

Appeal against the Royal Court decision to dismiss the Appellants' claim for (i) rescission of a trust instrument dated 27 October 2008 (the "**Trust Deed**") and/or (ii) rescission of a transfer of shares in Cornerstone Advisory Services Limited ("**Cornerstone Advisory**") to the Respondent ("**Marlborough Trust**") as trustee of the Cloudburst Trust.

[2023]GCA065

IN THE COURT OF APPEAL OF GUERNSEY  
(CIVIL DIVISION)

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY  
(ORDINARY DIVISION)

7<sup>th</sup> December 2023

**Before:** Jonathan Crow, CVO, KC  
David Perry, KC  
Sir Adrian Fulford

**Between:** DAVID WARREN HANNAH  
GEORGIA DEANNE HANNAH  
RYAN MATTHEW HANNAH

**Appellants**

**-and-**

MARLBOROUGH TRUST COMPANY LIMITED  
(in liquidation)  
as trustee of the Cloudburst Trust

**Respondent**

Advocate T.W. McGuffin for the Appellants  
The Respondent was not represented and did not appear

Crow JA

**INTRODUCTION**

1. This is the judgment of the court.
2. By their appeal, the Appellants invite this court to overturn that part of the judgment of the Royal Court (Jessica E. Roland DB, with Jurats S. M. Jones, OBE, J. Hooley and S. Morris), sitting as the Ordinary Court, dated 5 May 2023 (the "**Royal Court Judgment**"), by which the Royal Court dismissed the Appellants' claim for (i) rescission of a trust instrument dated 27 October 2008 (the "**Trust Deed**") establishing a Guernsey-law trust known as the Cloudburst Trust, and/or (ii) rescission of a transfer of shares in Cornerstone Advisory Services Limited ("**Cornerstone Advisory**") to the Respondent ("**Marlborough Trust**") as trustee of the Cloudburst Trust on or about the same date (the "**Share Transfers**"). The Appellants invite this court to rule that the establishment of the Cloudburst Trust was, and/or the Share Transfers were a 'mistake' (as that concept is understood in the context of the court's jurisdiction to grant equitable relief, as recognised in cases such as *Gresh v. RBC Trust Company* (Judgment 6/2016), at §20). There is no suggestion that the Royal Court applied the wrong legal test. This is accordingly an appeal solely on the facts, as the Appellants rightly acknowledge.

## THE BACKGROUND

3. The First Appellant (“**David**”) lives in England. He is a chartered accountant and a chartered tax adviser. In March 2006, he established a sole practice in England under the name of Cornerstone Tax Advisers (“**Cornerstone Tax**”), providing specialist tax practice. The Second and Third Appellants (“**Georgia**” and “**Ryan**”) are his children. They are now adults, but they were 11 and 14 in 2008, when the Cloudburst Trust was established. Nicholas Hannah (“**Nicholas**”) is David’s brother.
4. Benjamin Tustin (“**Mr Tustin**”) and Adrian Howe (“**Mr Howe**”) are former directors of Marlborough Trust, which is now in compulsory liquidation, and of Marlborough Nominees Ltd (“**Marlborough Nominees**”), which is now in voluntary liquidation. Nicholas is also a former director of Marlborough Trust and of Marlborough Nominees, as is David Enevoldsen (“**Mr Enevoldsen**”).
5. In 2008, Mr Tustin and Mr Howe contacted David with an offer to purchase Cornerstone Tax, which they wanted to acquire in order to expand Marlborough Trust’s business offering. Negotiations then followed, the business was professionally valued, and in due course a sale agreement dated 4 August 2008 (the “**Sale Agreement**”) was executed between David as the seller and Marlborough Nominees as the buyer.
6. The purchase consideration was £12.5 million, payable by means of 100 loan notes for £125,000 each issued to David as noteholder by Cornerstone Advisory, a Guernsey-incorporated company established by Mr Tustin and Mr Howe to run the Cornerstone Tax business. Mr Tustin, Mr Howe and Mr Enevoldsen were all appointed as directors of Cornerstone Advisory on its incorporation. The two initial shareholders in Cornerstone Advisory were Marlborough Trust and Marlborough Nominees.
7. It is not clear how or when, but at some stage the ownership of Cornerstone Tax’s business was transferred from Marlborough Nominees to Cornerstone Advisory.
8. After the sale of Cornerstone Tax’s business, David continued to provide consultancy services, and he was a non-executive director of Cornerstone Advisory from 1 June 2009 until the company’s dissolution in 2013.
9. On 27 October 2008, Mr Tustin settled the Cloudburst Trust, with Marlborough Trust as the trustee and an initial settlement sum of £10. On the same day, the two issued shares in Cornerstone Advisory, which had until then been held by Marlborough Trust and Marlborough Nominees, were settled into the Cloudburst Trust (that is, the Share Transfers). About a year later, the assets of Cornerstone Advisory were transferred to a BVI company, Cornerstone International Advisory Services Limited (“**Cornerstone International**”) whose issued share capital was then also transferred to Marlborough Trust as trustee of the Cloudburst Trust. David was a non-executive director of Cornerstone International between 28 October 2009 and 18 March 2014. The other directors were Mr Tustin, Mr Howe and Mr Enevoldsen.
10. On 3 March 2009, an account was opened with Investec Bank by Marlborough Trust as trustee of the Cloudburst Trust. The mandate declaration was signed by Nicholas and Mr Howe.
11. For the purpose of this appeal, it is sufficient to note the following key features of the Trust Deed (using capitalised terms as defined in the deed):
  - (i) Georgia and Ryan were named as Beneficiaries.
  - (ii) David was not named as a Beneficiary, but nor was he named as an Excluded Person.
  - (iii) The trustee had a power to add to the Beneficiaries as from a specified date.

- (iv) The trustee had a power to lend the Trust Fund (or any part of it) to any person, whether a Beneficiary or not.
  - (v) The trustee had a power to permit any person, whether or not a Beneficiary, to reside in, occupy or have custody of any property comprised in the Trust Fund.
12. David's evidence is that he was not aware of the establishment of the Cloudburst Trust at the time, let alone of the Share Transfers. He says that:
- (i) while he was a director of both companies, he was unaware of the beneficial ownership of either Cornerstone Advisory or Cornerstone International;
  - (ii) he only became aware of the existence of the Cloudburst Trust during the course of an investigation by Her Majesty's Revenue & Customs ("HMRC") into his tax affairs which started in November 2012;
  - (iii) he only became aware of the Share Transfers in December 2014;
  - (iv) he only received a copy of the Trust Deed in December 2018.
13. Georgia and Ryan also gave evidence denying any knowledge of the Cloudburst Trust when it was established, or of the Share Transfers when they were effected. Nicholas gave evidence admitting that he had signed certain paperwork in relation to the Cloudburst Trust, and that he had provided Mr Tustin with the dates of birth of David's children in September 2008, but he denied that he was aware at the time that Georgia and Ryan were beneficiaries.
14. HMRC has issued assessments against David in excess of £5.5 million, with additional penalties of nearly £2.5 million, on the basis that the circumstances outlined above fall within ss. 714 – 751 on the Income Tax Act 2007, *i.e.* the transfer of assets abroad regime. HMRC relies in particular on the following facts:
- (i) David could potentially enjoy income from the arrangements because, although he is not named as a Beneficiary of the Cloudburst Trust, his children are Beneficiaries, David is not an Excluded Person, and he could be added as a Beneficiary;
  - (ii) various trustee powers under the Trust Deed (including the power to transfer assets, lend funds or use property) could be exercised for David's benefit;
  - (iii) after the Sale Agreement was executed, David continued to run Cornerstone Tax's business;
  - (iv) David also continued to receive a substantial income, with the ability to draw upon further funds, paying at the capital gains tax rate.
15. The Appellants say that they are also concerned that HMRC may make assessments against Georgia and Ryan, although none has as yet been made.

### **THE APPLICATION & THE ROYAL COURT JUDGMENT**

16. It was against this background that the Appellants issued an application dated 8 October 2020 (the "**Application**"), seeking two alternative forms of relief:
- (i) an order rectifying the Trust Deed so as to provide for their complete exclusion from benefit under the Cloudburst Trust;
  - (ii) alternatively, an order setting aside the Cloudburst Trust, and/or the Share Transfers.
17. Although the two alternative heads of relief appeared in this sequence on the face of the Application, the Appellants made clear in the course of their submissions in the court below that their preference was to secure a rescission of the Cloudburst Trust and/or of the Share Transfers. They invited the Royal Court only to consider rectification if it was unable to grant rescission.

18. HMRC was notified of the proceedings in the usual way. It provided written submissions and supporting authorities in opposition to the Application, but indicated that it did not wish to be joined as a party. In summary, its position was that: (i) the Appellants did not have *locus standi* to seek rescission, and David did not have *locus standi* to seek rectification; (ii) in any event, there was insufficient evidence to justify the grant of any relief; (iii) alternatively, there had been undue delay, and relief should be refused on that basis.
19. The evidence in support of the Application took the form of various affidavits from David, Georgia, Ryan and Nicholas, and certain purely formal evidence from a solicitor. David and Nicholas also gave oral evidence at the hearing on 8 August 2022.
20. Mr Tustin, Mr Howe and Mr Enevoldsen were all asked by the Appellants to give evidence in support of the Application, but they declined to do so.
21. In its judgment, the Royal Court first set out the legal tests for granting equitable relief on the grounds of mistake and for rectification in §30 – 35 of its judgment. As noted above, no challenge is made in this appeal to the Royal Court’s summary of the law or the direction to the Jurats.
22. As regards the claim for rescission, HMRC submitted that neither David nor his children had *locus standi*. The Royal Court Judgment dealt with that issue at §39 – 42 without making a clear finding either way. In relation to Georgia and Ryan, reference was made to s. 69(2) of the Trusts (Guernsey) Law 2007, but this court was told that the Application was deliberately not made in reliance on that provision. In relation to David, the Royal Court found it unnecessary to decide whether he would have been granted leave to bring the Application. We will revisit these issues below when discussing the issues under appeal.
23. In dealing with the substance of the claim for rescission of the Cloudburst Trust, the Royal Court’s conclusions are set out in §55. This is at the heart of the appeal, so it is worth quoting in full:

*“The Jurats found that there was no evidence of a mistake on Mr Tustin’s part in setting up the Trust. The evidence before the Jurats was that he made the disposition to the Trust for the benefit of Ryan and Georgia. The Trust Deed sets this out in its terms. The Jurats found that the contemporaneous documentation including correspondence with the Guernsey Income tax office and the New Business Enquiry Sheet evidences that this was his intention. Whilst there was no evidence that David Hannah knew of the Trust, there was no evidence upon which the Jurats could conclude that Mr Tustin had made a causative mistake in its creation including a finding based on an inference or tacit assumption. Nicholas Hannah in his first affidavit surmised that he did not believe Mr Tustin would have deliberately wished to create a tax problem for David Hannah least of all one with enormous consequences and that he believed that had Mr Tustin appreciated the terms of the trust he would not have established the Trust or included Ryan and Georgia as beneficiaries. In oral evidence he surmised if this was “virtue washing” by Mr Tustin, however he also accepted he did not have any actual evidence of Mr Tustin’s intentions. The Jurats came to the unanimous conclusion that there was no or insufficient evidence before the Court as to Mr Tustin’s state of mind at the time to draw any inference that he was mistaken as to the consequences of the creation of the Trust. Further, there was no evidence before the Court of what Mr Tustin believed he was achieving by creating this Trust for the benefit of the Ryan [sic] and Georgia.”*

24. As regards the claim for rescission of the Share Transfers, the Royal Court Judgment stated that –
  - (i) the Jurats came to the conclusion that the Share Transfers were voluntary dispositions, *i.e.* there was no contractual basis for the transfers, nor was any consideration given (§56 – 61);

- (ii) the Jurats were satisfied that the shares in Cornerstone Advisory were intended to be trust property (§62);
  - (iii) the Jurats concluded that there was no evidence that would support a finding that there had been a causative mistake in relation to the Share Transfers (§62);
  - (iv) as a result, the claim for rescission of the Trust Deed failed (§64).
25. The key findings in this regard appear in §62 and §64 of the Royal Court Judgment, the relevant parts of which said this:

*“62. ... The Jurats were satisfied that the shares were intended to be the trust property. The Jurats concluded that there was no evidence of a mistake nor was there evidence to support a finding based on an inference of a conscious belief or tacit assumption that would support a finding that a causative mistake of the transfer of the shares [sic] to the Trust.*

*...*

*64. The Jurats were not satisfied on the evidence before them that there was a mistake on the part of Mr Tustin as to the legal effect of the disposition or as to an existing fact which was basic to the transaction. The mistake was not the establishment of the Trust or the transfer of the shares, rather the error was in the drafting, which it would appear, failed to explicitly exclude David Hannah from the Trust ... It is this failure that attracts the unintended consequences not the creation of the Cloudburst Trust itself if it had been properly drafted. Putting it another way, the error does not appear to have been Mr Tustin’s, but rather whomever drafted the documentation forming the Trust on his behalf. Therefore, as the Applicants cannot show on the balance of probabilities that there is a relevant mistake, the Jurats have found as a matter of fact, having been directed by me on the law, that the claim for rescission fails.”*

26. As regards rectification, HMRC accepted that Georgia and Ryan were entitled to bring the claim, but submitted that David did not have *locus standi*. The Royal Court agreed that Georgia and Ryan were entitled to bring the claim as of right, and it also granted David “*leave ... to have standing to bring the Application with Ryan and Georgia*” (§70).
27. In determining the substance of the claim for rectification, the Royal Court Judgment records that the Jurats concluded that –
- (i) it was the clear intention of Mr Tustin as settlor of the Cloudburst Trust to include Georgia and Ryan as beneficiaries (§77);
  - (ii) Mr Tustin’s clear intention was that David was not to benefit from the Cloudburst Trust (§76);
  - (iii) there had been a genuine mistake in failing formally to exclude David as a beneficiary under the Trust Deed (§79);
  - (iv) no remedy other than rectification was available (§80);
  - (v) in all the circumstances, there had been no undue delay in bringing the Application (§81);
  - (vi) in the exercise of the court’s discretion, rectification should be granted by formally excluding David as a beneficiary of the Cloudburst Trust (§85 – 87).

## **THE APPEAL**

28. Although the Appellants have secured one element of one of the alternative forms of relief sought in the Application, they remain keen to obtain the greater prize of rescission. By their appeal, they are accordingly inviting this court to overturn the Royal Court Judgment to the extent that it refused the claim for rescission.

29. As noted above, because the Royal Court ultimately held that there was no causative mistake, there was no need for it to reach a clear conclusion on whether David or his children have *locus standi* to bring the Application as of right, or (if not) whether they should be given leave to do so. For reasons that will become apparent, we do not consider it necessary to express any view on those matters either. For the purpose of this appeal, we will proceed on the assumed basis (*i.e.* without deciding) that the Appellants did have the necessary *locus standi*, or that they could properly have been granted leave to bring the Application.
30. On that basis, the sole issue in this court is whether the Royal Court's findings of fact should be overturned. The Appellants' argument on that issue is simple. They say that §55 of the Royal Court Judgment focused on the wrong issue: they say that the question was not whether, in establishing the Cloudburst Trust, Mr Tustin intended to create a settlement for the benefit of Georgia and Ryan, but whether he was mistaken as to the tax consequences of doing so, and of causing the Share Transfers to be effected.
31. The Appellants then submit that, if the Royal Court had focused on the correct issue, it would have reached the conclusion that Mr Tustin was mistaken as to the tax consequences of establishing the Cloudburst Trust:
- (i) They say that the Royal Court failed to take into account inherent probabilities: it is, they say, inherently unlikely that, if Mr Tustin had been aware of the potential UK tax consequences, he would have settled the assets on the terms of the trust, because there was no reason to think he would have intended to visit a significant tax risk on David.
  - (ii) More specifically, the Appellants rely on the evidence indicating that: (a) Mr Tustin was an experienced fiduciary, having been a director of Marlborough Trust for several years; (b) he had previously worked on a number of UK tax issues with David; (c) there was no obvious reason why Mr Tustin would have chosen to benefit Georgia and Ryan; and (d) Nicholas believed that, if Mr Tustin had appreciated the problematic effect of the terms of the Cloudburst Trust, he would not have caused it to be established as it was, or settled the assets on the terms of the trust.
  - (iii) The Appellants also rely on the following matters: (i) they say that the Sale Agreement was an arm's length transaction under which David was intended not to retain any interest in the Cornerstone Tax business; (ii) the establishment of the Cloudburst Trust formed no part of the sale transaction; and (iii) David (and his children) were kept in ignorance of the trust's establishment and of the Sale Transfers.

## **THE LEGAL CONTEXT**

32. As noted in §2 above, this is an appeal on the facts. As such, the relevant test (derived from cases such as *Cyma Petroleum (CI) Ltd v. The States of Guernsey* [2015] GLR 1, at §13, and *Simon v. The Committee of Health & Social Care* [2020] GRC 028, at §27) is well established: this court will only interfere with the factual findings of the Jurats if there is no evidence on which they could reasonably have arrived at their findings, or if those findings are otherwise perverse.
33. In considering this appeal on the facts it is particularly important for this court to keep well in mind the following considerations:
- (i) The Jurats had the advantage of assessing the full range of evidence, including hearing oral testimony from David and Nicholas.
  - (ii) The onus of proof was plainly on the Appellants to demonstrate to the Royal Court, on the balance of probabilities, that there had been a mistake. The decision of the Jurats was that the Appellants had failed to discharge that burden. In order to succeed on appeal, the Appellants accordingly have to satisfy this court that it was perverse of them to reach that conclusion: in other words, the Appellants effectively have to satisfy this court that, on the evidence at trial, there was only one reasonable conclusion for the Jurats to reach.

34. Although the Appellants do not suggest that the Royal Court applied the wrong legal test in relation to mistake, nevertheless in order to appreciate the nature of the fact-finding exercise which the Royal Court had to conduct, it is also important to understand the relevant legal framework.
35. In order to invoke the court's equitable jurisdiction in relation to mistake, there are essentially three constituent elements that need to be proved: (i) there must have been a mistake; (ii) the mistake must have caused the relevant act; (iii) mistake must be sufficiently grave as to make it unconscionable to leave it uncorrected – the test of unconscionability being applied objectively to the particular circumstances in hand.
36. As to the nature of a mistake, the relevant principles may be summarised for the purpose of this appeal as follows:
- (i) There must have been a distinct mistake, as distinguished from mere ignorance, inadvertence, disappointed expectations, or misprediction about some possible future event.
  - (ii) The test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.
  - (iii) Although ignorance, inadvertence or misprediction are not of themselves sufficient, nevertheless they may result in a conscious belief or a tacit assumption which was itself mistaken, and which would be capable of justifying relief.
  - (iv) A mistake made carelessly is nevertheless a mistake, unless the circumstances are such as to show that a risk was deliberately run.
  - (v) A mistake as to the consequences of a transaction, including the tax consequences, is capable of triggering the court's equitable jurisdiction to grant relief.

## **DISCUSSION & CONCLUSION**

37. It is a truism to say that every case is different, but the circumstances here are particularly unusual. Most significantly, the Application to rescind the Cloudburst Trust was made without any supporting evidence from the settlor to explain what he intended to achieve by establishing the trust; and the Application to rescind the Share Transfers was made without any supporting evidence either from the directors of the transferor companies (Marlborough Trust and Marlborough Nominees) or from the trustee as transferee of the shares in Cornerstone Advisory to explain what they intended to achieve by entering into the transaction. Against that background, it is in our judgment impossible to say that it was perverse for the Jurats to reach the conclusion that they did – namely, that they were not satisfied that a causative mistake had been made. The short point is that there was no direct evidence at all to support the Appellants' case on mistake.
38. In the absence of direct evidence, the Appellants could only succeed in this appeal if they could persuade this court that it was perverse of the Jurats not to draw the inference that there had been a causative mistake. In our judgment, that argument must also be dismissed for an accumulation of reasons:
- (i) As noted above, the Application sought alternative forms of relief: the court was asked to order rectification if it was not persuaded that rescission could be granted. In other words, the Application was drafted, and the case was advanced in the Royal Court expressly on the basis that the court might not grant rescission, but it could grant the alternative relief. In the circumstances, it is in our judgment logically impossible for the Appellants now to say that it was perverse of the Jurats to reach a conclusion which the Application itself expressly contemplated as a possible outcome – namely, that rescission was to be refused, but rectification was to be granted.
  - (ii) This court, like the court below, was invited to take into account the inherent probabilities. The Appellants' argument on that footing was that it was inherently unlikely that Mr Tustin would have established the Cloudburst Trust as he did, and caused the Share Transfers to be

effected, if he had appreciated that it would have tax consequences for David: that is the relevant mistake that the Appellants say Mr Tustin made. However, the principal problem facing that argument was that, because there was no clear evidence of what Mr Tustin was seeking to achieve either by establishing the trust or by causing Marlborough Trust and Marlborough Nominees to settle the Cornerstone Advisory shares onto the trust, the Jurats were fully entitled to reach the conclusion that there was insufficient evidence to demonstrate that there had been a distinct mistake, as opposed to any form of mere oversight. The Royal Court was entitled to reach the conclusion that Mr Tustin could only have made a mistake (within the meaning of the relevant legal principle) if he had been thinking about the tax consequences for David in the first place. But, if he did what did without even thinking about those tax consequences, because they were entirely immaterial to his purpose, the fact (if it is a fact) that he did not appreciate the tax consequences does not constitute a mistake.

- (iii) Furthermore, when participating in the acquisition of Cornerstone Tax's business, Mr Tustin was not advising David, nor was he acting in David's interests: on the contrary, each of David and Mr Tustin were representing the two opposing sides in an arm's length commercial sale. Similarly, in establishing the Cloudburst Trust, Mr Tustin was not advising David (who was apparently ignorant of the trust's existence) nor was he acting in David's interests: the few contemporaneous documents that survive (namely, the New Business Enquiry Sheet and the letter from Mr Tustin to the Guernsey Income Tax Office dated 25 March 2008) appear to demonstrate that his interest in establishing the trust was to benefit Georgia and Ryan, and that his only verifiable tax concern at the time was his own, and Mr Howe's tax position under Guernsey law – not David's position under UK tax law.
- (iv) It was pressed on us, in the course of oral argument, that Mr Tustin was an experienced tax adviser. In our judgment, the Jurats were fully entitled to consider that that consideration was capable of cutting against the Appellants' case. The Jurats were entitled to take the view (as Advocate McGuffin himself said in oral argument) that any experienced tax adviser would have been alive to the fact that settling a Guernsey trust with English-resident beneficiaries was highly likely to have at least some UK tax consequences. That consideration does not support the conclusion that Mr Tustin made a causative mistake: rather, it is more likely to support the conclusion that Mr Tustin understood the possible consequences of what was being done.
- (v) The Appellants also invited the court to take into account the fact that there was no obvious reason for Mr Tustin to benefit Georgia and Ryan, and that they were apparently kept in ignorance of the Cloudburst Trust and the Share Transfers. In our judgment, the Jurats were fully entitled to take the view that neither factor had any probative value in demonstrating that the alleged mistake had been made.
- (vi) Finally, we were invited to take into account the evidence from Nicholas mentioned in §31(ii)(d) above. In our judgment, the Jurats were fully entitled to take the view that that evidence did not advance the Appellants' case. In circumstances where a person is giving evidence about what they would or would not have done in the past if the circumstances had been different from what they were, they are not giving evidence of a fact within their knowledge, but rather they are speculating as to what they now think they would then have done. Any such speculation will inevitably be contaminated with hindsight, and potentially also with self-interest. The court must in such circumstances make up its own mind whether to accept their evidence: it is not bound to do so. But this case is even more attenuated than that. Here, the Jurats were not considering evidence from Mr Tustin explaining what he now thinks he would have done in 2008 if he had known then what the Appellants say he did not know. Instead, the Jurats were presented with evidence from Nicholas as to what he now says Mr Tustin would have done in 2008, on the hypothetical basis that Mr Tustin had made the alleged mistake. In our judgment it cannot possibly be said that it was perverse of the Jurats not to accept that second-hand speculation.

39. This court accordingly finds that the Royal Court was fully entitled to reach the conclusion that the Appellants had not discharged the burden of proof in relation to the question whether there was a causative mistake. In the circumstances, this court (like the Royal Court) considers it unnecessary to express any view on whether, if there had been a mistake, it would have been unconscionable to leave it uncorrected.
40. For the reasons given in this judgment, the appeal is dismissed.