Neutral Citation Number: [2019] EWHC 2039 (Ch)

Petition No: CR-2015-009042

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LITS (ChD)

IN THE MATTER OF EDWARDIAN GROUP LIMITED
IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/07/2019

Before:

THE HON. MR JUSTICE FANCOURT

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Between:

(1) ESTERA TRUST (JERSEY) LIMITED
(a company incorporated under the Laws of Jersey)
(2) HERINDER SINGH

Petitioners

- and –

(1) JASMINDER SINGH
(2) VERITE TRUST COMPANY LIMITED
(a company incorporated under the Laws of Jersey)
(3) JEMMA TRUST COMPANY LIMITED
(a company incorporated under the Laws of Jersey)
(4) EDWARDIAN GROUP LIMITED
(5) JASMINDER SINGH AND HERINDER SINGH
(as trustees of the English Trusts)

Respondents

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Mr Steven Gee Q.C., Mr Giles Goodfellow Q.C., Mr Oliver Conolly and Mr Alex Barden (instructed by **Arnold & Porter Kaye Scholer LLP**) for the **Petitioners**
Mr Ian Croxford Q.C., Mr Daniel Lightman Q.C. and Ms Emma Hargreaves (instructed by **Orrick, Herrington & Sutcliffe LLP**) for the **First Respondent**
Mr Andrew Green Q.C, Mr Kevin Prosser Q.C and Mr Fraser Campbell (instructed by **Baker & McKenzie LLP**) for the **Fourth Respondent**

Hearing dates: 16, 17, 18 July 2019

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Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Mr Justice Fancourt:

1. On 5 July 2018, after the trial of liability issues ("trial 1") in this heavy and vigorously contested minority shareholder action, I made an order in the following terms:

> "… the First and Fourth Respondents, on a joint and several basis, do purchase the shares in the Company registered in the Petitioners' sole names … at the price and in a manner to be determined at Trial 2 …"

2. There followed a quantum trial ("trial 2"), which was also vigorously contested, at which the purchase price and the time for payment were determined. In my judgment upon trial 2 dated 8 April 2019, I ordered that an initial sum of £22,500,000 on account of the full price be paid no later than 28 days after judgment and that the balance be paid no later than 6 months after judgment. I left it to the parties to agree the wording of an order reflecting the terms of my judgment and ordered that all other consequential matters should be adjourned to be heard on a date to be fixed.

3. By the end of term, 17 April 2019, there remained one issue about the exact wording of the order, namely whether the shares purchased for £22,500,000 should be transferred "as jointly directed by the First and Fourth Respondents", wording that was added to the Petitioners' draft order by the First and Fourth Respondents ("the Respondents"). In circumstances explained in more detail in a short, ex tempore judgment of 10 May 2019, which I do not need to repeat, I allowed a little time at the request of the parties for them to resolve a further (at that time unidentified) issue. The result was a letter dated 30 April 2019 from the Petitioners followed by their application dated 1 May 2019, asking me to order that the final order in trial 2 be not sealed until a further hearing had taken place.

4. The reason for the Petitioners' application was that they had very belatedly realised that a purchase by the Company (rather than by Jasminder Singh ("JS") or any other person) of the Petitioners' shares would be treated as an income distribution by a UK-resident company under sections 368 and 383 of the Income Tax (Trading and Other Income) Act 2005 ("the 2005 Act") and not (as might have been expected) as a capital transaction. If treated as a capital transaction, the gain arising to the First Petitioner ("Estera"), which holds the majority of the shares in question, would have been treated as a trust gain, liable to capital gains tax (at a rate of 20% currently) as and when distributed to on-shore beneficiaries. The appropriate rate of income tax for Estera would be the dividend trust rate, namely 38.1%, and would be payable immediately. The cap on tax for a non-UK resident holding the shares would not apply because the trust has UK-resident discretionary beneficiaries. The Petitioners want to seek to avoid being subject to any - or certainly the 38.1% - immediate tax liability.

5. A possible reaction to such concerns may be that those who use offshore trusts to hold their wealth may have to suffer the disadvantages that such structures can bring as well as benefiting from their advantages; but nevertheless the tax treatment is relatively anomalous and the concern of the Petitioners is understandable. On the facts of this case, the price being paid for the Petitioners' shares is self-evidently not in the nature of a disguised income distribution by the Company, so the expected tax treatment - though correct - can be seen as burdensome in so far as it exceeds a rate of 20%. If the shares had been bought by JS rather than by the Company the price would have been treated as a capital receipt giving rise to a trust gain. However, JS was in no financial position to buy all of Estera's shares and, for the reasons that I gave on 10 May 2019, the Company was entitled to do so and the Petitioners were not entitled to say that it should not do so.

6. The Petitioners told me on 10 May 2019 that they wished to have further time to explore with HMRC whether any relief against tax might be available under the relatively new Double Taxation Agreement between the UK and Jersey ("DTA"), and to investigate other potential measures that might properly (and without prejudicing the Respondents) mitigate the likely tax treatment of the price payable. At the hearing on 10 May, the Company pointed out that a perfectly legitimate measure to mitigate tax would be to bring the trust onshore, by appointing UK resident trustees, which would then entitle the Company to apply to HMRC for capital gains tax treatment of the payment by way of relief under sections 1033-1043 Corporation Tax Act 2010. The Petitioners, however, wished to seek to obtain DTA relief before the purchase of the shares, which if successful would result in no tax being payable immediately. The position on 10 May was that it was thought likely to take 30 days to obtain clearance from HMRC in that regard.

7. I therefore granted the Petitioners a stay on drawing up the final order until July 2019 to enable them to take the following steps:

> (1) to seek to obtain DTA clearance from HMRC, in which event the sale of the shares could then proceed without further delay;
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> (2) to identify whether there was any other means of proper mitigation open to the Petitioners that would not potentially harm the interests of the Respondents, in which regard I indicated that I expected the Respondents to cooperate reasonably; and
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> (3) to progress if thought fit the "on-shoring" of the trusts.

I also ordered that no further interest would be payable on the purchase price, since the Company had been ready and willing to complete the purchase of all the shares on 3 May 2019.

8. Contrary to the Petitioners' expectations, it was later discovered that HMRC would not give advance clearance under the DTA but that an application for such relief could only be made after the date of the transaction. By way of contrast, an application for capital gains tax treatment of the price payable has to be made in advance of the transaction taking place. Such an application would be likely to be considered by HMRC within 30 days and, if approved, the transaction could then proceed and the change of trustees be effected. But no application has yet been made for that purpose, though the Respondents are content to assist the Petitioners to do so. They are currently seeking to agree the terms of a draft clearance request letter.

9. What can perfectly properly happen, therefore, is for an application to be made in respect of one of the four Herinder trusts for capital gains tax treatment of the price to be paid for its shares and if such treatment is granted the sale of those shares will proceed. The Petitioners will then apply for DTA relief in relation to the other three trusts, and if granted those three trusts will remain resident in Jersey. If not granted, the three trusts can also be brought onshore within the current tax year to mitigate tax liability to the rate of 20% on the gain rather than 38.1% on the whole price. All agree that this course is perfectly proper and no question of illegitimate tax avoidance arises.

10. However, the Petitioners wish to pursue a quite different structure in order to avoid any immediate tax liability being incurred. Their expert tax advice is that, even if DTA relief is not available, any immediate tax liability can be avoided if Estera incorporates a Jersey company and transfers the shares in the Company to that company ("Jersey NewCo"), so that Jersey NewCo and not Estera can then sell the shares to the Company and receive the price

payable. To avoid a residual risk of JS being taxed as (arguably) an economic settlor of the Jersey trusts, the sale cannot take place until the tax year 2020/21, so what is intended is that after April 5, 2020 Jersey NewCo will be incorporated, Estera's shares in the Company will be transferred to it and then it will exercise a put option (or the Company will exercise a call option in relation to those shares) with completion taking place in June 2020. The Petitioners envisage that the transfer and put and call option structure will be created by order of the Court, but say that, alternatively, contracts to that effect can be made if the court so directs.

11. The order that the Petitioners seek is in the following terms:

> "(a) [Estera] shall be permitted to transfer such shares to a new company to be incorporated under the laws of Jersey ("NewCo") between 6 April 2020 and 3 May 2020. The pre-emption provisions of the Company's articles of association shall not apply to such transfer.
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> (b) At any time between 4 May 2020 and 4pm on 15 May 2020, NewCo shall be entitled to serve a notice on the Company requiring it to purchase from NewCo all such shares transferred to it within 10 business days of receipt of the notice.
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> (c) If no notice has been served under sub-paragraph (b) above, at any time between 16 May 2020 and 4pm on 5 June 2020, the Company shall be entitled to serve a notice on NewCo requiring it to sell all such shares transferred to it by [Estera] to the Company within 10 business days of receipt of the notice.
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> (d) The price for such shares will be, in respect of the shares currently held in the Elm, Oak and Rosemary Trusts, a price reflecting the principal sum of £101,169,048.40, plus interest …. If such shares also include the shares held in the Lily Trust, the additional price shall be [the principal sum of £33,723,016.15 plus interest].
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> (e) In the event that no transfer takes place in accordance with sub-paragraph (a), or no notice is served under sub-paragraphs (b) or (c) above, the parties shall return to the Court for further directions."

12. JS and the Company decline voluntarily to engage in this structure, for essentially two reasons. First, they say that there is a real risk that the scheme will be regarded by HMRC as aggressive tax avoidance, with which they do not wish to be associated and which could have adverse effects for both of them in terms of the way that HMRC regards the financial affairs of the Company and JS in future. They do not wish to run that risk (because of the considerable inconvenience of being subject to an investigation) and they do not wish to be seen to be indulging in aggressive tax avoidance. Second, they do not wish to wait until June 2020 to acquire the Petitioners' shares. The order for a buy-out was made on 5 July 2018 on the basis that there needed to be separation of the interests of JS and the Second Petitioner ("HS") and their respective trustees, and until that takes place the affairs of the Company are inhibited by the fact that HS and Estera remain 20% shareholders, entitled to participate as such and entitled to any dividends that are declared.

13. Both the Company and the Petitioners have obtained specialist tax advice. In the case of the Company, an Opinion of Mr Prosser QC was relied on as being the evidential basis for the Company's and JS's unwillingness to agree to the scheme. Mr Prosser QC has also appeared to assist the court in understanding the tax issues that arise, as correspondingly has Mr Goodfellow QC, who appears on behalf of the Petitioners. The Petitioners have also very recently produced and seek to rely upon an Opinion of Mr Ewart QC, and during the course

of the hearing produced a second Opinion. I am not sure what status these Opinions are intended to have – the court has not given permission for expert evidence on this application. Strictly, the Petitioners' contentions should be made by submissions, by Mr Goodfellow QC or Mr Gee QC, who appeared before me on the application, since the Court does not receive evidence about domestic law, and does not generally receive evidence about the practice of HMRC. The Respondents objected to the Court receiving the Opinions of Mr Ewart QC on the basis that they were irrelevant, were not in a proper form for expert evidence and no permission had been given for it. In addition, the second Opinion was an attempt by the Petitioners to answer submissions made by Mr Prosser QC at the first day of the hearing and to shore up the content of the first Opinion. I read the content of the Opinions *de bene esse*, but it seems to me that the Respondents' objections are right in principle and that I should not take those Opinions into account. In any event, Mr Goodfellow QC covered exactly the same ground in his submissions and in greater detail than Mr Ewart QC did.

14. For the Company, Mr Prosser QC submits that it is likely that HMRC will scrutinise the transaction involving Jersey NewCo, may well regard the transfer of shares via Jersey NewCo as an attempt improperly to avoid tax, so that the principle in W.T. Ramsay Ltd v IRC [1982] A.C. 300 will apply, and could interpret section 385 of the 2005 Act as allowing them to charge a person who does not in fact receive the distribution but for whose benefit it is made. He relies by analogy on the decision of the House of Lords in Furniss v Dawson [1984] A.C. 474, a decision on the wording of a provision for reorganisation relief in the context of capital gains tax, and UBS AG v HMRC [2016] UKSC 13 at [64], summarising the principle of construction that applies.

15. The scheme, Mr Prosser QC submitted, is in substance a means of disguising the true nature of the purchase of the shares of the Petitioners by the Company. HMRC may well consider the scheme to be aggressive tax avoidance – not unlawful as such, but as Lord Walker of Gestingthorpe said in Pitt v Holt [2013] 2 AC 108 at [135], something that has come to be regarded as "a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures". That conclusion, if drawn, could result in HMRC scrutinising and investigating the other affairs of the Company or JS. Mr Prosser QC accepted that that was speculative, because it was not known what HMRC might do, but he considered that it was a real risk.

16. Mr Goodfellow QC for the Petitioners disagrees that the Ramsay principle is applicable on the basis that the transaction will not be one freely to be entered into by the parties but is to be done pursuant to a court order, and so the purpose of the transaction cannot be one of tax avoidance. He also argues that it does not follow that, because the step involving Jersey NewCo is one element arguably without a commercial purpose in a composite transaction, therefore the Ramsay principle applies. He submits that, as is made clear in MacNiven v Westmoreland Investments Ltd [2001] UKHL 6; [2003] 1 A.C. 311, there is no overriding principle that enables a tax statute to be applied so as to defeat attempted tax avoidance, but rather the question is first one of the true construction of the statute – identifying what types of transaction fall within the provision – and then of deciding whether or not the actual transaction is of that type. Ultimately, Mr Goodfellow differs from Mr Prosser on the correct interpretation of section 385 of the 2005 Act, in particular whether the provision in section 385(1)(a) as regards "a person to whom the distribution is made" is a broad alternative basis of charge to that in section 385(1)(b) - a "person receiving or entitled to the distribution" – or whether the former only caters for a limited category of cases established as giving rise to a charge under specific statutory provisions of the previous (now consolidated) legislation.

17. As far as risks to the Company are concerned, Mr Goodfellow does not really differ from Mr Prosser: there is no identified harm to the Company (or JS) but rather a speculative risk of harm if HMRC take a dim view of the scheme and decide to investigate the Company's or JS's affairs. Mr Goodfellow however says that the risk of such harm is an irrelevant consideration for the court, and that HMRC will in any event be scrutinising this transaction if the Company applies for on-shoring clearance. He also says that any risk will fall on Estera, not on the Company, that the risk of harm to the Company or JS is disproportionate to the harm that Estera may suffer if the scheme is not implemented, and that any risk to JS will disappear as a result of the deferral of the scheme to the 2020/21 tax year.

18. It is common ground that I cannot and should not decide on a hypothetical basis in advance of any transaction who is right about these arguments. Any decision about the effect of such a scheme needs to be based on its true facts, and in any event no decision that I could make today would bind HMRC.

19. What is submitted on behalf of the Petitioners is that I should conclude that there is nothing unlawful (or in that sense improper) about the proposed scheme; that the worst that will happen is that it will not succeed and that the Petitioners will be subject to tax; that any risk of harm resulting to the Respondents is very small compared with the possible adverse consequences to the Petitioners of not adopting it and potentially being liable for 20% or 38.1% tax; and that as an exercise of the broad discretion that I have under section 996 of the Companies Act 2006 I should make an order requiring the scheme to be implemented. That is justified by Mr Gee QC on the basis that:

(1) the price for the Petitioners' shares was determined on the basis of a sale to a person in the same position as JS, in effect the majority shareholder, but that a sale to JS rather than the Company would not have attracted the adverse tax treatment that the Petitioners may now face unless the scheme is ordered;

(2) the unfairly prejudicial conduct of the Respondents contributed to the inability of the Petitioners to sell their shares at a fair price in the market, and had they been able to do so they would not have attracted that adverse tax treatment;

(3) the Petitioners made a mistake, in failing to spot the issue about the adverse tax treatment, and the court can and should be willing to grant relief against that mistake even if the nature of the relief is to avoid a tax liability that would otherwise be incurred;

(4) had the issue been appreciated sooner, the Petitioners could have created Jersey NewCo at an earlier time, possibly at the end of trial 1, and transferred the shares to Jersey NewCo then, with the Court's assistance to override the pre-emption provisions in the articles of association of the Company;

(5) if in doubt about the effectiveness of the proposed scheme and the way that HMRC might regard it, the Court should nevertheless make the order given that there is far greater prejudice to the Petitioners by not making it than there can possibly be to the Company or JS by making the order (given that the scheme will then be effected pursuant to an order of the Court).

20. The first question is whether I have jurisdiction to proceed in the way that the Petitioners urge. It is recognised that, on the basis of Re L and another [2013] 1 WLR 634, the court retains a power to amend the terms of a decision before the order is drawn up and perfected, subject to the overriding objective of dealing with the case fairly. A new fact or

point of law arising or coming to a party's attention after judgment is handed down is capable of amounting to a case falling with that broad power, though much depends on the facts of any given case.

21. However, Mr Croxford QC for JS submits (and the Company adopts the argument) that I cannot now order a different buy out structure because the Order of 5 July 2018 determines that the shares must be bought by JS or the Company from the Petitioners; that there was no appeal against that order; and that it is therefore now impossible for the Court to derogate from that Order by substituting instead an order that the shares be bought by the Company or JS from Jersey NewCo. He submits that if the shares were transferred to Jersey NewCo the shares to be bought by the Company would then be different shares, and the order creating options for the purchase and sale of those shares would conflict with the terms of the existing Order.

22. I do not accept that submission. The Order of 5 July 2018 requires the Respondents to buy the shares that are registered in the Petitioners' names at the date of the Order, but in a manner to be determined at trial 2. The Order identifies the shares to be sold, not the way in which they are to be sold, which was a matter for the next trial. The shares in question are issued and paid up ordinary and deferred shares that were allotted to HS and Estera. They are registered in the Company's books as shares that are owned by HS and Estera. Those shares are identifiably the same shares if they are transferred to and become registered in the name of Jersey NewCo. The Order of 5 July 2018 does not preclude the court from deciding at trial 2, if appropriate, that the shares should be transferred to the Company via a different person, company or trust, or that the price be paid to nominees on behalf of the Petitioners. The relevant question, at trial 2, is whether a proper basis is made out for so ordering, given that the obvious order to make would be for the Petitioners to sell the shares registered in their names to the Company or JS and for the price to be paid to the Petitioners.

23. The next question is therefore whether this is an appropriate case in which the Court should now exercise its discretion. It seems to me that the following questions arise:

> (1) Is the proposed scheme capable of being viewed by a reasonable person (including HMRC) as aggressive tax avoidance, and therefore, although not unlawful, deserving of moral opprobrium? If so, despite the argument of Mr Gee QC for the Petitioners to the contrary, it is hard to envisage circumstances in which the Court would order such a scheme to be carried out before it had been established that it was not improper in that sense.
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> (2) Does the proposed scheme give rise to a real risk that HMRC will wish to scrutinise the financial affairs of the Company or JS, thereby potentially causing difficulties for them?
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> (3) If not improper tax avoidance (in the sense identified in (1) above), should the Court nevertheless make an order the sole purpose of which is to enable one party to avoid a tax liability that it will otherwise incur?
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> (4) If the Court could do so, is it fair and just to exercise that discretion in favour of the Petitioners?

24. On the first question, despite the persuasive submissions of Mr Goodfellow, I consider that the proposed scheme could reasonably be regarded by HMRC and others as aggressive tax avoidance. Looked at in context rather than in the abstract - in particular in the context of the Order of 5 July 2018 - it is an artificial scheme conceived at the last minute for the sole

purpose of avoiding a substantial income tax bill. Although that is obviously not the correct test for determining whether the scheme succeeds or fails to avoid a particular tax liability, these are the indicia that will cause HMRC to scrutinise the scheme and, if so advised, raise an assessment on Estera.

25. It is perfectly common for Jersey trusts to own limited companies that hold trust assets. Estera has not hitherto used that structure for the Herinder trusts, probably because of the restrictions in the Company's articles on the transfer of its shares and because the trusts hold no other non-cash assets. In those circumstances, Jersey NewCo would be created not to follow a trend or usual practice in Jersey but simply in order to attempt to avoid a large tax bill. Evidence on behalf of the Petitioners asserts that the price paid would then be retained by Jersey NewCo and invested by it. This evidence is self-serving, but even if it turns out to be true that would not of itself prevent the scheme from being regarded as tax avoidance, nor would it prevent HMRC from arguing that Estera should be treated as the person to whom the distribution was made, within the meaning of section 385(1)(a) of the 2005 Act.

26. Having heard the respective arguments of Mr Prosser and Mr Goodfellow, I am of the provisional view that Mr Goodfellow may well be right, on the basis that Jersey NewCo would – by dint of the Court's order – be entitled to and would receive the distribution, and because section 385(1)(a) of the 2005 Act does not provide a broad alternative basis of charge on which HMRC could successfully rely. But I have not heard full argument on this point and have not heard submissions by HMRC. I am unable to rule out an alternative interpretation that could lead to the proposed scheme failing to transfer the liability for the tax charge from Estera to Jersey NewCo. In those circumstances, the scheme – although it turns out to be unsuccessful – could be regarded as aggressive tax avoidance, even though relatively unsophisticated in comparison with other notified avoidance schemes. The Court should not without very good reason order reluctant parties to enter into a scheme that could be held to be improper (in the sense that I have identified). Such an order could assist the parties to persuade HMRC not to challenge a scheme that it would otherwise have challenged. For this and other reasons that I will develop, I am not willing to make such an order in this case.

27. If HMRC did form the view that the scheme amounted to aggressive tax avoidance the scheme would be likely to be challenged and, if HMRC were proved right, it would be ineffective. But, in addition, the Company (and JS as a party to the litigation and the CEO of the Company) could be regarded by HMRC as persons who are engaged in aggressive tax avoidance, or, even if HMRC's challenge failed, "creative" tax avoidance.

28. I accept Mr Prosser's qualified view that a challenge by HMRC to the scheme is capable (he puts it no higher) of having unfortunate consequences in future for the Company. That view is not in terms disputed by Mr Goodfellow, although he does not agree that the scheme is aggressive tax avoidance. I am unable to accept Mr Goodfellow's suggestion that the risk of unfortunate consequences is an irrelevant consideration for the court in exercising a discretion whether to order the parties to enter into the scheme. Nor do I agree that there is no risk to the Company or JS. The risk of JS being taxed personally on the deemed income can be removed by deferring the scheme for a year but not the risk of his or the Company's affairs being scrutinised by HMRC as a result of the scheme being used. I do however agree with Mr Gee that such a risk is but one factor in the exercise of my discretion and must not be given disproportionate or overriding weight.

29. Mr Gee further submitted that the simple answer to any risk of potential harm to the Company and JS is that they are able to say to HMRC that the Court ordered them to enter

into the scheme and so it is not aggressive tax avoidance. That might succeed, but it only raises another difficulty for the Petitioners' argument, namely whether the Court should be willing to make such an order if the effect of it would be for something that would otherwise be treated as aggressive tax avoidance to be regarded more leniently by HMRC and possibly not challenged on that basis. The answer to that question seems to me to be that the Court should not do so, otherwise it is potentially assisting a party to engage in what may be inappropriate tax avoidance. The Petitioners cannot rely on the fact that the scheme will be made pursuant to an order of the Court as a reason for the Court making the order.

30. Turning to the third question that I identified in para 23 above, even if I had concluded that there was no risk of HMRC regarding the scheme as aggressive tax avoidance and so no risk of harm to the Company or JS as a result, the scheme is nevertheless designed to avoid a tax liability (or possible tax liability, given that the DTA relief application might be successful in any event - however the entire purpose of the scheme is to remove the risk of DTA relief not being granted). Had the parties agreed to implement the scheme, the Court would have had nothing to say about it – because (on this assumption) no improper tax avoidance is involved – and would merely order the price for the shares to be paid by a particular time.

31. That was the course apparently taken by this Court in a case called Shah v Shah [2011] EWHC 1902 (Ch), where the petitioner was neutral about whether the Company or one of the other respondents should purchase his shares. Roth J was content to leave it to the parties to agree a structure that was fiscally most advantageous: para [57]. It does not appear that it was contemplated in that case that the Court would order the parties to enter into a particular structure that was designed to avoid tax, though it may well be that a purchase by the individual respondent rather than the Company would have done so.

32. There could in any event be nothing controversial in that case about ordering one of the respondents rather than another to buy the shares of the petitioner. The same result could be achieved by agreement even if all the respondents were ordered jointly and severally to buy the shares. But this case is different. The parties do not agree and the Court is being asked to order the parties to enter into a transaction for the purpose of mitigating a tax liability. The proposed transaction involves a currently non-existent non-party being required to sell shares that it does not own. That is, on any view, relief that is wholly out of the ordinary – if not unprecedented – for the Court to grant on a section 994 petition, despite the breadth of the jurisdiction to grant relief.

33. There are undoubtedly circumstances in which the Court will order a reluctant party to enter into a transaction for the purpose of saving tax for another party. A recalcitrant trustee is one obvious example, but there the Court is ordering the trustee to comply with his fiduciary duty. Cases where the public interest requires such an order are another example. The Petitioners rely in this regard on Sherdley v Sherdley [1988] 1 AC 213. In that case, the House of Lords approved making an order on the application of a father that he make periodical payments to his children in respect of school fees and that such payments be made directly to the schools. That was consistent with an approved practice of the Family Division at the time, though such orders had previously only been made on the application of a mother against a father. The purpose of the order was to reduce the tax liability of the father who was responsible for the maintenance and welfare of the children of the marriage. It was held that there was no valid objection that the sole purpose of the application was to obtain tax advantages.

34. In my judgment that is a very different case. What the House of Lords decided was that it should not discriminate between an ex-husband and an ex-wife when considering whether to make an order the consequences of which would be a more beneficial tax treatment of the family's income. With the approval of the Inland Revenue, as it then was, the family courts had long used a particular structure in relation to school fees as a means of benefiting a family where an order for maintenance was made against a husband. The House of Lords held that it should afford the same treatment when the request was made by the husband, for his fiscal advantage. But in that case the Court was only ordering what, by concession, the Inland Revenue had agreed to treat as a valid scheme, and it was doing so for the welfare of the children of the marriage. It is clear that there was a public interest (the welfare of the children) that justified making such an order, as reflected in the settled practice of the Family Division and the agreement of the Revenue.

35. I am not persuaded that that case stands as authority for any broader proposition in a purely commercial context that the Court should make an order the consequences and sole purpose of which are the avoidance of a liability for tax that might otherwise arise. The avoidance of tax in circumstances like the present case would result not from the parties' own legitimate arrangement of their financial affairs, because they could not reach agreement, but from the force of the Court's order. Mr Gee tried to persuade me that there was an element of public interest in making an order here, but I confess that I am unable to see it. The public interest is rather in refusing the order, so that whatever is the appropriate amount of tax is paid to the public finances.

36. With regard to the particular facts of this case, I return to the arguments made by Mr Gee, summarised at para 19 above, as to why the Court should be prepared to make an order in this case.

37. It is true that a sale of Estera's shares to JS (or any outsider) rather than the Company would not have attracted the same adverse tax consequences that the Petitioners now seek to avoid. However, a sale to anyone other than the Company or JS would not have achieved the price that the Petitioners were awarded at trial. The substantial uplift attributable to a share of the marriage value – some £39,600,000 – is a consequence and recognition of the fact that the shares will in fact be sold to JS or the Company and are more valuable in their hands. A sale at market value (disregarding the effect of the unfairly prejudicial conduct) would have achieved £39,600,000 less for the Petitioners. The Petitioners sought an order that the Company buy their shares because it had the ability to do so. JS cannot afford to pay £137.4 million and the Petitioners' claim against the trustees of the Jasminder trusts failed. The Petitioners can therefore only obtain their £137.4 million if the Company buys their shares. There is therefore substantial benefit to the Petitioners from the Company's purchase as well as potentially disadvantageous tax consequences.

38. As to the suggestion that the Court should grant the Petitioners relief against a mistake that was made, the evidence of a mistake having been made is rather limited. The Court is being asked to infer that there was a mistake. The Petitioners' solicitor, Ms Greener, says only that the Petitioners became aware for the first time of the potential for an income tax liability after the hand down of the judgment at trial 2 and upon taking interim tax advice. Mr Prosser, the director of Estera (not Mr Prosser QC) adds nothing to this in his witness statement. The obvious inference is that the Petitioners did not take tax advice at an earlier stage. Mr Gee seeks to argue that this is all of a piece with the mistake (against which relief was ultimately granted) in Pitt v Holt, where the settlor's solicitors addressed various income and capital gains tax issues in their advice on the structured settlement but did not advert to the specific provisions of the Inheritance Tax Act 1984 that would have avoided inheritance

tax on the patient's death. In that case, the advice given was negligent; in the instance case, it appears that no advice was taken.

39. In Pitt v Holt, however, it is obvious what steps would have been taken had the mistake not been made, and those steps would readily have avoided the IHT liability. In the instant case it is not at all clear how the Petitioners would have been able to improve their position at an earlier stage, other than by seeking an order for payment of £137.4 million against JS alone. Mr Gee suggested that the right time to do something about transferring the shares would have been after judgment in the first trial. But what could the Petitioners have done? Estera could not assign the shares to a Jersey NewCo because of the pre-emption provisions in the articles of association. The Respondents would doubtless have refused to agree any such transfer of the shares with the benefit of the buy-out order. The Petitioners would have had to ask the court to order a transfer, overriding the pre-emption rights of the other shareholders of the Company.

40. On the assumption that the Petitioners were then candid with the Court, the reason why a transfer was desired would have had to be explained. The Court would have been faced with exactly the same issue as it is now faces, namely whether the Court should order the Company and JS to cooperate with a transfer designed only to secure a tax benefit to the Petitioners. For this reason, I do not consider that the argument based on relief against a mistake is one that takes the Petitioners any further. I fully accept the argument that a Court can grant relief against a mistake, even though the consequence of that relief is that tax that otherwise would have been payable is not payable (see per Lord Walker of Gestingthorpe in Pitt v Holt at [129]-[130]). But the relief can only remove the effect of the mistake; it cannot put the person seeking relief into a better position than he would have been in had he not been mistaken.

41. In my judgment, in a purely commercial context such as this, there is no compelling reason why the Court should force reluctant parties to enter into a transaction solely for the purpose of saving tax for another party, even if there is no possible harm to them. There is no public policy interest in favour of making such an order. This is a case of an offshore trust, which will incur a tax liability on the receipt of an enormous sum of money, which it can very likely mitigate so that only the same tax has to be paid as would be paid by a private person resident in the UK. The public interest seems to me to be served by the payment of that tax, not by the avoidance of the substantial majority of the tax payable.

42. Even if I am wrong and the Court should in principle be willing in an appropriate commercial case to order parties to attempt to avoid a tax liability, I would have declined to do so on the facts of this case. Although I have held that I have jurisdiction so to order, in the sense that I am not constrained by the terms of the Order of 5 July 2018, the effect of the order that the Petitioners seek is nevertheless to substitute for the intended sellers of the shares and the recipient of the price a different company, Jersey NewCo, and an entirely different purchase structure and timetable. Jersey NewCo does not exist and is not a party to the claim and will not be subject to the order that I make.

43. It is proposed that I make an order conferring on Jersey NewCo an option to require the Company to buy shares that it will by then have and also confer on the Company a right to call for the shares; but neither is to be exercisable before May 2020. There is no mechanism to enforce any such obligations binding Jersey NewCo in the draft order other than a liberty to apply and the ability of the Court to enforce its own order against the parties to the Petition. The consequence is that the Court, long after the end of the trial, will have a continuing residual role in bringing about the result that it has sanctioned. In some cases that

may be necessary, but it is not desirable. These parties have fallen out badly over a number of years and goodwill between them is notably lacking. The scope for further disputes about the machinery and the ability to enforce it is obvious.

44. The Respondents are entitled to say that there should be an end to the process of buying out the Petitioners. The Petitioners have sought an order that they be bought out. They sought to limit the time that the Respondents could have to raise money and pay the price for their shares. Having made arrangements with its bankers, the Company was ready and able to proceed to complete on 3 May 2019, but completion was delayed by the Petitioners' application. Now the Petitioners propose a scheme that cannot be fully implemented until June 2020, and possibly longer if the court has to be involved in any disagreements that arise in future.

45. That, in my view, is an unjustified interference with the rights of the Respondents to pay the price for the Petitioners' shares and – to put it colloquially, as Mr Goodfellow did in argument – get the Petitioners "out of their hair" as soon as possible. In evidence, JS explained that he has had to exploit all the goodwill that exists between the Company and its bankers to raise the money required. The money has been on standby in the Company's solicitors' client account since 3 May 2019. To delay completion of the share purchase until June 2020 would inevitably interfere with the Company's financial plans at an important time for it, as the new flagship Leicester Square hotel nears the stage of fitting out and opening. The Company has incurred a serious set back (albeit brought upon itself) in having to finance the purchase of the Petitioners' shares, and in my judgment the other shareholders of the Company are entitled to see it now free to proceed with its profitable business.

46. The governance of the Company is also likely to be adversely affected by the fact that the Petitioners continue to hold shares. Although on his feet and in reply to Mr Croxford, Mr Gee volunteered that the Petitioners would either renounce any dividends that are declared or take them on account of the purchase price, and not seek to exercise any voting rights attached to the shares, that is not a complete or a satisfactory answer to the continuing inhibition that the Company will face with a substantial minority of dissentient shareholders. Although I have held the Company to have been at fault, all of that is taken into account in the orders that I have made and the price that the Company must pay for the Petitioners' shares. Being ready to pay that price, the Company is now fully entitled to put an end to the Petitioners' interests in it and be free to continue its successful business.

47. In exercising my discretion to refuse the order that the Petitioners seek, I also take into account that my doing so does not mean that the Petitioners are likely to be saddled with an unfair tax liability. The parties' tax experts agree that there is a reasonable prospect of achieving relief under the DTA, and if that does not succeed they agree that HMRC is very likely to clear the capital gains tax treatment of the transaction in the event that the trusts are brought onshore. The Petitioners therefore have it within their power to ensure that, at worst, they are treated in the same way as a UK resident whose shares were purchased by JS or by anyone else. Parity will be achieved by "on-shoring" the Jersey trusts. If DTA relief is granted, Estera will pay no tax. The rest of the draft order (with which the Respondents agree) allows a short period of time for the Petitioners to seek on-shoring clearance of the Lily Trust before completion of the sale and purchase of those shares.

48. In these circumstances, there is no occasion for the Court to stretch a point to benefit the Petitioners further, potentially at the expense of the Respondents' business interests. Considerations of fairness, simplicity and finality far outweigh the interests of the Petitioners in avoiding all risk of paying tax on the purchase price.