[2019] UKFTT 259 (TC)

TC07099

Appeal number: TC/2014/00462

CAPITAL GAINS TAX - Potential liability of the Appellants to CGT liabilities of a trust - Application to advance new Grounds of Appeal, including mistake, non est factum and undue influence in relation to the Second Appellant's execution of a deed - Application allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) DAVID STUART WESLEY **Appellants**
(as a Trustee of The Ellen Morris 1990 Settlement)

(2) NICOLA SUZANNE MACKAY
(as a Trustee of The Ellen Morris 1990 Settlement)

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in public at the Tribunals Service, Alexandra House, 14-22 The Parsonage, Manchester M3 2JA on 18 March 2019

Mr Thomas Chacko, of Counsel, acting under the Bar Direct Access Scheme, for the Second Appellant

Mr Christopher Stone, of Counsel, instructed the General Counsel to Her Majesty's Revenue and Customs, for the Respondent Commissioners

DECISION

Background

1. This appeal first came before me for a case-management hearing in November 2018. On that occasion, the main issue was whether the appeal should be reinstated, out of time, following the failure by the-then third appellant (a company, which had gone into liquidation) to comply with an unless order. That failure had led to the appeal being struck-out as long ago as 21 July 2016.

2. For the reasons set out as a preamble to the directions which I made on that occasion, I reinstated the appeals by the First Appellant, Mr Wesley, and his daughter, the Second Appellant, Mrs Mackay. On the basis that I already had some acquaintance with the history of this appeal, I reserved further case-management to myself, and I am also scheduled to hear the substantive appeal, which is set down for four days in June 2019.

3. On the last occasion, Mr Chacko sought to amend the Second Appellant's Grounds of Appeal. I did not accede to that application on the day, but instead directed that any such application was to be made formally. On 7 December 2018, such an application was made. HMRC opposed the application.

4. The Appeal concerns the affairs of the 'Ellen Morris 1990 Settlement' ('the Trust').

5. It is common ground that the Second Appellant, Mrs Mackay, signed a document, described on its face as a 'Deed of Appointment and Retirement', appointing her as a 'New Trustee' of the Trust, on 19 March 2003. On that same date, Mrs Mackay also signed a document described as a 'Deed of Indemnity' relating to the Trust. Mrs Mackay signed a third document - described as 'Agency Agreement' - dated 26 March 2003. She also signed a fourth document - described as 'Resolution of the Trustees' - dated 1 April 2003, which recorded her resolution, as a Trustee, to establish a trust bank account with Abibocash Plc in the Isle of Man and to transfer the Trust Fund to it.

6. On 29 May 2013, HMRC amended the Appellants' self-assessment for 2002/3. That amendment was made pursuant to section 9C of the *Taxes Management Act 1970* so as to bring into charge a Capital Gains net tax gain of approximately £2.907m with tax due of approximately £990,000.

7. The thrust of HMRC's case as set out in its Statement of Case is that the arrangements made in relation to the Trust were substantially similar to those of a Mauritius / 'Round the World' scheme defeated by HMRC in the Court of Appeal in *Smallwood v HMRC* [2010] EWCA Civ 778.

8. The Appellants' case in that regard is that their arrangements were not substantially similar (or, put another way, were materially dissimilar) to those in *Smallwood*, and that the Trust was resident in Mauritius as well as in the UK during 2002/3, meaning that the chargeable gains accruing to the Appellants are to be treated as taxable only in Mauritius and not in the United Kingdom.

9. The requested additional ground is that Mrs Mackay's agreement to act as a trustee of the Trust in March 2003, being one of the documents which I refer to above, should be set aside by the Tribunal, on any the following three bases: (a) mistake; (b) undue influence; (c) non est factum.

10. The Application is supported by detailed reasons, which, in summary, are that, at the time of signing:

(1) Mrs Mackay had not received or been offered any advice before accepting appointment as a trustee;

(2) Mrs Mackay 'was in no fit state to take on' responsibilities as a trustee for medical reasons.

11. These reasons are set out more fully in Mrs Mackay's supplementary witness statement, dated 21 February 2019, which exhibits a chronology and a photograph of a print-out of an email said to have been sent by Mrs Mackay on 20 March 2013. All of these are to be read alongside her witness statement dated 20 April 2018 and her Defence, dated 20 October 2017, filed in the County Court at Burnley in Claim Number D94YX092 and supported by a Statement of Truth. For the sake of completeness, and as I understand it, I note that the County Court proceedings are at the appeal stage, but are presently stayed pending the determination of this Appeal.

12. In terms of mistake, it is argued that her acceptance of the trusteeship was made under a mistake of sufficient gravity that it would be unconscionable for the beneficiaries of that mistake (said to include HMRC) to insist on their legal rights under the deed once they had become aware of the circumstances in which they had acquired those rights. Reliance it placed on the decision of the Supreme Court in *Pitt v Holt* [2013] 2 AC 108, and especially at [124]-[126] per Lord Walker of Gestingthorpe.

13. It is argued that Mrs Mackay was not aware (amongst other matters) that she was exposing herself to the Trust's debts. It is argued that one of the effects of an operative mistake of the kind alleged in this appeal can be that a deed can be rescinded insofar as it affects the individual subject to the mistake. It is accepted that the civil courts have jurisdiction to rescind for mistake, but it is argued that this Tribunal is not obliged to wait for the civil courts to make such a declaration, but, where that remedy would be available, that this Tribunal can and should determine the tax position as if that remedy had been granted: see the decision of Proudman J in *Lobler v HMRC* [2015] STC 1893.

14. In terms of undue influence, it is argued that Mrs Mackay reposed trust and confidence in her father at a time when she was in a position of great vulnerability, and that vulnerability was exploited: see *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 and especially the speech of Lord Nicholls of Birkenhead at Paras [21]-[33]. In response to my question whether this would necessarily entail Mrs Mackay cross-examining her co-appellant, namely, her father, Mr Chacko argued that undue influence of this alleged character does not necessarily turn on any malicious intent, but is capable of engaging wherever the circumstances, looked at objectively, expose the elements of undue influence.

15. Finally, and in terms of non est factum, it is argued that Mrs Mackay's signature of the deed appointing her as trustee should be treated as void, applying the principles

articulated by several of their Lordships in *Saunders (Executrix of Gallie) v Anglia Building Society* [1971] AC 1004, and especially the speeches of Lord Reid at 1015G-1016H; Lord Hodson at 1019D-F; Lord Wilberforce at 1026-1027; and Lord Pearson at 1036. I will not set out those passages *in extenso*. In this regard, I am asked to consider Mrs Mackay's witness statement, and her evidence that she was simply given documents to sign.

16. I should add that there is some overlap between the factual matters and circumstances giving rise to the pleas of mistake, undue influence, and non est factum. Principally, and for reasons set out more fully in the Grounds and her statements, Mrs Mackay is described as in a state of vulnerability.

17. In summary, HMRC argues:

(1) The Tribunal has no jurisdiction to declare who is and is not a trustee of the Trust;

(2) The application is years too late, since Mrs Mackay has known since at least September 2011 that she was a trustee;

(3) It is common ground that Mrs Mackay was advised in December 2012 that she was able to apply to the High Court to be removed as a trustee, and did not do so;

(4) The trustees of the Trust are to be treated as a single and continuing body of persons, distinct from the persons who may from time to time be the trustees (Taxation of Chargeable Gains Act 1992, section 69), and that Mrs Mackay, by engaging in the appeal as a trustee, has waived or lost her right (if any) to contend that she is not a trustee.

Discussion

18. I have decided to allow the Second Appellant's application, in its entirety, for the reasons which I set out more fully below.

19. As to timing, Rule 5 affords me the power to extend any time limit. In doing so, I must have regard to the overriding objective, set out in Rule 2, which requires me to deal with cases fairly and justly.

20. Although the application is, on one view, a late one, the whole appeal (originally brought by way of a Notice of Appeal dated 20 January 2014), had, until November 2018, already been subject to serious prolongation. I cannot properly call this whole period 'delay' in the strictest sense because, between July 2016 and November 2018 there was no extant appeal at all. It had been struck-out.

21. The new grounds were articulated in November 2018, at a time when the Appeal had still not been reinstated. The reasons for prolongation/delay to that point are good ones. They are substantially the same reasons which persuaded me last November that the Appeal should be reinstated.

22. I should add that Mr Brennan QC, who appeared for HMRC on that occasion, when made aware of a document in the Tribunal's file suggesting that neither Mrs Mackay nor her father were aware, at the time, that the appeal was in jeopardy of being struck-out and its subsequent striking-out, indicated that HMRC no longer

opposed the application to reinstate. That was an entirely appropriate concession to make.

23. Naturally, I must also take into account what prejudice is occasioned to the Second Appellant if she cannot advance her new ground, and to the Respondents if she can. This is necessarily a balancing exercise.

24. The prejudice to the Second Appellant, looked at in the round, is that she would be prevented from advancing facts and matters which, in her view, materially enhance her prospects of successfully appealing an assessment where there is a large amount of money at stake - almost £1m.

25. I do not consider that the proposed grounds of appeal impose any significant additional burden on the Respondents in their preparation for this appeal. The new ground(s) do not self-evidently invite any further evidence from the Respondents. Nor will the proposed grounds of appeal add to the estimated length of hearing so as to require vacation of the hearing dates which are presently listed. In this regard, I have already heard detailed submissions as to the law.

26. I consider that the prejudice to the Second Appellant if she cannot advance her new grounds far outweighs the prejudice to HMRC if she can.

27. The point as to want of jurisdiction is pressed on me strongly by HMRC. The arguments are intricate. There are arguably differing interpretations of what Proudman J, sitting as a Judge of the Upper Tribunal, decided in *Lobler v HMRC* [2015] UKUT 152 (TCC) and, depending on the correct formulation of her *ratio decidendi*, how - if at all - that does or should apply to the circumstances of this case.

28. As the First-tier Tribunal (Judge Philip Gillett) correctly identified in *Hymanson v HMRC* [2018] UKFTT 667 (TC), *Lobler* is binding on Judges of this Tribunal unless distinguishable. Judge Gillett's decision, which grapples with *Lobler* and its application in the context of the rules governing fixed protection in relation to the pensions saving allowance, was handed down on 13 November 2018, but (according to the Upper Tribunal's publicly-accessible register) was subject to an application for permission to appeal lodged on 20 February 2019. But, even if *Hymanson* (which does not bind me) were not under appeal, Judge Gillett's decision nonetheless serves to highlight some of the difficulties in analysing and working-out the extent of this part of the Tribunal's jurisdiction.

29. On the face of it, the issue of jurisdiction *per se* is a binary 'bright line' issue. It is not a matter of discretion. I am reminded that the Tribunal, and its judiciary, are creatures of statute, and, unlike the High Court, there is no 'inherent' jurisdiction. Hence, and as a matter of positive law, this Tribunal cannot choose whether or not it has jurisdiction - it either has jurisdiction to decide a matter or it does not. Jurisdiction cannot be conferred by consent, or (for that matter) a misunderstanding or a mistake (whether unilateral or shared) as to the scope of its jurisdiction. However, this to some degree obscures the (perhaps different) question as whether the Tribunal's jurisdiction (even though flowing from statute) is protean - in the sense that it can nonetheless develop and lend itself to newly-emerging scenarios.

30. Standing back and reflecting on the submissions which I have heard, it is my view that the issue of rescission, even approached purely as a matter of law, cannot (at

least, in this case) be easily or cleanly disentangled from the underlying circumstances where, it is argued, those circumstances potentially entitle me to consider the tax position as if any document or documents signed by Mrs Mackay were to be rescinded.

31. I do not consider it would be fair or just for me to decide the issue of justiciability (or, put another way, the issue of whether I can consider what the tax position would be on the footing that a deed should be rescinded) in the abstract.

32. Hence, and despite some misgivings as to whether this Tribunal indeed has jurisdiction of the kind and/or scope contended for on behalf of Mrs Mackay, I consider it most consonant with overall fairness and justice to decide the point of jurisdiction only as part of my overall evaluative exercise and once I have heard the evidence.

33. I heard detailed submissions as to the law applying to mistake, undue influence, and non est factum, and how the principles (upon which the parties were not wholly agreed) engaged in the circumstances of Mrs Mackay's case.

34. HMRC argued forcefully that the Applicant's evidence, in her witness statements, and expressed to stand as her evidence-in-chief, even taken at face value, and at its highest, does not suffice to demonstrate operative mistake, or undue influence, or to engage the doctrine of non est factum. Particularly intense focus was directed to her witness statements tested against the various articulations of the principles governing the law of non est factum as set out in *Saunders v Anglia*.

35. It is well-settled that in an application of this kind, I should have some regard to the apparent strengths or weaknesses of a new ground of appeal, and I do so. This is part of my overall evaluative exercise. However, I do not consider that I must go so far as to assess whether a ground is bound to succeed or bound to fail. Ultimately, I simply must do what is fair and just. I do not consider that the guidance of the Upper Tribunal (Judges Berner and Poole) in *Martland v HMRC* [2018] UKUT 178 (TCC) compels me to do anything differently. The Upper Tribunal emphasises - and, even if I were not bound by *Martland*, I nonetheless respectfully agree - that I should be alert and astute not to descend into a detailed analysis of the underlying merits.

36. That is the position here. In my view, refusing at this stage to allow the Second Appellant to advance her new grounds of appeal effectively amounts to a summary disposal of them. I do not consider that this would be an appropriate or sound course of action to adopt at this stage in this appeal. In my view, formed on my reading of the evidence, the written and oral argument which I have heard, to reach a conclusion (even tentatively, and even for the purposes of this application) as to the merits of Mrs Mackay's claims of mistake, undue influence, and/or non est factum would require me to come too close to conducting a 'mini-trial'. I decline to do so.

37. In my view, the issues of fact and law raised by the new grounds are most properly considered at a substantive hearing, however that unfolds, rather than at this juncture.

38. I am reassured - both by my reading of the witness statements and the other documents presently before me - and by Counsel, that proceeding in this way will not add to the length of hearing of the trial. I am fortified in this conclusion in that I have

already heard fairly full submissions as to the relevant principles to be applied in relation to the new Grounds of Appeal.

39. The new grounds are advanced in toto, but it was accepted that I could and should regard the new grounds discretely. However, the difficulty which arises with this suggested approach is that the evidence and submissions in relation to the new grounds appear (at least, to a non-trivial extent, and at this stage) to be inter-related.

40. The attempt to winnow out one ground from another seems to me to be artificial, and also to pose a non-trivial risk of unintentionally excluding facts and matters which should be included. Hence, at this stage, it is better to allow the Grounds to be advanced in their totality, and then for them to be addressed in the decision following the conclusion of the substantive hearing.

41. I should also record that there was an application by HMRC for an unless order in relation to another direction, but that application was not pursued.

42. This document contains full findings of fact and reasons for this preliminary decision. Any party dissatisfied with this preliminary decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR CHRISTOPHER MCNALL
TRIBUNAL JUDGE

RELEASE DATE: 15 APRIL 2019