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Jersey Royal Court judgment demonstrates independence from English law

A significant judgment delivered by the Jersey Royal Court on Tuesday, 21 June 2011, showed that Jersey has not followed a recent English court decision in an important part of trust law. The landmark ruling could, in circumstances where a case could be brought either in Jersey or England, attract a number of similar cases to the Jersey court.

The Royal Court was considering whether a gift should be set aside on the grounds of a donor's mistake and ruled that it would not follow the recent English Court of Appeal decision in *Pitt v Holt 2011*.

In the *Matter of the S Trust*, Carey Olsen partner Robert MacRae, acting for the applicant, R, explained that R was seeking to have set aside, on the ground of mistake, a gift of shares to a Jersey resident trustee and the subsequent transfer of those shares to three US trusts.

The Royal Court decided it would follow the course charted in the previous Jersey case of *In Re the A Trust 2009*.

In that case, the Royal Court concluded that the right test was whether the donor was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him and would not have entered into the transaction but for the mistake. Such a "mistake" could include mistakes with financial (usually tax) consequences.

In reaching this decision the Royal Court rejected the distinction drawn by certain English cases between the effects of a transaction and consequences of a transaction mistakenly entered into, which had held that only mistakes as to effects could be set aside.

The A Trust decision was then followed by other judges in the Royal Court in subsequent cases.

However, the distinction between effects and consequences was recently upheld by the English Court of Appeal in *Pitt v Holt* where the Court of Appeal said that: "the mistake must be of sufficient gravity as to satisfy the 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."

So under English law, a donor would have to show that there was a mistake, that it was the right type of mistake (i.e. one as to effect, not consequence) and that it was sufficiently serious.

In its judgment *In the Matter of the S Trust*, the Royal Court stated that there were two competing principles. On the one hand it should not be too easy for a donor to retrieve a gift when things did not turn out precisely as he had anticipated, because legal certainty was important. 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 Royal Court said the English Court of Appeal's approach leaned toward the first principle while the Royal Court's approach tended towards the second.

The English Court of Appeal in *Pitt v Holt* had criticised the Jersey Court for "ignoring the distinction between effects and consequences" and applying a test which 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 the English case of *Ogilvie v Littleboy* 1897).

The Royal Court said that, in its view, these criticisms were misplaced. In *Re the A Trust*, the Royal Court "plainly had the distinction (between effects and consequences) very much in mind" but preferred to formulate its own test, which did indeed give effect to the need for the mistake to be a serious one.

Mr MacRae said: "It is now clear that the test to be applied in Jersey, in considering whether a gift into trust should be set aside on the grounds of a donor's mistake, is fundamentally different from the test applied in England.

"There may now be an advantage, in certain cases where either court has jurisdiction, for a donor to choose to bring his or her application in Jersey rather than in England.

"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."

Robert MacRae is available for interview on this topic. Please contact Emma Anderson in the first instance on emma@orchardpr.com or on the telephone number below.

NOTES TO EDITORS:

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