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Protecting a beneficiary from a Protector

1. When dealing with an offshore trust it is not simply the actions of the trustees that can give cause for concern. Certain powers over the trust assets are often conferred on third parties who are commonly called "Protectors".
2. The primary question arising in connection with powers conferred on Protectors is whether the powers conferred upon them are beneficial, limited or fiduciary in nature. The importance of this classification is that it determines the duties which accompany the powers since breach of these duties can often be cited as a ground for removal.
3. On the question of whether a Protector is a fiduciary, the statute books of offshore jurisdictions fall into five categories:
 - a. those which provide that a protector owes a fiduciary duty (Anguilla, Antigua and Barbuda, Belize, Dominica, Montserrat, Saint Kitts and Nevis and Saint Vincent and the Grenadines);
 - b. the Cook Islands, where it is enacted that a protector is not a fiduciary;
 - c. those in which the statute refers to protectors, and adds that they are not liable for the *bona fide* exercise of their powers (the Bahamas, the British Virgin Islands, Mauritius);
 - d. those in which the statute refers to protectors but does not state whether or not they are fiduciaries (Barbados, Brunei Darussalam, Grenada, Saint Lucia, the Turks and Caicos Islands);
 - e. those in which the statute makes no reference to protectors (Bermuda, the Cayman Islands, Guernsey, the Isle of Man, Jersey, the Seychelles, Western Samoa).
4. The primary rule in English law is that powers conferred on beneficiaries are likely to be beneficial, as opposed to fiduciary. This rule has been expressly adopted in the Cayman Islands in *Re Z Trust*, and in the Bahamas in *Rawson Trust v Perlman*.
5. Conversely, where powers are conferred on an office created by the trust document, for the protection of the beneficiaries, the House of Lords has held that **these powers are fiduciary**.
6. Even where the trust instrument expressly provides that the protector's powers are not fiduciary ones, so that those powers are mere limited powers, a protector must nonetheless exercise the power in good faith for the purpose for which the power was intended, i.e. for the benefit of the beneficiaries. Consequently, he can be liable (and it was held in that case, removed) if he has a conflict of interest. This was the decision reached in the recent Jersey case of *Re Centre Trustees*, where it was held that the clause:

"declaring that the powers vested in the Protector are not held in a fiduciary capacity would simply mean that he is not under an obligation to consider from time to time whether or not to exercise them. If he does exercise

News

Chambers continues to be involved in the major litigation in the Chancery Division whilst strengthening our offshore links. We look forward to holding a reception in New York this autumn and to addressing STEP both in New York and Bermuda.

We are very pleased to welcome Matthew Slater to Chambers. He has a strong Chancery/Commercial practice both on and offshore which he combines with public law work in his role as Treasury Counsel.

We are also pleased to congratulate Professor Norman Palmer CBE on his award of honorary silk.



Sarah Asplin QC

them, then they have to be exercised for the benefit of one or more of the beneficiaries.”

7. The position might therefore be put thus:

- a. in most jurisdictions in which a statute determines the issue either way, the protector is a fiduciary;
- b. in other jurisdictions (bar the Cook Islands and those adopting the “*bona fide*” requirement), a protector almost certainly owes fiduciary duties;
- c. the trust instrument can change these positions. Where it is prescribed that a protector is not to be a fiduciary, however, the protector must still act in accordance with the terms of the trust, which often require him to act in a manner which would, in any event, have been compliant with fiduciary obligations.

8. The seminal case on the removal of trustees is *Letterstedt v Broers*, where Lord Blackburn outlined the extent of the court’s jurisdiction in the following terms:

“Story says, s. 1289, “But in **cases of positive misconduct**, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the **acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.**”

9. As the interests of the trust are of paramount importance, the jurisdiction will be exercised whenever the welfare of the beneficiaries requires it. The measure is not a punitive one – being instead one to ensure the proper execution of the trust – and as such a trustee’s removal or

otherwise is not strictly dependent on the existence of a proven breach of trust.

10. In respect of the question whether Protectors can be removed, as regards the legislation, there are two related areas for consideration: firstly, whether the court has the power to remove protectors at all, and secondly, if so, upon what grounds they may be removed. The jurisdictions may be broadly grouped into seven categories, though some jurisdictions fall into more than one of them.

11. The categories are:

- a. those which provide for the appointment of a new protector on grounds similar to those upon which a fiduciary might be removed, such as where he is either unable or unwilling to act (Anguilla, Barbados, Belize, Grenada Montserrat, Saint Vincent and the Grenadines);
- b. Antigua and Barbuda, which expressly recognises the possibility of the removal of protectors, but does not provide grounds for removal;
- c. the Bahamas, which in relation to purpose trusts, provides that an authorised applicant may bring “*other proceedings, against the trustees and other persons*”. This may well be said to include the removal of protectors;
- d. those which impliedly suggest that the court cannot remove a protector (Anguilla, Belize, Saint Kitts and Nevis);
- e. those which impliedly suggest that the court can remove a protector (Dominica, Saint Lucia);
- f. those in which no particular provision is made for the removal or appointment of protectors (the British Virgin Islands, Brunei Darussalam, the Cook Islands, Mauritius, the Turks and Caicos Islands, the Seychelles, Western Samoa);
- g. those in which the statute makes no reference to protectors (Bermuda, the Cayman Islands, the Isle of Man, Guernsey, Jersey).

12. There are few reported cases on the removal of protectors, and the four leading cases emanate from different jurisdictions. It is useful however to consider the different ways in which the courts have approached the question of removal.

Re Papadimitriou (2002):

13. This case was heard in the High Court of the Isle of Man (Chancery Division), Judgment being handed down on 18 September 2002.
14. This was a case in which the protector and the beneficiary were involved in acrimonious contentious litigation in a separate matter. The beneficiary applied to have the protector removed, alleging that the latter might prevent him from

receiving benefits to which he was properly entitled. The beneficiary pleaded a conflict of interest as his ground for removal. It will be remembered that there is no provisions mentioning protectors in the Isle of Man.

15. Deemster Cain stated that:

“*I am not prepared to say that the court does not have, in any circumstances, an inherent power to remove a protector, if that were necessary to protect the assets of a trust or to prevent the trusts failing, or if the continuance of a protector would prevent the trusts being properly executed. However, I consider that the court would only so act in exceptional circumstances.*”

16. In summarising the circumstances in which a court has jurisdiction to remove a protector (highlighted in bold), Deemster Cain more or less summarised the grounds in *Letterstedt v Broers*.

17. Deemster Cain then went on to consider whether, on the facts, it was necessary to remove the protector, implying that a conflict of interest could, if necessary, found such a decision. He held that such conflict as there was did not warrant the removal of the protector. The principal reasons for this were:

- a. it was the settlor’s deliberate decision to appoint this protector, so that not every refusal of consent by the protector merited her removal;
- b. other protectors had been considered and rejected, so the personal characteristics of this protector were clearly important;
- c. the trustees were still in charge of distributing the funds, not the protector (who was herself a beneficiary);
- d. if, on some future occasion, the trustees considered that the protector was preventing the trusts being properly executed, by improperly withholding the specified consent, they could apply to the court for relief. This situation had not yet occurred;
- e. the assets of the settlement were not at risk; and
- f. the interests of the beneficiaries were not at risk.

Re the Freiburg Trust (2004):

18. This case was heard in the Royal Court of Jersey. In this case the settlor of a discretionary trust provided for the plaintiff trust company as trustee and also appointed a protector. The trustee required the written consent of the protector to exercise certain powers, including the making of appointments of capital or income to any of the beneficiaries. The trust deed provided for the trustee to appoint a new protector but made no provision for the removal of the protector.



The deed also provided that the trustee did not need the consent of the protector if at any particular time there were no protector.

19. The protector was convicted of fraud, including misappropriation of moneys from the trust. After serving a term of imprisonment the protector disappeared. The trustee applied to the court for an order removing the protector and an order that the trustee need not appoint a new protector. It will be recalled that protectors are not dealt with in the Trusts (Jersey) Law 1984.

20. Sir Philip Bailhache (Bailliff) and Jurats Bullen and Allo started from a position strikingly similar to the second argument in *Re Papadimitriou*. They remarked that:

“The Trusts (Jersey) Law 1984 as amended confers no such express power upon the court, although there is provision at art 15 for the removal of a trustee. The court has, however, long asserted a power to remove trustees for cause. For example in Baudains v Du Heaume (1886) 211 Ex 379 the court removed from office a trustee who was in prison.”

21. Article 15 of the Trusts (Jersey) law 1984 (which, following the renumbering of the statute, is now Article 19) bears similarities to section 41 of the Trustee Act 1925, and *Baudains v Du Heaume* seems remarkably comparable, both in principle and in time, to *Letterstedt v Broers*.

22. From this position, the court had no hesitation in making the same connection made by Deemster Cain, namely that the principles relating to the removal of trustees could be applied to the removal of protectors. The court held:

“We have no doubt that this court has an inherent jurisdiction to remove a protector of a trust from office for due cause.

A protector is in the position of a fiduciary and the court must have power to police the activities of any fiduciary in relation to a trust whether he be called a protector or indeed by any other name. Such a jurisdiction is a necessary incident of the duties to protect the interests of beneficiaries, especially minor and unascertained beneficiaries, and to ensure that the wishes of the settlor are respected as far as may be possible and appropriate. As Lord Morris of Borth-y-Gest stated in Connelly v DPP [1964] AC 1254 at 1301, [1964] 2 All ER 401 at 409:

‘There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and defeat any attempted thwarting of its process.’

It would be quite unconscionable and unthinkable that this court should have no jurisdiction to remove a protector who was thwarting the execution of a trust or who was otherwise unfit to exercise the functions entrusted to him by the trust instrument.”

23. The court proceeded to a damning condemnation of the protector in question, finding that he satisfied the threshold for the removal of a protector:

“Mr Goven is the antithesis of a protector. Far from protecting the trust, he has actually defrauded it and misappropriated part of the trust fund. The only surviving adult beneficiaries are supportive of the removal of the protector. Mr Renouf, who appeared for the unascertained and unborn beneficiaries, also confirmed that, in his view, the removal of the protector was in the interests of the trust.

We can think of few clearer cases calling for the exercise of the court’s jurisdiction. We accordingly remove Mr Goven from the office of protector of the Freiburg Trust with immediate effect.”

Bridge Trustees Ltd v Noel Penny (Turbines) Ltd (2008):

24. Whilst not a case concerning a protector, this authority is of importance. It was a decision of Judge Purle QC, who sat as an additional judge of the High Court of Justice, Chancery Division, Birmingham District Registry.

25. The case concerned a principal employer, P of a pension scheme which was being wound up. It was held, first, that P had ceased to be a trustee, but was now in possession of a fiduciary power which he was bound to exercise in some way, applying *Mettoy Pension Trustees Ltd v Evans*.

26. Purle J turned, secondly, to the question whether the court had power under its inherent jurisdiction to ensure that the trust was executed in accordance with its terms:

“Outside section 41 of the Trustee Act 1925, the Court has power under its inherent jurisdiction to remove or appoint a new trustee: see Lewin, paras 13-47 to 48 at pp. 462-3. As this is done in exercise of the Court’s jurisdiction to execute a trust, it would seem to follow in principle that the Court, in the exercise of that same jurisdiction, could in a proper case appoint some fit and proper person to exercise a fiduciary power in place of the donee. A proper case would be where the donee is refusing to act, has died (or in the case of a corporation been dissolved) disappeared or is otherwise unsuitable to exercise the power in question.

In reaching this conclusion, I take note of 3 off-shore authorities, 2 from the Isle of Man, and one from Jersey, where the Courts there have recognised the inherent

power of the Court to remove or appoint a protector where (as is commonly the case) the powers of a protector under the settlement in question can properly be described as “fiduciary”: see Rawcliffe v Steele [1993-95] MLR 287; re Papadimitriou [2004] WTLR 287; re Freiburg Trust (2003-4) ITEL 1078. As the Jersey Court succinctly put the matter in the Freiburg decision:

“It would be quite unconscionable and unthinkable that this court should have no jurisdiction to remove a protector who was thwarting the execution of a trust or who was otherwise unfit to exercise the functions entrusted to him by the trust instrument.”

That reasoning applies to the donee of a fiduciary power. Whether the Court should exercise its power to replace the donee is another matter but where, as here, the donee is acting in breach of its duty by refusing to exercise the power, it is clear that some intervention by the Court is necessary.

I therefore rule that I do have power to appoint the Claimant in place of the Defendant to exercise the powers under Rule 9.”

27. Purle J went on to hold that, as P had in fact breached its duty by refusing to exercise the power, the court had the power to intervene and appoint B in the place of P.

Centre Trustees (2009):

28. This case was heard in the Royal Court of Jersey, judgment being handed down on 2 June 2009. This case is slightly different, in that the court had to consider a protector’s position when he was not a fiduciary (because the trust deed expressly stated that the powers were not fiduciary in nature), but the mere holder of limited powers.

29. The facts in this case were as follows: the protector (Mr Pabst) of the VR Trust was a business partner of the prematurely deceased settlor and also the appointer of the VR trust with power to appoint new or additional trustees and new protectors. The protector was also the settlor of a parallel trust, the Africa Trust. The Africa Trust and the VR Trust each owned 50% of Terret Holdings Limited.

30. Terret Holdings Limited, at the behest of the protector of the VR Trust, distributed the proceeds of the sale some of its assets dramatically unevenly between the two trusts heavily favouring the Africa Trust at the expense of the VR Trust. The protector of VR Trust offered to buy the assets of the VR Trust for the nominal sum of \$1 when the assets were valued by Ernst & Young at over \$5 million. The protector of the VR Trust claimed entitlement and demanded payment of large sums from the VR Trust assets on behalf of various other entities which was refused by the trustee. The Protector of the VR Trust then appointed

an additional trustee, Langtry Trust Company (Channel Islands) Limited, for the purposes of re-evaluating the Protector's claims to payment of the trust assets.

31. The last move, the appointment of the new trustee quickly backfired as the new trustee sided with the existing trustee's position. The trustees applied for the removal of the protector. The Protector remained in office right up until the hearing of the application for his removal. Importantly, the trust deed provided that the power to appoint a protector lay with the appointer or failing the appointer in the trustees.
32. Having first established that the protector had limited powers which he had to perform in good faith for the benefit of the beneficiaries, the court set out three principal obligations arising where a protector has a conflict of interest, two of which were on the protector himself and one of which was on the trustee:
- the protector is obliged to disclose the conflicting interest to the trustee and in the case of a fixed trust to the beneficiaries or in the case of a discretionary trust to the principal beneficiaries if practicable;
 - the protector is also required to resign unless:
 - it is in the interests of the beneficiaries for him to remain; and
 - he reasonably and honestly believes that he can discharge his duties in the interests of the beneficiaries;
 - the trustee has a "duty" to apply for the protector's removal where the protector has failed to comply with the protector's obligation in B.
33. In this instance, the court held that the conflict of interest was pervasive and the learned judges stated that they could not envisage any circumstances in which Mr Pabst could reasonably contemplate remaining in office. It was held that Mr Pabst had a duty to resign from the moment it was contemplated that claims in which he had an interest would be advanced against the VR Family Trust. As he had failed to do so, certain cost orders were made against Mr Pabst.



Andrew Child

Recent Cases in Chambers

Since our last newsletter members of Chambers have been involved in a number of novel, interesting and ground-breaking cases in the private client field. Here we set out the details of three that are particularly noteworthy.

Servoz-Gavin and Nuncupative Wills

In *Re Servoz-Gavin Deceased* [2010] 1 All ER 410 Gilead Cooper QC appeared in the first reported case involving a nuncupative, or "seaman's" will for over 20 years.

Section 11 of the Wills Act 1837 provides "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this Act" that is, without the need for the signature, witnesses, or even writing which is otherwise required by section 9 of the Act.

The deceased, was a "freelance" naval radio officer, signing up for voyages on merchant ships whenever work was available.

The Claimant was the deceased's aunt, referred to in the judgment of Peter Langan QC as "Aunt Anne". She was 98 years old at the time of the hearing and was supported in her claim by her granddaughter, who was also the personal representative of the deceased's estate, and by her daughter Christine, the deceased's cousin.

The Claimant argued that in 1985 and again in 1990 the deceased had made nuncupative wills which fell within the requirements of s 11. The first will, in 1985, was made during the course of a conversation between the deceased and Christine in which he said "*You listen to me. If anything happens to me, I want everything to go to Auntie Anne*". In 1990 he said again "*What I told you before still applies. If anything happens to me, if I snuff it, I want everything to go to Auntie Anne*".

No written statement of the deceased's intentions was put in evidence, and no one else was present at the time that the alleged wills were made. There was no evidence that the deceased had made similar statements to anyone other than Christine. One of the interesting elements of the case was that, under the circumstances, it was agreed that Christine's evidence would be given by what the Judge described as "*an old-style examination-in-chief*".

The Judge accepted Christine's version of events and held that although the evidence for the 1985 will was equivocal, the deceased had made a valid nuncupative will in 1990.

The case demonstrates the extreme width of the provisions of s 11 of the 1837 Act. The deceased was not "*at sea*" when he declared

his intentions to Christine in either 1985 or 1990 in the sense of being actually aboard, but was in each case on land and "*under orders*" to join his ship. Following a line of cases involving valid nuncupative wills made in preparation for a voyage the Judge held that this was sufficient.

Neither was the deceased in the service of the Royal Navy (which might draw a parallel with the equivalent exemption for soldiers), or even under orders to join a British-registered merchant ship, at the time he declared his wishes to Christine: in both 1985 and 1990 he was under orders to join a foreign-registered ship. The Judge accepted that the section should be read in a "non-restrictive" manner in this respect, and refused to limit its scope to sailors serving in the British merchant navy.

Finally, the fact that the deceased died in 2005, some 15 years after making his will and long after returning from his contemplated voyage, underlines the fact that there is no equivalent requirement in s 11 to that required for a valid donatio mortis causa that when the contemplated peril is ended the gift is automatically revoked.

Futter v Futter and the Hastings-Bass Jurisdiction

Richard Wilson appeared for the successful trustees in *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982, an application by the trustees for the Court to set aside an exercise of their discretion under the Rule in *Re: Hastings-Bass*.

The facts on which the application was based were fairly typical: the trustees had exercised discretionary powers of advancement and enlargement under two family trust deeds, believing that any chargeable gain which arose could be offset by losses incurred by the settlor. Sadly they had failed to take into account the effect of s 2(4) of the Taxation of Chargeable Gains Act 1992 which prohibits the offsetting of losses in such circumstances. Consequently the dispositions effected by the trustees gave rise to a significant and unanticipated tax charge.

The Rule in *Re: Hastings-Bass* in its present form provides that, where a trustee acts under a discretion given to him by the terms of a trust, the court will interfere with his actions if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account. The trustees' evidence was that, perhaps unsurprisingly, they would not have exercised their powers had they appreciated the tax charge which would arise.

The case is noteworthy as one of two this year in which HMRC has abandoned its previous stance of not appearing on Hastings-Bass applications to play an active part at the hearing, disputing not the trustees' evidence but the extent of the Rule itself. The arguments put forward by HMRC

against the application of the Rule to the facts of the Futter case were threefold.

Firstly HMRC argued that, by analogy with the law of mistake, the Rule should be restricted to cases where the effect of the trustees' actions was unintended, rather than merely the consequences. This was rejected by Norris J as inconsistent with previous first-instance authority (presumably causing some at HMRC to wish that they had played a part in those earlier hearings at which the Rule was developed).

Secondly HMRC argued that trustees should only be allowed to rely on the rule in *Hastings-Bass* where the factor they failed to take into account was "objectively significant". This was also rejected by Norris J on the grounds that tax consequences were a proper consideration for trustees to take into account. On this basis, and where trustees say (albeit subjectively) that they would not have acted as they did had they been aware of those consequences, it is difficult to see how a substantive tax charge could ever be an insignificant consideration, whether objectively or otherwise.

The third argument was that where, as in Futter, the trustees had had the benefit of legal advice, it was those legal advisors rather than the public purse which should bear the loss. This was also unsuccessful.

Having decided to play an active part in *Hastings-Bass* applications HMRC is not giving up easily, and has appealed Norris J's decision. The hearing, which has been set down for three days from the 23rd November 2010, will be the first opportunity the Court of Appeal has had to consider the scope of the Rule since its decision in *Hastings-Bass* itself in 1975.

Re M

Finally, Charlotte Edge appeared on behalf of five charities in *Re M* [2009] WTLR 1791, an application for a statutory will which came before Munby J sitting as a judge of the Court of Protection.

The court's jurisdiction to make a statutory will (i.e. a will on behalf of a patient who lacks capacity to do so himself) is among the functions of the Court of Protection which have been transformed by the Mental Capacity Act 2005, which introduces a new statutory formula for ascertaining a patient's wishes and determining his best interests. s 1 of the 2005 Act provides that any act done or decision taken under it must be made "in his best interests". Those interests are to be ascertained in accordance with s 4 which provides, inter alia, that the Court must take into account the patient's past and present wishes and feelings, beliefs and values, and the other factors which he would be likely to consider if he were able.

M was an elderly lady lacking testamentary capacity who had lived for some years with "Z" and in 2004 had executed a will in his favour. During the time she lived with Z, M transferred him what Munby J described as "very substantial sums of money". Z opposed the making of the statutory will.

The charities were joined as respondents having been named as beneficiaries in varying but fairly consistent proportions of wills made by M before 2004.

Munby J agreed with the earlier decision of Lewison J in *Re P* [2005] EWHC 163 (Ch) that the 2005 Act marks a "radical change" in the treatment of people lacking capacity so that the cases decided under the earlier acts are no longer relevant. According to Munby J's judgment there is now "no place for any reference to – any harking back to – judicial decisions under the earlier and very different statutory scheme". These first decisions of the Court on the new Act are thus particularly valuable to practitioners grappling with the new scheme.

Munby J also acknowledged the difficulty, in statutory will applications, in applying a test which focuses on the patient's "best interests" to a decision which will only take effect after his death. Here he also agreed with Lewison J's earlier decision, holding that M's best interests would not cease on the moment of death and that human beings have an interest in doing "the right thing", either during their life or by their will.

The practical application of this view can be seen in the terms of the statutory will made by Munby J, which provided for the charities named in her earlier wills and did not make provision for one of M's relatives (who she had previously stated had enough money of his own). Munby J expressly declined to make provision for the relative either as a reward for the care he was taking of M, or as an inducement for him to do more for her in the future.

The judgments in each of the above cases, along with a number of other cases in which members of Chambers have been involved, can be downloaded from our website.



Charlotte Edge

Mistake or Confusion?

Applications to the Court to set aside voluntary transactions on the grounds of mistake continue to be extremely popular in a number of jurisdictions. However, rather than creating certainty in this area of law, the recent cases in a number of jurisdictions have raised important questions concerning the nature of the mistake that is required in order to enable relief to be granted.

The leading modern English authority is *Gibbon v Mitchell* [1990] 1 WLR, in which Millett J (as he then was) set out the following test:

"In my judgment ... wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponent did not intend the transaction to have the effect which 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"

The remedy of rescission is therefore available whether the operative mistake is one of law or fact. However, that mistake must be as to the effect and not the consequences of the transaction. The distinction between the effect of a transaction and its consequences is often not a particularly easy one to draw. However, it seems clear that applied strictly, the *Gibbon v Mitchell* test would prevent rescission from being available where a settlor was fully aware of the effect of his deed (e.g. the creation of a discretionary trust for a particular class) but was mistaken as to the tax consequences, a point made by Davis J in *Anker-Petersen v Christensen* [2002] WTLR 313. This is of course, very different from the position under the Rule in *Hastings-Bass* which enables a trustee's exercise of a discretionary power to be declared void if it can be shown that he was mistaken as to the correct tax consequences (see *Sieff v Fox* [2005] 1 WLR 3811).

The next significant development in England came with the decision in *Ogden v Griffiths* [2009] 1 Ch 162. In *Ogden* the Court relied not on *Gibbon v Mitchell*, but on the older authority Court of Appeal authority of *Ogilvie v Littleboy* (1897) 13 TLR 399 (an appeal from which was dismissed by the House of Lords). In *Ogilvie*, Lindley LJ set out the relevant test as follows:

"Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relationship

between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor ... In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he 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."

There is, at the very least, a clear difference in emphasis between the test in *Ogilvie* and that in *Gibbon*. In the former, no distinction is drawn between mistakes as to *effect* and mistakes as to *consequence*: all that is required is a mistake of a sufficiently serious nature as to render it unjust for the transaction to stand. It is also notable that *Ogilvie* was not cited to the Court in *Gibbon*.

The rediscovery of the *Ogilvie* test has had a significant impact, particularly in offshore jurisdictions. In the Manx case of *McBurney v McBurney* [2009] WTLR 1489 the Deputy Deemster held that a mistake as to tax consequences was sufficient to entitle a party to rescind a settlement. The Jersey Royal Court came to the same conclusion in *Re The A Trust* [2009] JRC 245. Two recent Jersey decisions – *Re The Lochmore Trust* [2010] JRC 068 and *Re The First Conferences Limited 203 Employee Benefit Trust* [2010] JRC 055A have confirmed that in that jurisdiction, the Court has now abandoned the *Gibbon v Mitchell* test and will apply the broader test set out in *Ogilvie*. In doing so it will grant relief where there is a mistake as to tax consequences provided it can be shown that the settlor would not have entered into the transaction 'but for' the mistake and the mistake is of so serious a character as to render it unjust on the part of the donee to retain the property.

The *Lochmore* case involved a transfer of shares into a trust in order to obtain certain UK Capital Gains Tax advantages. In order to avoid paying UK Inheritance Tax ('IHT') it was decided to effect the transfer by means of a sale rather than a gift. However, by mistake, it was effected in such a way as to constitute a gift rather than a sale and gave rise to a charge to IHT. Whilst the mistake in that case could be categorised as one of *effect* rather than *consequence*, the Royal Court did not seek to reconcile its decision with that in *Gibbon*, and held that tax consequences were sufficient to enable rescission to be granted. The Court stated the following:

"... we are satisfied that this is indeed a case of a mistake of so serious a character as to render it unjust on the part of the trustee and beneficiaries to retain the property. As a result of the shares being gifted into the Trust rather sold, a chargeable transfer for inheritance tax purposes has arisen which means that the settlor is liable to a charge to inheritance tax in the approximate sum of £800,000. This is clearly a mistake of a serious nature and it would be unjust for the beneficiaries to be able to retain the benefit of the trust fund at a time when the settlor is incurring a charge of £800,000 for inheritance tax which he did not intend to incur."

It is notable that IHT is charged on the donor and not the donee, and it was that fact that would have made it unjust for the settlement not have been set aside: making the gift meant that the donor became liable for a substantial tax charge. Had the charge been on the donee, it seems likely that the Court would have held that no such injustice arose.

Whilst the Jersey and Manx Courts have seemingly abandoned the distinction between *effect* and *consequence* in favour of the broader test of injustice in *Ogilvie*, the English High Court has thus far declined to do the same. In *Pitt v Holt* [2010] EWHC 45 (Ch) Robert Englehart QC (sitting as a deputy Judge) held that there was no "real divergence" between the tests in *Ogilvie* and *Gibbon* as in *Ogilvie* Lindley LJ was not considering the question of the type of mistake required in order to enable rescission to be granted. In doing so, he held that the *McBurney* case "does not accord with English Law". The Deputy Judge did, however, leave open the question of whether in certain circumstances a mistake as to the tax consequences might enable rescission to be granted:

"It is perhaps just possible that a mistake about the resultant tax might count as an operative mistake where tax planning was the objective of a disposition and the person making the disposition made an error of tax law, although I should certainly not be taken as expressing any view about that."

Permission to appeal has been given in *Pitt v Holt* and therefore the Court of Appeal will soon have the opportunity to deal with this issue in the near future. That Court has previously approved *Gibbon* in the context of rectification but expressly left open the question of whether rescission would be available where the mistake was as to fiscal consequences (see *Allnutt v Wilding* [2010] EWCA Civ 412).

The appeal in *Pitt* will give the Court of Appeal the chance to clarify the English Law of mistake and decide whether it accords with that in Jersey and the Isle of Man. The crucial question is whether *Gibbon v Mitchell* can be reconciled with *Ogilvie v Littleboy* (as the Deputy Judge held in *Pitt* at first instance) or whether *Gibbon* is *per incuriam* due to *Ogilvie* not having been cited in it.

The decision in *Gibbon* is questionable for another reason: one of the decisions relied upon by Millett J for the distinction between *effect* and *consequence* appears to be one in which relief was granted where the mistake was on of consequence and not effect. In *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 the donor decided to make a gift to one of her daughters in order to redress a perceived imbalance created by a previous gift to her other daughter. In fact, the donor had made gifts to both of her daughters, but had simply forgotten about one of them. The gift made by her therefore created precisely the sort of imbalance she had wished to eliminate. The Court granted relief on the basis of her mistake. It is hard to see how the mistake in that case can be said to fall into the 'effect' category: the donor intended to make a gift to the daughter in question and achieved that outcome. The *consequence* of doing so, however, was entirely different from what she had intended.

Given the great importance of tax planning in relation to so many transactions, there is a considerable practical attraction in the approach of the Manx and Jersey Courts in this context. It is also arguably more consistent with the broad test set out by the Court of Appeal in *Ogilvie* than the test applied in *Gibbon*. By the end of this year, we should find out whether the Court of Appeal agrees.



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