Nourse and Heritage Corporate Trustees Limited et al
Royal Court
15th January, 2015

JUDGMENT 01/2015

Application for an order that a transfer of shares by deed of assignment be set aside on the grounds of mistake.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(ORDINARY DIVISION)

Between:	**DOUGLAS GEORGE NOURSE**	**Applicant**
	-and-	
	HERITAGE CORPORATE TRUSTEES LIMITED	**First Respondent**
	in its capacity as trustee of the BiGDUG Limited Remuneration Trust and the BiGDUG Limited Remuneration Trust – First Sub-Trust	
	CONCEPT FIDUCIARIES LIMITED	**Second Respondent**

Hearing date: 15th October 2014

Judgment handed down: 15th January 2015

Before: Richard James McMahon, Esq., Deputy Bailiff

and Jurats S Mowbray, C H Le Pelley and T J Ferbrache

Counsel for Applicant: **Advocate N Kapp**
Counsel for First Respondent: **Advocate J T Le Tissier**
Counsel for the Second Respondent: **Advocate St J A Robilliard**

Cases, texts & legislation referred to:

Dervan v Concept Fiduciaries Limited (unreported, 11 February 2013)
The Royal Court (Reform) (Guernsey) Law, 2008
The Trusts (Guernsey) Law, 2007
Pitt v Holt [2013] UKSC 26
Boyd v Rozel Trustees (Channel Islands) Limited [2014] JRC 056
The Taxation of Chargeable Gains Act 1992
The Income Tax (Trading and Other Income) Act 2005

The Finance Act 1986
Roome v Edwards [1982] AC 279
Inheritance Tax Act 1984

Introduction

1. Because of the involvement of a good number of the same people, this case has echoes of the earlier case of *Dervan v Concept Fiduciaries Limited* (unreported, 11 February 2013). However, the factual situation is not the same so it does not necessarily follow that the outcome will be identical. Each case of this type, alleging that a transaction be set aside on the grounds of mistake, is fact-specific and each case involves the Court considering whether to exercise its discretion to grant the relief sought.

2. This judgment has been prepared in accordance with the provisions of section 16(5) of the Royal Court (Reform) (Guernsey) Law, 2008:

> *"(5) A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain –*
> *(a) the Jurats' findings and decisions,*
> *(b) any dissenting findings or decisions made by different Jurats,*
> *(c) the identity of the Jurats making dissenting findings or decisions,*
> *(d) the Bailiff's findings, decisions and directions of law and procedure, and*
> *(e) the application of his findings, decisions and directions of law and procedure to the facts.*
>
> *(6) In this section "the Bailiff" means the person presiding over the proceedings."*

3. The Deputy Bailiff did not sum up to the Jurats in open Court but instead retired with them, as he is permitted to do under section 14(2) of the 2008 Law.

4. The Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats must accept his directions on the law and follow them. The Deputy Bailiff directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgments about the affidavit evidence and the exhibits thereto, and which evidence each of them regarded as reliable and accepted, and any which is not. The Deputy Bailiff emphasised that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the submissions they heard, but are not bound to accept them. Equally, if at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. The Deputy Bailiff reminded them that, when it comes to the facts of this case, it is the Jurats' judgment alone that counts.

5. The Deputy Bailiff directed the Jurats that the burden of proof is on the Applicant throughout and to apply the civil standard of proof on the balance of probabilities, adding that to establish something on the balance of probabilities means to prove that something is more likely so than not so.

Background

6. By an application dated 20 May 2014, as subsequently amended (hereafter referred to as "the Application"), the Applicant, Douglas Nourse, seeks an order that the transfer by him of 52 ordinary shares in BiGDUG Limited by deed of assignment dated 17 April 2009 be set aside on the grounds of mistake. The Application further seeks an order that the First Respondent, Heritage Corporate Trustees Limited, acting in its capacity as the current trustee of the BiGDUG Limited Remuneration Trust and the BiGDUG Limited Remuneration Trust – First

Sub-Trust, take the necessary action to transfer those 52 shares to the Applicant. The Application is made under section 69 of the Trusts (Guernsey) Law, 2007.

7. The Application is supported by two Affidavits of the Applicant sworn on 20 May and 11 July 2014 respectively, as well as two Affidavits of Christopher Williams, a solicitor acting for the Applicant, sworn on 20 May and 13 June 2014 respectively and an Affidavit of Advocate Kapp sworn on 4 September 2014, those three Affidavits deposing to technical matters relating to notifications to HM Revenue & Customs and its responses. The Applicant also relies on two expert reports prepared by Simon Taube QC, the contents of which are accepted by the Respondents.

8. As the current and former trustee of the BiGDUG Limited Remuneration Trust and the BiGDUG Limited Remuneration Trust – First Sub-Trust, the First and Second Respondents have adopted neutral positions, providing information so as to assist the Court. Because the bulk of the events in question occurred before the First Respondent took office as trustee, the two Affidavits of John Wright, sworn on 24 June and 9 July 2014 respectively, provide updates about some events during its trusteeship and exhibit other relevant documentation. An Affidavit sworn on 23 June 2014 by Jacqueline Eley on behalf of the original trustee, the Second Respondent, sets out the relevant facts as they were known to the Second Respondent before and at the time of the settlement of the BiGDUG Limited Remuneration Trust and until the trusteeship was transferred to the First Respondent.

9. The position of HM Revenue & Customs is set out in a letter dated 8 August 2014, in which it confirmed "*that HMRC do not wish to provide comments for the Court's consideration*". Accordingly, it was not convened to this hearing.

10. Pursuant to a direction of the Court, the past and present employees of BiGDUG Limited were written to making them aware of the Application and inviting any of them who wished to make representations to contact the Advocates acting for the First Respondent. Only one response was received, in which a former employee complained that he was unaware that the BiGDUG Limited Remuneration Trust even existed and queried how his name came to be associated with it. The co-protector of the trusts, Allyson Leech, who is the Applicant's sister, was also contacted, but did not respond.

11. The Applicant has been represented by Advocate Kapp. Advocate Jeremy Le Tissier appeared on behalf of the First Respondent and Advocate Robilliard on behalf of the Second Respondent, both of whom had appeared in *Dervan v Concept Fiduciaries Limited* (*supra*). All three Advocates agreed that English law principles needed to be applied. Accordingly, a jointly-commissioned report on the law of mistake as now settled by the Supreme Court decision in *Pitt v Holt* [2013] UKSC 26 was obtained from Richard Wilson. The Court is grateful to all Counsel for their assistance.

Law

12. The Deputy Bailiff directed the Jurats in accordance with the agreed statement of the applicable principles set out in the expert report of Richard Wilson:

> "*7. The first requirement is, self evidently, that there be a mistake. However, in his judgment [in Pitt v Holt], Lord Walker sought (at paragraphs [104]-[105]) to distinguish between a mistake [and] "mere ignorance or inadvertence". This is not always an easy distinction to draw. At paragraph [105] Lord Walker stated that:*
>
> > *"Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognize as a mistake. The Court of Appeal of Victoria has held that mistake certainly comprehends "a mistaken belief arising from inadvertence to or ignorance of*

> *a specific fact or legal requirement": Ormiston J in Hookway v Racing Victoria Ltd (2005) 13 VR 444, 451. That case was on the borderline between voluntary disposition and contract. It concerned prize money for a horse race which was paid to the wrong owner because the official in charge of prize money was ignorant of a recent change in the rules of racing (permitting an appeal against disqualification after a drugs test). He made a mistake as to the real winner."*

8. Pitt v. Holt is a good example of the way in which the Court approaches the distinction. Mrs Pitt had received advice as to capital gains tax and income tax, but her advisers did not advise her in relation to inheritance tax ("IHT"). A settlement was created to hold the funds received from Mr Pitt's personal injury claim, but it was in a form which gave rise to an IHT charge. Arguably, Mrs Pitt was merely ignorant of the IHT position (and therefore had not made a mistake) but the Court held that she had made a mistake. Ultimately, the task of the Court is to decide on the facts of each case whether there has been a positive mistake (in which case relief can be granted) or 'forgetfulness, inadvertence or ignorance'. The Supreme Court considers the distinction further at paragraphs [106]-[113].

9. There is no need for the mistake to be one of fact as opposed to law, nor does it have to be as to the 'effect' of the transaction, rather than its 'consequences'. It is also largely irrelevant if the mistake is the result of carelessness on the part of the person making the disposition (paragraph [114]). All that is required is a causative mistake of sufficient gravity, a test that will ordinarily be satisfied only where there is a mistake either as to the legal character of a transaction, or as to some matter of fact or law which is basic to the transaction (paragraph [122]).

10. If the foregoing conditions are satisfied, the Court must then consider whether it is unconscionable to leave the mistaken disposition uncorrected. It will not do so by reference to an elaborate set of rules (paragraph [128]):

> *"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 about whether it would be unconscionable, or unjust, to leave the matter uncorrected. The court may and must form a judgment about the justice of the case.""*

13. In essence, the Jurats were asked to consider all the facts concerning the transaction by which the Applicant settled 52 shares in BiGDUG Limited into the BiGDUG Limited Remuneration Trust and decide whether there was a positive mistake (as distinct from "*forgetfulness, inadvertence or ignorance*") that was causative of the transaction and is of sufficient gravity to justify setting aside the transaction. In considering whether any mistake identified satisfies that test, the Jurats were invited by the Deputy Bailiff to check their findings by looking either at the legal character of the transaction or at some matter of fact or law which was basic to it.

14. At the end of his report, Mr Wilson also drew attention to the possibility raised by the Supreme Court that relief might be refused if the transaction involved a tax avoidance scheme that had gone wrong (paragraph [135]) on the basis that "*tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures*". Mr Wilson acknowledged that such an issue would be a "*question of public policy for each court in each jurisdiction to consider*", noting the recent political sensitivities surrounding such matters in England and Wales.

15. Advocate Robilliard drew attention to the comments of the Royal Court of Jersey on this issue in *Boyd v Rozel Trustees (Channel Islands) Limited* [2014] JRC 056 (at para. 25):

> "*There is certainly more than one approach that one could take to what Lord Walker describes as an issue of some importance in the United Kingdom, and the arguments would be further complicated in this jurisdiction by a recognition that the social evil of artificial tax avoidance which puts an unnecessary burden on the shoulders of those who do not adopt such measures might receive a different emphasis where it is not our domestic taxation system which is being avoided. The complexity of such arguments, including the difficulties in establishing what amounts to a social evil where the relevant jurisdiction's legislature can be assumed to have taxed everything that it intended to tax (which makes avoidance, on one analysis, entirely legitimate) emphasises that in the absence of any contentions to the contrary, it is unnecessary to consider such an issue further in this case.*"

16. The Deputy Bailiff directed the Jurats that such a question of public policy was more about the way they might choose to exercise their discretion and was not a matter of pure law for him. They could take it into consideration, if they considered it relevant, before reaching a decision, but he pointed out that the transaction in question did not avoid payment of any tax due to the States of Guernsey. As such, as in the Jersey case, the Jurats might feel that the underlying purpose of the transaction did not itself add anything either way as to whether it would be unconscionable, or unjust, to leave any mistake they might find uncorrected.

Facts

17. The Applicant, who has two young children, is a director and shareholder of BiGDUG Limited. That company was incorporated on 19 January 2004 in England and Wales. It sells metal shelving and racking units to the general public. His fellow director is Jon Powell. The pair had met when working for Rapid Racking, which went through a management buyout from which the Applicant was excluded, which served as the motivation for him to establish his own business. Initially, the Applicant held 64 shares and Mr Powell the other 36 shares. At first it was tough to establish the business and the Applicant made huge financial sacrifices. By Christmas 2004, he and Mr Powell decided to liquidate the company's stock using eBay. This marketing tactic proved immensely successful with the company's fortunes being transformed through 2005 so that it became profitable. The company's turnover grew exponentially through 2006, when it employed 12 or 13 people and into 2007, by which time it had over 20 employees. Growth slowed in 2008 due to the general economic decline.

18. In May 2008, the Applicant was approached by a competitor, the Brady Corporation, wishing to buy BiGDUG Limited. After discussing the prospect of selling with Mr Powell, they decided to consult advisors to assist them in maximising the value of the company. The Applicant's research identified BCMS Corporate Services Limited (hereafter referred to as "BCMS") as a reputable and credible business sales agent. A representative of BCMS explained that its approach was to seek to generate interest from a number of potential acquirers so as to increase the likely offer price. In June 2008, BiGDUG Limited engaged BCMS's services and paid its fee. Upon a sale being achieved, a further success fee would become payable.

19. BCMS recommended that the shareholders of BiGDUG Limited should appoint Mark Hodge of Stuart Hodge as their legal advisor, with whom BCMS had an established relationship. Following a meeting on 14 August 2008, the Applicant and Mr Powell were impressed with Mr Hodge and so decided to appoint him.

20. BCMS prepared an information memorandum to send to potential purchasers. The Applicant and Mr Powell were keen that Rapid Racking, which was the main competitor, should not become aware that BiGDUG Limited was being marketed for sale. As a result of the

approaches made, a number of responses was received by BCMS, but after some initial meetings there were really only two interested parties, the Brady Corporation and Nisbets plc. However, without prior warning, the Brady Corporation withdrew its interest on 13 October 2008.

21. During January 2009, when the prospects of a sale to Nisbets plc looked increasingly likely, BCMS suggested to the Applicant and Mr Powell that they might like to meet Stefan Wissenbach of the Wissenbach Group to discuss wealth planning and, in particular, the establishment of a vehicle to hold the shares in BiGDUG Limited and through which the proceeds of the sale of the shares could flow in a way which would minimise tax and also protect their assets from claims and preserve them for the benefit of their families in the future. The Applicant spoke with Mr Wissenbach on the telephone for around 30 minutes and says that Mr Wissenbach's mantra was centred on something called the "*magic number*", being the amount of money necessary to live on with the remainder of a person's wealth being put into an investment vehicle via a trust.

22. On 27 January 2009, the Applicant met Mr Wissenbach at his offices in Berkswell. Mr Wissenbach suggested that the Applicant consider a tax planning structure using a remuneration trust through Sanctum Tax and Trust Solutions LLP (hereafter referred to as "Sanctum"), which the Applicant understood was part of the Wissenbach Group. The Applicant agreed to sign a non-disclosure agreement.

23. The Applicant had some reservations about the "*magic number*" concept and so took some soundings about Mr Wissenbach from a long-term friend. His concerns were allayed to some extent when he was shown an article about Mr Wissenbach, which included the fact that he had been honoured for being a top advisor.

24. On 6 February 2009, the Applicant received a letter of advice from Alan Thomson of Sanctum, which set out its "*share protection strategy*". The tax planning structure referred to involved transferring shares to a remuneration trust. This would produce the effect that no tax would be payable by the shareholder on the subsequent sale of the shares; the capital held within the trust would accumulate tax-free; balance sheet reserves could be gifted into the trust and would not attract a tax charge and the shareholder in question could enjoy the benefit of the funds in a number of ways; the shareholder in question could access trust capital by way of a loan, which is not taxable in the hands of the shareholder and, on the shareholder's death, any loan amount outstanding will reduce inheritance tax liability on the shareholder's estate; all trust income and gains would accrue to the trust free of UK tax; and the shareholder's family would be able to enjoy the trust funds tax free after the shareholder's death.

25. The Applicant sought advice from Mr Hodge about the proposals and raised his continuing concerns about Mr Wissenbach. Mr Hodge had a meeting with Mr Wissenbach on 9 February 2009, after which he told the Applicant that "*the tax advice is bought in using best of breed external advisers*", identifying Davenport Lyons as the source.

26. On 13 February 2009, the Applicant spoke with Mr Thomson of Sanctum, who suggested that this type of structure was commonplace for people with money and that the next step would be to arrange to meet with Davenport Lyons. That meeting took place on 18 February 2009, when the Applicant first met Roger Bindschedler. Mr Hodge and Mr Thomson were also in attendance. The Applicant has described this meeting as a "*watershed*" moment because instead of meeting advisors in converted barns he was meeting a partner of a leading law firm in the heart of Mayfair. Having researched the firm on the internet, his reservations as to the legitimacy and prudency of the arrangements were more than satisfied. However, being a cautious person, he enquired whether he could obtain advice on the proposed structure from another lawyer. He was told that he could not because of the intellectual property rights

associated with the structure, which could not be disclosed to anyone else. Further, when he asked if he could consult the Queen's Counsel who had advised on and drafted the trust, he was told it would be very costly and the advice too complicated for him to understand. Following the meeting, the Applicant discussed the things that had been said with Mr Hodge during a 90-minute car journey and noted that Mr Hodge did not raise any concerns.

27. The Applicant was informed by BCMS and Mr Hodge that, because the sale of BiGDUG Limited was believed to be imminent, he needed to move quickly. Earlier that month there had been discussions with BCMS as to whether to bring Rapid Racking's parent into the bidding process. The Applicant and Mr Powell remained of the view that the company's sensitive information should not be divulged to its main competitor. They preferred to put the potential sale to Nisbets plc on hold. However, BCMS sent the information memorandum to Rapid Racking's parent in any event. At this time, the Applicant was also dealing with the failing health of his mother. In early March 2009, Nisbets plc withdrew its interest in purchasing BiGDUG Limited. The Applicant and Mr Powell decided, therefore, to meet with Rapid Racking's team. After an initial meeting on 13 March 2009, a week later Rapid Racking's parent confirmed its interest in acquiring BiGDUG Limited.

28. During late March 2009, the Applicant felt pressurised by BCMS to get the trust structure in place before a firm offer materialised. The Applicant was also considering a different tax planning scheme proposed by his accountants. Whilst still in two minds about the scheme proposed by Sanctum, the Applicant met with Mr Hodge and Mr Thomson on 30 March 2009, when he was given a presentation and slide show about the scheme. The significant difference between using the scheme and receiving the proceeds of sale directly was emphasised. The mechanics of how loans could be taken from the trust assets through a sub-trust was explained. The Applicant knew that he would be excluded personally from direct benefit from capital from both the trust and sub-trust, but was not told that his family beneficiaries were also excluded. The Applicant confirmed to Mr Hodge and Mr Thomson at this meeting that he wished to go ahead with setting up the trust.

29. Following that meeting, Mr Thomson sent the Applicant more details, explaining that the contracting party would be Pan Continental Consultants Limited, part of Concept Group. The fees involved were set out. Mr Hodge was keen to get everything organised as a priority before any purchase offer was made. The Applicant was advised that a minimum of 51% of the shares of the company needed to be put into the trust. Because he did not wish to retain 13% of the company, regarding it as an unlucky number, the Applicant chose to transfer 52 of his 64 shares. Mr Powell knew the Applicant was considering the arrangement and had a vague understanding about it, believing that it was for the Applicant's personal benefit and would have little or no bearing on BiGDUG Limited.

30. As Ms Eley explains, the first time the Concept Group became involved was 2 April 2009, when Pan Continental Consultants PCC Limited (to give that company its correct name and hereafter referred to as "Pan Con") received a fax following a conversation with Mr Thomson acting on behalf of AMAT Limited, which was a consultant to Pan Con. Ms Eley confirms that no one at the Concept Group was privy to any of the discussions and advice involving the Applicant before that time. Pan Con's letter of engagement was issued to the Applicant as managing director of BiGDUG Limited on 2 April 2009. Although the Applicant does not recall having done so, he signed the letter of engagement the next day.

31. By way of further background, Pan Con was registered in April 2007 and is beneficially owned by Roger Berry and Ms Eley. That company was formed as a result of a proposition from Bill Auden, a director of Wye Associates Limited, and Mr Thomson, a director of AMAT Limited, both of which companies offer wealth and tax consultancy services. By agreements dated 25 and 30 January 2008 respectively, AMAT Limited and Wye Associates Limited were engaged as consultants for Pan Con. In April 2009, there was no relationship

between Pan Con and Mr Wissenbach. He was known only as an introducer of clients to AMAT Limited and Wye Associates. At Mr Auden's request, Pan Con entered in a consultancy agreement with the Wissenbach Group only on 10 December 2009. There was also no business relationship between Pan Con and Sanctum.

32. Pan Con had entered into a distribution agreement with CB Nominees Limited on 22 January 2008. CB Nominees Limited held the intellectual property rights to the employment trust strategy model and the distribution agreement enabled Pan Con to market and distribute solutions within European markets through its independent consultants. On 23 January 2008, CB Nominees Limited engaged Howard Kennedy, a firm of solicitors. That firm obtained an Opinion from Counsel (Richard Vallat) dealing with the implementation of an employment benefit trust structure and setting out the tax benefits. Under the arrangements developed at that time, Mr Bindschedler, then with Howard Kennedy, would be put forward to provide legal advice to prospective clients. Mr Bindschedler subsequently moved to Davenport Lyons. Although prospective clients were introduced through Pan Con, or through its agent, Concept Group Holdings Limited, each directly engaged Mr Bindschedler's firm to give advice.

33. On 7 April 2009, a Concept Group Limited Remuneration Trust Application Form was returned in respect of the proposed BiGDUG Limited Remuneration Trust. The Applicant and Mr Powell had signed it on 3 April 2009.

34. On 15 April 2009, Concept Group Holdings Limited wrote to Mr Bindschedler instructing him to advise the Applicant/BiGDUG Limited in relation to establishing a remuneration trust. The same day, Mr Bindschedler sent an e-mail informing Pan Con that it was envisaged that the trust deed would be executed the next day. Early on 16 April 2009, Ms Eley confirmed to Mr Bindschedler by e-mail that the initial contribution of £100 had been received so the Concept Group were in a position to enter into the deed that day.

35. On 16 April 2009, the Applicant attended at the offices of Davenport Lyons. Mr Thomson and Mr Bindschedler, as well as an associate of the latter, were present. The Applicant knew the meeting was for the purpose of signing documents. Mr Bindschedler took him through a series of documents, none of which the Applicant had seen before.

36. The first document was a letter of engagement dated 8 April 2009. It stated that the scope of the work to be undertaken was to "*involve explaining to you the tax report and providing your company with a parallel report*". The firm's "*charges for the matter will be £100, exclusive of disbursements and VAT*".

37. The second was a letter of advice dated 16 April 2009 regarding the establishment of the trust and the tax advantages. It states it was "*written upon the instructions of the Directors of Concept Group Holdings Limited ("Holdings") following a request to them from Douglas Nourse who is a director and current shareholder in BiGDUG Limited*" and that "*The facts discussed in this Letter are taken from the facts provided to us by Holdings*". Ms Eley has confirmed that the facts set out in this letter were provided to Davenport Lyons by Mr Auden and that the form of letter is a standard one generally used by Davenport Lyons for clients wishing to set up a remuneration trust, adapted to reflect the client's circumstances. That letter also says that "*It is Douglas Nourse's intention to make a gift of about 80% of his shareholding in the Company to the Trustees of the Trust that is to be established by the Company*". Under the heading "SUMMARY", the letter records that "*the Shareholders' objectives*" are:

> "*1. To utilise the Trust as a commercial executive incentive scheme.*

> 2. *To receive loans and other financial assistance directly or indirectly from the Trust subject to Benefit in kind tax charges or subject to payment of a commercial rate of interest.*
>
> 3. *For the Trust funds to be used to provide benefits in cash and/or in kind to directors and employees (past, present and future) of the Company.*
>
> 4. *For the Shareholder's family to be able to enjoy the Trust funds tax free after the Shareholder's death.*"

There is no apparent recognition that Mr Powell, as the other Shareholder, did not share all of these objectives. Further, the Jurats noted that the letter switches between referring to Shareholders and Shareholder, the former being defined but the latter not. The letter of advice sets out, in what appears to be a standard format, and was noted by the Jurats who had sat in the ***Dervan*** case (*supra*) to be in the same or a very similar form to the letter in that case, as shown by the extracts quoted in the Court's judgment, the way the remuneration trust would be implemented and operated, the benefits to employees and the benefits to the Shareholders.

38. The letter of advice enclosed a report for the directors of the company. The Report for Directors does not refer to any intention to deal with the Applicant's shareholding, but does state at para. 2.5 that "*The Company proposes to make an initial gift of cash to the Trustees of the Rem. Trust which is to be established by the Company*" and goes on to set out the consequences for BiGDUG Limited of "*a cash funded Rem. Trust and its applicability to the circumstances of the Company*" (para. 3.2). The document similarly appears to be in standard form, suitably tailored, at least in places, to reflect the factual position of the company. This is potentially best shown by reference to para. 6, which reads in part:

> "*6.3 It is our preference that a Guernsey resident trust company is appointed as Trustee due to the strict regulatory regime in Guernsey. Concept Group is a prestigious independent group that provides cost efficient and effective trustee services.*
>
> *6.4 However the choice of Trustee is a matter for the Company. …*
>
> *6.6 We note that you wish to appoint Concept Group, who have developed these arrangements, to act as independent Trustees and that you have already completed their Trust Questionnaire. It should be noted that the acceptance of an appointment as Trustee is always entirely at the discretion of the individual offshore Trustees.*"

It remains a mystery as to why para. 6.6 has been added in the way it has without modifying either or both of the preceding sub-paragraphs to reflect what has actually happened prior to receiving the report.

39. The Applicant was not taken through these documents by Mr Bindschedler; they were handed to him as a formality.

40. Mr Bindschedler explained that there needed to be a meeting of the board of directors of BiGDUG Limited to consider a draft minute he had prepared. The meeting was convened at 11.25 am with Mr Powell attending by telephone. The Applicant read the draft minute out, there was no discussion, but agreement to establish the trust and appoint the Second Respondent as trustee of the trust. The Applicant then signed the minute, amending the time in manuscript from the expected time that had been inserted in the type-written version and noting that Mr Powell had attended by telephone. Minute 3.1 records that "*the purpose of the*

meeting was to consider and if thought fit to approve a commercial executive incentive scheme for the purposes of attracting, incentivising and retaining key executives for the benefit of the Company". In Minute 4, it is stated that the Applicant, as Chairman, produced to the Board the Report for Company and the draft Trust Deed, although it is not clear whether Mr Powell had actually seen or considered the contents of either of those documents when they had not been supplied previously. The resolutions at that meeting were to establish the Remuneration Trust "*in the manner set out in the Report*", to appoint the Second Respondent as the trustee of that trust and to authorise two directors or a director and a secretary "*to sign and execute any documents relating to or necessary for the establishing of the Rem Trust*". Mr Bindschedler telephoned Ms Eley to let her know that the directors of BiGDUG had resolved to establish the remuneration trust. Whether before or after that telephone call, the Applicant was handed the trust deed for signature without further explanation and his signature on it was witnessed by Mr Bindschedler's associate. He left the trust deed with Mr Bindschedler to pass to the Second Respondent for further signature. The Applicant was then presented with a deed of assignment in respect of his 52 shares, which he signed, again witnessed by Mr Bindschedler's associate and also a share transfer form in favour of the Second Respondent, which he duly signed, similarly leaving the documents with Mr Bindschedler for onward transmission to the Second Respondent. Scanned copies of these documents were provided to the Concept Group that afternoon.

41. By clause 2 of the Trust Deed, the proper law was expressed to be the laws of England and Wales. Clause 10 deals with powers of exclusion. Clause 43 then contains the provision that:

> "*No Excluded Persons shall be capable of taking any benefit of any kind by virtue or in consequence of this Settlement*"

and spells out in particular (at clause 43.2) that:

> "*No part of the capital of the Trust Fund shall be paid or applied for the benefit either directly or indirectly of any such Excluded Person in any manner or in any circumstances whatsoever*".

£100 was indicated as being the property constituting the initial Trust Fund.

42. The Deed of Assignment between the Applicant and the Second Respondent was stated to be made on 17 May 2009. By clause 5.2, it was expressly to "*be governed by and interpreted in accordance with English Law*". The third recital records that the BiGDUG Limited Remuneration Trust "*is intended by the Company and the Trustees thereof to constitute an employee trust for the purposes of Section 28 Inheritance Tax Act 1984 and Section 239 Taxation of Chargeable Gains Act 1992*". Clause 2 provides that the Applicant, as the Assignor, "*assigns all its legal and beneficial right and interest in the Ordinary Shares [in the Company] by way of gift for no consideration*" and, by clause 3, the Second Respondent undertook "*to hold the Ordinary Shares for the purposes of the [Remuneration Trust] and as capital of [that Trust]*". The reference to the Assignor as "*its*" rather than "*him*" appears to be a further indication that this document may also have been taken from a template with insufficient care being taken to modify it to reflect its actual use for the Applicant.

43. Whilst at the offices of Davenport Lyons, a message was left on the Applicant's mobile telephone by BCMS indicating that Rapid Racking's parent had withdrawn its interest in purchasing BiGDUG Limited.

44. On 17 April 2009, a second board meeting was convened, this time at the company's offices. Mr Powell attended by telephone and Mr Bindschedler was also on the telephone. The draft minute approving the transfer of 52 shares that had been provided the previous day by Mr Bindschedler was read out, there was no discussion, but agreement to approve this. The

Applicant signed the minute. It records that "*the purpose of the meeting was to consider and if thought fit to approve the transfer by way of gift from one or more Shareholders to Concept Fiduciaries Limited acting as the Trustees*" and then lists just the 52 shares held in the name of the Applicant.

45. On 21 April 2009, Davenport Lyons sent to BiGDUG Limited a specimen letter to use to inform the company's employees about the establishment of the Remuneration Trust.

46. The Applicant held meetings with Mr Thomson on 22 June and 3 September 2009. The Applicant was concerned that he had been told that a letter of wishes was important but nothing was being done to assist him in preparing one. He was also concerned that Mr Thomson seemed more interested in persuading him to settle more assets into the trust so as to generate additional fee income. He did, however, take steps to ensure that the Second Respondent established a sub-trust and knew of the intention to appoint the Applicant and his sister as protectors. This course of action gave the Applicant comfort that he still had a degree of control over the destination of the shareholding. Following receipt on 11 September 2009 by the Second Respondent of a re-signed set of relevant pages from the Remuneration Trust Application Form dated 7 September 2009, the BiGDUG Limited Remuneration Trust First Sub-Trust was declared, with £10 settled into it, by the Second Respondent on 14 September 2009.

47. Because BiGDUG Limited had performed reasonably well in 2009, there was some discussion about what to do with the surplus cash. The Second Respondent had waived its entitlement to any dividend. The company's accountants wanted to know more details about the options of using the Remuneration Trust as a vehicle to make payments. The Applicant suggested contacting Mr Thomson, and sent an e-mail himself to Mr Thomson on 11 March 2010 alerting him to the possibility that he would be contacted in that fashion. On 18 March 2010, the Applicant received an e-mail from Mr Auden. He had had no contact from Mr Auden previously and indeed had never heard of him or Wye Associates Limited. Mr Auden explained that the Wissenbach Group had asked him to assist in covering for Mr Thomson who was on a prolonged break from work.

48. The company's accountant spoke with Mr Auden and confirmed what he had been told to the Applicant. As a result, certain payments were made to the Second Respondent rather than to the Applicant directly. Because the Applicant did not perceive any urgency in the suggestion of meeting with Mr Auden, that meeting did not occur until 28 October 2010. There was further contact later in 2010, particularly over the changes introduced from 9 December 2010 by HM Revenue & Customs, which Mr Auden indicated were being looked into, albeit that the planning strategy from which the Applicant was benefiting was said to be "*very much still alive*".

49. The Remuneration Trust was used in 2011 to pay bonuses to employees of BiGDUG Limited.

50. Following a meeting the Applicant had on 5 April 2011 with an old friend, who brought with him a colleague who has some knowledge of trust matters, the Applicant contacted Mr Auden, and his colleague, Daniel Hayes, explaining his further concerns about the Remuneration Trust and whether it was capable of achieving for him what he had been told it could. Mr Hayes replied, indicating that there were new challenges to overcome, adding that "*your structure still provides key benefits and a great platform for growing wealth outside the UK tax net*".

51. On 26 May 2011, the Applicant exercised the power he had to appoint himself and his sister, Allyson Leech, as protectors of the Remuneration Trust and the First Sub-Trust. The next day he was in Guernsey to meet with representatives of the Second Respondent. He was told by Ms Eley that the Second Respondent was concerned about the way Wye Associates Limited

had been conducting itself and that the Concept Group was distancing itself from it by no longer accepting business. By e-mail on 29 June 2011, Ms Eley informed the Applicant that the Concept Group had formally parted company from Mr Auden and Mr Wissenbach and that it was no longer using Mr Bindschedler for advice.

52. The Applicant organised an urgent meeting with Mr Bindschedler the following day. He was shocked to find Mr Auden and Mr Hayes present, and asked them to leave. However, after some 45 minutes of discussion with Mr Bindschedler, the Applicant agreed to let the other gentlemen re-join the meeting. He was told that it was on the initiative of Wye Associates Limited and Davenport Lyons that the relationship with the Concept Group had been ended. It appears that the Applicant was not being given accurate information by Mr Bindschedler and Mr Auden at this time and in the period following.

53. The Applicant had further e-mail contact with Ms Eley during August 2011. The Applicant then had further contact with Mr Bindschedler and Wye Associates Limited on 30 August 2011, at which time it was suggested that the Applicant move the Remuneration Trust from the Concept Group to the First Respondent. This led to a meeting with John Wright from the First Respondent on 11 October 2011. At that time, the Applicant was also told that Mr Bindschedler would be taking a sabbatical of an uncertain length.

54. The Applicant continued to have contact with Davenport Lyons, Mr Auden and Mr Hayes in 2012 but felt that all they wanted was to generate more fees for themselves and that Mr Auden seemed to be increasingly desperate to persuade the Applicant to make investments he was proposing. The Applicant arranged for BiGDUG Limited's accountants to review how the structure was capable of working. As a result of that review, he has brought this Application. His last contact with Mr Auden was on 18 December 2012. Prior to that he had noted a change in the e-mail address being used by Mr Auden, which no longer contained any reference to Wye Associates.

55. In the meantime, on 22 May 2012, the Applicant and Ms Leech had exercised their powers as protectors to remove the Second Respondent as the trustee of the Remuneration Trust and the First Sub-Trust and to appoint the First Respondent in its place. The First Respondent has acted as trustee with effect from 14 August 2012. By a declaration of trust dated 19 December 2012, HG Nominees 1 Limited declared that it held the 52 shares in BiGDUG Limited as nominee and trustee for the First Respondent as trustee of the Remuneration Trust. Since being appointed trustee, the First Respondent notes that there has been minimal activity within the Remuneration Trust and First Sub-Trust. However, the funds already in the Remuneration Trust were used in 2013 and 2014 to pay bonuses to employees of BiGDUG Limited in respect of their efforts in the preceding years.

Expert evidence

56. The Applicant relies on two Opinions of Simon Taube QC, dated 14 May and 4 July 2014 respectively. In the first of those Opinions, Mr Taube summarises his view as "*it appears that Mr Nourse was induced to make the transfer of the shares to the trustee by the fundamentally inaccurate advice that was given to him about the United Kingdom tax consequences of the trust arrangements.*"

57. In relation to his detailed analysis of what the Applicant was told by Mr Thomson and Mr Bindschedler, Mr Taube states that "*in April 2009 the actual tax consequences of the remuneration trust structure put in place by Sanctum and Mr Bindschedler would have been totally different from those explained by them to Mr Nourse*". It was incorrect for them to state that no tax would be payable on a subsequent sale of the shares in BiGDUG Limited. As a result of section 86 of and paragraph 6 of schedule 5 to the Taxation of Chargeable Gains Act 1992, Mr Taube considers that the Applicant, as settlor of the shares, would be liable to

any capital gains tax in respect of the chargeable gains arising on such a disposal. For similar reasons, it was inaccurate to assert that the trusts gains would accrue free of UK tax. It was also incorrect to state that the income of the trustees would accumulate free of UK tax, because under the terms of the BiGDUG Limited Remuneration Trust the Applicant, a future spouse and his infant children were capable of benefiting from distributions of income from the trust fund, which meant that the Applicant was chargeable to income tax on the trustees' income as a result of the provisions in Chapter 5 of Part 5 of the Income Tax (Trading and Other Income) Act 2005. As the Applicant could recover tax for which he became liable from the trustees, it meant that the ultimate burden of the UK income tax would be borne by the income of the trust fund.

58. As regards the inheritance tax advice, Mr Taube gives his view that it was also incorrect in respect of how any outstanding loans from the trust would be treated because of the possible impact of section 103 of the Finance Act 1986 making an exception for deductibility of loans when computing a deceased person's estate where the money lent was derived from property the deceased had given to the lender or property representing such property. If the trustee lent funds derived from the proceeds of sale of the shares gifted to the Remuneration Trust by the Applicant, this exception could be applied. Finally, it was inaccurate to assert that upon the Applicant's death his family would have been able to enjoy the trust funds tax free. Distributions of income and capital could have attracted charges to income tax and capital gains tax.

59. Mr Taube further identifies a possible problem arising from clause 10.3 of the trust deed, which provides:

> "*Notwithstanding any other provision within this Deed no benefit may be given to any person if in doing so transfers of shares in the Settler [sic, ie, BiGDUG Limited] or any connected company to this Trust whether such a transfer takes place or not, would cease to be exempt transfers within section 28 of the Inheritance Tax Act 1984*".

Because of the definition of "*connected person*" in the legislation relating to inheritance tax meaning that a child is connected with his parent, Mr Taube considers that there is real doubt that the trustee could distribute capital to a child of the Applicant.

60. The second Opinion of Mr Taube comments on the advice contained in the earlier Opinion of Mr Vallat. Although the Applicant may not have seen that Opinion prior to commencing these proceedings, it was the Opinion that Mr Bindschedler (and possibly also Mr Thomson) was apparently relying on and which the Second Respondent had also relied on, when dealing with the Applicant in 2009. Mr Taube highlights the fact that Mr Vallat's Opinion had been given without reference to any specific set of facts. It was general advice. Accordingly, Mr Taube's expert report was not, in his view inconsistent with the generic advice in Mr Vallat's Opinion, save for on one issue about whether the trust constituted a settlement within the meaning of sections 86 and 87 of the 1992 Act. Having regard to the facts deposed to by the Applicant, including the Applicant's stated motive including a desire to benefit himself and his children, that there was an element of bounty, rather than this being purely a commercial transaction, rendering the Remuneration Trust a settlement for the purposes of those provisions. He did so by reference to the test from Lord Wilberforce's speech in ***Roome v Edwards*** [1982] AC 279 (at page 293):

> "*The question whether a particular set of facts amounts to a settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying the knowledge in a practical and common-sense manner to the facts under consideration, would conclude.*"

61. Mr Taube also comments on the suggestion in Ms Eley's Affidavit that the Applicant was an "*Excluded Person*" for the purposes of the BiGDUG Limited Remuneration Trust. He noted that clause 10.1 of the trust deed enabled the trustee to declare a person to be an Excluded Person, but that neither of the trustees had taken the steps of making such a declaration in respect of the Applicant. Returning to clause 10.3, he points out that the effect of section 28 of the Inheritance Tax Act 1984 is to exempt from inheritance tax an individual's transfer of a majority shareholding in a company to the trustee of an employment benefit trust satisfying section 86 of that Act, provided the trust does not permit the transferor/participator to benefit from distributions of the settled property, ie, from the capital. However, section 28(6) permits payments to the participator (or persons connected with him) of income, which is taxable in the recipient's hands. This was something on which Mr Vallat had also commented.

Discussion

62. The findings and decisions in this case are the Jurats' unanimous findings and decisions.

63. The facts set out above and, in particular, the impact of the opinions given in the unchallenged expert reports of Mr Taube lead the Jurats to conclude that the Applicant assigned 52 of the 64 shares he held in BiGDUG Limited as a result of inaccurate legal advice. The inaccuracy of that advice is such that it constitutes a positive mistake of the type that can justify the Court considering whether to exercise its discretion to set aside that transaction. The Jurats are satisfied that this was not anything like forgetfulness, inadvertence or ignorance.

64. The Jurats are left with the impression that the Applicant was rather out of his depth with his new-found wealth. Accordingly, he was entirely reliant upon the advisers that he and Mr Powell chose to engage to assist them with what could happen if they sold their respective shareholdings in BiGDUG Limited. The Jurats do not fully understand why the Applicant chose on 17 April 2009 to convene the second board meeting to deal with the assignment of his shares when he had found out the previous day that there was no longer any potential buyer of those shares, meaning the urgency to put in place these arrangements had disappeared. It would have been possible at that time to have undone what had already taken place the previous day in relation to his shares, whilst leaving in place the Remuneration Trust with its bare funding of £100, but they suspect that the Applicant felt that significant fees had already been paid for the establishment of the structure and that he was committed to proceeding in the way he had already determined come what may because of the tax benefits that would be available once the shares were sold.

65. The roles played by Mr Thomson and Mr Bindschedler in giving advice that has now been shown to be flawed and exerting a degree of pressure on the Applicant without explaining as completely as they might have what was happening is comparable to that in the ***Dervan*** case, to which reference has been made throughout this judgment. A similar comment can apply to Mr Auden. This case strikes the Jurats as another example of where a person has not been well-served by his advisors.

66. The Jurats are satisfied that the Applicant's shareholding in BiGDUG Limited was his principal asset by April 2009. From owning comparatively little a few years earlier, he had built an asset worth some millions of pounds. He knew he was parting with his majority shareholding and so his control of the company, although his powers as protector, if so appointed, would enable him to exercise some control over who actually held the shares in trust. The Jurats appreciate that the Applicant quite properly may have chosen to seek advice, as he did, about the steps that could be taken to arrange his affairs in such a way as to minimise tax implications or defer when they might apply. Of course, the transaction that the Applicant seeks to avoid is not the establishment of the remuneration trust with £100 of money from BiGDUG Limited, but rather the gift of his 52 shares to the trust and the consequences that would follow for him and his family from that share assignment.

67. Although the Applicant has indicated that he understood that he had not engaged Sanctum to provide tax advice, and that the relevant advice would formally be provided by Davenport Lyons, and further that the advice, when it came, was simply handed to him without him reading it before he participated in the board meetings at which the Remuneration Trust was established and at which his shares were gifted to the Second Respondent as trustee of that Trust, the Jurats are satisfied that he made that assignment of his shares on the basis of the advice that he had received and which has been shown to be inaccurate. His motive in assigning his shares in BiGDUG Limited was to be able to provide benefits for his family in a manner which would minimise the tax implications. Being reliant on his advisors, he attended a series of meetings with each adviser passing through to the next one, culminating in him being referred to Davenport Lyons and Mr Bindschedler. The reputation of that firm was such that the Applicant's concerns were allayed to the extent that the remuneration trust model being marketed to him would meet his needs. The Applicant was taking other advice and carrying out his own research into the people he was meeting. He was being as cautious as he could be.

68. By the end, he was in a position to reach an informed decision that this was the scheme that he should choose because of the advice about it he had received. The "*watershed*" moment was the meeting on 18 February 2009 with Mr Bindschedler. Although Mr Bindschedler's formal advice was only provided on 16 April 2009, My Bindschedler did not indicate that anything in that presentation was incorrect, instead he confirmed it, and so aligned himself to that summary of the benefits of the scheme. The tipping point in his decision-making process was on 30 March 2009 with the "*impressive slideshow presentation*". The letter of advice, which it seems the Applicant did not read before entering the transaction to gift his shares to the Remuneration Trust, confirms the position that had been explained to him previously. His mistaken belief as to the consequences had been formed earlier, but was continuing at that point.

69. As already indicated, the mistake under which the Applicant laboured on 16 and 17 April 2009 is, in the opinion of the Jurats, one that goes to the heart of the transaction. They accept the Applicant's evidence that, had he known the true position about the tax implications of the gift of his shares to the Second Respondent, he would not have made the assignment. The mistake is, therefore, one of sufficient gravity to justify the Jurats considering whether or not to exercise the Court's discretion to set that transaction aside.

70. In doing so, the Jurats note that there is a difference between a shareholder gifting the entirety of their shareholding into trust (as was the position in the ***Dervan*** case) and where a shareholder retains a part of the shareholder and so continues to enjoy the benefits of legal ownership of some shares. The position of someone divesting themselves of almost the entirety of their wealth is so momentous that it follows almost automatically that it will be treated as particularly grave. The position of someone who divests themselves of only part of their wealth calls for closer scrutiny as to the reasons and careful consideration of causal link between the mistake and the action. In the present case, the Jurats are satisfied from the evidence given by the Applicant that the inaccurate advice he was given, as shown clearly by the unchallenged expert evidence of Mr Taube, had a direct bearing on his decision to proceed in the manner that had been suggested by his advisors. In those circumstances, having regard to the totality of the evidence, the Jurats find the requisite causal link satisfied.

71. In relation to the final question of whether the Court should grant the relief sought or refuse it on the basis of some public policy reason of the type referred to by Lord Walker in ***Pitt v Holt*** (*supra*), the Jurats do not regard the fact that the Applicant was participating in a scheme to avoid payment of taxes in the United Kingdom as any reason to refuse to grant the relief if it would otherwise be given. They recognise that a jurisdiction is entitled to tax those who are obliged to pay its taxes and to deal with its taxpayers as it sees fit. The same, of course,

applies in Guernsey. There is no suggestion that the transaction suffers by being tainted with any illegality; indeed, it was, it seems, a perfectly legitimate arrangement for the Applicant to carry out. Accordingly, because the Jurats are satisfied that it would be unconscionable, or unjust, to leave the Applicant's mistake uncorrected, they agree that the assignment of the 52 shares should be set aside. Further, they agree that the Court should direct the First Respondent to take whatever steps are necessary to transfer those shares back to the Applicant.

Conclusion

72. For the reasons given, the Application of 20 May 2014, as amended, is granted.

73. The Advocates expressly requested that the costs of the proceedings be reserved and so the Deputy Bailiff will, therefore, reserve the question of costs.