



Trusts and Fiduciary Group

In the Matter of the Representation of R and in the Matter of the S Trust



Summary

In a landmark decision, the Royal Court of Jersey has held that, in considering whether a gift should be set aside on the grounds of the donor's mistake, it would **not** follow the recent English Court of Appeal decision in **Pitt v Holt** [2011] EWCA Civ.197 but would continue to follow the course charted in the previous Jersey case of **In Re the A Trust** [2009] JLR 447.

Development of Jersey law

In that case, the Royal Court had definitively stated the application of equitable principles to the law of mistake in Jersey, and concluded that the test was whether the donor (a) was under some mistake of so serious character as to render it unjust on the part of the donee to retain the property given to him, and (b) would not have entered into the transaction but for the mistake.

That test was then applied by different judges in the Royal Court in subsequent cases, including **In Re the Lochmore Trust** [2010] JRC 068, when the Court said that it had to ask itself the following questions:

- 1 Was there a mistake on the part of the settlor?
- 2 Would the settlor not have entered into the transaction "but for" the mistake? and
- 3 Was the mistake of so serious of character as to render it unjust on the part of the donee to retain the property?

The Royal Court had accordingly rejected the distinction between effects and consequences which was first articulated in the English case of **Gibbon v Mitchell** [1991] 1 WLR 1304, when Millet J concluded that:

"Wherever there is a voluntary transaction by which one party intends to confer a bounty on the other, the deed will be set aside if the Court is satisfied that the disponent did not intend the transaction to have the effect that it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."

Pitt v Holt

That test was recently upheld by the English Court of Appeal in the case of **Pitt v Holt** when the Court of Appeal said that:

"for the equitable jurisdiction to set aside a voluntary disposition for mistake to be invoked, there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction."

The Court of Appeal went on to say that in addition *"the mistake must be of sufficient gravity as to satisfy the **Ogilvie v Littleboy** test, which provides protection to the recipient against too ready an ability of the donor to seek to recall his gift. The fact that the transaction gives rise to unforeseen fiscal liabilities is a consequence, not an effect, for this purpose, and is not sufficient to bring the jurisdiction into play."*

In summary, a donor would have to show (i) that there was a mistake, (ii) that it was the right type of mistake and (iii) that it was sufficiently serious. If it was not the right type of mistake to start off with, then one would not even consider the **Ogilvie v Littleboy** ([1897] 13 TLR 399) test of gravity of the mistake.

The Royal Court's analysis of the decision in Pitt v Holt

The Royal Court said that in light of the fact that the tests in the two jurisdictions are now plainly different, there may be an advantage in choosing one jurisdiction over another in which to bring an application of this kind, and that it was therefore particularly important for the Royal Court to satisfy itself that the judicial policy being followed in Jersey is one which should be maintained.

The Court referred to there being two competing principles.

- 1 On the one hand, it should not be too easy for a donor to retrieve a gift when things do not turn out precisely as he had anticipated, because legal certainty is important.
- 2 On the other hand, parties should not be held to transactions into which they would not have entered had they known what the outcome would be.

The English Court of Appeal's approach "*leans towards the first principle*", whereas the Royal Court's approach "*tends toward the second*".

The Royal Court made a number of observations on the Court of Appeal's judgment in **Pitt v Holt**. The Court of Appeal had criticized the Jersey Court for, it said, (1) ignoring the distinction between effects and consequences, and (2) applying a test which, the Court of Appeal said, is "*a great deal too relaxed for the donor who seeks to recover his gift*" and gives "*wholly inadequate effect to the gravity of the test posed*" in **Ogilvie v Littleboy**.

The Royal Court said that in its view, these criticisms were misplaced.

First, the Royal Court **In Re the A Trust** had "*plainly had the distinction [between effects and consequences] very much in mind*", but preferred nevertheless to formulate its own test. Second, the tests applied by the Court (see **In Re Lochmore Trust** above) were, the Royal Court said "*significant hurdles*", requiring a "*balancing of competing interests on the basis of fairness*", with the burden being squarely on the party seeking to set the transaction aside to show that it would be unjust for it to stand. Third, the Royal Court said that the test posed in **Ogilvie and Littleboy** was, in essence, the same as the **A Trust** test:

"A donor can only obtain back property which he has given away by showing that he was under some mistake of so serious of character as to render it unjust on the part of the donee to retain the property given to him".

The Royal Court observed that the inference of the judgment in **Ogilvie v Littleboy** is that had the donor been able to persuade the Court that she had, as a matter of fact, made the relevant mistake then she would have succeeded in her application, notwithstanding that her mistake was as to the application of certain rules of law to her transfer which is, it appears, a mistake as to one of the consequences of the transfer.

Observations on the test applied in Pitt v Holt

The Royal Court was troubled by two aspects of the test applied by the Court of Appeal.

The first is that there appeared to be a distinction between a mistake on the part of the donor as to the legal effect of the disposition on the one hand and as to an existing fact which is basic to the transaction on the other. However, it is difficult to see why a sufficiently serious mistake to an existing **fact** basic to the transaction should be sufficient to enable a gift to be set aside, but not a sufficiently serious mistake as to **law**. The Royal Court said that it was not clear whether the Court of Appeal's reference to mistakes as to existing facts was intended also to include mistakes of law, or whether a mistake of law was only to be dealt with as part of the limb of the test dealing with mistakes as to the legal **effect**. The Royal Court said that in its view, this would exclude many mistakes of law which were nevertheless "*basic to the transaction*".

The Royal Court said that the **A Trust** test, which does not distinguish between mistakes of fact and mistakes of law, does not give rise to any such concerns.

The second aspect that troubled the Royal Court is the weight or preference apparently given by the English Court to the interests of the tax authorities, with which the Royal Court is not sympathetic. As the Royal Court said, "*Leviathan can look after itself*". The Royal Court obviously has no sympathy whatsoever with tax evaders, but said that in Jersey, it is still open for citizens to enter into lawful and transparent arrangements which will minimise the tax payable by them. The Royal Court said that it saw no reason for adopting a judicial policy which favours the position of the tax authority to the prejudice of the individual citizen, and that it saw "*no fairness in such a policy*".

"Justice and fairness"

The Royal Court made particular reference to the circumstances of Mrs Pitt, the appellant in the **Pitt v Holt** case. Had Mrs Pitt arranged her affairs differently, then the compensation that her husband received for his injuries would not have been subject to IHT; it is unlikely that she would have been criticised for making such a different arrangement, so long as it was transparent and lawful. In entering into the arrangement that she actually entered into, which was subject to IHT, Mrs Pitt was under a mistake which, the Court of Appeal had acknowledged, was of sufficient gravity to have satisfied the **Ogilvie v Littleboy** test. However, since it was not the right type of mistake, according to the Court of Appeal, it was nonetheless, the Royal Court said, "*excluded from the possibility of equitable relief because the policy [of the English Court] is to treat unforeseen fiscal liabilities as a consequence rather than an effect of the mistake.*" The Royal Court said that "*justice and fairness seems .. to have been at the heart of the approach adopted in **Ogilvie v Littleboy***" and that it was therefore "*troubling .. that the outcome for Mrs Pitt seems to have been so unjust and unfair*".

The Court of Appeal had suggested that Mrs Pitt's remedy was to sue her legal advisers. The Royal Court made the point that Mrs Pitt had apparently already been failed by one set of advisors, but that she was now expected "*to entrust herself to another set and to commit herself to the risks, uncertainties and expense of further litigation.*" In line with previous judgments of the Royal Court, the Court was clearly not attracted by the prospect of satellite litigation.

The Jersey approach

The Royal Court said that in referring to these concerns, it merely wished to underline the differences between the now settled law in England and the law as it has emerged in Jersey. The Royal Court agreed with the Court of Appeal that the case of **Ogilvie v Littleboy** was the original foundation of the jurisdiction to set aside transactions on the ground of mistake, and referred to the Court of Appeal's acknowledgement that "*equity does not generally define too closely the categories of case in which it may intervene*". However, it seems that in **Pitt v Holt**, the Court of Appeal has "*nonetheless*

extracted principles from the English cases, and now laid down certain general rules". The Royal Court, however, saw no reason to circumscribe the broad discretion conferred by the approach which had been developed by the Royal Court **In Re the A Trust** and further refined **In re the Lochmore Trust**.

The decision

In considering the representor's application against that background, the Royal Court found that (1) there was no doubt that there had been a mistake on her part, (2) she would not have transferred the assets to the trustee **but for** her mistaken impression that there would be no significant adverse tax consequences arising from the transfer and finally (3) the fiscal consequences of the mistakes could hardly have been of a more serious character. In light of all that, the Court concluded that it would be unfair to hold the representor to transfers made, and unjust for the trustee to retain the property transferred.

There were two additional points of interest.

Effect on subsequent transfers

The first was that a significant proportion of the assets transferred by the representor to the trustee had subsequently been transferred by the trustee to the trustees of new trusts. The Court found that the assets transferred to the new trusts remained subject to an equity in favour of the representor, and that she was accordingly entitled to set aside the subsequent transfers, because the trustees of the new trusts were not bona fide purchasers for value of the assets transferred.

Void or voidable?

Finally, the Court found that the dispositions made by the representor were voidable at her instance on the grounds of her mistake, as opposed to being void. She was entitled, at her own election, either to affirm the transfers or to avoid them and exercise her right to have them set aside. The action which avoids the gift is in equity the action of the donor, and not that of the Court.

Comment

It is now clear that the test to be applied in Jersey in considering whether a gift should be set aside on the ground of the donor's mistake is fundamentally different from the test applied in England. As the Royal Court has acknowledged, there may now be an advantage in certain cases for a donor to choose to bring his or her application in Jersey, rather than in England, in circumstances where either jurisdiction would be available. The Royal Court has once again shown that it is prepared not to follow English jurisprudence where it is satisfied that it is either wrong, or conflicts with existing Jersey authority.

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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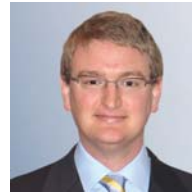
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