Bending over backwards? *Representation of The Grundy Trust* [2020] JRC 071 (27 April 2020)

The recent case of *Representation of The Grundy Trust* ("***Re the G Trust***") demonstrates the wide powers available to the Jersey Court under Article 47H of the Trusts (Jersey) Law 1984 as amended (the "**Jersey Trusts Law**"). It also appears to show the Jersey Court's willingness, where possible, to assist a beneficiary who has been excluded as a result of a trustee's inadequate decision-making, which fails to take into account relevant considerations or takes into account irrelevant considerations. Nevertheless, and perhaps despite first appearances, the case may not represent much more than a confirmation of previously established principles and so it remains to be seen what wider impact, if any, it will have.

The facts

The case concerned The Grundy Trust, a Jersey law discretionary trust (the "**Trust**") established in April 1986. Initially, the beneficiaries were, *inter alios*, the Settlor, the wife of the Settlor (the "**Wife**") and the children and remoter issue of the Settlor. By clauses 4 and 5 of the Trust, the trustees had the power to remove beneficiaries or to declare that any person (or class of persons) shall be an "Excluded Person". Clause 23 of the Trust provided that no Excluded Person would be able to benefit directly or indirectly from the Trust.

In February 2017, the Former Trustee of the Trust became aware that changes were to be made to the UK IHT regime, such that all UK residential property would be within the scope of UK IHT, regardless of whether the property was owned by a non-UK resident company or trustees. These changes were to take effect from 6 April 2017.

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The Trust held shares in a company which owned a UK residential property in London valued at approximately £1.8m. Accordingly, if no action was taken, after 6 April 2017 the value of such property would be included in the Settlor's estate for UK IHT purposes, chargeable at 40%.

The Former Trustee sought UK tax advice and on 3 April 2017 was presented with:

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Option 1: Exclude the Settlor and the Wife from benefitting under the Trust, though it was noted that since the Trust comprised significant assets (in addition to the London property) "*this may not be a desirable outcome*".

Option 2: Transfer the company holding the London property into a new trust and exclude the Settlor and the Wife from benefitting under the new trust, such that the negative IHT consequences would be avoided but the Settlor and the Wife could remain beneficiaries of the Trust.

Either option needed to be implemented before 6 April 2017.

The former trustee chose Option 1 and executed a deed of exclusion by which the Settlor and the Wife were each declared to be an Excluded Person in respect of the entirety of the Trust (the "**Exclusion**"). It appears that the Settlor was not told of Option 2 and the Former Trustee had no conversation at all with the Wife about the exclusion.
The Former Trustee retired as trustee of the Trust in May 2019 and the Settlor appointed the New Trustee.

Further advice, obtained in April 2020, stated that there was a more nuanced, third option, that the Former Trustee had not considered:

Option 3: Exclude the Settlor irrevocably for life and exclude the Wife irrevocably during the lifetime of the Settlor but not thereafter.

The application

The application before the Royal Court sought to set aside the Exclusion wholly or in part. The preferred remedy was for the Exclusion to be set aside "in part", namely for the Royal Court to declare that the Exclusion shall have effect as if the Former Trustee had implemented Option 3 at the relevant time.

The alternative remedies were far less advantageous:

1. If the Royal Court set aside the Exclusion in its entirety and left the New Trustee to implement Option 3 by way of a new exclusion, that exclusion would be a potentially exempt transfer for UK IHT purposes (see [14]).

2. If the Royal Court set aside the Exclusion insofar as it related to the Wife only, there would be a risk that the Settlor would have been regarded as having retained a benefit in the Trust via the Wife, particularly if she were to benefit from the Trust in a form which provided collateral benefit to the Settlor (see [27]).

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The decision

In the circumstances, it is entirely unsurprising that the Royal Court concluded (at [30]-[31]) that:

1. The Former Trustee failed to take into account relevant considerations, including:
a. the wishes of the Wife;
b. the needs of the Wife;
c. Option 2, which was not discussed with the Settlor and would have resulted in a partial exclusion only;
d. Option 3;
e. the effect of the Exclusion upon the Settlor and the Wife (which needed to be considered carefully).

2. The Former Trustee took into account irrelevant considerations, namely:
a. that the Settlor and the Wife could still benefit via their children, when that was prohibited by the Trust itself (see also [18]-[19]); and
b. that the Wife had requested that she be excluded when she had made no such request.

3. Its jurisdiction to set aside, under Article 47H of the Jersey Trusts Law, was therefore engaged (the Royal Court accepted that in certain circumstances the same facts might engage the Court's jurisdiction under Article 47G also).

What is surprising, perhaps, is the Royal Court's interpretation of the scope of its powers under Article 47H(2)(a) which provides that:
"*The court may …declare that the exercise of a power by a trustee…is voidable and -*

(a) *has* ***such effect as the court may determine****…*" (emphasis added)

The Royal Court referred to two decisions, *BNP Paribas Jersey Trust Corporation Limited v Crociani* [2018] JCA 136A and *Re the B Trust* [2019] JRC 035, in considering the scope of its powers:

1. It relied on *Crociani* for the proposition that the Jersey Trusts Law provides the Court with "*a discretion as to determining [sic!] what effects, if any, of the exercise of the trustees' fiduciary powers are to be retained*" (see [34]).

2. It then briefly considered the limits to these flexible powers by reference to *Re the B Trust*[1] and concluded that it was not empowered "*to re-write history, or to make a new decision which the trustee wished it had made at the time*".

The Court went on to conclude (at [36]) that:
"*…the Former Trustee intended*

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1 In that case, the Royal the Court accepted that transfers into trust could be voided on the grounds of mistake under Article 47E but refused to make a declaration that the transfers should, instead, take effect as gifts (which would have been more tax efficient than voiding the transfers and would have come closest to achieving the settlor's intentions). The Court emphasised that: "*It is one thing to make orders as to the validity of transactions where those orders might have tax consequences, and it is quite another thing to select for one of the parties which order to make so as to achieve the best taxation outcome. That is no part of the business of this Court.*".

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to exclude [the Wife] and did so. However, that decision was flawed and is liable to be set aside ab initio. The Former Trustee had a duty to consider the exclusion of [the Wife] very carefully and take into account the relevant considerations listed above and not take into account irrelevant considerations. Had the Former Trustee acted in accordance with its duty there can be no doubt that it would have excluded [the Wife] during the settlor's lifetime only. It would have been the obvious course. Accordingly, for the Court to order the exclusion of the settlor's wife as a beneficiary to take effect only for the duration of the settlor's life is not to substitute a different transaction for that which was undertaken. To make such an order is squarely within the Court's power to declare that the Former Trustee's exercise of its fiduciary power shall have such effect as the Court may determine."

An extension of the remedies available or simply the status quo?

The analysis in *Re the G Trust* of *Crociani* and *Re the B Trust* is perhaps not as full as it could be. As a result (i) the reference by the Court to a seemingly unfettered discretion to determine "*what effects, if any, of the exercise of the trustees' fiduciary powers are to be retained*" coupled with (ii) its comment that "*there can be no doubt that [the Former Trustee] would have excluded [the Wife] during the settlor's lifetime only... [as] the obvious course...*" at first read as if the Court is exercising a broader power and is willing to take a positive step to improve the taxation outcome for the Settlor by putting into effect Option 3 itself (i.e. making the decision the Former Trustee should have made at the time).

However, upon closer analysis, the order in *Re the G Trust* does not necessarily have such far-reaching implications. Looking closely at the relevant parts of *Crociani* it is clear that the Court's power under Article 47E(2)(b)(i)[2] to declare that the transfer "*has such effect as the court may determine*" only appears to extend to the question of determining **the date** from which a transfer should be voided, acknowledging the potentially different consequences for the settlor, donees and third parties depending on whether the transfer is voided from the time it was made or from

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2 The Article 47H(2)(a) equivalent.

Re the G Trust may simply represent an unusual occasion in which the Court's declaration, pursuant to its power under Article 47H(2)(a), as to the date from which a trustee's decision would be voided (i.e. from the date of the Settlor's death as regards one of the beneficiaries) is also the order which achieves the best taxation outcome for the Settlor.

some other date. The reference in *Crociani* to the "*flexible framework*" should therefore properly be understood only as referring to the Court's power to decide whether a transfer (or, by analogy, a trustee decision) should be voided from the date it is made or from some other date, where appropriate.

Accordingly, *Re the G Trust* may simply represent an unusual occasion in which the Court's declaration, pursuant to its power under Article 47H(2)(a), as to the date from which a trustee's decision would be voided (i.e. from the date of the Settlor's death as regards one of the beneficiaries) is also the order which achieves the best taxation outcome for the Settlor. In the circumstances, it seems that the correct interpretation of *Re the G Trust* is that it does not represent an extension of the principles set out in *Crociani* nor a departure from the general principle, expressed in *Re the B Trust*, that the Court will not take any positive steps to improve the taxation outcome for the applicant party.

Conclusion

For now, *Re the G Trust* spells good news for settlors and beneficiaries in cases where the date from which a trustee decision (or transaction) is set aside may have significant taxation consequences, but it remains to be seen whether the decision has any greater impact on the orders the Jersey Courts will be prepared to make in the future, or indeed to what extent other courts consider they have jurisdiction to take decisions for trustees where they have acted with inadequate deliberation. ■

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