Neutral Citation Number: [2021] EWHC 2929 (Ch)

Case No: PT-2021-000276

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 04/11/2021

Before :

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court
Between :

JTC EMPLOYER SOLUTIONS TRUSTEES LIMITED	**Claimant**
- and -	
RAMIN KHADEM	**Defendant**

- -
- -

Ms Harriet Brown (instructed by **Farrer & Co LLP**) for the **claimant**
The **defendant** appeared in person

Hearing dates: 25 October 2021
- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.
The judgment was handed down remotely and deemed so at 10.30am $ November 2021

HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC:

Introduction

1. The claimant is the trustee of the Inmarsat Employment Company (Ramin Khadem) Pension Plan (the plan). It seeks rescission, on the grounds of mistake, of the defendant Mr Khadem's entitlement of a sum (the sum) of over £6 million under an escrow agreement (the agreement) made between him and the claimant's predecessor trustee, RBC Trustees (Jersey) Limited, on 24 December 2018. The claimant has been substituted in these proceedings in place of its predecessor, whom it replaced on the latter's retirement, but for ease of reference I shall refer to both as the claimant.

2. The company referred to in the plan (Inmarsat), a limited company, was concerned with satellite infrastructure and employed Mr Khadem as a financial officer based in London from 1981 until his retirement in 2004, by which time he had become its chief financial officer. It established the plan for Mr Khadem, with HMRC approval, as his pension plan which was tailored for those employees who may retire abroad. It made contributions into the plan throughout Mr Khadem's employment by crediting it with part of his gross salary and bonuses. He made no contributions. He was born in Iran on 24 January 1945 but raised in USA and Canada, where he also worked before coming to the UK in 1981 and where he met and married his wife.

3. After his retirement he remained resident here as his wife continued to work as a consultant in Great Ormond Street Hospital and as a professor at UCL. As he approached his mid-70s, and his wife approached her retirement, they discussed where they should live. Their three adult children each had families and resided in Canada, UAE and London respectively. The couple decided to move to UAE to be close to their daughter and son-in-law and family. Mr Khadem made that move in March 2018 and became resident there.

4. The claimant and Mr Khadem each took tax advice from RSM UK. Advice (the advice) was given in writing to the claimant on 12 December 2018. It was to the effect that UAE only provides a tax domicile certificate (the certificate) covering the period up to the date of the application for such a certificate and so it would be necessary for the claimant to pay Mr Khadem's pension into an escrow arrangement for him and then to apply for the certificate. The claimant and Mr Khadem executed and delivered the agreement on Christmas Eve that month, the effect of which was that his entire pension fund of over £6million was thereafter held for him. Later the same day, UAE issued the certificate which covered the period from April 2018 to April 2019. The issue of the certificate is timed at the equivalent of just before 6pm GMT. There is no evidence as to what time the agreement was executed but it is likely that that was before the certificate was issued.

5. Accordingly the advice received from RSM as to the timing of the payment to be covered by the certificate was wrong. That would not have been a problem had Mr Khadem remained resident in the UAE. There is currently no personal income tax in the UAE and upon his remaining a resident there he could have applied for relief under the UK-UAE Double Tax Convention (SI 2016/754) so that no UK tax would be payable either.

6. Mr Khadem and his wife, who remained in the UK, visited one another from time to time, but his tax domicile remained in the UAE. Upon one such visit to the UK on 15 March 2020, UAE closed its borders until June 2020 because of the Covid pandemic. Even after the borders were open again however, the situation with Covid there remained such that the UK Government advised against all non-essential travel. Mr Khadem, who by then had turned 75 years of age, and who suffers from high blood pressure, decided not to return to UAE. In his first witness statement dated February 2021 filed in these proceedings, he says that due to the global situation he does not think it is likely that he will leave the UK in the near future.

7. This means that a large charge to UK tax, in the region of 45%, arises on the sum which is the subject of the agreement. It is the claimant's case that had it not made a mistake of fact as to the practice of the UAE in issuing the certificate, it would not have entered into the agreement, but instead would have made some other arrangement. One option would have been to make pension payments to Mr Khadem over a ten year period, leading to less tax being paid depending on his circumstances, or at least to the deferral of the payment of tax, which deferral in itself is of value.

8. Accordingly, it commenced these proceedings by claim form filed on 29 March 2021 under CPR Part 8. Mr Khadem does not dispute such relief, and his position in these proceedings is no different from that of the claimant. However, HMRC does dispute such relief. It has not applied to become a party to these proceedings, but it has asked that the court's attention is drawn to the contents of a letter dated 8 July 2021 and attachments, which was written by one of its senior lawyers. Accordingly at the hearing of the claim, which was conducted via video platform, Ms Brown appeared on behalf of the claimant and Mr Khadem represented himself. I heard no oral evidence. The claimant relied upon two witness statement from Rachel Pettitt, one of its customer relationship directors, and two from Mr Khadem. I admitted the second witness statement of Ms Pettitt after hearing submissions, to provide an updated version of the plan.

The procedure adopted by HMRC

9. The procedure which HMRC has adopted in these proceedings has been adopted in previous cases and is the subject of judicial comment. In *Wright v National Westminster Bank plc* [2014] EWHC 3158 (Ch). Norris J at paragraph 10 said:

> "In the circumstances this application proceeds on what is effectively an unopposed basis. But even if the evidence is not challenged the court must still be satisfied that it proves the facts necessary to establish that the jurisdiction is available and that it is appropriate for the court to exercise the jurisdiction and make an order for rescission. The exercise of the jurisdiction involves the court making several discrete value judgments as to seriousness, causative effect and unconscionability. These are matters for the judgment of the court and not for the judgment of the parties. The mere fact that the application is not opposed does not mean that it can be safely assumed that an order for rescission will follow. The jurisdiction to set aside transactions, even of a voluntary nature, is not a collusive remedy."

10. In *Hartogs v Sequent (Schweiz) AG* [2019] EWHC 1915 (Ch) HH Judge Hodge QC, sitting as a judge of the High Court, made similar observations in paragraph 4 of his judgment:

> "I wish to make it clear that the court is always willing to consider anything that HMRC may wish to say about claims of this nature, even if it is only in the form of a written letter to be placed before the court by the claimant's own solicitors. In this case I have heard no representations from HMRC. That, however, does not mean that the court will not scrutinise a case of the present kind closely to ensure that the applicable legal principles have been properly addressed and considered."

11. More recently the law on this point was summarised by Marcus Smith J in *Bhaur and others v Equity First Trustees (Nevis) Limited and others* [2021] EWHC 2581. At paragraph 107 he said:

> "Even where the claimant's application to set aside a transaction is essentially unopposed, the court must still be satisfied that the claimant has proved the facts necessary to establish that the court has the jurisdiction to set aside the impugned transactions and that it is appropriate for the court to grant relief."

12. The grounds upon which HMRC rely on in the present proceedings in setting out in its letter why it says the court should not grant the recission sought are in essence those alluded to by Norris J in *Wright* as set out above, namely the absence of the necessary factors of seriousness, causative effect and unconscionably.

13. I shall deal with each of the grounds in turn, but in order to understand them it is necessary to say something more about the advice given to the claimant by RSM and its effect.

The alleged mistake

14. The advice referred to a statutory direction (the direction) under SI70/488 Double Taxation Relief (Taxes on Income)(General) Regulations 1970, Regulation 2, which provides:

> "1) The following provisions of these Regulations shall have effect where, under arrangements having effect under section 497 of the Income and Corporation Taxes Act 1972, persons resident in the territory with the government of which the arrangements are made are entitled to exemption or partial relief from United Kingdom income tax in respect of any income from which deduction of tax is authorised or required by the Income Tax Acts.
>
> (2) Any person who pays any such income (referred to in these Regulations as "the United Kingdom payer") to a person in the said territory who is beneficially entitled to the income

> (such person being referred to in these Regulations as "the non-resident") may be directed by a notice in writing given by or on behalf of the Board that in paying any such income specified in the notice to the non-resident he shall—
>
> (a) not deduct tax, or
>
> (b) not deduct tax at a higher rate than is specified in the notice, or
>
> (c) deduct tax at a rate specified in the notice instead of at the lower or basic rate otherwise appropriate; and where such notice is given, any income to which the notice refers, being income for a year for which the arrangements have effect, which the United Kingdom payer pays after the date of the notice to the non-resident named therein shall, subject to the following provisions of these regulations, be paid as directed in the notice:
>
> Provided that income specified in a notice given under this paragraph shall not include distributions in respect of which income tax is chargeable under Schedule F."

15. The direction was eventually given to Mr Khaled's accountants in the present case on 23 February 2021. It provides:

> "On behalf of HM Revenue & Customs, I direct The lnmarsat Employment Company Pension Plan when making a payment to Mr Ramin Khadem, 27 Hampstead Hill Gardens, London, NW3 2PJ to do so without deduction of Income Tax. This direction takes affect from 21 December 2018. It gives relief from UK Income Tax that is due under the UK/UAE double taxation treaty."

16. The direction went on to set out the circumstances where it would not apply as follows:

> "The direction will not apply if
>
> - There is a change in the nature or description of the scheme
>
> - You learn of a change in the residence status of the individual, including a change of address.
>
> - There are any material changes to your business including changes in name, address or ownership
>
> If any of the above happen, then you will need to start to deduct income tax at the full rate due under the treaty from the Pension you pay to them."

17. The advice explained that:

> "The UAE Ministry of Finance will only issue certificates of residence in arrears - ie the certificate covers the period up to the date of application but no later. For HMRC to confirm that treaty relief is available by issue of the Statutory Direction ("SD") following the application for treaty relief, a residence certificate which covers the date of the payment will be required. In most cases, the Member makes their request for a distribution and the Trustee defers making the resolution to pay the lump sum until the Member has submitted his claim for relief and HMRC has issued the SD. In this way, the Trustee and the Member can be satisfied that the terms of the DTT apply and no income tax is due. This procedure will not work in this case as the certificate of residence is only issued in arrears; for example, if the Member applies for the certificate on say 18 December, it will cover the 12 month period to 17 December 2018. In other words, as it applied for before the Trustee makes its resolution, it will be out of date at the appropriate time ie the date the Trustee makes the resolution to pay the lump sum. HMRC will not process the treaty relief claim without a valid certificate of residence. Thus, the timing of making the distribution should be-slightly amended, it is recommended that the Trustee considers taking the following actions:
>
> 1. A date is agreed on which the Trustee will make the resolution to pay the lump sum - Day 1. - The resolution is made but no funds are actually paid over to the Member, instead the Trustee retains the funds in an escrow account pending receipt of the SD.
>
> 2. Immediately after Day 1, the Member will submit his claim for a residence certificate from the UAE Ministry of Finance (the certificate is usually issued within 72 hours).
>
> 3. Once RSM have received the certificate, they will submit the DT-Individual form and certificate of residence to HMRC, noting Day 1 as the date when the payment was made.
>
> 4. Once HMRC has issued the SD to the Trustee, It will be able to release the funds held in escrow to the Member.
>
> If HMRC decline to issue a SD, the terms of the escrow agreement should allow the Trustee to pay income tax to HMRC on the basis that the DTT does not apply and income tax is due. t will then be up to the Member to make an application to HMRC for a refund of the tax paid over on the basis that he does meet the criteria for the DTT to apply."

18. This advice was made known to Mr Khadem who queried it with the UAE Ministry of Finance, who in turn suggested that the advice received by the claimant was incorrect. However, the claimant considered RSM to be reliable and followed that advice in

entering into the agreement. That is clear from the recitals set out in the agreement, which refers to Mr Khadem as the owner, as follows:

> "(B) It is proposed that the Trustee shall enter into an Instrument of payment and transfer (the "Instrument of Payment"), pursuant to which the Trustee shall pay and transfer to the Owner the Appropriated Amount (as defined in the Instrument of Payment) (the "Distribution") under the Plan.
>
> (C) The Trustee is advised that the Owner is resident in the UAE, and that it is intended that the Owner will obtain a residence certificate in arrears, covering the period to the date of Distribution. The Trustee is not in receipt of a statutory direction from HMRC confirming that double tax treaty relief is available under the UAE/UK Double Taxation Treaty ("DTT Relief'), which would have the effect that no withholding of income tax or social security contributions would be required under UK law (a "Statutory Direction"), in respect of the Distribution. The Trustee requires a Statutory Direction in order to be able to make the Distribution without the deduction of UK taxation.
>
> (D) The Owner requested the Trustee to proceed with the making of the Distribution and the Trustee is willing to make the Distribution, on the conditions that:
>
> a. the Owner undertakes (amongst other things) that on receipt of a UAE residence certificate to cover the period to the date the Instrument of Payment is signed, he will claim DTT Relief from HMRC in the expectation that a Statutory Direction from HMRC would then be issued to the Trustee; and
>
> b. the Trustee holds the Distribution in escrow on the terms of this Agreement pending receipt of the Statutory Direction in a form acceptable to the Trustee and the Trustee's approval of the transfer of the Distribution to the Owner.
>
> (E) The Owner and the Trustee wish to record the terms on which the Trustee will hold the Distribution in escrow and have agreed to enter into this Agreement for this purpose."

The tax regime

19. The charging provision to UK tax on the sum, in the events which have happened, is section 394 of the Income Tax (Earnings and Pensions) Act 2003 (the 2003 Act) which provides, so far as material:

> "(1) If a benefit to which this Chapter applies is received by an individual, the amount of the benefit counts as employment income of the individual for the relevant tax year.

> […]
>
> (2) If a benefit to which this Chapter applies is received by a person who is not an individual, the person who is (or persons who are) the responsible person in relation to the scheme under which the benefit is provided is chargeable income tax on the amount of the benefit for the relevant tax year.
>
> (3) In this section the "relevant tax year" is the tax year in which the benefit is received.
>
> (4) For the purposes of subsection (2), the rate of tax is 45% or such other rate as may for the time being be specified by the Treasury by order."

20. Section 394A deals with benefits received by a person who is temporarily non-resident and, so far as material, provides:

> "(1) This section applies if an individual is temporarily non-resident.
>
> (2) Any benefits within subsection (3) are to be treated for the purposes of section 394(1) as if they were received by the individual in the period of return.
>
> (3) A benefit is within this subsection if—
>
> (a) this Chapter applies to it,
>
> (b) it is in the form of a lump sum,
>
> (c) it is received by the individual in the temporary period of non-residence,
>
> and
>
> (d) ignoring this section—
>
> (i) no charge to tax arises by virtue of section 394(1) in respect of it, but
>
> (ii) such a charge would arise if the existence of any double taxation relief arrangements were disregarded.
>
> (4) Subsection (3)(d)(i) includes a case where the charge could be prevented by making a DTR claim, even if no claim is in fact made."

21. It is common ground that under these provisions, when Mr Khadem returned to and stayed in the UK from March 2020, his residence in the UAE became temporary and so a charge arose on the sum. In his first witness statement, he says that he understood that tax would be due on the sum upon resuming residence in the UK, but says in

paragraph 18 that he was not aware of any reason to delay taking the sum once he qualified as a resident of the UAE, and that he was not advised of the alternative of taking periodical pension payments.

22. Ms Pettitt at paragraph 16 of her first witness statement says that she discussed his plans to retire to UAE and it was not considered a risk of the temporary non-residence rules applying as he was not expected to return to the UK. She continues:

> "RSM did not flag up any potential issues with temporary non-residence or suggest that the provisions commonly applied; nor did they explain that if was easy for an individual to become resident in the UK again because of the statutory residence test…I understood it was mentioned just to make Mr Khadem aware of the position if he did return, neither the [claimant] nor Mr Khadem was made aware of the likelihood of return in circumstances similar to his, which I no understand is quite high."

Setting aside disposition for mistake

23. The leading case on the law regarding the setting aside of voluntary dispositions is the Supreme Court's decision in *Pitt v Holt* [2013] UKSC 26. Marcus Smith J, in *Bhuar* described the decision in these terms at paragraph 95:

> "The judgment of Lord Walker, delivered on behalf of the Supreme Court, comprehensively considered the development of the jurisprudence on equitable mistake, and concluded that first instance decisions demonstrated the uncertain state of the law. Lord Walker simplified the test for equitable mistake, finding that the court's equitable jurisdiction to set aside a voluntary disposition on grounds of mistake was exercisable whenever there was a causative mistake of sufficient gravity, which it would be unconscionable to leave uncorrected."

24. The position of a trustee in this situation was considered by Lord Walker at paragraph 41 of *Pitt v Holt*:

> "If in exercising a fiduciary power trustees have been given, and have acted on, information or advice from an apparently trustworthy source, and what the trustees purport to do is within the scope of their power, the only direct remedy available (either to the trustees themselves, or to a disadvantaged beneficiary) must be based on mistake (there may be an indirect remedy in the form of a claim against one or more advisers for damages for breach of professional duties of care)."

25. Lord Walker in paragraphs 104 to 109 set out what constitutes a causative mistake. Mere ignorance, mere inadvertence or misprediction does not. Forgetfulness, inadvertence or ignorance leading to a false conscious belief or tacit assumption, may do so, where the evidence supports such a conclusion. There is a distinction between a misprediction that relates to some possible future event and a legally significant

mistake, which would normally relate to some past or present matter of law or fact. There may be cases where the boundary between misprediction and mistake is unclear.

26. At paragraph 114, Lord Walker dealt with the type of mistake which may attract a remedy:

> "It does not matter if the mistake is due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong…Nor need the mistake be known to (still less induced by) the person or persons taking a benefit under the disposition. The fact that a unilateral mistake is sufficient (without the additional ingredient of misrepresentation or fraud) to make a gift voidable has been attributed to gifts being outside the law's special concern for the sanctity of contracts…Conversely, the fact that a purely unilateral mistake may be sufficient to found relief is arguably a good reason for the court to apply a more stringent test as to the seriousness of the mistake before granting relief."

27. However, in paragraph 115, Lord Walker rejected the argument that an instrument which transfers property for no consideration can be set aside only for a mistake of a fundamental nature that would render a contract void, and after examining the approach of equity in cases of mistake, said:

> "But the notion that any voluntary disposition should be accorded the same protection as a commercial bargain, simply because it is made under seal, is insupportable."

28. At paragraph 122 he set out the test to be applied:

> "I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction."

29. He developed the assessment of the gravity of the mistake at paragraph 126:

> "The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion."

30. At paragraph 128, he dealt with the requirement of unconscionability. He referred to what he had said about this principle in *Gillet v Holt* [2001] Ch 210, 225 in the context of proprietary estoppel, namely that the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round. He continued:

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

31. Lord Walker then went on to consider relief from mistake in tax cases. He rejected as too wide the submission on behalf of HMRC that a mistake which relates exclusively to tax cannot be relieved, and continued:

> "In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy. Since the seminal decision of the House of Lords in WT Ramsay Ltd v Inland Revenue Comrs [1982] AC 300 there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures. But it is unnecessary to consider that further on these appeals."

32. In *Kennedy v Kennedy* [2014] EWHC 4129 Ch, paragraph 36, Etherton C summarised the key principles of Lord Walker's judgment as follows:

> "(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.
>
> (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary

> disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
>
> (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.
>
> (4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."

33. These principles have been applied in many subsequent cases, including *Freedman v Freedman* [2015] EWHC 1457 Ch, *Van der Merwe v Goldman* [2016] EWHC 790 Ch, *Rogge v Rogge* [2019] 1949 Ch and *Mackay v Wesley* [2020] EWHC 1215 Ch. The facts of some of these cases illustrative what sort of causative mistake in tax cases may be relieved.

34. In *Kennedy v Kennedy*, it was found that the trustees would not have executed a deed of appointment, had they been aware that the deed made provision for the transfer of shares, which the claimant intended to retain in order to avoid capital gains tax liability. In *Van der Merwe v Goldman*, Morgan J found that the claimants would not have settled property in the way they did if they had been aware of recent legal changes which meant that the transactions caused a substantial tax liability.

Was there a mistake in the present case?

35. Applying those principle to the facts of this case, I am satisfied that the claimant did make a distinct mistake when entering into the agreement. This was not ignorance or inadvertence or a misprediction as to a possible future event. The claimant had properly sought tax advice as to what was required in order to attract treaty relief in respect of any payment from the plan to Mr Khadem in his particular circumstances as at December 2018. The advice was that a UAE residence certificate which covers the date of the payment was required, and that such a certificate would only be issued "in arrears."

36. In my judgment it is clear from the fact that the claimant followed the steps set out in the advice, the most important of which was entering into the agreement, and from the recitals set out in the agreement, that such a mistake was made. Ms Brown categorised the mistake as a mistake of fact, namely as to the practice of the UAE Ministry of

Finance in issuing certificates in arrears, and to the extent that anything turns on such categorisation in my judgment that is sound.

Effect on the claimant

37. The first ground relied upon by HMRC is that the mistake (and it is not suggested that one was not made) had no negative effect upon the claimant as the effect of the agreement is that UK tax can be deducted before the balance is paid to Mr Khadem. He confirmed that the sum remains in escrow and that he has physically received none of it to date. In this context attention is drawn to paragraph 10 of Ms Pettitt's witness statement where she says:

> "What normally happens in relation to payments being made is that a member speaks to the tax advisor to discuss options available and tax implications that could arise. The tax advice is generated from that and presented to the Trustee who will consider if it seems fair and whether there is any reason why it could not be agreed. This is the course that was followed with Mr Khadem. It is not the Trustee's position to tell a member where he ought to reside when he is taking benefit and therefore if Mr Khadem was choosing to remain in the UK and taking his benefits whilst resident there the Trustee would have withheld the tax to settle the UK tax liability; in other words it did not matter to the Trustee whether the distribution would have resulted in a UK tax charge if that is what Mr Khadem's residency circumstances resulted in. The Trustee was obliged to start making a distribution before Mr Khadem turned 75."

38. The reference to 75 is to the age of Mr Khadem at the latest relevant date for payment as defined in schedule 1 part 1 of the plan, as amended.

39. In response to this first ground, Ms Brown submits that there is no such requirement amongst the principles set out in *Pitt v Holt*. Even if there were, there is a potential breach of trust by entering into the agreement on the basis, because of incorrect advice, that it would not be possible to get the direction if payment was made at a different time. In the case of a professional trustee such as the claimant, a potential action for breach of trust is a serious matter. Moreover, it has potential for significant reputational damage.

40. Given that the claimant sought, obtained and acted upon professional tax advice, care must be taken not to overstate that potential. However, assuming (but not deciding) for present purposes that there is such a requirement, in my judgment there is no requirement that the negative impact must be financial or that such an impact is narrow in compass. In *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476, the court set aside a gift to two daughters to put them on an equal financial footing on the basis of a mistake by their mother in making the gift by forgetting an earlier gift to one of the daughters. In my judgment the claimant has sufficient interest, on the basis set out above, in seeing the mistake corrected.

Gravity

41. The next ground relates to the seriousness of the mistake. HMRC says that the direction has no impact on the tax charge to Mr Khadem. That is simply a direction that tax need not be deducted at source and even if this had been issued prior to the time he became entitled to any sum from the plan, that would not have prevented HMRC pursuing him for any resultant tax becoming due when he returned to the UK. Moreover, the direction has no impact on tax charges owed by Mr Khadem "under section 394A" of the 2003 Act following his return to the UK.

42. To some extent, this ground overlaps with the next ground, lack of causation, which may be seen as the major ground of HMRC's objection. I shall come on to deal with that shortly. Ms Brown accepts that the timing of the direction has no effect on the tax charged and that the direction is not a guarantee that no tax would be charged in the event of a change of circumstances. However, she submits that this ground fails to take into account the nature of the mistake, which is a mistake of fact as to when a UAE certificate of residency would run from and to. Moreover, the tax charges arise not under section 394A of the 2003 Act, but under section 394. Section 394A is a deeming provision which expressly applies so that certain benefits are "to be treated for the purposes of section 394(1)…" It creates a legal fiction that a benefit was received in a year when the taxpayer becomes resident in the UK.

43. I accept those latter submissions and shall consider the remaining issues of gravity, and the next ground of causation, together.

Causation

44. Put simply, HMRC says that it was Mr Khadem's residence in the UK since March 2020 which caused the tax charge, and not the mistake which I have found above. It is true that had he not so returned, the tax charge would not have arisen.

45. Ms Pettitt in paragraph 23 of her witness statement, referring to the sum and the agreement says this:

> "It was never necessary for the payment to be made prior to the certificate from the UAE Ministry being received. Had I known this, and had this been communicated to the Trustee I consider that the Trustee would not have entered into expensive escrow arrangements, nor would we have made the payment at that time. We would have followed the advice of RSM as to what happens in "most cases"…and deferred making the resolution to pay the lump sum until HMRC had issued the [direction]."

46. Ms Brown makes the point that another option, which RSM should have advised upon, would make annual payments over 10 years, say at £600,000 per annum, so that a lump sum within the meaning of section 394A of the 2003 Act would not arise.

47. As Ms Brown submits, the key element in relation to causation, is the fact that Mr Khadem became entitled to the sum under the agreement on 24 December 2018. It is that which is chargeable. If there were no such entitlement to the sum as a lump sum then no charge would arise. The legal fiction under section 394A of the 2003 Act is to prevent avoidance of the charge by leaving the UK for a short period. I accept the

evidence of Mr Khadem that it was not his intention to do so, and that it was the restrictions in response to the Covid pandemic in March 2020 which changed that.

48. The authorities cited above require that the mistake has a degree of centrality to the transaction in question. In my judgment that degree is shown in the present case. If it were necessary for me to find that the claimant would, but for the mistake, not have entered into the agreement, then based on the evidence of Ms Pettitt, which I accept, I would make such a finding. Whilst the claimant had to start making a distribution before Mr Khadem's 75th birthday in January 2020 under the terms of the plan, it does not follow that such a commencement had to be by way of lump sum. Nor does that follow from her evidence and that of Mr Khadem that they did not consider the risk that he would return to reside in the UK to be a significant one.

49. In my judgment the mistake was a causative one, and of sufficient seriousness to satisfy the test set out above.

Unconscionability

50. I finally turn to unconscionability. HMRC make the point that whilst Mr Khadem faces a tax charge, this is in the amount that would be due from any UK resident who received the sum. There is no element of double taxation as no tax will be due on the payment in the UAE. If relief is granted, then under the terms of the plan, the claimant will be obliged to make some form of payment to him now as he has reached the age of 75. As long as he resides in the UK any such payment will be subject to UK tax. If the payment is the full value of the fund in the plan, then the tax charge is unlikely to be significantly different to that presently obtaining.

51. HMRC acknowledges that payment may be made in another way, for example by regular annuity payments. It says however that it is not possible to compare the tax due on such payments without further significant information as to how such alternative payments would be structured. It also says that Mr Khadem chose to take the risk of becoming entitled to the sum when he was residing in the UAE, which risk did not pay off as he returned to the UK when Covid restrictions applied. This is a consequence of the temporary residence rules rather than an unfairness which needs correcting by the court.

52. Ms Brown submits that is unconscionable to leave the mistake uncorrected having regard to a number of factors. First, the size of the tax charge. Even if the difference between the tax charges under the agreement and upon setting that aside is limited to interest payable on the underlying tax, this will be significant. Second, the claimant lost the opportunity to pay Mr Khadem in tranches, some of which might have been paid while he was not UK resident, or might still be so paid in the future. Third, leaving the mistake uncorrected leaves the claimant potentially open to action for breach of trust with both the financial and reputational consequences that such an action may have.

53. In my judgement these factors are such as to make it unconscionable for the mistake to remain uncorrected. It may be that the difference will be limited to interest on the underlying tax. That in itself would be significant. However, there is a realistic possibility that the difference will be significantly more than that, depending on Mr Khadem's circumstances. Setting aside the agreement will not lead to his avoiding

paying any UK tax which is due from him on payments from the plan made to him whilst he is resident in the UK.

54. As for risk, I accept on the basis of the written evidence before me that in the circumstances obtaining at the time of the agreement, neither the claimant or Mr Khadem considered the risk of his returning to live in the UK to be at all significant and the circumstances in which he did so were not then foreseeable.

55. Another aspect of unconscionably is the possible cause of action which Mr Khadem may have against the claimant and/or which the claimant may have against RSM if the mistake remains uncorrected. Ms Brown pointed to Lord Walker's distinction between direct and indirect remedy in paragraph 41 of *Pitt v Holt*. She submits that only limited weight should be attached to this factor, and given the uncertainties of seeking such an indirect remedy I accept that submission.

Conclusion

56. I consider that the agreement was entered into because of the mistake set out above, which a causative mistake of sufficient gravity, and which it would be unconscionable to leave uncorrected. The claimant is entitled to the relief that it seeks.

57. I would be grateful if the claimant would file a draft order within 7 days of hand down of this judgment, together with further written submissions if (which seems unlikely) there are aspects of it which are controversial.