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Trust me – it was a mistake! Latest Guidance on Mistake in Trusts Law

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Earlier this year, the Jersey Royal Court handed down its decision in *In the Matter of the Noor Trust*¹. The judgment highlighted important findings in relation to the concept of mistake in trusts law and, in particular, it affirmed that a mistake may be voidable in certain circumstances.

The outcome in this case provides useful guidance when considering a mistake application in Jersey, and it may also be helpful for this type of application in Guernsey. Indeed, whilst Jersey law is not directly binding in Guernsey (and vice versa), it is well-established in both islands that in the absence of their own express jurisprudence, the Jersey or Guernsey courts may be guided (and persuaded) by a decision of the other.

Background

In this case, E, J and K were settlors of a Jersey discretionary trust (“the Noor Trust”), together with L who was K’s husband and E’s father (“the Settlers”). L died in December 2015. J is E’s wife.

The Noor Trust was established on 22 September 2009, pursuant to a declaration by the trustee, EFG Trust Company Limited (“the Trustee”). The purpose of establishing the Noor Trust was for succession planning due to the ages of L and K. The family were at the time of the hearing, and beforehand, resident in Pakistan. The funds within the Noor Trust were sourced from the family business in Pakistan. At no stage prior to the Noor Trust being established did the Trustee (or any of its representatives) discuss any potential tax implications with the Settlers, nor did the Settlers take such advice. The Settlers presumed that, because they were neither domiciled nor resident in the UK, there would be no UK tax implications for them in setting up the Noor Trust.

Prior to setting up the Noor Trust, in 2003, L and K opened up a bank account with EFG Private Bank (Channel Islands) Limited in Guernsey (“the Guernsey Bank Account”). Subsequently, in 2007, E and L opened up a bank account in London with EFG Private Bank Limited (“the London Bank Account”). The purposes of the London Bank Account were to enable the purchase of property in the UK and to hold spending money for when the family visited the UK.

The application came before the Royal Court of Jersey in relation to matters arising from the transfer of funds to the Noor Trust from the London Bank Account.

The facts

The beneficiaries of the Noor Trust are (i) K, L, E; and (ii) any spouses or widow(er)s (unless remarried) of K, L or E; and (iii) remoter issue. At the time of the hearing, there were five beneficiaries – two of whom were minor children of J and E. J was thereby appointed to represent the minors and any unborn issue.

In addition to shares in two BVI companies, various other assets were settled into the Noor Trust from time to time. From the Noor Trust’s formation in 2009 and since 14 June 2013, such funds have originated from non-UK sources. Between 6 September 2010 and 14 June 2013, however, there were 11 additions into the Noor Trust from the London Bank Account with the Settlers settling a total sum of £2,180,000. The addition of funds to the Trust via the London Bank Account could easily have been avoided and all funds ultimately came from the family business in Pakistan.



In March 2020, the Trustee notified E of the fact that liability to UK inheritance tax had arisen, owing to the settlement of funds in the Noor Trust from the London Bank Account. E's argument was that he and his parents simply would not have arranged for the transfer of assets into the Noor Trust in that way had they known about the tax consequences that would arise as a result.

Therefore, K, J and E applied to set aside the transfers from the London Bank Account on the grounds of mistake.

It is important to note that in the Trust Formation Questionnaire ("**the Questionnaire**") filled out prior to the establishment of the Noor Trust, E, L and K ticked the box "Yes" that "*all relevant advice [had] been obtained to ensure that all parties [had understood] the implications of creating the appropriate structure*". In doing so, E, L and K agreed to provide the Trustee with a copy of the "*relevant advice*", however no such advice had in fact been taken. They had ticked "yes" because they did not think advice was needed at the time. In any event, signing the Questionnaire meant that E, L and K had declared that the Trustee had not given advice on any tax consequences arising outside Jersey, and recommended obtaining such advice before the formation of the Noor Trust.

The decision

The Jersey Royal Court referred to Article 47E of the Trusts (Jersey) Law 1984 (as amended) ("**the Jersey Law**"), which provides that the court may declare a transfer or other disposition of property into a trust is voidable if, on the application of a settlor or any of his personal representatives or successors in title:

- a mistake has been made in relation to the transfer or other disposition of property into a trust; and
- the transfer or disposition into the trust would not have been made but for that mistake.

The mistake must also be of a sufficiently serious character.

The definition of 'mistake' is therefore widely drawn under this provision of the Jersey Law. Article 47B(2) of the Jersey Law provides that it may include but is not limited to:

- a) a mistake as to –
 - i. the effect of,
 - ii. any consequences of, or
 - iii. any of the advantages to be gained by,

a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property;

- b) a mistake as to a fact existing either before or at the time of, a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property; or
- c) a mistake of law including a law of a foreign jurisdiction.

The Jersey Royal Court held it was clear that a mistake had been made on the part of the Settlers as to the UK tax consequences arising from the transfers into the Noor Trust. It was also apparent that the Settlers would not have entered into those transfers but for the mistake and, further, the mistake was of sufficiently serious character to render it just for the Jersey Royal Court to grant the declarations sought.

As a result, the Jersey Royal Court exercised its wide discretion in relation to the relief it may grant and the transfers made into the Noor Trust were set aside on grounds of mistake and declared to be voided and of no effect from the dates on which they were made.



Conclusion

This decision affirms that the Jersey Royal Court is willing to declare transactions entered into in relation to a trust void on the grounds of mistake. This relief may be helpful for both trustees and beneficiaries alike. However, it is important to bear in mind that it will be necessary for the person bringing the application to comply with the relevant provisions in the Jersey Law.

The party making the application will need to satisfy the test that will be applied by the Jersey Royal Court, which requires that:

- i. the mistake is in relation to a transfer or disposition of property to a trust;
- ii. the transfer would not have been made but for the mistake; and
- iii. the mistake is of sufficiently serious for the Jersey Royal Court to consider it just to declare the transaction be voided.

The position in Guernsey is similar; section 11 (2) (d) (i) of the Trusts (Guernsey) Law, 2007 provides that a trust is invalid and unenforceable to the extent that the Guernsey Royal Court declares it was established by mistake. It will therefore be interesting to see how this decision may guide and persuade the Guernsey Royal Court should a similar matter come before it.

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