Application to set aside the transfer of shares made by the Applicants to the Trust, on the grounds of mistake

[2019]GRC075

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between:

LEONIE SAMPSON

DAVID PETER SAMPSON

CAROLINE JENNE **Applicants**

-and-

ESTERA CORPORATE TRUSTEES (GUERNSEY) LIMITED

(in its capacity as trustee of the Hereward House Remuneration Trust) **Respondent**

Hearing and decision date: 27th November 2018

Reasons handed down: 8th November 2019

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for Applicants: **Advocate N Kapp**
Counsel for Respondent: **Advocate A C Williams**

Cases, texts & legislation referred to:

The Trusts (Guernsey) Law, 2007
Dervan v Concept Fiduciaries Limited (unreported, 30 November 2012 and 11 February 2013)
Nourse v Heritage Corporate Trustees Limited (unreported, 15 January 2015)
Whittaker v Concept Fiduciaries Limited (unreported, 23 March 2017)
Pitt v Holt [2013] 2 AC 108
Kennedy v Kennedy [2014] EWCH 4129 (Ch)
The Finance Act 2004
The Income and Corporation Taxes Act 1988
The Inheritance Tax Act 1984
Barker v Baxendale-Walker [2018] 1 WLR 1905
The Taxation of Chargeable Gains Act 1992
The Income Tax (Trading and Other Income) Act 2005
The Income Tax Act 2007
The Income Tax (Earnings and Pensions) Act 2003

Introduction

1. By an Application dated 14 September 2018, the Applicants, Leonie Sampson, David Sampson and Caroline Jenne, sought the setting aside of transfers each of them had made in July 2011 of shares in Hereward House School Limited (to which I will refer as "the Company") to the Hereward House Remuneration Trust, of which the Respondent, Estera Corporate Trustees (Guernsey) Limited, which was previously known as Heritage Corporate Trustees Limited, is the trustee, on the ground of mistake. At the hearing on 27 November 2018, I announced that I would grant the Application and briefly explained my reasons for doing so. I indicated that I would set out those reasons more fully in writing at a later date. This judgment contains those reasons.

Procedural matters

2. The Application was first before the Court on 21 September 2018 for directions. Given that the class of beneficiaries of the Remuneration Trust was broader than just the employees of the Company at that time, I directed that further information be provided to enable me to consider the extent of notification required. I did, however, direct that the current employees be notified of the Application by way of a notice to be displayed on the employees' notice board at the Company's premises and that Her Majesty's Revenue and Customs ("HMRC") should be notified by way of letter so as to enable it to indicate if it wished to be heard or provide any written submissions.

3. The further information provided, contained in the Second Affidavit of Alexander Jenne, sworn on 26 September 2018, demonstrated that there were only 19 former employees involved. Accordingly, I directed that all of those having one or more years of service should also be notified about the Application so that any one of them could, if they wished, make representations. I decided that Advocate Kapp's suggestion that only those with in excess of 10 years' service should be notified would have had the effect of excluding certain former employees who must be regarded as having made a contribution to the School. I chose to exclude the four teaching assistants with less than one year's service on the basis that they appeared to me to have insufficient "real" interest in the Application to justify them also being contacted.

4. In the event, none of those notified chose to make any representations. The response from HMRC, by way of a letter dated 15 October 2018, indicated that it did not wish to be joined to the Application and agreed to be bound by whatever order might be made.

5. The evidence in support of the Application comprised the initial Affidavits of the Applicants (and for ease of reference I will refer to them by their first names), each of which was sworn on 3 September 2018, an Affidavit of Alexander Jenne, also sworn on 3 September 2018 and an Affidavit of Caroline's husband, Charles, sworn on 4 September 2018. David swore a Second Affidavit on 26 September 2018. On behalf of the Respondent, one of its directors, Adaliz Lavarello, swore an Affidavit on 11 October 2018. The Applicants each swore a further Affidavit on 1 November 2018. The formal evidence of compliance with the Court's directions about notifying others of the Application was dealt with in Alexander's Second Affidavit and an Affidavit of Advocate Kapp sworn on 1 November 2018.

6. I had the benefit of a Skeleton Argument prepared by Advocate Kapp on behalf of the Respondents and a short Skeleton Argument on behalf of the Respondent from Advocate Williams. Both Advocates made oral submissions at the hearing, although in the case of Advocate Williams that was confined to confirming that the Respondent remained neutral in relation to the Application.

Background

7. The First Applicant, Leonie Sampson, has had a long career in teaching. In 1973, she took up a post at Hereward House School, an independent preparatory school for boys, which had been founded in 1949. In 1980, she and her late husband, Peter, purchased the School. Leonie became the Headmistress and continued in that role until 2012, having reached what might be termed "normal retirement age" quite a few years earlier. She remains the Principal of the School. The School is operated by the Company. When the Sampsons purchased the School, Leonie and Peter jointly held all 100 issued ordinary shares in the Company and all of the preference shares.

8. In 1997, Leonie and Peter gifted 20 ordinary shares to each of their children, Caroline and David. They split the remaining 60 ordinary shares so that each of them held 30 shares individually. In 2007, Peter gifted his 30 ordinary shares to Caroline and Leonie and Peter gifted to Caroline one of the preference shares they continued to hold jointly. In the years that followed, the strong reputation the School had gained through Leonie's efforts meant that it continued to be a profitable institution, enjoying pre-tax profits approaching one-quarter of its annual turnover, with the result that it had significant undistributed profits and reserves.

9. The family faced a number of health concerns. In the years before his death, Peter was not well. David has suffered from a serious condition for a number of years. He has a job with the School, but would struggle to fulfil similar duties if he were forced to seek employment in the wider marketplace. Caroline's sons, including Alexander ("Alex"), have similar, though perhaps not as severe, problems. Alex is also employed by the Company to work at the School. Caroline and her husband, Charles, also have a daughter. David has a daughter from a former relationship and was, for approximately a decade, married to Olga. The couple separated in 2012 and divorced in 2014. All of Leonie's grandchildren are adults.

10. Caroline and Charles had been taking financial advice from Stefan Wissenbach of the Wissenbach Group for a number of years. In 2010, it was suggested to them, as part of that ongoing relationship, that Caroline's half share of the Company could benefit from the creation of a trust for both inheritance and tax planning purposes, with similar benefits for the other shares held by family members. In October that year, they met with one of Mr Wissenbach's colleagues, Andy Gillett, who explained what might be done. Caroline reported these discussions to her mother, who understood that the benefits of a trust included a way legitimately to reduce exposure to taxation and to provide a shelter for the shares in the event, for example, of a divorce. David met fairly frequently with Caroline and heard about the idea of the trust for the shares in the School at around this time.

11. A meeting was arranged for 26 January 2011 at the offices of the Wissenbach Group in London. Leonie was unwell and so unable to attend, so those attending were Caroline, Charles and Alex. They met with Mr Gillett, Lee Noble from the accountants Sterling Financial and William Auden and Daniel Hayes from Wye Associates. This was the first occasion on which Caroline met Mr Auden, who was introduced to her as a tax expert with a substantial level of expertise and experience in setting up remuneration trusts. Caroline exhibits her handwritten notes from the meeting, from which it is apparent that providing an inheritance tax shelter was uppermost in her mind. The Jenne family members present were told that the suggested structure was well-established and was legally watertight because it had been reviewed by leading counsel and accepted by HMRC. Although the costs associated with setting up the trust would be high, it was suggested that it would end up being worthwhile. If the Company were sold, cash could be taken from the proposed trust. The solicitors involved were mentioned as Davenport Lyons, which resonated with Caroline.

12. A further meeting took place on 11 February 2011. Caroline was unable to attend on this occasion but Leonie did go, together with Charles and Alex. They met with Mr Auden and Mr Hayes. Leonie asked about the possibility of the trust buying some premises in which

David could live because protecting him was important to her. Mr Auden explained during this meeting that inheritance tax savings would be made on Leonie's estate as well as those of Caroline and David. They were shown some documents, which included an Example Step Plan, setting out what would happen in order to establish such a trust and an Example Dividend Capital Value Summary showing the advantages to be obtained through a trust as opposed to the School's existing strategy. Leonie understood that any assets in the trust at the time of her death would be capable of being distributed to her family tax-free, that members of the family could take out money from the trust whenever they wished, subject to paying tax on it and that Leonie would be in control of the trust through her appointment as protector.

13. On 17 June 2011, Roger Bindschedler of Davenport Lyons issued an engagement letter addressed to Leonie on behalf of the Company setting out what that firm would do and the fees that would be charged. These amounts were in due course settled in full by the Company.

14. The next meeting took place on 5 July 2011 at the offices of Davenport Lyons. Leonie, Caroline, Charles and Alex attended and met with Mr Bindschedler, Mr Auden and Mr Gillett. Mr Auden's advice was not to place all of the shares in the Company into the proposed trust but that each shareholder should retain some shares to enable dividends to be received. Leonie and Caroline were persuaded that the proposed structure was a tax-efficient model and agreed to progress towards completion.

15. On 18 July 2011, the Respondent, then known as Heritage Corporate Trustees Limited, received an e-mail from Mr Hayes confirming that it had been selected as the preferred trustee of the Hereward House School Remuneration Trust and enquiring if someone would be available for the scheduled completion three days later. The next day there were e-mails passing between Mr Bindschedler and a director of the Respondent in which Mr Bindschedler described the trust deed and deeds of assignment as "*standard form deeds which have previously been approved by Counsel and used in recent trusts*" he had been involved with.

16. On 21 July 2011, Leonie, Caroline, Charles and Alex returned to the offices of Davenport Lyons. David joined the meeting by telephone. Prior to this meeting, Leonie held 30 ordinary shares in the Company, Caroline 50 and David 20 and Leonie and Peter jointly held 99 preference shares and Caroline held one such share in the Company. Also present were Mr Gillett, Mr Hayes, Mr Auden and Gabriel Chan from Davenport Lyons. Two board meetings of the Company were convened to approve the establishment of the Remuneration Trust and the transfer of shares to the new trustee. Leonie signed the trust deed on behalf of the Company and the two sets of board minutes and also the stock transfer forms and deeds of assignment for her own shares and those jointly held with Peter. Caroline signed under a power of attorney on behalf of Peter and completed her own stock transfer form and deed of assignment. David had already signed his stock transfer form and deed of assignment, which were produced by Alex. The Respondent also signed the trust deed and the deeds of assignment on the same day, having first held a meeting, as described in Ms Lavarello's Affidavit, to note the Company's wish to establish a remuneration trust and to accept £100 as the initial trust fund, and then a second meeting for the purpose of signing the various documents.

17. A letter from Mr Bindschedler dated 21 July 2011 addressed to the Directors of the Company was not provided to Leonie or Caroline at the meeting on that day. A copy was not received until it was sent to Alex, as part of the package of relevant documents, termed by them as the "Bible" of documents, on 25 October 2011. In that letter, it states that the shareholders' objectives are *inter alia* "*To utilise the Trust as a commercial incentive scheme*" and "*to provide benefits in cash and/or in kind to directors and employees (past, present and future) of the Company*" and "*For the Shareholders' families to be able to enjoy the Trust funds tax*

free after the Shareholders' deaths". This letter further indicated that all income and gains would accrue free of UK tax, income distributions could be made to any controlling shareholder (or former controlling shareholder) and family, subject to normal income tax rules, any controlling shareholder (or former controlling shareholder) and family were to be excluded from receiving capital distributions, the trustee could make commercial loans to the shareholders and their families and such loans would be treated as investments rather than distributions, and that it was no longer recommended for shareholders to use loans to access capital following the introduction of new tax legislation but, once that legislation settled down, various mechanisms to access capital were expected to become available.

18. On 7 October 2011, a further contribution from the Company to the Remuneration Trust of £500,000 was made. Leonie and Caroline signed the corresponding deed of contribution. This amount was paid from the reserves of the Company. However, the Application does not affect this transfer because its focus is solely on the Applicants' transfers of their shares.

19. The Respondent resolved on 12 December 2011 to make distributions of £4,000 to 11 beneficiaries and to pay the cost of the staff Christmas lunch. This was the first in a series of transactions made by the trustee, which included the receipt of dividends, which helped to fund some of those transactions.

20. A meeting took place at the offices of Davenport Lyons on 10 August 2012 to discuss the operation of the Remuneration Trust. Leonie, Caroline, Charles and Alex attended and met Mr Auden, Mr Hayes, Mr Chan and another solicitor, Jo Summers. It became apparent during the meeting that there was little possibility to withdraw capital from the Trust, but Leonie was not unduly concerned at that because she did not envisage wanting to access capital in the short-term. It was also noted that no protector had been appointed. In due course, Caroline was appointed protector in July 2013, with Leonie and David being appointed as co-protectors in January 2015.

21. Mr Auden visited Leonie at her home in October 2014. He re-affirmed to her that the Remuneration Trust was "marvellous" and that solutions could be found to any concern she and others might raise. One outcome was that a letter of wishes addressed to the trustee was provided by the economic settlors, which was subsequently replaced by a further letter of wishes.

22. In 2016, Leonie wished to receive a large dividend from the Company. Alex referred the request to the Company's accountants, Sterling Financial, the management of which had changed since the meeting in 2011, who advised that the trustee could not waive dividends, which meant that the ability of the Applicants to receive dividends was referable only to their aggregate 14% shareholding in the Company. As a result, further advice was taken which led to this Application.

23. In their Affidavits, each of the Applicants confirms that if she or he had known the true legal consequences of the transfers of shares made (to which I will turn shortly), the transaction would not have been performed because of the adverse effect on the underlying rationale to provide long-term security for family members, especially given the health problems of some of them, and the inability to benefit from any capital realisation in the event that the Company, the School or its premises were at some point in the future sold, which would have been the case had the shareholder retained the shares personally.

Law

24. Counsel were agreed as to the legal principles that applied to the Application. It was made pursuant to section 69 of the Trusts (Guernsey) Law, 2007. The primary relief sought in para. 2 was:

> "*That the transfers by the Applicants to the Respondent of the shares (listed below) by deeds of assignment dated 21 July 2011 and by stock transfer forms dated 21 July 2011 be set aside:*
>
> *2.1.1 28 ordinary shares of £1.00 held by Leonie Sampson and 90 non-cumulative preference shares of £1.00 each held by Leonie Sampson and Peter Sampson jointly;*
>
> *2.1.2 18 Ordinary shares of £1.00 held by David Sampson and;*
>
> *2.1.3 40 ordinary shares of £1.00 held by Caroline Jenne*
>
> *(together, the "**Shares**").*"

By para. 3 of the Application the Applicants also sought an order that "*the Respondent shall take the necessary action to transfer the Shares and any benefits deriving therefrom after 21 July 2011 to each of the Applicants in accordance with paragraphs 2.1.1 to 2.1.3 above.*"

25. It was common ground that, although the proper law of the Remuneration Trust is stated in clause 2 of the trust instrument to be that of England and Wales, the property is administered in Guernsey, which means that section 4(1)(b)(ii) of the 2007 Law confers jurisdiction on this Court. Similarly, it was accepted that the Applicants had standing pursuant to section 69(2) of that Law to bring the Application.

26. Because the transactions to be set aside were the transfers of shares, Advocate Kapp referred to the decision in *Dervan v Concept Fiduciaries Limited* (unreported, 30 November 2012) in which the Court concluded that the applicable law in relation to such dispositions is the *situs* of the intangible property concerned. Because the Company is registered in England and Wales, which is also where the share register is kept, I was satisfied that the applicable law for the Application was the law of England and Wales. Indeed, all the Deeds of Assignment were expressly made subject to English law. It was for this reason that I gave leave to the Applicants to rely on expert evidence relating to the English law of mistake as it applies to an application such as this, to which I will turn in more detail in due course.

27. There has been a series of cases before this Court with facts that are somewhat similar and involving some of the same personnel as feature in the present case. They include *Dervan v Concept Fiduciaries Limited* (unreported, 11 February 2013), *Nourse v Heritage Corporate Trustees Limited* (unreported, 15 January 2015) and *Whittaker v Concept Fiduciaries Limited* (unreported, 23 March 2017). In this instance, I was persuaded that I could properly sit unaccompanied by Jurats in accordance with section 79 of the 2007 Law.

28. The expert evidence in this case came from Simon Taube QC. In his report dated 26 October 2018, he set out the applicable principles of English law governing the equitable jurisdiction of the English court to set aside a transfer of property by a donor where the transfer was the result of a mistake. (Mr Taube had been the expert in the *Whittaker* case and so this summary of the principles reflects what is set out in that case.) The position derives from the Supreme Court's decision in *Pitt v Holt* [2013] 2 AC 108 and also how it has been explained since.

29. At para. 37 of his report, Mr Taube identifies six key elements in the English equitable doctrine of mistake derived from the judgment of Lord Walker of Gestingthorpe in *Pitt v Holt*:

"*(1) 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.*

(2) The test will normally be satisfied where 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.

(3) Such a causative mistake may relate to the tax consequences of the transaction.

(4) 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.

(5) 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 disponor.

(6) 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."

30. In the following paragraph, Mr Taube quotes the summary provided by the Chancellor, Sir Terence Etherton, in *Kennedy v Kennedy* [2014] EWCH 4129 (Ch) at para. 36, which has regularly been quoted in this Court as a convenient way to set out the applicable principles:

"*(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call "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."

Expert evidence

31. With those principles firmly in mind, I next turn to the report given by Mr Taube about the areas which could be regarded as demonstrating that the Applicants acted as a result of a mistake before considering whether, on the facts, they did so.

32. There are a number of provisions in the trust instrument that are material. The first is the definition of "Beneficiaries" in clause 1.1 as meaning "*the present, past and future employees from time to time of the Settlor and the wives husbands civil partners widows widowers children step children and remoter issue of such employees and the spouses and former spouses (whether or not remarried) of such children and remoter issue*". There is then a proviso that no "Excluded Person" can be a Beneficiary. Clause 12 confers a power on the trustee to add persons to the class of Beneficiaries, other than an Excluded Person. That power is exercisable with the protector's consent.

33. Clause 10 contains the power of exclusion. With protector consent, the trustee is authorised by clause 10.1 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. By virtue of clause 10.2, a Beneficiary of full age is able to disclaim the interest or declare that he is an Excluded Person. Clause 10.3 then provides:

> "*Notwithstanding any other provision in this Trust Deed (but subject to clause 10.3.2 hereof):*
>
> *10.3.1 the Trustees shall not apply the Trust Fund or any part thereof in any manner whatsoever for the benefit of any person specified in the Inheritance Tax Act 1984, Section 13(2), or Section 28(4) and any such person shall be an Excluded Person, whether or not the Trustees have made a declaration under Clause 10.1 hereof;*
>
> *10.3.2 But declaring always that:*
>
> *(a) a person is not an Excluded Person under Clause 10.3.1 hereof if that person falls within the class of persons specified in Section 13(3) or Section 28(5) of the said Inheritance Tax Act 1984;*
>
> *(b) and further declaring that a person is not an Excluded Persons [sic] by virtue of Clause 10.3.1 hereof if such person:*
>
> *(i) is not beneficially entitled to, or to rights entitling him to acquire, 5% or more of, or any class of the shares comprised in, the issued share capital of the Settlor company or any connected company, or*

(ii) on a winding up of the Settlor company or any connected company, would not be entitled to 5% or more of the assets of any one or more of the said companies;

(c) and further declaring that notwithstanding the provisions of Clause 10.3.1 hereof, the Trustees may permit the Trust Fund to be applied for the benefit of any person (whether or not that person is within the class of persons specified in the said Section 13(2) or the said Section 28(4)) by exercising any power conferred by this Trust Deed to make a payment which is the income of any such person for any of the purposes of income tax, or would be the income of any of those purposes of such a person who is not resident in the United Kingdom if he were so resident within the meaning of the said Section 13(4)(a) and the said Section 28(6);

But Declaring always that nothing in Clause 10.3.2 or any other provision in this Trust Deed shall permit the Trustees to apply the Trust Fund or any part thereof in any manner whatsoever for the benefit of any person to the extent that any such power to do so would prevent a transfer of any assets or property of any description to the Trustees of the Trust Fund from being made free of any charge to Inheritance Tax under the Inheritance Act 1984."

34. There are wide-ranging discretionary powers and provisions of a dispositive kind contained in clauses 5 to 9 of the instrument, which would enable the trustee to pay, appoint, apply or advance income or capital in favour or for the benefit of one or more of the Beneficiaries, but clauses 11 and 43 contain overriding restrictions on the use of the funds and the exercise of the trustee's powers. Clause 11.1 provides:

> "*Notwithstanding anything to the contrary express or implied in this Deed, no power or discretion hereby or by law conferred on the trustees shall be exercisable nor exercised by the Trustees in such manner as to cause any part of the Trust Fund or the income thereof to be used to provide a Prohibited Benefit or to become payable to or applicable for the benefit of the Settlor PROVIDED THAT where the Trustees make any payment to or provide any benefit for the Beneficiary in circumstances where the Settlor is liable to account to the Revenue Authorities of the United Kingdom for income tax and/or national insurance contributions in respect of such payment or benefit then the Trustees shall pay to the Settlor such sum as shall be required to fully discharge the liability*."

The definition of "Prohibited Benefits" in clause 1.1 refers to a benefit falling within the definition of "relevant benefits" under the rules on taxation of pensions in operation before the coming into force of the Finance Act 2004, as shown by the reference to section 612(1) of the Income and Corporation Taxes Act 1988. Clause 11.2 provides:

> "*Notwithstanding anything to the contrary express or implied in this Deed, no dispositive duty or power hereby or by law conferred on the Trustees by law or under the trusts hereof or any amendment to the trusts hereof shall be exercisable nor exercised by the Trustees so as to cause the capital of the Trust to be applied (whether by advancement, or appointment upon new Trusts or appointment upon existing Trusts or otherwise to or for the benefit of any Excluded Person.*"

Clause 43 contains the provisions as to Excluded Persons as follows:

"*No Excluded Person shall be capable of taking any benefit of any kind by virtue or in consequence of this Settlement and in particular but without prejudice to the generality of the foregoing provisions of this Clause;*

43.1 The Trust Fund shall henceforth be possessed and enjoyed to the entire exclusion of benefit of any such Excluded Person and of any benefit to him by contract or otherwise;

43.2 No part of the capital of the Trust Fund shall be paid or applied for the benefit either directly or indirectly of any such Excluded Person in any manner or in any circumstances whatsoever; and

43.3 No power or discretion hereby or by any appointment made hereunder or by law conferred upon the Trustees or any of them shall be capable of being exercised in such manner that any such Excluded Person will or may become entitled either directly or indirectly to any benefit in any manner or in any circumstances whatsoever."

35. Mr Taube explains that the overriding restriction in the final part of clause 10.3.2 of the instrument, read together with clause 10.3.1, prohibits the distribution of any capital of the Trust Fund to any of the Applicants, or their children. However, clause 10.3 does not prohibit distributions of income to the Applicants or their families, provided the distribution is chargeable to income tax on the Beneficiary receiving such a distribution, but in his opinion this would produce a wholly unforeseen negative tax consequence in the United Kingdom.

36. He then explains that the exemption in section 28 of the Inheritance Tax Act 1984 applies to an individual's transfer of shares in a company to the trustees of an employment benefit trust falling within section 86 of the Act if the trustees acquire a controlling shareholding in the company. Each of the Applicants was, in 2011, a participator in the Company and so their respective spouses, lineal descendants and their nephews and nieces were persons connected with each participator. Section 28(4) of the 1984 Act provides that the exemption from inheritance tax in subsection (1) will not apply to an individual's transfer of a shareholding in a company to the trustees of an employment benefit trust if the trusts permit the transferor/participator or persons connected with the participator to benefit from applications of the settled property, ie, the capital of the trust fund. However, section 28(6) specifies that if the trusts contain a power to permit payments to the participator, or a connected person, of income, taxable in the hands of the recipient, such a power will not prevent the exemption in section 28 from applying to the individual's original transfer of the shares to the trustees of an employment benefit trust.

37. Mr Taube refers to ***Barker v Baxendale-Walker*** [2018] 1 WLR 1905 as being a recent case that had considered the effect of section 28 of the 1984 Act. Albeit *obiter*, Henderson LJ pointed out that for a transfer to the trustees of an employment benefit trust to benefit from the exemption to inheritance tax in section 28(1), it was essential to ensure that no transferring shareholder or connected person could benefit at any time from the capital representing the shares being settled, whether before or after the transferor's death.

38. The next section of Mr Taube's report deals with capital gains tax. If the trustee of the Remuneration Trust sold the shares that the Applicants settled (or any investment derived from the shares) during the transferor's lifetime, ordinarily the effect of sections 2 and 69 of the Taxation of Chargeable Gains Act 1992, where the trustee is not resident in the United Kingdom, as is the case here, would mean no chargeable gain in the trustee's hands. However, section 86 of that Act causes the settlor to be liable for capital gains tax if the settlor is domiciled in the United Kingdom at some time in the year and resident there for the year

and "*has an interest in the settlement*", as is also the case with the Applicants. This phrase is defined in para. 2 of schedule 5 to the Act as being where any capital or income of the property settled by the settlor is or will or may become applicable for the benefit of any defined person, which includes the settlor, the settlor's spouse or children or grandchildren. According to para. 7 of that schedule, a person is a settlor if the settled property consists of or includes property originating from him or her. Accordingly, it is not just the Company that is the settlor of the Remuneration Trust but also the Applicants. Whilst there is provision that any liability to capital gains tax can be recovered from the trustee, it does mean that there is the potential for the trust fund to have to meet any capital gains tax liability and so be depleted. Even if the effect of section 86 did not operate, section 87 of the Act could still operate if a distribution were made to some Beneficiary and not "matched" with other capital payments received by Beneficiaries.

39. Mr Taube then deals with the income tax position. Because each of the Applicants was a transferor, each remained liable in respect of income on the part of the trust fund derived from the respective transfer, even if the income, such as a dividend from the Company to the Respondent, was not distributed to that person. This consequence arises from the Income Tax (Trading and Other Income) Act 2005. Section 625 deems a transferor as settlor to have an interest in the settlement due to the power of the trustee to pay income to him or her, or his or her spouse. Again, there is an entitlement to recover tax from the trustee (under section 646), but it means the income tax would be borne annually as it arose and not only on a distribution of the income. Further, had the Remuneration Trust invested funds through an investment company owned by the trustee, income tax would become payable by the investment company as it arose under the Income Tax Act 2007 and not only when distributed to a Beneficiary. This is because the anti-avoidance provisions of that Act catch the situation where the transfer to a person abroad is made by someone who has the "*power to enjoy the income*", which Mr Taube explains applies to the Applicants.

40. In relation to the advice given, which is contained in the Davenport Lyons' letter dated 21 July 2011, that after a transferor's death his or her family would be able to enjoy the trust funds "tax free", Mr Taube considered it was flawed because of the potential that any distribution of capital or income to members of the transferor's family as Beneficiaries could attract capital gains tax and income tax: the income tax consequence arises in the same way as any distribution by the trustee exercising a power to make it from income received; and, if it were made from capital, section 731 of the 2007 Act or section 87 of the 1992 Act could make it taxable.

41. More broadly, Mr Taube offers the opinion that, by 2011, using an employment benefit trust to hold the family's shares in the Company was seriously flawed because on any of their deaths, so long as the school continued to trade, it is unlikely that there would be any charge to inheritance tax because each of their holdings of shares would be eligible for 100% business property relief under Chapter 1 of Part V of the 1984 Act. A second reason is that, from 9 December 2010, the new disguised remuneration rules, introduced as Part 7A of the Income Tax (Earnings and Pensions) Act 2003, meant that tax planning to benefit employees using an employment benefit trust ceased to have the supposed previous tax benefits. Whilst he notes that the new rules are mentioned in the letter dated 21 July 2011, he is critical of the fact that no advice was given to the applicants that these new rules meant that it made no sense for them to transfer their shares in the Company into an employment benefit trust, under which they could never benefit from the capital in the trust fund, and where they would be benefiting employees in the Company whom they never intended to benefit anyway.

Discussion

42. The first thing I noted when giving my decision last year was that I was dealing with three Applicants who each sought the setting aside of the transfer of shares made. There were, therefore, three separate decisions that needed to be taken. That said, the evidence of each related to the overall sequence of events through which they had relied on the advice being given to them. I was conscious that David had relied more on what he had been told by others, because he had been unable to receive any of the advice directly. The initial advice had been given to Caroline. Further, Caroline had been the shareholder with the greatest number of shares and had transferred the largest number of ordinary shares to the Respondent. Although the School was Leonie's life work, the future was really for her children. I formed the impression that no one would have done anything had Leonie not been persuaded it was the best course of action. So far as it is possible to glean family dynamics from the words on the pages of Affidavits, I took the view that Caroline and David would have respected the decision of Leonie had it not been a positive one and so would not have acted unilaterally. In that way, I concentrated on Leonie's position first and the impact the "loss" of control of the School had on her.

43. I was further satisfied that the understanding each Applicant had of the benefits of transferring the majority of the shares each held in the Company, but perhaps most importantly that Leonie had, was that there would be tax advantages to them in doing so. In Leonie's case, she was particularly keen to ensure that there was some future-proofing to protect those members of her family who had health problems. The Applicants did not wish to establish the Remuneration Trust as a means of benefiting the other employees (or former employees) of the School but, if that also happened to be the outcome, then that was an acceptable ancillary benefit. As the evidence shows, the Trust has been used for various purposes since it was established and the Application does not seek to bring the Trust to an end, but rather to reverse the position as to who owns the various tranches of shares in the Company. Each believed that settling the majority of their shares into the Trust would reduce their own exposure to tax in their lifetimes and that there would be further benefits through reducing their estates' exposure to inheritance tax and, in particular, that the mechanism of using the Trust would enable benefit to be derived to those each would wish to benefit after their deaths by capital and income being receivable tax-free. I accepted the analysis undertaken in Mr Taube's report that this belief arose from the flawed advice they had been given, principally by Mr Auden and by Mr Bindschedler. I accepted the evidence of the Applicants that, had they known the true impact in law of making the share transfers, they would not have made those transfers.

44. The applicable legal principles led me to conclude that this all amounted to a positive mistake on the part of each of the Applicants and that this was not something that arose through their forgetfulness, inadvertence or ignorance. They took advice and relied on it, but that advice has been shown through Mr Taube's report to be wrong. Because of the very nature of what they were attempting to do, that mistake on the part of each of the Applicants, in my view, went to the heart of the transactions of their transfers of their shares. It was causative to the whole of each of their transactions. In this regard, I was able to draw a distinction between the initial establishment of the Trust and the subsequent transfer of some of the Company's reserves, which has been used for the purposes mentioned, and these share transfers, which were of the Applicants' personal assets as opposed to being Company assets.

45. Given the consequences about which they were not advised, I was satisfied that each of them had made a grave mistake. Their shareholdings represented a significant part of their personal assets. In each of the Applicants' cases, I was further satisfied that they made this mistake as a result of believing that they would be obtaining taxation benefits that were illusory or non-existent. Consequently, they did not derive the tax benefits they envisaged when making the transfers. I was, therefore, satisfied that there were serious consequences for each of the

Applicants where the heart of the transaction was to achieve tax benefits that are not available in the way that their advisers led them to believe they would be.

46. In all those circumstances, I was also satisfied that it would not be right for the Respondent to retain the shares that had been transferred to the Remuneration Trust, in the sense that I regarded it as unjust as against the Applicants, and so unconscionable. I noted that the Respondent had expressed its neutrality throughout.

47. I paid close attention to the timing of the Application and whether it could be said that there was any undue delay in seeking to set aside the transactions. I decided that there was not because it had inevitably taken some time for the Applicants to take their own advice as to what had happened. Initially, they continued to deal with those who were responsible for the establishment of the trust, including Mr Auden, so any relevant period would only be once that relationship ended. I noted that the ability to take capital out of the Trust had been clarified in 2012, but that it was not then of immediate concern. The problems came into sharper focus in 2016, when Leonie was informed that the large dividend she wished to take could not be achieved. Although two years to get around to making the Application is a fairly long time, in the circumstances of this Trust, I was not persuaded that it was so long as to deprive the Applicants of the relief they sought on the ground of *laches*.

48. For reasons similar to those already stated in the ***Nourse*** and ***Whittaker*** cases, there is no principle of public policy operating in Guernsey to deprive the Applicants of the equitable relief they seek. I took into account that HMRC had been informed of the Application and had chosen not to make any representations. Taking all these factors into account, there was, in my view, no other reason to exercise the Court's discretion against granting the relief sought.

Conclusion

49. For all the reasons that I have now set out in more detail than when I announced the decision last year, the Application was granted. As a result, the share transfers made by each of the Applicants on 21 July 2011 were set aside. I also granted para. 3 of the Application requiring the Respondent to take the actions necessary to restore the shares that has been settled into the Remuneration Trust to the Applicants.