R

Jurisdiction:	Jersey
Judge:	Sir Philip Bailhache, Jurats Clapham, Liddiard, Bailhache, Commr. and Jurats Clapham and Liddiard
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Court:	Royal Court

Text

[2011] JRC 117

ROYAL COURT

(Samedi)

Before:

Sir Philip Bailhache, **Kt., Commissioner and** Jurats Clapham **and** Liddiard.

In the Matter of the Representation of R
And In The Matter Of The S Trust Established On 3 April 1997
And In The Matter Of Article 51 Of The Trusts (Jersey) Law 1984 (As Amended)

Advocate R. J. MacRae **for the Representor**.

Advocate E. C. G. Bennett **for B Limited, the Trustee**.

Authorities

Service of Process Rules 1994.

Dicey, Morris and Collins on the Conflict of Laws, 14th edition, 2006.

HMRC v Gresh (2009–10) GLR 239.

Re Seaton Trustees Limited [2009] JLR N 15.

Re Seaton Trustees Limited [2009] JRC 050.

Pitt v Holt and *Futter v Futter* [2011] EWCA Civ.197.

In the matter of L [2011] JRC 085.

Re the A Trust [2009] JLR 447.

In re First Conferences Limited 2003 Employee Benefit Trust [2010] JRC 055A.

In re the Lochmore Trust [2010] JRC 068.

Gibbon v Mitchell [1990] 1 WLR 1304.

Ogilvie v Allen (1889) 15 TLR 294.

JP v Atlas Trust Company (Jersey) Limited [2008] JRC 159.

Kleinwort Benson Limited v Lincoln City Council [1999] 2 AC 349.

Re Glubb [1901] 1 Ch 354.

Abram Steamship Co v Westville Shipping Co [1923] AC 773.

THE COMMISSIONER:

Introduction

1 This is a representation brought by R ("the representor") as *de facto* settlor of the S Trust ("the Trust"), which is a discretionary trust established by declaration of trust by B Limited on 3 rd April 1997. The representor seeks orders that the transfer of assets by her to B Limited is voidable at her instance on the ground of mistake, and that subsequent transfers of assets from the Trust to three new trusts established in the USA ("the New Trusts") are similarly voidable at her instance. On 19 th April 2011, the Court announced that it would make those orders. Our reasons are set out below.

2 The background to the application appears from an affidavit sworn by the representor and may be stated as follows. On 3 rd April 1997, the representor transferred to B Limited, a company incorporated in Jersey, a number of shares in a French company called C. Subsequently, B Limited (to which we will hereafter refer as “the trustee”) settled the shares on trust in its capacity of trustee of the Trust. The beneficiaries of the Trust have been, since the execution of a Deed of Exclusion by the trustee on 31 st December 2007, the representor's children and grandchildren and any future issue. The settlement of these shares resulted from advice given by Norton Rose, a leading firm of London solicitors. The representor had sought advice on tax planning issues relating to her holding of shares in a family company called D, established by her grandfather and another. D is an international trading company with its headquarters in France. The representor's holding in D was held by C. The advice of Norton Rose was that if the representor gifted all her C shares to a UK discretionary trust, no UK Inheritance Tax (“IHT”) would be payable because 100% business property relief would apply to the gift of the shares. In fact, that advice was wrong.

3 The representor was at the time of the transfer to the Trust deemed to be domiciled in England, and an immediate charge to IHT arose in the sum of £1,943,689, including interest. That liability was met by the representor. Subsequently, she instituted proceedings against Norton Rose which were apparently compromised on terms that have not been disclosed.

4 The representor's difficulties were not however confined to IHT. At the time of the creation of the Trust, no consideration was given to the position of the principal beneficiaries who were, and still are, resident in the USA. They are US citizens and therefore US taxpayers. Distributions of accumulated income from the Trust to beneficiaries who are US taxpayers would be subject to the onerous tax rules which apply to US beneficiaries receiving distributions from foreign non-grantor trusts such as the Trust. At worst, it appears that the potential effect of those rules would be to impose a tax charge of up to 100% of the value of the distribution. That is the advice of David Stein, a US tax lawyer and a partner of Withers Bergman LLP. His view is that the US federal income tax rules in relation to non-US trusts with US beneficiaries are notoriously arcane and “ *often produce unexpected or counter-intuitive results”*. The representor was advised of none of this at the material time.

5 The representor has deposed that, if she had appreciated that the creation of the Trust would give rise to immediate charges to IHT and to the adverse tax treatment in the USA of the US resident beneficiaries, she would not have transferred the C shares to the trustee, nor directed the trustee to declare a trust over the shares. In simple terms, but for the misleading and/or inadequate legal advice that she received, the representor would not have taken those steps. Instead, she would either have taken no steps at all, or would have moved to Switzerland, as indeed she subsequently did, and made other arrangements.

6 In April 2001, the representor sought advice from tax counsel in England as to whether it was possible to rescind the transfer of the C shares to the Trust, and as to the fiscal

consequences of any such rescission. The US tax consequences were not at that stage considered. The representor was advised that, on the basis of the law as it then stood in England, such an application would probably fail, and merely add to the costs incurred in pursuing an action against her former legal advisers. On the basis of that advice, she took no action in 2001.

7 In 2007, the New Trusts were established by the representor in accordance with the laws of the State of Delaware in the USA. They were the F Trust, the G Trust, and the H Trust. The representor was named as the grantor of the New Trusts on the basis that she was the source of the S Trust Funds. In February 2008, substantial funds were transferred by the trustee of the Trust to the trustees of the New Trusts. The beneficiaries of the New Trusts are the representor's children and their issue. No other distributions from the Trust have been made since its creation.

8 The transfer of funds from the Trust to the New Trusts did not give rise to any further liability to IHT. Both the Trust and the New Trusts remain within the IHT net, and a 10 year anniversary charge and tax charges on distribution apply to all the trusts.

9 The representor has moved to Switzerland, where she is now permanently resident. She lost her deemed UK domicile status on 6 th April 2011, having been non-resident in the UK for three full tax years.

10 If the representor obtained a declaration that the trust was voidable at her instance, counsel submitted that this would impact upon the New Trusts in that they were funded by assets transferred from the Trust. The assets, being subject to an equity in favour of the representor entitling her to undo the transaction, and not being in the hands of good faith purchasers for value, remained subject to that equity in the hands of the trustees of the New Trusts. The representor accordingly sought a further declaration that the New Trusts were similarly voidable at her instance.

Jurisdiction and applicable law

11 It is clear that the Court has jurisdiction to hear the representor's application. The principal respondent to the representation is a trust company incorporated and resident in Jersey and is amenable to the Court's jurisdiction. The beneficiaries of the Trust are necessary or proper parties who can be served out of the jurisdiction under the Service of Process Rules 1994.

12 What is perhaps not quite so clear is what law should be applied to the transfer by the representor of the trust assets to the trustee. The answer to that question is important, because the proper law of the transfer will govern the issue of whether the transfer may be declared voidable on the ground of mistake.

13 There are two main contenders in the ring. At the time when the transfer was made, the representor was resident and domiciled for tax purposes in England. English law is therefore one protagonist. The transfer was made to a company registered in Jersey which subsequently declared a trust of that property governed by English law. The Trust is administered in Jersey. The law of Jersey is accordingly the other contender. It is true that the property transferred was shares in a company registered in France, but we do not think that that fact alone is sufficient to advance the cause of French law as a third possibility. The law governing the transfer is either English law or Jersey law.

14 The most relevant rule of Jersey private international law (as in England) is the rule for restitutionary obligations. The rhetorical question is – with which jurisdiction does the restitutionary obligation have the closest and most real connection? Counsel for the representor drew our attention to a passage from Dicey, Morris and Collins on the Conflict of Laws, 14 th edition, 2006, a work which has often been treated as authoritative in this Court. Rule 230 at paragraph 34R – 001 provides:-

> ***"Rule 230-***
>
> ***The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation*** .
>
> ***The proper law of the obligation is (semble) determined as follows*:**
>
> ***If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;***
>
> ***If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);***
>
> ***If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."***

Counsel submitted that the question for the Court was where the enrichment occurred, and he contended that it occurred in Jersey. Not only did the enrichment occur in Jersey, but the potential obligee (the trustee) is resident in Jersey and the administration of the property which would be the subject of the potential restitutionary obligation is also undertaken in this jurisdiction. Mr MacRae accordingly submitted that these factors outweighed the residence and domicile of the representor at the time when the transfer was made, and the proper law of the Trust. Counsel for the trustee did not demur from those submissions.

15 This is not a case where the alleged obligation arises in connection with a contract or in connection with immovable property. Nor is it a case where a beneficiary is seeking to enforce a claim arising under a trust which would ordinarily be governed by the choice of law rules for trusts. This is a case falling within the ***"other circumstances"*** mentioned in Rule 230. The proper law of the obligation is accordingly the law of the country where the

enrichment occurs. As we indicated during oral submissions, we had no doubt that the law of the restitutionary obligation, assuming it existed, was the law of Jersey. We accepted the submissions of counsel for the representor. In addition, it seemed to us just and convenient that, if the representor obtained the relief which she was seeking, enforcement of the restitutionary obligation should be dealt with in accordance with the law of the country where the trustee was incorporated. The question whether the transfer by the representor is voidable on the ground of mistake was therefore to be determined in accordance with the law of Jersey.

The parties to the representation

16 When the representation was first presented to the Court on 18 th March 2011, the Court ordered that the trustee and the issue of the representor be convened. The Court also ordered that the representor's advocates should inform the trustees of the New Trusts that:-

> *"..the Representor is seeking directions of the Royal Court as to whether the transfer of the shares in C to B as trustee of the Trust is voidable at the instance of the Representor on the ground of her mistake, and as to whether the transfer by B Limited to the New Trusts is similarly voidable, and of the date of the anticipated hearing."*

17 At the hearing on 6 th April 2011, the Court enquired whether Her Majesty's Revenue and Customs ("HMRC") had a sufficient interest in the proceedings to warrant their being convened. The Court had in mind the judgment of the Guernsey Court of Appeal in *HMRC v Gresh* (2009–10) GLR 239, where the Court allowed an appeal from the decision of the Guernsey Royal Court and declared that it was just and convenient to join HMRC as a party to the Hastings Bass application by Mr Gresh. In so doing, the Guernsey Court of Appeal disapproved a dictum of Clyde-Smith, Commissioner in *Re Seaton Trustees Limited* [2009] JLR N 15; [2009] JRC 050 that HMRC had no interest in a similar Hastings Bass application but ***"only in the UK tax consequences that may flow from it"***. It is true that *HMRC v Gresh* concerned a Hastings Bass application rather than an application under the law of mistake. We were, nonetheless, concerned that HMRC had not even been informed of the application so as to afford them the opportunity of considering whether they wished to apply for joinder.

18 In the event, we were satisfied that it was unnecessary to adjourn and to convene HMRC, or to notify them of the application. Counsel for the representor drew our attention to an affidavit sworn by Samantha Morgan, a partner in Withers LLP on 23 rd March 2011 where Ms Morgan deposed that, in the event of relief being granted to the representor, she had been instructed that no claim would be made to recover any tax paid on the creation of the Trust or on any 10 year anniversary of the creation of the Trust or the New Trusts. Furthermore, if the representor were to revoke the Trusts, IHT would be paid on the capital distributed. In any event, it is possible to anticipate that HMRC would have done no more than to ask the Court to apply the decision of the English Court of Appeal in *Pitt v Holt* and

Futter v Futter [2011] EWCA Civ.197, which we are to consider in some detail below. That was, effectively, the stance taken by HMRC when notified of an application that led to this Court's decision in *In the matter of L* [2011] JRC 085. In all the circumstances, we were satisfied that it was not appropriate to convene HMRC in this case, even if we think that it would have been desirable to have notified them of the application.

The law of mistake

19 The application of equitable principles to the law of mistake in this jurisdiction was definitively stated in *Re the A Trust* [2009] JLR 447. Clyde-Smith, Commissioner, reviewed the relevant Jersey authorities and cases decided in England and the Isle of Man. He concluded, at paragraphs 43 and 44:-

> ***"43. We therefore conclude that under Jersey law the test when considering an application to set aside a voluntary disposition on the ground of mistake by an individual is that set out in*** *Ogilvie v. Littleboy* (13 T.L.R. at 400), ***as confirmed in*** *Ogilvie v Allen* ***(16), namely whether the donor or settlor "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". In applying the test, the court must be satisfied that the donor or settlor would not have entered into the transaction "but for" the mistake***.
>
> ***44. This case involves a mistake of law as opposed to fact. In Clarkson (5) (see para. 34) and In re Betsam Trust (4) (see para. 39), the Isle of Man courts could see no reason to distinguish between the two kinds of mistake, citing*** *Gibbon v. Mitchell* ([1990] 1 W.L.R. at 1309) ***where Millett, J. was content it mattered not whether the mistake was one of law or of fact, and the House of Lords decision in*** *Kleinwort Benson Ltd. v. Lincoln C.C*. ***(15) which abolished the rule that payments under a mistake of law were not recoverable.*** In our view, the Jersey court can grant relief whether the error is one of law or one of fact."

20 *In re the A Trust* has been followed by different judges of the Royal Court in subsequent cases, namely *In re First Conferences Limited 2003 Employee Benefit Trust* [2010] JRC 055A (William Bailhache, Deputy Bailiff) and *In re the Lochmore Trust* [2010] JRC 068 (Birt, Bailiff). In the latter case, Birt, Bailiff stated:-

> ***"10. The law regarding the setting aside of a trust on the ground of mistake has been considered in depth and clarified in the recent decision of the Royal Court in*** *Re the A Trust* [2009] JRC 245. ***In that judgment, Commissioner Clyde-Smith reviewed the different tests as set out in*** *Gibbon v Mitchell* (1991) 1 WLR 1304 ***on the one hand and*** *Ogilvie v Allen* (1889) 15 TLR 294 ***on the other and adopted the test set out in the latter case, namely whether the donor or settlor was under some mistake of so serious a character as to render it unjust on the part of the done to retain the property given to him.*** In applying that test, the Court must be

satisfied that the donor or settlor would not have entered into the transaction “but for” the mistake. The Court rejected the distinction between a mistake as to the “effect” of a transaction and a mistake as to the “consequences” of a transaction as formulated in *Gibbon v Mitchell*.

11. It follows that the Court has to ask itself the following questions:-

(i) Was there a mistake on the part of the settlor?

(ii) Would the settlor not have entered into the transaction “but for” the mistake?

(iii) Was the mistake of so serious a character as to render it unjust on the part of the done to retain the property?”

21 This Court has therefore set its face against the ***“effects/consequences”*** distinction first articulated by Millett J (as he then was) in *Gibbon v Mitchell* [1990] 1 WLR 1304, where he concluded that the authorities showed that:-

“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 disponor 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.”

22 The Royal Court's rejection of the *Gibbon v Mitchell* test was not, until recently, without some empathic reaction in the English courts. In a helpful affidavit sworn in these proceedings, Professor Paul Matthews referred to a number of judicial pronouncements in this way:-

“6. The test propounded by Mr Justice Millett was narrower than that of Lord Justice Lindley, and required a distinction to be drawn between effects and consequences. In a later English case , *AMP (UK) Ltd. v Barker*, ***Lawrence Collins J commented that –***

‘If anything, it is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them.’

7. But some English judges found it difficult to apply in practice. Thus, in *Anker-Petersen v Christenson*, ***Mr Justice Davis said*:**

‘38. It will be noted that a distinction is to be drawn between the effect of a transaction and the consequences of a transaction. In some cases that may be

a rather difficult distinction to draw. Indeed, in the Shorter Oxford English Dictionary one of the definitions of "effect" is given as "consequences". Nevertheless, I think one can see what is behind the distinction. An example in this context might be tax. If a party enters into a deed (with a view to saving tax) on terms which are fully understood and where the effect of such terms is fully appreciated and if for whatever reason the anticipated desirable tax consequences thereafter do not flow, it would really not be open, in the ordinary way at least, to such person to seek to set aside that deed on the ground that he had not understood its nature or effect. I say this appreciating that possibly the position may be different in a case of the exercise of a power or of a discretion by a fiduciary: it may be – and I say no more than it may be – that the adverse and unexpected tax consequences of the exercise of the power or discretion may be invoked to set aside the exercise of that particular power or discretion. But I think the position is entirely different where what is sought to be set aside is a deed entered into by way of voluntary transaction .

39. Clearly, if a person does not understand the nature of the deed which he enters into, then the court may, in appropriate circumstances, set the transaction aside. Equally, if a person does not understand the effect of what he is entering into the court may also, in appropriate circumstances, set the transaction aside. The mistake or misapprehension in my view does not necessarily have to be as to the direct terms or direct effect of the document in question; it may also be as to the indirect effect of the document in question. Examples of this can be found in the authorities.'

8. And in *Wolff v Wolff*, ***Mr Justice Mann said*****:**

'25 I confess that originally I had thought that the mistake of the Wolffs (which I have found they made as a matter of fact) was more as to the consequences of their transaction than as to its effect (although that distinction is not always easy to grasp.)'

9. Finally, in *Sieff v Fox*, ***Lord Justice Lloyd, sitting as a judge at first instance, said*****:**

'95 [Counsel] may rely first on the decision of Millett J in *Gibbon v. Mitchell* ***which I have described and from which I have quoted at paragraph 36.*** The judge said that, for a mistake to justify a voluntary disposition being set aside, it must be 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. That distinction may be difficult to apply.'"

23 All these doubts have now however been swept away. The law in England has been comprehensively settled by a decision of the Court of Appeal in *Pitt v Holt* and *Futter v Futter* [2011] EWCA Civ. 197 x, to which counsel for the representor very properly drew our attention. Counsel did not contend that this Court ought to apply the new English test, but considered that it was right to give us the opportunity to re-visit the Jersey approach in the light of judicial developments in England. There were two separate but conjoined appeals

involving the application of the Hastings Bass principle, but *Pitt v Holt* also concerned the circumstances in which a transfer by a settlor to a trustee may be set aside on the ground of mistake. We turn therefore to the judgment of Lloyd LJ in *Pitt v Holt*.

The decision in Pitt v Holt

24 We begin by recording our indebtedness to Professor Matthews, whose clear analysis of the Court of Appeal's decision has been of considerable assistance. The facts in *Pitt v Holt* may be shortly stated. Mr Pitt was severely injured in a road traffic accident in 1990. His wife was appointed by the Court of Protection as his receiver. Mrs Pitt made a claim on behalf of her husband which was settled in 1994. With the advice of her legal advisers, and the consent of the Court of Protection, Mrs Pitt created a Special Needs Trust of the compensation received by her husband. Unfortunately, the professional advice received by Mrs Pitt ignored the impact of IHT. Of the £800,000 received by Mrs Pitt, £100,000 would be payable by way of tax. It appeared that the trust could easily have been structured in a different way, which would not have given rise to this tax liability. After Mr Pitt's death in 2007, Mrs Pitt began proceedings, *inter alia* to set aside the gift into trust under the Hastings Bass principle and on the ground that she had been acting under a relevant mistake at the time when the trust was created. It may be noted that, unlike the facts of the present application, in *Pitt v Holt* no one addressed the issue of potential IHT. It was not considered either by Mrs Pitt or by her adviser. At first instance, Mrs Pitt succeeded under the Hastings Bass rule, but failed in her claim based on mistake. HMRC appealed, and Mrs Pitt cross appealed in relation to mistake. The Hastings Bass element of the appeal is not relevant for our purposes, but the decision on Mrs Pitt's cross appeal is of interest. The leading judgment was given by Lloyd LJ, with whom Mummery and Longmore LJJ concurred. Lloyd LJ discussed all the relevant cases and rationalised the apparent inconsistency between the dicta of Lindley LJ in *Ogilvie v Littleboy* and the decision of Millett J in *Gibbon v Mitchell* by agreeing with the judge at first instance ***that*** "Lindley LJ was describing the gravity of the mistake that was required to invoke the jurisdiction whereas Millett J was addressing the type of mistake that could be relevant." Lloyd LJ concluded, at paragraph 210 by setting out the test to be applied:-

> ***"210. I would therefore hold 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. (I leave aside cases where there is an additional vitiating factor such as some misrepresentation or concealment in relation to the transaction, among which I include*** *Dutton v Armstrong*). ***Moreover 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."

25 Lloyd LJ accordingly found that in order to succeed, Mrs Pitt would have to show (i) that there was a mistake; (ii) that it was a relevant type of mistake; and (iii) that it was sufficiently serious to satisfy the *Ogilvie v Littleboy* test. If it was not a relevant type of mistake, one did not reach the *Ogilvie v Littleboy* test of gravity.

26 As Professor Matthews stated in his affidavit, the law in England is now settled. Lloyd LJ considered all the relevant English authorities as well as decisions from the Isle of Man, and the decision of this Court in *Re the A Trust*. He rejected the approach of the Manx and Jersey Courts and laid down the test set out in paragraph 24 above.

Discussion

27 We observe *en passant* that the tests laid down in *Re the A Trust* and *Pitt v Holt* as to whether to set aside a voluntary disposition on the ground of mistake are plainly different. As this case shows, there may now be advantage in choosing one jurisdiction over another, where this is possible, to litigate a matter of this kind. It is important, therefore, against the background of the thorough and careful approach of the English Court of Appeal in *Pitt v Holt*, for this Court to satisfy itself that the judicial policy being followed is one that should be maintained.

28 There seem to us to be two competing principles in play. The first is that it should not be too easy for a donor to retrieve a gift when things do not turn out precisely as he had anticipated. As Lawrence Collins J expressed it in the passage cited above at paragraph 22, equitable relief for mistake should be kept within reasonable bounds so that "it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them." Similarly, the customary law principle ***"donner et retenir ne vaut"*** did not allow that a donor should retain dominion over the thing purportedly given. In both cases, one of the underlying principles is that legal certainty is important. The second principle is, however, that parties should not in fairness be held to transactions into which they would not have entered if they had known what the outcome would be The English Court of Appeal's approach leans towards the first principle, whereas this Court's approach tends rather to the second.

29 The reference by Lawrence Collins J to " ***commercial effects"*** may be regarded, in reality, as a reference to *"fiscal effects"*. Lloyd LJ made the point more strongly in holding, at paragraph 210 of his judgment in *Pitt v Holt*, that ***"[t]he 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."*** It is instructive to consider how this approach would relate to the facts of this case. In *Pitt v Holt*, the mistake gave rise to an unforeseen fiscal liability of about £100,000, which represented some 12% of the trust fund of £800,000. In this case, the mistake in relation to the impact of US tax involved an unforeseen tax liability, according to the expert advice of US tax counsel, of up to 100% of any distribution made to members of the representor's family. The practical effect would be to exclude the US beneficiaries from benefit under the Trust and to substitute the US

government in their place. The representor did not wish to establish a trust for the US government. She wished to provide for her family. This must surely, on the *Pitt v Holt* test, have amounted to a mistake as to the legal effect of the gift into trust rather than a mere consequence of the mistake. If that is correct, there is a spectrum at one end of which (12 $^{1}/_{2}$% of the trust fund) the mistake is to be regarded as giving rise to a mere consequence, and at the other end of which (100% of distributions from the trust fund) the mistake is to be regarded as giving rise to an effect which brings the equitable jurisdiction into play. Somewhere between 12 $^{1}/_{2}$% and 100% a consequence shades into an effect. But where? It does not seem to us, with respect to the English Court of Appeal, that the purported reconciliation of *Ogilvie v Littleboy* with *Gibbon v Mitchell* has necessarily resolved all the problems inherent in the effects/consequences distinction.

30 Lloyd LJ referred at paragraphs 207–209 of his judgment to *In re the A Trust* and to other cases from the Isle of Man. He stated:-

> ***"207. Since** Ogilvie v Littleboy **x emerged from the shadows to be cited in court, it has been applied in a number of different jurisdictions. By way of cases in the Isle of Man and Jersey which were included in the bundles of authorities, a decision of Deemster Kerruish came to my attention:** Clarkson v Barclays Private Bank and Trust (Isle of Man) Ltd [2007] WTLR 1703. **This was an action for recovery of sums paid by a settlor to a trustee said to have been made under a mistake of law or fact (as to the impact of UK taxation).** The judge decided that the common law claim succeeded, but he went on to deal in the alternative with the equitable jurisdiction to set aside voluntary dispositions made under a mistake. Having cited Ogilvie v Littleboy **and other cases, including some of what I said about the point in** Sieff v Fox, **the judge said this at paragraph 41:**
>
> **'By way of analogy with the approach of the courts to a common law claim in restitution, the best measure as to whether the mistake was so serious as to render it unjust for the volunteer donee to retain the moneys is if the payment would not have been made "but for" the mistake.** In other words the mistake is the cause of the payment.'
>
> ***208. That test has been applied in other cases in the Isle of Man** (Re Betsam Trust [2009] WTLR 1489) **and in Jersey** (In re the A Trust [2009] JLR 447). **I have to say that it seems to me that this passage misinterprets and misapplies what Lindley LJ said in** Ogilvie v Littleboy **and poses a test which is a great deal too relaxed for the donor who seeks to recover his gift.** I agree **with Mr Englehart who said at paragraph 52 that the decision in Re Betsam Trust does not accord with English law.** The same goes for Clarkson and the Jersey case.
>
> ***209. These decisions are, however, a useful foil to the English decisions that I have reviewed. Not only does it seem to me that they give wholly inadequate effect to the gravity of the test posed by Lindley LJ, they also ignore the distinction drawn by Millett J between effect and consequences."***

31 A number of observations may be made about this passage. First, it is not correct to state that the Court in *Re the A Trust* ignored the distinction drawn by Millett J between ***"effect"*** and ***"consequence"***. On the contrary, Clyde-Smith, Commissioner referred at paragraph 25 of his judgment to ***"the traditional test for mistake"*** set out in *Gibbon v Mitchell*, and at paragraph 26 to the extensive review by Lloyd LJ in *Sieff v Fox* of the relevant cases, and in particular, *Gibbon v Mitchell*. At paragraph 30, the Commissioner cited a passage from Lloyd LJ's judgment in *Sieff v Fox* where the learned Lord Justice discusses the differences between the *Gibbon v Mitchell* and *Ogilvie v Littleboy* tests. At paragraph 31 the Commissioner referred to a judgment of Birt, Deputy Bailiff (as he then was) in *JP v Atlas Trust Company (Jersey) Limited* [2008] JRC 159, where the Court applied the narrower test in *Gibbon v Mitchell* but left open the question of whether the more general *Ogilvie* test was the correct test to be applied in this jurisdiction. Lloyd LJ was perfectly entitled, of course, to disagree with the conclusion at which the Court arrived in *Re the A Trust*, but he was incorrect to state that the effects/consequences distinction was ignored. The learned Commissioner plainly had the distinction very much in mind, but he preferred to adopt the wider *Ogilvie v Littleboy* approach, and to formulate his own test.

32 Secondly, it is suggested that the *A Trust* test is "a great deal too relaxed for the donor who seeks to recover his gift". Lloyd LJ is again perfectly entitled, of course, to express this view, but we respectfully doubt whether it stands up to close scrutiny. We would agree that a relaxed approach to the setting aside of voluntary dispositions on the ground of mistake would be entirely inappropriate. As Birt, Bailiff put it in *Re the Lochmore Trust*, the Court, in applying the *A Trust* test, has to ask itself three questions:

These seem to us to be significant hurdles. Even if the Court is satisfied that the settlor/donor has done something which, if he had been properly informed or advised, he would not have done, the Court has still to be satisfied that the mistake was of so serious a character that it would be unjust for the donee to retain the property. This requires a balancing of competing interests on the basis of fairness, which seems to us to be a perfectly proper exercise of an equitable jurisdiction. The burden is on the party seeking to set the transaction aside to show that it would be unjust for the transaction to stand. This does not seem to us to be a relaxed approach to the issue.

(i) Was there a mistake?;

(ii) Would the settlor/donor not have entered the transaction 'but for' the mistake?; and

(iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

33 Thirdly, it is suggested that the *A Trust* test gives "wholly inadequate effect to the gravity of the test posed by Lindley LJ". It is not entirely clear to us in what respect the *A Trust* test is said to be wanting. Lindley LJ stated:-

"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 relation between donor and donee, no mistake induced by those who derive any benefit made by it, a gift, whether by mere delivery or 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" .

That seems to us, in essence, to be the *A Trust* test.

34 Indeed, the matter seems to us to go further, because the implication from *dicta* of Lindley LJ later in his judgment would suggest that the spirit of *Ogilvie v Littleboy* survives rather more intact in the *A Trust* test than in the test laid down in *Pitt v Holt*. In *Ogilvie v Littleboy*, one of the plaintiff's arguments for setting aside the gifts into trust was the she had not realised that, in creating a charity, she was liable to control by the Charity Commissioners in the management of the trust funds. Lindley LJ dealt with this argument in the following way:-

> ***"The contention that she never intended to come under the jurisdiction of the Charity Commissioners, and that it was never explained to her that she must inevitably do so if she founded any charity and kept the management of it in her own hands, is the only contention which, in our opinion, gives rise to any real difficulty.*** Her liability in this respect is clear from the provisions of the Charitable Trusts Acts of 1853 and 1855 (vide sections 10, 12 and 14 of the Act of 1853, and sections 44 and 45 of the Act of 1855). After reviewing the evidence upon this point, his Lordship refused to believe that the plaintiff was not fully aware that by executing the deeds she necessarily rendered herself subject to the jurisdiction of the Charity Commissioners. He had little doubt that she was informed that practically she was not likely to be interfered with, and was satisfied with this explanation; but he could not believe that she was kept in the dark on this matter."

The strong inference to be drawn is that, if Lindley LJ had found on the facts in favour of the plaintiff, she would have succeeded in her claim. Yet the suggestion that she was mistaken about the powers of the Charity Commissioners had nothing to do with the legal effect of the transfer, but only the application of other rules of law to the transfer once it had been completed. One might also say that the point concerned only one of the consequences of the transfer once the gift into trust had been made. This point does not appear to have been drawn to the attention of the Court of Appeal in *Pitt v Holt*. On the *A Trust* test, the issue would have been considered, as it presumably would have been in *Ogilvie v Littleboy*, not in the context of whether it was an effect or a consequence, but in the context of the gravity of the mistake. Was it of so serious a character as to render it unjust for the trustees to retain the property? We think that the criticism of the *A Trust* test as giving a wholly inadequate effect to the gravity of Lindley LJ's test is misconceived.

35 There are two other aspects of the test enunciated by Lloyd LJ that we find troubling, and that incline us to prefer the *A Trust* test. The first was drawn to our attention by counsel for the representor, and is contained in the analysis of Professor Matthews. In paragraph 210 of his judgment, cited above, Lloyd LJ draws a distinction between a mistake on the part of the donor ***"as to the legal effect of the disposition"*** and such a mistake ***"as to an existing fact which is basic to the transaction"***. Counsel submitted that it was difficult to see why a mistake as to an existing fact basic to the transaction should be sufficient to set aside a gift (assuming that it is serious enough) but not a mistake as to law which is basic to the transaction and also sufficiently serious. The distinction between mistakes of fact and of law has in recent years been swept away in English law. The key decision was that of the House of Lords in *Kleinwort Benson Limited v Lincoln City Council* [1999] 2 AC 349. Counsel submitted that it was not clear whether Lloyd LJ's reference to mistakes as to ***"existing fact"*** was intended also to include mistakes of law, or whether he meant a mistake of law to be dealt with only as part of the mistake as to the legal effect limb of the test, which would exclude many mistakes of law which were ***"basic to the transaction"***.

36 This may have been what Millett J had in mind in *Gibbon v Mitchell* [1990] 1 WLR 1304 because he stated at 1309:-

> ***"In my judgment, these cases show that, 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 disponor did not intend the transaction to have the effect which it did.*** It will be set aside for mistake whether the same 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 proposition that equity will never relieve against mistakes of law is clearly too widely stated …" .

37 Professor Matthews draws the following conclusion:-

> ***"The problem is that Lord Justice Lloyd's formulation of the test is that either a mistake as to effects or a mistake of fact which is basic to the transaction will suffice.*** So mistakes of fact do not have to be as to effects. This formulation, wider than that of Mr Justice Millett, allows him to explain decisions such as Re Griffiths deceased [2009] Ch 162, ***where the settlor made no mistake as to the effects of the transaction, but did make one as to a basic fact (i.e. his life expectancy).*** Mr Justice Millett, on the other hand, put both mistake of law and mistake of fact into the same category of mistakes 'as to effects', and had no separate category of mistake of fact not going to effects. It is difficult to see why, if there is to be an additional category of mistakes basic to the transaction not going to effects, that should be confined nowadays to mistakes of fact."

38 We agree with counsel for the representor, and with Professor Matthews, that the dichotomy articulated by Lloyd LJ does give rise to this conceptual and practical problem. By contrast, the *A Trust* test does not distinguish between mistakes of fact and mistakes of

law. Both are capable of giving rise to the equitable jurisdiction to grant relief.

39 The second aspect of the *Pitt v Holt* test that troubles us is the weight given to the interests of the tax authority. We entirely accept that it is open to the courts of any country to lay down their own judicial policy in relation to the exercise of an equitable jurisdiction. The preference accorded to the interests of the tax authority in the UK is not one, however, with which we are sympathetic. In our view, Leviathan can look after itself. We should not be taken as indicating any sympathy for tax evasion, which we regard as fraudulent and as entirely undeserving of any favourable discretionary treatment. But in Jersey it is still open to citizens so to arrange their affairs, so long as the arrangement is transparent and within the law, as to involve the lowest possible payment to the tax authority. We see no vice in this approach. We accordingly see no reason for adopting a judicial policy in this country which favours the position of the tax authority to the prejudice of the individual citizen, and excludes from the ambit of discretionary equitable relief mistakes giving rise to unforeseen fiscal liabilities. We see no fairness in such a policy. If, as we understand it, Mrs Pitt had arranged her affairs differently, the compensation that her husband received for his terrible injuries would not have been subject to IHT. We do not think that many people would have criticised her for making such a different arrangement so long, of course, that it was transparent and lawful. It was a mistake for Mrs Pitt to enter the arrangement that she did. It was a mistake of sufficient gravity, as was acknowledged by Lloyd LJ, to satisfy the *Ogilvie v Littleboy* test. Yet it was excluded from the possibility of equitable relief because the policy is to treat unforeseen fiscal liabilities as a consequence rather than an effect of the mistake.

40 Justice and fairness seem to us to have been at the heart of the approach adopted by Lindley LJ in *Ogilvie v Littleboy*. It is troubling, therefore, that the outcome for Mrs Pitt seems to have been so unjust and unfair. At paragraph 214 of his judgment, Lloyd LJ summarised the way in which Mrs Pitt's case had been put by her counsel:-

> ***"214. Coming on to the gravity of the mistake and the Ogilvie v Littleboy test, the case is put in this way. Before the creation of the Special Needs Trust and the assignment of the annuity to its trustees, Mr Pitt was absolutely entitled to the lump sum and to the annuity both of which were payable under the structured settlement. They had been negotiated, we can assume, to provide a sum that was adequate but not generous on the basis of a prediction of his needs for the rest of his life, given the severity of his injuries in the accident. He had his home, jointly owned with his wife, but he had no spare assets. Through his wife, he was advised that it would be a good idea to put the lump sum and the annuity into a trust. The main reason for this, in the end, was to save having to pay fees to the Court of Protection, and to avoid being subject to the policy of the Court of Protection as to how much was released. He could have been advised to do this in a way which had no disadvantages in respect of any fiscal liability. He was advised that there would be no tax disadvantage. Instead, the moment that the assets were transferred into the Special Needs Trust, the assets, then worth of the order of £800,000 became subject to a liability***

for about £100,000 iht, secured by an immediate charge on the assets, and to the prospect of future liabilities on the withdrawal of assets from the trust, and on the assets in the trust every ten years. The assets which can be assumed to have been adequate, but no more than that, to provide for Mr Pitt's needs for the rest of his life, and which, apart from his home, were the only assets of any substance that were available for that purpose, thereby immediately became significantly less than adequate for that purpose. It could be foreseen that they would become even more inadequate when further charges to IHT arose."

41 The Court of Appeal accepted that if it were merely a question of satisfying the *Ogilvie v Littleboy* test of gravity, there would have been much force in the argument of Mrs Pitt's counsel. The argument foundered, however, upon the rock of the effects/consequences distinction. The remedy for Mrs Pitt, according to the Court of Appeal, was to sue her legal advisers. Having been failed by one set of advisers, she was to entrust herself to another set and to commit herself to the risks, uncertainties and expense of further litigation.

Conclusion

42 The principal judgment in *Pitt v Holt* was, if we may respectfully say so, a monumental and comprehensive analysis of the way in which English courts have approached the exercise of this equitable jurisdiction since *Ogilvie v Littleboy* was decided by the Court of Appeal in 1897, and subsequently endorsed by the House of Lords. If we have indicated reservations about some aspects of the decision in *Pitt v Holt*, it has been only to underline the differences between the now settled law in England and the law as it has emerged in this jurisdiction. Like the Court of Appeal, we regard the case of *Ogilvie v Littleboy* as the effective *fons et origo* of this equitable jurisdiction. As Lloyd LJ acknowledges at paragraph 203 of his judgment, equity does not generally define too closely the categories of case in which it may intervene. In *Pitt v Holt* the Court of Appeal has nonetheless extracted principles from the English cases, and now laid down certain general rules.

43 We see no reason, notwithstanding this development in England, to follow that course and to circumscribe the admittedly broad discretion that has been charted in *Re the A Trust*. It would not be, in any event, open to this Court to follow the lead of *Pitt v Holt* unless we were convinced that the *A Trust* test laid down by Commissioner Clyde-Smith was plainly wrong. We do not consider that the test is plainly wrong and, for all the reasons articulated above, we prefer the approach developed in *Re the A Trust* and refined by Birt, Bailiff in *Re the Lochmore Trust*. We will therefore consider the representor's application against that background.

Application of the law to the facts of this case

44 There are therefore three issues to consider.

(i) Was there a mistake on the part of the representor?

(ii) Would she not have transferred the shares in C but for the mistake?

(iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

45 (i) There is no doubt that there was a mistake, and indeed little doubt that there was more than one mistake. The representor was advised by Norton Rose that, if she gave her shares in C to the trustee, and directed the trustee to declare trusts of the shares, there would be no liability to IHT because 100% business property relief would apply to the transaction. This advice was mistaken and wrong. In fact, the transfer did give rise to IHT which was subsequently assessed at £1,943,869 and paid. Furthermore, neither Norton Rose nor any other professional adviser advised the representor of the possible fiscal consequences in the USA of establishing the Trust, given that the intended principal beneficiaries were US citizens and resident in the USA. The representor was under the mistaken impression that there were no potentially significant fiscal consequences for her children and grandchildren.

46 (ii) An affidavit sworn by the representor has been placed before the Court in which she states:-

> *"Had I understood that the creation of the S Trust would give rise to immediate charges to UK inheritance tax and adverse US tax consequences because it is regarded as a foreign non-grantor trust, I would not have transferred the C shares to B, or directed B to declare a discretionary trust over the shares.* Instead I would have either taken no steps, or I would have moved to Switzerland (as indeed I subsequently did and where I still live) and put in place an alternative arrangement."

47 We have no doubt, both from the affidavit evidence of the representor and as a matter of common sense, that the representor would not have transferred the shares in C to the trustee but for her mistaken impression that there were no significant adverse tax consequences in her proposed course of action.

48 (iii) As to the nature of the representor's mistakes, and the balancing of the different interests involved, it is plain that the consequences of the representor's mistakes were nothing short of catastrophic. First, she became liable to an unforeseen and immediate payment of nearly £2M in IHT, and to further fiscal obligations in the UK. Secondly, and even more significantly, a potential liability to US tax arose which might amount to 100% of any distribution made to the principal beneficiaries of the Trust. If the representor had received proper US tax advice in 1997, she would have been informed that an alternative, and from her perspective far more preferable, means of structuring the Trust was available

to her. As it is, the person most likely to benefit from the transfer of the representor's property is the US Internal Revenue Service rather than the representor's family. In terms of the fiscal consequences, or effects, of the mistakes, they could have hardly have been of a more serious character.

49 As stated in paragraph 16 above, the representation was served on the children and the adult grandchildren of the representor. None of them had any objection to the relief sought by the representor. The representation was also served upon the trustees of the New Trusts, given that the representor is seeking a declaration that the transfers of funds from the Trust to the New Trusts are voidable at her instance. Letters were placed before the Court indicating that none of the trustees of the New Trusts had any objection to the Court granting that relief.

50 Finally, the trustee, through its counsel Mr Bennett, indicated that it did not oppose the relief sought by the representor. Its position was one of neutrality. If declarations were made by the Court, and the representor subsequently exercised a right to set aside the Trusts, the trustee would seek indemnities in terms that have been agreed.

51 The Court's conclusion was that it would be unfair in all the circumstances to hold the representor to transfers that were made on the basis of mistakes as to the fiscal consequences of what she had been advised to do. Those mistakes were of so serious a character that it would be unjust for the trustee to retain the property. The Court was also satisfied that that the assets transferred by the trustee to the New Trusts remained subject to the equity in favour of the representor. She was entitled to set aside the transfer because the trustees of the New Trusts were not bona fide purchasers for value of the assets transferred. The representor retained a mere equity in the property and was entitled to have set aside not only the transfer to the trustee but also the transfers made by the trustee to the New Trusts. In the exercise of its equitable jurisdiction the Court granted the relief sought and declared:-

> (i) that the transfer of shares in C to the trustee as trustee of the Trust is voidable at the instance of the representor on the ground of mistake; and
>
> (ii) that the transfers of funds from the Trust to the New Trusts are similarly voidable at the instance of the representor on the ground of mistake.

Postscript

52 The form of the order is unusual and merits, perhaps, a word by way of further explanation because the Court was not asked to set aside the transactions in question. No detailed submissions were made on the point, but we understand that it was important for fiscal reasons that the representor, rather than the Court, should set them aside. We were satisfied that the orders sought were correct and in accordance with principle. This Court found, in *Re the A Trust*, after a comprehensive consideration of the authorities, that the

dispositions made by the settlor in that case were voidable as opposed to void. For essentially the same reasons, we were persuaded that in this case the dispositions were voidable.

53 The result of that conclusion was that the transfers of property were voidable at the instance of the representor on the ground of her mistake. She was accordingly entitled, at her election, to affirm the voidable transfers if she thought fit, or to avoid them and to exercise her right to have them set aside. As it happens, the representor did, pursuant to the order made on 19 th April 2011, exercise her right to have the transfer to the trustee set aside by executing a Deed of Avoidance on 6 th May 2011. Analogous results have been achieved in relation to the New Trusts. Had she not done so, she might have been treated as having affirmed her gift into trust. She was not entitled to sit on the fence in perpetuity.

54 Although not previously the subject of consideration by this Court, this principle emerges clearly from a decision of the English Court of Appeal in *Re Glubb* [1901] 1 Ch 354. In that case gifts to charity were induced by innocent misrepresentations. When these misrepresentations were discovered, the donees asked the donors whether they would be prepared to apply their money to a different charitable gift (which they were). The situation was analysed by Lindley LJ as follows:-

> ***"I think the subscribers could, when the mistake was discovered, have got their money back, if they had chosen to demand it, and, having the right to do that, they elected to have their money applied to meet the deferred legacy.*** In other words, if the gifts were voidable in equity, (I do not say they were voidable at law), the subscribers have elected not to avoid them, but they consented to appropriate their former subscriptions to meet the deferred legacy."

55 The action which avoids the gift is thus in equity the action of the donor and not the Court, although the Court may of course be asked to declare that the donor has that right and even, at the request of the donor, that the gift has been set aside.

56 The same analysis appears from the speech of Lord Atkinson in *Abram Steamship Co v Westville Shipping Co* [1923] AC 773 at 781. The case concerned a contract, but the explanation appears to us to be equally relevant to this equitable jurisdiction. His Lordship stated:-

> ***"Where one party to a contract expresses by word or act in an unequivocal manner that by reason of fraud or essential error of a material kind inducing him to enter into the contract he has resolved to rescind it, and refuses to be bound by it, the expression of his election, if justified by the facts, terminates the contract, puts the parties in statu quo ante and restores things, as between them, to the position in which they stood before the contract was entered into.*** It may be that the facts impose upon the party desiring to rescind the duty of making restitutio in integrum. If so, he must discharge that duty before the rescission is, in effect, accomplished; but if the

> other party to the contract questions the right of the first to rescind, thus obliging the latter to bring an action at law to enforce the right he has secured for himself by his election, and the latter gets a verdict, it is an entire mistake to suppose that it is this verdict which by itself terminates the contract and restores the antecedent status. The verdict is merely the judicial determination of the fact that the expression by the plaintiff of his election to rescind was justified, was effective, and put an end to the contract."

57 We were satisfied that these dicta may equally be taken to express the law of Jersey in relation to this equitable jurisdiction.