it is a matter of fine margins, we think it would be just for the Court to make a declaration in this case."**

42. In my view, the facts of that case militating against the grant of relief were more serious than the present, as there is no evidence of any deliberate attempt to conceal the identity of the settlor, or any intimation that he was less than frank with HMRC. Nor are there any real concerns that the Plaintiff may be attempting to conceal assets or to evade taxes. I am of the view that there is a wide gulf between tax evasion and the actions of the Plaintiff, which might be viewed as prudent conduct to safeguard the future. The failure to obtain advice, despite the indication that it was obtained, does not adversely affect the tacit assumption that no inheritance tax would apply, nor does it affect the gravity of the consequences faced by the Plaintiff. It is merely a question of whether equitable relief should be granted in the circumstances. Having considered this matter in the round, I am of the view that the justice of this case still lies in favor of the granting of relief.

43. The First Defendant also seeks a declaration that the "First Defendant be relieved and excused from liability to any person in their capacity as a beneficiary of the Trust in respect of any and all of its acts or omissions which were preparatory to the creation of or otherwise in connection with the Trust, other than for acts or omissions which constituted breaches of trust for which the First Defendant would be liable if action were taken against it. The First Defendant's exoneration under this clause is in addition and without prejudice to any other release or indemnity which the First Defendant may be entitled to under the Trust Deed."

44. While I am aware of circumstances in which Trustees are indemnified for acts done as trustees, I note that this is most appropriate in cases where the Trustees approach the court for the blessing of the court for acts that are contemplated. Such a declaration for prior acts, as in this case, would in my view not be appropriate in a case where the application is essentially unopposed, and where the evidence is documentary, as issues of credit, among others, might arise. I therefore decline to grant such a declaration.

45. In all the circumstances of this case, I grant the following declarations:

1. The establishment of the Trust and the transfer of property into the Trust are voidable and of no effect. The Trust is set aside ab initio on the ground of mistake; and;

2. The capital and income distributions out of the Trust which were made to the Plaintiff on the basis that he was a beneficiary of the Trust, are valid and the Plaintiff may retain such distributions;

3. The First Defendant may retain its reasonable remuneration, costs and expenses which to date have been taken out of the Trust; and

4. The reasonable costs of all parties in connection with this application be paid out of the Trust Fund.

Dated this 21st day of April 2023

Neil Brathwaite

Justice