



**Whittaker v Concept Fiduciaries Ltd.**  
Royal Court  
23<sup>rd</sup> March 2017

**JUDGMENT**  
**15/2017**

In the matter of MBESL, SWFAAL, SWFABL, SWFACL, SWFADL Remuneration Trusts. And in the matter of Section 69 of The Trusts (Guernsey) Law, 2007

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**  
**(ORDINARY DIVISION)**

**IN THE MATTER OF MBESL REMUNERATION TRUST**  
**IN THE MATTER OF SWFAAL REMUNERATION TRUST**  
**IN THE MATTER OF SWFABL REMUNERATION TRUST**  
**IN THE MATTER OF SWFACL REMUNERATION TRUST**  
**IN THE MATTER OF THE SWFADL REMUNERATION TRUST**

**AND IN THE MATTER OF SECTION 69 OF**  
**THE TRUSTS (GUERNSEY) LAW, 2007**

**B E T W E E N:-**

**MARGARET GLYNIS WHITTAKER**

**Applicant**

**- and -**

**(1) CONCEPT FIDUCIARIES LIMITED**

**(2) ANTHONY WILLIAMS**

**(in his capacity as representative of the minor, unborn and unascertained beneficiaries of the sub-trusts declared in respect of the above-named trusts)**

**Respondents**

**Hearing date: 20<sup>th</sup> December 2016**

**Judgment handed down: 23<sup>rd</sup> March 2017**

**Before: Miss Amanda Jane Tipples QC, Lieutenant Bailiff**

**Counsel for the Applicant: Advocate N Kapp**

**Counsel for the Second Respondent: Advocate A Williams**

**The First Respondent was not represented.**

### Cases, texts & legislation referred to:

The Trusts (Guernsey) Law, 2007

*D G Nourse v (1) Heritage Corporate Trustees Limited and (2) Concept Fiduciaries Limited* (Judgment 01/2015)

*Dervan v Concept Fiduciaries Limited* (Judgment 38/2012)

*Dervan v Concept Fiduciaries Limited* (Judgment 04/2013)

*Freedman v Freedman* [2015] EWHC 1457 (Ch), [2015] 2 P & CR DG19

*Kennedy v Kennedy* [2014] EWHC 4129 (Ch), [2015] WTLR 837

*Pitt v Holt* [2013] 2 AC 108, SC(E)

### Introduction

1. On 23 November 2016 Mrs Margaret Whittaker applied to the court to set aside the transfer by her of a total of 70,000 shares to Concept Fiduciaries Limited (“**CFL**”) on the grounds of mistake (“**the Application**”).
2. Following the hearing on 20 December 2016 I gave a short judgment explaining that I was satisfied that Mrs Whittaker was entitled to the relief sought in her Application. I made the Order sought and said I would provide a written judgment at a later date.
3. The facts which give rise to the Application are somewhat similar to the facts of *Dervan v Concept Fiduciaries Limited* (Judgment 04/2013) and *D G Nourse v (1) Heritage Corporate Trustees Ltd and (2) Concept Fiduciaries Limited* (Judgment 01/2015).

### The Application

4. CFL is the sole trustee of the following trusts, namely the MBESL Remuneration Trust, the SWFAAL Remuneration Trust, the SWFABL Remuneration Trust, the SWFACL Remuneration Trust and the SWFADL Remuneration Trust (together “**the trusts**” or “**the remuneration trusts**”). CFL is part of the group of companies known as the Concept Group.
5. Pursuant to deeds of assignment dated 3 November 2008 and stock transfer forms dated 6 November 2008, the following shares were transferred by Mrs Whittaker to CFL:
  - a. 20,000 ordinary shares of £1.00 each and 10,000 ordinary ‘A’ shares of £1.00 each in Miles Bramwell Executive Services Limited (“**MBESL**”) to the MBSEL Remuneration Trust;
  - b. 10,000 ordinary shares of £1.00 each in Slimming World Field Area A Limited (“**SWFAAL**”) to the SWFAAL Remuneration Trust;
  - c. 10,000 ordinary shares of £1.00 each in Slimming World Field Area B Limited (“**SWFABL**”) to the SWFABL Remuneration Trust;
  - d. 10,000 ordinary shares of £1.00 each in Slimming World Field Area C Limited (“**SWFACL**”) to the SWFACL Remuneration Trust; and
  - e. 10,000 ordinary shares of £1.00 each in Slimming World Field Area D Limited (“**SWFADL**”) to the SWFADL Remuneration Trust.

MBESL, SWFAAL, SWFABL, SWFACL and SWFADL, the Slimming World companies, are collectively referred to as “**the companies**”.

6. The Application was supported by affidavit evidence from Mrs Whittaker and her husband, Mr Ronald Anthony Whittaker (“**Mr Whittaker**”), together with evidence from a Mr David Rathbone, a Mrs Jacqueline Eley and Ms Natasha Kapp.
7. On 25 November 2016 the court gave Mrs Whittaker permission to put in expert evidence from Mr Simon Taube QC as to “the United Kingdom tax consequences of the transfer of shares by her to the trusts and the law of England and Wales on setting aside transactions on the grounds of mistake”. Mr Taube is an English Queen’s Counsel practising at the Chancery Bar. He has expertise in matters concerning equity, trusts and UK trust taxation and his expert evidence in relation to the issues identified was contained in an Opinion dated 25 November 2016. There is no dispute in relation to any part of Mr Taube’s expert evidence and, as set out below, I have accepted it.
8. Mrs Eley is a director of CFL, a Guernsey company. In CFL’s capacity as trustee of the remuneration trusts, she confirmed in her evidence that CFL was neutral in these proceedings, would abide by the decision of the court and did not propose to appoint its own Counsel. It was for that reason that CFL was not represented at the hearing on 20 December 2016.
9. The adult beneficiaries of the remuneration trusts and the relevant sub-trusts, namely Mrs Whittaker’s husband, three adult children (from her first marriage) and two adult grandchildren, did not oppose the Application, and letters have been filed with the court indicating that they are “fully supportive” of it.
10. On 2 December 2016 the court appointed Advocate Anthony Williams to represent the minor, unborn and unascertained beneficiaries of the sub-trusts declared in respect of the remuneration trusts and in that capacity he was joined as the Second Respondent to the Application. He supported the Application on the basis that it was in the best interests of the minor, unborn and unascertained beneficiaries of the sub-trusts that the relief sought in the Application was granted. The reasons he supported the Application were set out in a detailed letter to Mrs Whittaker’s advocates dated 12 December 2016.
11. HMRC were notified of the Application in November 2016 and, by a letter dated 16 December 2016, stated that, if the transaction was set aside by the court on the grounds of mistake, then they agreed to be bound by that decision and treat the transfer as void.
12. The court also directed CFL to notify the past and present employees of the companies of the Application by putting a letter on the noticeboard at the companies’ premises. That letter was put on the noticeboard on 25 November 2016 and informed any reader of the nature of the Application, the date of the hearing and provided contact details in case anyone should have any queries. No such queries were received as a result of that letter.

### **The companies**

13. The companies are all incorporated in England and Wales, and the registered office of each company is at Clover Nook Road, Somercotes, Alfreton, Derbyshire, DE55 4RF.
14. MBESL was incorporated in 1976 and is the owner of the intellectual property rights in respect of the Slimming World Business and dietary method. MBESL is responsible for

licensing four field area companies to grant franchises to franchisees who are self-employed individuals to run a Slimming World group. The four field area companies are SWFAAL, SWFABL, SWFACL and SWFADL. In November 2016 MBESL employed 47 members of staff and Mrs Whittaker was a remunerated employee of MBESL.

15. Mrs Whittaker and Mr Rathbone are directors of MBESL (together with two other individuals) and in 2008 Mr Whittaker was also one of MBESL's directors. Prior to November 2008 Mrs Whittaker held 20,000 ordinary shares of £1.00 each and 10,000 ordinary 'A' shares of £1.00 each in MBESL, together with 52,600 7% preference shares.
16. In respect of SWFAAL, SWFABL, SWFACL and SWFADL: each company was incorporated in 1995; Mrs Whittaker and Mr Rathbone are two of the five directors; prior to November 2008 Mrs Whittaker was the sole shareholder of each company, holding 10,000 ordinary shares of £1.00 each; and, in terms of employees, SWFAAL and SWFADL have 18 members of staff each, SWABL has 15 and SWACL has five.

### **Jurisdiction and applicable law**

17. The Application was made by Mrs Whittaker under section 69(1)(a)(iv) of The Trusts (Guernsey) Law, 2007 (“**the 2007 Law**”). She was the settlor, as defined by section 80 of the 2007 Law, and therefore had the necessary standing to make the Application (section 69(2)(c) of the 2007 Law).
18. CFL, as the trustee, is resident in Guernsey and there is no dispute that the trust property is administered in Guernsey. This, of course, means that the court also has jurisdiction in relation to this Application under section 4(1)(b)(i) and (ii) of the 2007 Law.
19. The trusts are governed by the law of England and Wales. They are “foreign trusts” and Part II of the 2007 Law does not apply to them. The applicable law as to whether the transfers in question should be set aside on the grounds of mistake is the law of England and Wales. This is because the *lex situs* of property which is the subject of the disposition to a foreign trust sought to be set aside determines the applicable law in respect of that disposition (see *Dervan v Concept Fiduciaries Limited*, Judgment 38/2012 at paras. 21, 30 and 47; followed in *D G Nourse v (1) Heritage Corporate Trustees Limited and (2) Concept Fiduciaries Limited*, Judgment 01/2015 at para. 11). Shares have their situs in the country where they may be dealt with between shareholder and company (ie where the share register is kept) and in this case the shares in question were in companies registered in England and Wales.

### **English law of mistake**

20. The applicable principles were set out in the Opinion of Mr Taube.
21. Under English law the court has an equitable jurisdiction to set aside a transfer of property by a donor where the transfer was the result of a mistake. The law on the subject was considered authoritatively by the Supreme Court in *Pitt v Holt* [2013] 2 AC 108 in the single judgment of Lord Walker of Gestingthorpe. The other members of Supreme Court agreed with him.
22. In *D G Nourse v (1) Heritage Corporate Trustees Limited and (2) Concept Fiduciaries Limited* (Judgment 01/2015) the Royal Court in Guernsey was assisted by expert evidence from Mr Richard Wilson on the effect of *Pitt v Holt*. Mr Wilson's evidence was given over

two years ago and, in that context, Mr Taube provided an up-date on the English law in this area. In doing so he stressed that, in spite of many later English decisions on the doctrine, the reported decisions have not altered the doctrine's main elements.

23. In *Pitt v Holt* the following key elements in the English equitable doctrine of mistake were identified by Lord Walker:

- a. The court may set aside a voluntary transaction where there was a causative mistake which was so grave that it would be unconscionable to refuse the relief of setting it aside.
- b. The test will normally be satisfied only where there is a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which is basic to the transaction.
- c. Such a causative mistake may relate to the tax consequences of the transaction.
- d. A causative mistake differs from inadvertence, misprediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not as such a mistake, can lead to a false belief or assumption which the law will recognise as a mistake.
- e. The gravity of the mistake must 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 disponent.
- f. The court then has to make an objective evaluative judgment as to whether it would be unconscionable, or unjust, to leave the mistake uncorrected. In this context it would be necessary to consider whether there was any defence based on the equitable doctrine of laches.

24. In *Kennedy v Kennedy* [2015] WTLR 837, Etherton C summarised the relevant principles to be derived from *Pitt v Holt* as follows:

“[36] ... 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* ... 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.”

25. Subsequently, other English judges have adopted Etherton C’s summary in *Kennedy v Kennedy* on the equitable jurisdiction to set aside voluntary transactions on the basis of mistake, especially as to tax matters (see, for example, *Freedman v Freedman* [2015] EWHC 1457 (Ch); [2015] 2 P & CR DG19, Proudman J).

## **Relevant facts**

### **Background**

26. Mrs Whittaker is a very successful businesswoman who, in 1969, founded the well-known diet and weight-loss business known as Slimming World. She was, at the time, 21 years old. In 1973 Mrs Whittaker sold one half of the business to a Mrs Pauline Paley (“**Mrs Paley**”) and, in 1976, Mrs Whittaker and Mrs Paley incorporated Miles-Paley Limited and each party subscribed for 50 shares in that company. In 1986 Mrs Paley sold her shares in Miles-Paley Limited to Mrs Whittaker for £50,000. Miles-Paley Limited changed its name to MBESL in 1995. Mrs Whittaker has built up the fortunes of the Slimming World business over very many years and the business now has a multi-million pound turnover.
27. Mrs Whittaker married Mr Whittaker in 1996 and, over the years, she entrusted Mr Whittaker with her financial affairs and, according to her evidence, was content for her husband to liaise with advisers on her behalf and to act as her representative. Mr Whittaker’s long-term financial consultant, was a Mr Graham Kemp (“**Mr Kemp**”)
28. Mrs Eley, a director of CFL, was also a director of Pan Continental Consultants PCC Limited Contracting Cell 2 (“**Pan Continental**”) from April 2007 until August 2013. In her affidavit Mrs Eley explained that in 2008 it was agreed that two companies, namely Wye Associates Limited and Fiscallia Limited (which was owned by Mr Kemp), would act as consultants for Pan Continental.
29. In January 2008 Pan Continental entered into a distribution agreement with CB Nominees Limited (“**CBN**”) and Mrs Eley explained that:

“CBN [a company within the Concept Group] held the intellectual property rights to the employment trust strategy model, to market and distribute solutions within European markets through their independent consultants... On 22 January 2008 CBN engaged the firm Howard Kennedy ... to provide generic tax and legal advice on the setting up of employment benefit trusts ... Howard Kennedy obtained an opinion from Richard Vallat ... on behalf of CBN in relation to the implementation of an employment benefit trust structure and setting out the tax benefits... As part of this structure, it was envisaged that Mr [Roger] Bindschedler [(“**Mr Bindschedler**”)], a solicitor with Howard Kennedy at that time, would be put forward to provide legal advice to prospective clients with regards to the employment benefit trust structure they chose. As part of the referral structure described ... above, although introduced by Pan Continental, Howard Kennedy was engaged directly by the prospective clients to advise them on the proposed structure. Neither Concept nor Pan Continental was privy to the clients’ engagement letter with or advice received from Howard Kennedy.”

*The tax-planning strategy and instructions to Howard Kennedy*

30. In August 2008 Mr Kemp put Mr Whittaker in touch with Mr Bill Auden (“**Mr Auden**”) of Wye Associates Limited.
31. On 6 August 2008 Mr Whittaker, Mr Auden, Mr Kemp and Mr David Rathbone (“**Mr Rathbone**”) met at the offices of Wye Associates Limited in Nottinghamshire. The purpose of the meeting was to discuss ways to mitigate potential future tax charges for Mrs Whittaker and her family. During that meeting Mr Auden recommended to Mr Whittaker a tax-planning strategy for the Slimming World business involving the establishment of remuneration trusts and sub-trusts. Mr Rathbone was, and remains, a director of the companies and he was involved in attending meetings in connection with the tax planning strategies that resulted in the establishment of the remuneration trusts, and checking the necessary documentation.
32. Mrs Whittaker did not meet Mr Auden personally, but her evidence was that she “accepted completely [her husband’s] judgment of [Mr Auden’s] professionalism and expertise in these matters” and she relied on the advice and recommendations Mr Auden put forward and, at a later stage the recommendations put forward by Mr Bindschedler.
33. Mrs Whittaker’s evidence was that:

“[72] ... My husband conveyed to me that Mr Auden presented himself as a credible and professional individual and that during that meeting Mr Auden convinced my husband that many successful businesses, like Slimming World, had entered into a tax planning strategy that involved the establishment of remuneration trusts and sub-trusts. My husband was informed, persuasively, that Slimming World was just the sort of business for which this planning would be appropriate....

[73] Mr Auden advised my husband that if I were to enter into a tax planning strategy involving the creation of remuneration trusts and sub-trusts I would succeed in mitigating my exposure to income tax and capital gains tax during my lifetime and that the incidence of inheritance tax on my probate estate would be lessened and my children would be able to benefit from the business tax-free after my death.

[74] Following the meeting on 6 August 2008, my husband and I discussed the tax planning which had been proposed by Mr Auden. I believed and understood, on the strength of what Mr Auden had advised my husband, that if I transferred the shares in the companies to the trusts the effect of the planning would be that I could save on income tax and capital gains tax during my lifetime, but crucially, I would save inheritance tax on my estate on my death and my children and grandchildren would be able to receive capital and income tax-free after my death. On that basis I was happy to proceed further and my husband made arrangements to progress the planning.”

34. This UK tax advice then appears in a “tax opinion” letter that Howard Kennedy, Mr Bindschedler’s firm, provided to the directors of the companies in October 2008. One letter was sent to each company and the content of each letter was, for all material purposes, the same. The advice provided in the tax opinions is explained in more detail below.
35. On 27 August 2008 Wye Associates Limited asked Pan Continental to issue a letter of engagement to Mr Whittaker who, following the meeting earlier in August, was interested in receiving details of the features and benefits of establishing remuneration trusts in respect of the companies. Mr Whittaker, who was at the time also a director of each of the companies, received a letter of engagement dated 3 September 2008 from Pan Continental addressed to MBESL in respect of the provision of remuneration trust arrangements to the companies. The letter of engagement set out that Pan Continental would provide “consultancy and distribution services within the Concept Group” and would “act as the contracting agent for the purpose of issuing this engagement letter and providing services within the Concept Group ...”. The services that Pan Continental would provide to the companies included the provision of “appropriate advice from our solicitors” and “the implementation of the [remuneration trust]”. Mr Whittaker signed the letter of engagement on behalf of the companies on 16 September 2008 and returned it, together with a cheque in the sum of £25,000 to Pan Continental. Ultimately the companies paid total fees of £1,402,500 to Pan Continental.
36. On 15 September 2008 Mr Rathbone, as a director of the companies, received an email from Mr Auden with a step plan, which set out the various steps required for each of the companies to establish the remuneration trusts. The step plan included that CFL would provide trustee services and that Howard Kennedy would carry out the planning for the companies and would provide tax advice and the relevant documentation for the establishment of the remuneration trusts. The final step, step 10, provided that Mrs Whittaker’s shares in the companies would be gifted to CFL, as trustee of the remuneration trusts.
37. On 2 October 2008 the companies received letters of engagement from Howard Kennedy which, under the heading “Scope of work”, set out:

“We understand that you have instructed [Pan Continental] to establish a Remuneration Trust. We have the benefit of Counsel’s opinions on this arrangement and are familiar with the documents that will be used. Pan Continental has asked us to provide a report on the documentation and explain the taxation aspects to them. You are asking us to extend the benefit of that analysis that we have produced by reproducing the report and providing you with an advice letter to your company confirming the tax analysis.”

38. On 13 October 2008 Mr Rathbone received four separate emails from Howard Kennedy attaching a complete suite of documentation for each of SWFAAL, SWFABL, SWFACL and

SWFADL. In respect of these four companies Howard Kennedy provided the following documents in a standard form:

- a. The report to the directors in respect of the planned “Remuneration Trust Arrangements” prepared by Howard Kennedy (13 pages). This document recorded that “the Company wishes to pay or provide benefits to its past, present and future employees, together with other classes of potential beneficiaries, over the short, medium and long term”, the “sole purpose in so doing is to attract, incentivise and retain key executives for the benefit of the business” and that “in [the opinion of Howard Kennedy] a [remuneration trust] ... provides the appropriate type of trust vehicle for the achievement of the Company’s commercial objectives”.
  - b. The letter dated 13 October 2008 entitled “Remuneration Trust Letter”. This letter was “intended to explain the taxation implications of the application, investment and distribution of the funds held by the Remuneration Trust ... which is to be established by the Company”. This letter was the tax opinion.
  - c. Board minutes relating to the establishment of the remuneration trust (2 pages).
  - d. The Remuneration Trust Deed (26 pages).
  - e. The share transfer forms for Mrs Whittaker to sign.
  - f. The Deed of Assignment (3 pages).
  - g. Further board minutes to approve the contribution of the shares into the remuneration trust (2 pages).
  - h. The template letter to the executives (1 page).
39. On 23 October 2008 Howard Kennedy provided Mr Rathbone with the same standard form suite of documents for MBESL.

#### The tax opinions

40. The tax opinion sent to each company was, for all material purposes, the same. It is necessary to look at this letter in some detail in order to identify the crucial statements from the perspective of Mrs Whittaker, as the shareholder in the companies about to transfer her shares to CFL as the trustee of the remuneration trusts. I shall do so by reference to the tax opinion written for SWFAAL.
41. Page 1 identifies the instructions and the background to the establishment of the remuneration trust. It says this:

“This Letter is written upon the instructions of the Directors of [Pan Continental] following a request to them from Margaret Whittaker who is a director and current shareholder in [SWFAAL]... This Letter is intended to explain the taxation implications of the application, investment and distribution of the funds held by the Remuneration Trust (“the Trust”) which is to be established by the Company.... It is Margaret Whittaker’s intention to make a gift of her entire shareholding in the

Company to the Trustees of the Remuneration Trust that is to be established by the Company.”

42. The shareholder’s objectives were then explained at the top of page 2 of the letter in these terms:

“(1) to utilise the Remuneration Trust as a commercial executive incentive scheme; (2) to receive loans and other financial assistance directly or indirectly from the Trust, subject to Benefit in Kind tax charges or subject to payment of a commercial rate of interest; (3) for the Trust funds to be used to provide benefits in cash and/or in kind to directors and employees (past, present and future) of the Company; (4) for the Shareholder’s family to be able to enjoy the Trust funds tax free after the Shareholder’s death.

We consider that the Shareholder’s objectives can be met by using a type of Remuneration Trust as a tax efficient vehicle for providing incentives to the Shareholder’s and his family and others and for acquiring and holding new assets.”

43. The letter then provided the following explanation about the establishment, and alleged nature of, the remuneration trust:

“The Remuneration Trust (which is strictly based on a proven Remuneration Trust model) is to be established as a wholly commercial trust... The Trust is a commercial discretionary trust. This means that none of the beneficiaries own any of the Trust property... Any controlling shareholder and his family, (or former controlling shareholder) in the Company is excluded from receiving capital distributions. Income distributions can be made, however, subject to normal income tax rules. However, upon his death, his family become full beneficiaries.”

44. The Trust Investments were explained on page 3 of the letter and this included the following advice:

“Where the Trustees are offshore [as CFL is and was], all Trust income and gains accrue to the Trust free of UK tax (save for any underlying withholding tax on UK Securities or bank deposits);”

45. The tax opinion then identified that the benefits to Mrs Whittaker, as the shareholder, included the following:

[1.] The Shareholders should always access Trust capital funds by way of loan. Income can be distributed to Shareholders however, entirely at the trustees’ discretion...

[6.] On a Shareholder[']s death, any loans outstanding to the Trust will not be written off;

[7.] Instead, the Trustees will take assets out of the Shareholder’s estate to repay the loans: this reduces the inheritance tax liability on the Shareholder’s Probate estate;

[8.] The Trustees may then, subject to their absolute discretion, appoint or apply those assets to the Shareholder's family free of inheritance tax;"

46. The last section of the tax opinion then identified the alleged benefits to Mrs Whittaker's family. These were stated to be:

"[1.] During the Shareholder's life, the Shareholder and his family are limited to receiving discretionary income payments or commercial loans from the Trust. Such loans made during the Shareholder's continuing office or employment with the Company only, may be subject to a taxable benefit in kind charge, unless a commercial rate of interest is paid;

[2.] Otherwise, the tax position is the same as for the families of other employees: ...;

[3.] After a Shareholder's death, his family members become full beneficiaries provided they are not excluded person in their own right. They are then eligible to receive Trust capital distributions free of all tax at any time, or income distributions subject to normal income tax rules;"

47. Mrs Whittaker's evidence at para. 89 of her first affidavit was that:

"I reviewed and discussed the Report for Directors with my Husband and with David [Rathbone]. Neither my Husband nor I had any reason to be concerned about the advice given... My Husband had been put in touch with Mr Auden by Mr Kemp, who my Husband has retained for financial advice for around 20 years. We had every confidence in Mr Kemp in terms of who he recommended and we also had confidence in both Mr Auden and Mr Bindschedler, who both appeared reliable and experienced. I decided to proceed with the setting up of the trusts on the basis of the Report for Directors to benefit the directors of the companies and to transfer my shares to the trusts on the basis of the Tax Opinion Letter."

*The establishment of the remuneration trusts*

48. On 24 October 2008 Mr Rathbone attended the offices of Howard Kennedy to discuss the tax planning with Mr Auden and Mr Bindschedler who explained how the remuneration trusts would operate. Mr and Mrs Whittaker attended this meeting by telephone. Mrs Whittaker explained in her affidavit that she understood the trusts would be beneficial in a number of ways and her evidence was that:

"The trusts could be used to pay bonuses to the directors of the companies, including myself. This accorded with my intention and the Company's intention to reward its senior executives for their contribution to the success of the companies. In particular, for me personally I understood that if I transferred my shares to the trusts, the trusts would act as a shelter from capital gains tax should I decide to sell the business or any part thereof during my lifetime and that I could take money out of the trusts by way of loans (which could further be used as a liability to reduce inheritance tax on my death). Of great importance to me was that I understood that transferring my shares to the trusts meant that my children and grandchildren would be able to benefit from the trusts without any incidence of tax after my death. On that basis I decided to go ahead."

49. On the same date, a board meeting was convened for each company, with Mr and Mrs Whittaker attending by telephone, to approve the establishment of the remuneration trusts.
50. On 28 October 2008 the five settlements known as remuneration trusts were executed, one in respect of each company. The company is in each case called “the Settlor”. Each remuneration trust deed is in identical terms (apart from the identity of the settlor), was signed by Mr Rathbone on behalf of the companies, and is governed by the law of England & Wales.
51. The following provisions of the remuneration trust deeds are relevant:
- a. Clause 1.1 defines the beneficiaries as meaning: “the past present and future employees from time to time of the Settlor [ie the relevant company] and the wives husbands civil partners widows widowers children step-children and remoter issue of such employees and the spouse and former spouses (whether or not remarried) of such children and remoter issue and “Beneficiary” has a corresponding meaning PROVIDED THAT no excluded person shall be a beneficiary”. Clause 12 confers a power on the trustees, exercisable with the protector’s consent, to add persons to the class of beneficiaries, other than any excluded person.
  - b. Clause 10 deals with excluded persons. Clause 10.1 authorises the trustees with the protector’s consent to declare that any person or class of persons, who are or would or might but for clause 10 be or become a beneficiary or otherwise able to benefit, to be wholly or partially excluded from benefit, or cease to be a beneficiary, or “shall be an excluded person...”. Clause 10.2 contains a provision authorising a beneficiary to disclaim or to declare he is an excluded person. Clause 10.3 provides:- “Notwithstanding any other provision within this Deed no benefit may be given to any person if in doing so transfers of shares in the Settlor [ie the relevant company] or any connected company to this Trust whether such transfer takes place or not would cease to be exempt transfers within section 28 of the Inheritance Tax Act 1984.”
  - c. Clauses 5 to 9 contain wide ranging discretionary trusts powers and provisions of a dispositive kind. In broad terms, those provisions enable the trustees to pay, appoint, apply or advance income or capital in favour or for the benefit of one or more of the beneficiaries.
  - d. However, clauses 11 and 43 of the remuneration trust contain overriding restrictions on the use of the funds and the exercise of the trustees’ powers. Clause 11.1 prevents the trustees using their powers to provide any “Prohibited Benefit”. Mr Taube’s evidence is that this means a benefit falling within the definition of “relevant benefits” for the purposes of the UK’s old rules on the taxation of pensions that operated prior to the coming into force of the new rules on pensions taxation in Finance Act 2004: see the reference to section 612(1) ICTA 1988 in the definition of “Prohibited Benefit” in clause 1.1 of the deed. Clauses 11.2 and 43 ensure that no duty or power could operate in any manner that might cause trust funds to be applied for the benefit of any excluded person.
52. On 3 November 2008, Mrs Whittaker signed the deeds of assignment in respect of her shares in each of the companies. On 6 November 2008, the companies held a further board meeting to approve the transfer of the shares and, on the same date, Mrs Whittaker signed stock

transfer forms whereby she transferred the 70,000 shares identified in the Application to CFL, as the trustee of the remuneration trusts.

53. On 9 November 2008 Mr Bindschedler was instructed to prepare declarations of trust to create sub-trusts for each of the remuneration trusts. Mr Bindschedler responded stating that the sub-trust precedent had been “remodelled” to make it fit with the trust deed being used, and that he was going to ask counsel to review it. However, no progress was made in relation to the creation of the sub-trusts during 2009, and the matter was overlooked until CFL followed it up in January 2010.
54. On 19 January 2010 a sub-trust for each of SWFAAL Remuneration Trust, SWFABL Remuneration Trust, SWFACL Remuneration Trust and SWFADL Remuneration Trust was executed by CFL, as the trustee of each remuneration trust. These sub-trusts were stated to be effective from 3 November 2008. Three sub-trusts in respect of MBESL Remuneration Trust were executed on 4 March 2009, 19 January 2010 (stated to be effective from 3 November 2008) and 31 March 2011. Mrs Whittaker’s evidence was that she understood that, as part of the planning, the sub-trusts were created for the exclusive benefit of herself and her family and the shares would be transferred by CFL to those sub-trusts, which they were on 19 January 2010 (albeit the declarations of trust were stated to be effective from 3 November 2008).
55. It is clear, in particular from the tax opinions, that from the outset everyone proceeded on the assumption that Mrs Whittaker, her husband and her descendants were intended to be included in the initial beneficiaries of each of the remuneration trusts. However, the expert evidence of Mr Taube is that, under the terms of the initial trust deeds, Mrs Whittaker, her husband and her descendants, could only have been beneficiaries if either:
  - a. Mrs Whittaker or Mr Whittaker was, or had previously been, an “employee” of the relevant Slimming World company (ie the company whose shares had been settled on the trustee of that remuneration trust) so that both of them fell within the definition of “the beneficiaries” in clause 1.1 of that remuneration trust; or
  - b. CFL, with the written consent of the protector, had added them to the class of beneficiaries under the power in clause 12 of the trust deed. Clauses 1.1 and clause 12 are set out at para. 51(a) above.
56. Mrs Whittaker was a remunerated employee of MBESL, but she was not an employee of any of the other companies. Further, CFL did not exercise, with the protector’s consent, the power to add Mrs Whittaker or Mr Whittaker to the class of beneficiaries of the remuneration trusts. Further, Mr Auden, Wye Associates Ltd, Pan Continental, Howard Kennedy, Mr Bindschedler and CFL, all of whom were responsible for implementing the remuneration arrangements, completely failed to address this very basic issue as to whether Mrs Whittaker or Mr Whittaker were actually employees of any of the companies or beneficiaries of the remuneration trusts.

#### Events in 2011 and 2012

57. In June 2011 Pan Continental and CFL decided that they would not be working with Wye Associates Limited or Mr Bindschedler in the future and, at the same time, Pan Continental terminated the consultancy agreements with Fiscallia Limited and Wye Associates Limited. Further, in 2011 there were a number of changes announced in the budget which CFL

understood could have an effect on the planning in respect of the remuneration trusts and, as a result, on 29 June 2011 CFL instructed Alastair Wilson at GSC Solicitors LLP (“**Mr Wilson**”) to provide an outline of the budget changes and how they might affect the tax planning of the remuneration trusts.

58. On 4 July 2011 Mrs Eley sent an email to Mr Rathbone regarding changes that had been announced in the budget, which she said would affect the remuneration trusts. She also told Mr Rathbone that Pan Continental had severed all ties with Mr Auden, Mr Kemp and related entities. On the same date, Mr Rathbone met with Mr Auden. At that meeting Mr Auden tried to reassure Mr Rathbone “that he would continue to provide a good service”. On 13 July 2011 Mr Auden sent Mr Rathbone an email stating that remuneration trusts still had “favourable short, medium and long term applications when operated correctly” and that his company’s strategies to work through the new rules had been validated “by multiple sources”. Mrs Whittaker’s evidence was, in the light of this, she had no reason at that time “to be concerned about the advice that had been given at the time the [remuneration] trusts had been established”.
59. On 4 July 2012 Mr Rathbone contacted Mr Wilson to seek clarification of various matters concerning capital gains tax and inheritance tax issues in relation to the establishment of the remuneration trusts. Mrs Whittaker explained in her evidence that:

“The reason why [Mr Rathbone] contacted Mr Wilson was because [Mr Whittaker] had been discussing the matter with various friends and had been told that I would be subject to capital gains tax if shares were disposed of by the [remuneration] trusts whilst I was resident in the UK. [Mr Whittaker] had also been told that there may be a charge to inheritance tax on the 10 year anniversary if the [remuneration] trusts and/or of distributions were to be made therefrom.”

60. Mr Wilson’s response was that he did not envisage any exposure to inheritance tax and any capital gains tax could be eliminated on the sale of the shares from the remuneration trusts. However, Mr Wilson did identify that there were problems with Mrs Whittaker being able to extract funds from the remuneration trusts. Between July 2012 and April 2014 Mrs Whittaker took advice about how, in order to benefit from the shares, this might be resolved. There was no obvious solution and the options were complex with uncertain results.

*Mrs Whittaker’s discovery that tax advice was incomplete and wrong*

61. In January 2016 Mrs Whittaker instructed Sue Knight (“**Mrs Knight**”), a partner at Grant Thornton UK LLP, to review her financial affairs. In doing so, Mrs Knight advised Mrs Whittaker that she thought the original advice provided in 2008 in relation to the remuneration trusts might be incorrect. In her evidence Mrs Whittaker said this:

“Sue advised me that the [remuneration] trusts presented potentially significant exposure to UK income tax and national insurance contributions, along with other tax considerations in other countries where my children and my grandchildren may be resident at that time. It was at this time that I really started to understand the significance of the impact of the advice that I had received in 2008 and that such advice had been wrong. Prior to that, I had understood that the difficulties with the [remuneration] trusts had arisen as a result of the changes to the tax rules after the planning had been implemented... Following discussions with Sue it became clear

that the planning involving the [remuneration] trusts was wholly wrong and inappropriate for my circumstances ...”.

62. Mrs Whittaker was then advised by Mr Taube that the tax advice she was given in 2008 in relation to the transfer of the shares and the establishment of the remuneration trusts was incomplete and wrong. Mrs Whittaker explains in her evidence that, had she realised the true position in 2008, she would not have transferred any of her shares into the remuneration trusts.
63. Mr Taube’s expert evidence to this court was that the original United Kingdom tax advice given to Mrs Whittaker about the consequences for her and her family of her settling her shares on CFL was wrong in many crucial respects.
64. Contrary to the advice provided by Howard Kennedy and Mr Bindschedler, under the law in force in the United Kingdom in October and November 2008, the actual tax consequences for Mrs Whittaker and her family of the Trust structures would have been fundamentally different from those consequences as they were explained to Mr and Mrs Whittaker. Mr Taube identified five major flaws in the tax related advice given to Mrs Whittaker.
65. First, contrary to Howard Kennedy’s advice in the tax opinions, it was not correct that, while a trustee such as CFL was “offshore” (ie resident in Guernsey, not the UK) that “all Trust income and gains accrue to the Trust free of UK tax”. Mr Taube explained that this was because:

“... if [CFL] or other non-resident trustees of the relevant remuneration trust were to dispose of the settled shares in the relevant Slimming World company (or any other trust investment acquired with the proceeds of property settled by Mrs Whittaker), Mrs Whittaker as “settlor” of the shares would be liable for any CGT in respect of the chargeable gains arising on such a disposal: section 86 of the [Taxation of Chargeable Gains Act 1992 (“**the TCGA 1992**”)]. Moreover, the trust funds would ultimately bear the burden of the charge to CGT because of Mrs Whittaker’s statutory right to recover the CGT from the trustees.”
66. Further, Mr Taube’s evidence was that if during Mrs Whittaker’s life section 86 ceased to apply to the offshore trustees’ capital gains in a year of assessment (eg because Mrs Whittaker was not resident in the UK in that year), there could still be CGT charges under section 87 of the TCGA 1992 on capital payments received by beneficiaries from the trustees. For similar reasons, Howard Kennedy’s UK tax advice was incorrect when it asserted that during Mrs Whittaker’s life the income would accrue to the trust free of UK income tax while there were offshore trustees. If Mrs Whittaker and her family were beneficiaries of the remuneration trust, then during her lifetime Mrs Whittaker would have been liable for income tax on income from the trust funds derived from Mrs Whittaker’s share transfers to CFL. This was because under each remuneration trust Mrs Whittaker would have been chargeable to income tax under section 624 of the Income Tax (Trading and Other Income) Act 2005 (“**the ITTOIA 2005**”) as she was “the settlor” and, under section 625 of the ITTOIA she would have been deemed to have “an interest” in the settlement, by virtue of the power of the trustees to pay income for the benefit of her or her spouse. In addition to that, although the income tax was chargeable on Mrs Whittaker as the settlor, section 646 of the ITTOIA 2005 conferred on Mrs Whittaker a statutory right to recover the tax from the trustees. So here again, the ultimate burden of the UK income tax would be borne by the income of the trust fund.

67. The second flaw in Howard Kennedy's advice was that the advice given in relation to IHT was incorrect. Howard Kennedy were wrong to advise that, if the trustees lent the trust funds to Mrs Whittaker, then on her death any loans outstanding would reduce the IHT on her estate on death (ie her "probate estate"). This error (which is explained at para. 28 of Mr Taube's opinion) was important as the scheme contemplated that the trustees would lend capital to Mrs Whittaker on commercial terms, not distribute capital to her beneficially.
68. The third error was that Howard Kennedy were incorrect to advise that, after Mrs Whittaker's death, her family would be able to enjoy the trust funds "tax free". This is because if, after Mrs Whittaker's death, the trustees had distributed capital or income to members of her family as beneficiaries, there could well have been charges to income tax and CGT. For example, if any beneficiary received a distribution of income, such income would have been chargeable to income tax in the hands of the beneficiary just like any other income received from trustees in the exercise of a power.
69. The fourth error identified by Mr Taube was that Howard Kennedy were wrong to advise that the remuneration trusts were "wholly commercial", at least in relation to the settled property derived from Mrs Whittaker's gifts of shares to CFL as trustee. Mr Taube's opinion was that "it is clear from the evidence and the terms of the tax opinions that Mrs Whittaker made the gifts of shares, at least in part, so as to benefit her family, not merely to establish a commercial employee incentive scheme. Consequently each remuneration trust amounted to a "settlement" for the purposes of the UK's income tax and CGT rules".
70. The final flaw identified by Mr Taube was that the promoters of the remuneration trust arrangements and Howard Kennedy failed to advise Mrs Whittaker on the serious consequences of clause 10.3 of each remuneration trust deed (even assuming Mrs Whittaker and her family were indeed "beneficiaries" of the remuneration trusts). Mr Taube's opinion was that the significant effect of clause 10.3 was that there was a serious risk it prohibited the provision of benefits to Mrs Whittaker and her family from the capital of the settled shares in the relevant company, although it did not operate as a complete bar to the provision of benefits to her or them out of the income.
71. In any event the upshot of Mr Taube's analysis of the advice given to Mrs Whittaker, and on which she relied in deciding to transfer her shares to CFL as trustee of the remuneration trusts, was summarised in these terms:
- "... Mrs Whittaker and her family could not have benefitted from these supposed UK tax advantages for Mrs Whittaker, which Mr Auden, Mr Bindschedler, Pan Continental and Howard Kennedy led Mrs Whittaker to believe would flow from the transfer to [CFL] of her shares in each of [the companies]. Accordingly, their advice induced Mrs Whittaker to give away to [CFL] her controlling shareholdings in [the companies] for non-existent tax advantages."
72. In his Opinion Mr Taube drew the court's attention to *Pitt v Holt* at para. 135 where Lord Walker raised obiter a question about whether equity would relieve a donor against a mistake in the context of artificial tax avoidance transactions. This point was considered by the Royal Court in *D G Nourse v (1) Heritage Corporate Trustees Limited and (2) Concept Fiduciaries Limited* (Judgment 01/2015) as to how it might have an impact in that case (see paras 14 to 16). In relation to the facts of this case, Mr Taube's evidence as to the English legal position is that there was nothing intrinsically artificial about the remuneration trust arrangements.

Mrs Whittaker made genuine transfers of her shares in the companies to CFL as trustee of the remuneration trusts, and the evidence shows that CFL was a genuine trustee. Further, prior to the transfers Mr Auden, on behalf of Pan Continental, had told Mr and Mrs Whittaker that many successful business, like Slimming World, had entered into tax planning schemes that involved the establishment of remuneration trusts and sub-trusts, and that Slimming World was just the sort of business for which this planning would be appropriate.

### **Conclusion**

73. I was quite satisfied on 20 December 2016 that this was a case in which the applicant, Mrs Whittaker, was entitled to set aside the transfers of shares she made in favour of CFL in November 2008 on the grounds of mistake.
74. I have set out in some detail the relevant facts which led Mrs Whittaker to transfer her shares in the companies to CFL, as trustee of the remuneration trusts. It is clear on the evidence from Mrs Whittaker, which I accept, that she understood from Mr Auden, through her husband, and also Mr Bindschedler that if she entered into a tax planning strategy involving the creation of remuneration trusts and sub-trusts followed by the transfer of her 70,000 shares in the companies (which was all her shares in SWFAAL, SWFABL, SWFACL, SWFADL, and the majority of her shares in MBESL) to the remuneration trusts, then she would succeed in mitigating her exposure to income tax and capital gains tax during her lifetime, and that the incidence of inheritance tax on her probate estate would be reduced and that her children would be able to receive capital and income tax-free after her death. However, it is clear from the evidence of Mr Taube that the advice Mrs Whittaker was given by Mr Auden and Mr Bindschedler about the effect of the remuneration trust structure was seriously flawed and misleading. Rather, the actual consequences of the remuneration trust structure put in place were completely different from those explained to Mrs Whittaker (see paras. 63 to 71 above).
75. It is clear that Mrs Whittaker took a conscious decision to transfer the shares in the companies to CFL because she believed that, by doing so, she would secure the tax benefits that had been explained to her as a result of the advice of Mr Auden and Mr Bindschedler. It is also clear from Mrs Whittaker's evidence that she would not have taken this decision, and would not have transferred any of the shares to CFL, if she had understood the true position. Indeed, the whole reason for transferring the 70,000 shares into the remuneration trusts was to secure the tax benefits, that Mr Auden and Mr Bindschedler had told her and Mr Whittaker would be achieved.
76. The advice Mrs Whittaker received as to the tax consequences of transferring her shares into the remuneration trusts was, as I have said, seriously flawed and misleading and, as a result, she made a distinct and "causative" mistake as to the whole foundation of the transaction when she transferred her 70,000 shares in the companies to CFL, as trustee of the remuneration trusts. This was, on any footing, a grave mistake by Mrs Whittaker. These shares represented Mrs Whittaker's life's work, and her primary source of wealth. However, as a result of the transaction she gave away her entire shareholding SWFAAL, SWFABL, SWFACL, SWFADL, and the majority of her shares in MBESL to CFL, as trustee of the remuneration trusts. She did so in order to obtain "illusory" or non-existent tax advantages and therefore no benefit at all. Further, having done so, it is unlikely that Mrs Whittaker's children or grandchildren would have been able to benefit from the capital distributions from

the remuneration trusts, and they would therefore have been unable to benefit from the wealth she had created.

77. Given the circumstances which led Mrs Whittaker to transfer the shares to CFL, it would be not be right for CFL, as the trustee of remuneration trusts, to keep the shares for the benefit of the other beneficiaries of the trusts, or to claim any such entitlement to do so. CFL is a member of the Concept Group. Pan Continental was acting as agent of the Concept Group when it sold the idea of the remuneration trust arrangements to Mrs Whittaker. Pan Continental's team were ultimately responsible for inducing Mrs Whittaker to enter into this fundamentally flawed and misconceived trust arrangement, for which they received over £1 million in fees. As for the beneficiaries of the remuneration trusts they are all volunteers, and they have not sought to oppose the Application.
78. There is no principle of public policy in Guernsey which could have deprived Mrs Whittaker of the relief sought by her Application. In this context, I also note that HMRC were given the opportunity to make representations, but they declined to do so. Further, there is no other equitable reason to refuse the remedy of setting aside the transfers of shares. In these circumstances, it was clear to me that it would have been unjust to leave the mistake uncorrected.
79. For the reasons identified above, on 20 December 2016 I made the order sought by Mrs Whittaker in the terms of her Application and set aside the transfer made by deeds of assignment dated 3 November 2008 and stock transfer forms dated 6 November 2008 of her shares in the companies to CFL, as trustee of the remuneration trusts.