JANUARY 2018

UPDATE

Where ignorance may not be bliss: Jersey court considers what might constitute sufficient mistake to set aside a transfer into trust

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In the case of Re K Trust [2017] JRC 177 the court raised, but in the event did not have to decide, an important question as to exactly what kind of mistake is required in order to engage the court's jurisdiction to set aside a mistaken transfer into trust.

The ability of the Jersey court to set aside a mistaken disposition into trust, already well established under the general law, was placed on a statutory footing in 2013. The relevant provision became Article 47E of the Trusts (Jersey) Law 1984 (the **Trusts Law**). This provides that a transfer of property into a trust by (amongst others) a settlor may be set aside by the court if:-

(a) the settlor made a mistake;

(b) the settlor would not have made the transfer but for the mistake; and

(c) the mistake is of so serious a character as to render it just for the court to set aside the transfer.

The most fundamental of these requirements is the last one. It follows the test applied by the Jersey courts prior to this jurisdiction becoming statutory in 2013 and this in turn reflected the test applied in the English case of *Ogilvie v Littleboy* (1897) 12 TLR 399. The decision of the UK Supreme Court in *Pitt v Holt*; *Futter v Futter* [2013] 2 AC 108 also confirmed that it should be regarded as the currently applicable test under English equitable principles for setting aside a voluntary disposition made by mistake.

The amended Trusts Law goes on to define 'mistake' very widely. This includes a mistake as to the effect or consequences of, or any of the advantages to be gained by, a transfer into trust; a mistake as to a fact which exists either before or at the time of making the transfer; and a mistake of law, whether domestic or foreign. A mistake as to tax consequences also falls within the definition.

In deciding whether it is just to set a disposition into trust aside, the court will take into account all the circumstances, but in particular will wish to consider whether it would be unjust on the beneficiaries for the transfers to be set aside and whether the position of third parties would be prejudiced.

What is not made clear in the legislation or case law is exactly what state of mind, in relation to the unforeseen and untoward outcome, is required on the part of the settlor. The judgment is of interest in drawing attention to this issue, albeit that, on the particular facts, no decision was ultimately required as to whether 'mere causative ignorance' (in the sense explained below) is sufficient.

Aside from that, the case is a particularly clear example of a liability to UK tax having been 'unnecessarily' incurred by a non-UK settlor. As is the custom, HMRC was given notice of the application but, in the circumstances, did not raise any objection to the disposition into trust in this case being set aside.

Facts

In November 2009, the representor, who was neither resident nor domiciled in the UK, established a Jersey discretionary trust (the **K Trust**) in order to hold, through a subsidiary company, certain investments in UK properties. He had in particular been given some advice on UK inheritance tax. Between November 2009 and June 2016 the representor made transfers from his personal bank account into the K Trust of some

£18.4 million. During the same period, the trustee made distributions to him, which with one exception were paid into the same bank account, of some £3.5 million.

In November 2016, the representor was made aware that there was a potential issue over the transfers into the K Trust being subject to UK tax. Advice was sought from English counsel and it was found that, although he was non-UK resident and domiciled for UK tax purposes, the bank account used by the representor to transfer the funds into the K Trust was UK situs for the purposes of UK IHT and, as a consequence of that, the transfers had in fact given rise to a substantial IHT liability of some £4.5 million (plus interest) if discharged by the representor, or £3.6 million (plus interest) if discharged by the trustee. The same issue applied to the distributions made to him.

The representor stated, by affidavit, that he would not have structured the disposition into trust or received payments out of it using his UK account had he known the true tax consequences that would result. He had received some advice on IHT but did not realise that transferring funds into a trust from a UK bank account would cause a UK tax liability to arise. He had other non-UK bank accounts from which he could have sourced the funds.

Required nature of operative mistake

Reviewing these facts, the court noted that there had been no Jersey decisions on what is to be considered as an operative mistake for this purpose, either under the Trusts Law or at customary law.

The leading English case in this regard is the Supreme Court decision in *Pitt v Holt* [2013] UK SC 26 at 108 and the fullest academic treatment was, the court noted, to be found in Goff & Jones, *The Law of Unjust Enrichment*, now in its 9th edition, at paragraphs 9-41 to 9-54. In summary, three different situations are distinguished under English law:-

(a) incorrect conscious beliefs: where, owing to an ignorance of some fact or facts, the claimant held an incorrect conscious belief which caused them to act;

(b) incorrect tacit assumptions: where the claimant acted on the basis of a tacit assumption about some fact which was falsified by some other fact of which the claimant was ignorant; or simply on the basis of an incorrect tacit assumption about a fact; and

(c) mere causative ignorance: where the claimant made neither an active nor a tacit mistake and simply acted in a state of mere causative ignorance. The claimant would not have acted as they did had they known of some fact of which they were ignorant; but when they acted, they held no belief or assumption about that fact, conscious or tacit; and no conscious belief or tacit assumption on which they acted was falsified by their ignorance of the relevant fact.

In *Pitt v Holt*, the UK Supreme Court took the view that only the first two were sufficient to form the basis of an action in equity to set aside a mistaken voluntary disposition. The Supreme Court noted, however, that the authors of (the then current edition of) Goff and Jones, were, on balance, in favour of treating mere causative ignorance as sufficient.

In the present case, the Jersey Royal Court found on the facts that the representor had held an incorrect conscious belief that the transfers from his UK bank account to the K Trust would not give rise to any UK tax liability. It was therefore not necessary to consider whether mere causative ignorance is sufficient as a matter of Jersey law.

The question may well, however, require decision on the facts of a future case. The courts in Jersey are not bound by *Pitt v Holt* and arguments can be envisaged which support the view that 'mere causative ignorance' should be regarded as sufficient.

The court's decision on the facts

The facts of the case brought it comfortably within the circumstances set out in Article 47E(3) of the Trusts Law. The representor was mistaken in his conscious belief that the transfers he made would not give rise to any UK tax liability. It was self-evident that he would not have made those transfers from his UK bank account if he had been advised of the tax liabilities. The court, having regard to the quantum, found there could be no question that the mistake was serious.

The representor was neither resident nor domiciled in the UK, and the tax liability was incurred unnecessarily. All that was required was for the transfers to be made from any one of his non-UK bank

accounts. The trustee supported the application as did the other beneficiaries of the K Trust. There were no third parties who would be affected by the transfers being set aside. HMRC had been notified of the application, and responded saying that, having reviewed the papers, they did not intend to make any representations. The court concluded that the mistake was indeed of so serious a character as to render it just for the court to set aside the transfers. The court therefore declared the transfers void *ab initio* pursuant to Article 47E of the Trusts Law.

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