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CC Ltd v Apex Trust Ltd

Jurisdiction:	Jersey
Judge:	The Bailiff:
Judgment Date:	30 March 2012
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Text

[2012] JRC 71

ROYAL COURT

(Samedi)

Before:

M. C. St. J. Birt, **Esq.**, Bailiff, **and** Jurats Kerley **and** Nicolle.

Between
CC Limited
Representor
and
Apex Trust Limited
Respondent

Advocate R. J. MacRae for the Representor.

Advocate D. J. Petit for the Respondent.**Authorities**

Trusts (Jersey) Law 1984.

[*Gibbon -v- Mitchell* \[1990\] 1 WLR 1304.](#)

Pitt -v- Holt [2011] 3 WLR.

Ogilvy -v- Littleboy [13 TLR 399.](#)

Re the A Trust [\[2009\] JLR 447.](#)

Re the Lochmore Trust [\[2010\] JRC 068.](#)

Re the S Trust [\[2011\] JRC 117.](#)

Trust — Application by representor to set aside transfer of assets to a trust on the ground of mistake.

The Bailiff:

- 1 This is an application by the Representor (“the Company”) to set aside a transfer of assets to a trust on the ground of mistake. Amongst other matters, it requires the Court to consider whether the matter is governed by Jersey law or English law.
- 2 At the conclusion of the hearing, we granted the relief sought and we now give our reasons.

Background

- 3 The Court has been provided with a detailed affidavit from one of the directors of the Company (“the son”) and a shorter one from his sister (“the daughter”).
- 4 At the material time, the son's mother (“the mother”) was the owner of certain fishing rights and two properties in the UK. She, the son and the daughter (together “the family members”) also each owned a portfolio of securities. All of these assets are compendiously hereafter referred to as “the Assets”.
- 5 In 2002, the mother consulted a firm of English solicitors called Baxendale Walker. They devised a plan with a view to saving capital gains tax and inheritance tax. In briefest outline, it involved the establishment of a partnership between the three family members to which they would each assign the portion of the Assets which belonged to them. Subsequently, the family members would establish a company of which they would each

be a director and equal share holder. The Assets would be transferred from the partnership to that company. Thereafter, the company would establish a trust and would transfer the Assets to that trust.

- 6 Baxendale Walker advised the family members that, although they would not be able to receive outright distributions of income or capital from the trust (described as an Employee Benefits and Shares Trust) ("EBT"), they would be able to receive loans on a commercial basis. Baxendale Walker pointed out that the receipt of loans would provide an "inheritance tax shelter" on the death of the relevant family member. It was emphasised to the family members that monies in the trust could be accessed at short notice and would be available to the mother to use during her lifetime. It was also specifically stated that a beneficiary (i.e. a family member) of the EBT would be able to leave a letter of wishes which would describe what he or she wished to happen after his or her death. The trustees would have power, after the death of a family member, to exercise their discretion to make payments to the persons nominated as beneficiaries by the family member.
- 7 The family members emphasised to Baxendale Walker that the mother relied on the income which she received from some of the Assets, as did the son. Baxendale Walker provided assurances that, in order to obtain money, all the family members had to do was to ring the trustees and ask; and the son was assured that he could receive by way of loans each year the equivalent of the dividends on the share portfolio which he would be contributing.
- 8 In due course the family members decided to go ahead on the basis of the advice received and on 2nd August, 2002, the partnership was established. The Assets were contributed to the partnership on 5th August, 2002. The Assets contributed by the mother constituted the bulk of her assets and those contributed by the son and the daughter constituted a material proportion of their assets.
- 9 The second step in the plan took place on 4th June, 2003, when the Company was established. The Assets were transferred by the partnership to the Company on 12th June, 2003.
- 10 On 24th October, 2003, Baxendale Walker submitted a report to the Company suggesting that a different type of trust from the EBT should be used, namely a "Commercial Security Trust".
- 11 Baxendale Walker assured the family members that they would still be able to receive loans out of the trust provided that they were at a commercial rate, as this did not amount to a benefit. They also confirmed that, following the death of each of the family members, the trustees could make distributions to the beneficiaries nominated by the family member. This was elaborated in November 2003 when it was explained to the mother that she could take out loans from the trust, usually on a ten year repayment basis. If any of the loans were outstanding on the mother's death, the value of her estate would decrease, so less

inheritance tax would be payable. The same would apply in respect of the son and, potentially, the daughter, although she lived in Australia and no specific tax advice was given in relation to her position.

- 12 On the basis of the assurances that they would be able to have access to the trust fund by way of loans during their respective lifetimes and could nominate beneficiaries to receive the Assets after their respective deaths, the family members decided to go ahead. Thus they procured that the Company create a Commercial Security Trust on 17th November, 2003, ("the Trust"). Atlas Trust Company (Jersey) Limited ("Atlas") was the first trustee. The Assets were transferred by the Company to Atlas as trustee of the Trust by deed dated 28th November, 2003, ("the Deed of Assignment"), made between the Company and Atlas. The Deed of Assignment was expressed to be governed by English law.
- 13 It is the gift effected by the Deed of Assignment which the Company seeks to have set aside on the ground of mistake.

The terms of the Trust

- 14 It is convenient at this stage to turn to the Trust. It has to be said immediately that it was incapable of satisfying the two assurances which had been given to the family members and the Company.
- 15 The proper law of the Trust was stated in the trust deed to be the law of Jersey. The Trust was established as a non-charitable purpose trust pursuant to Article 12 of the Trusts (Jersey) Law 1984 ("the 1984 Law").
- 16 Pursuant to the trust deed, the Trust has two purposes, a primary purpose and a secondary purpose. By virtue of clause 3.2, the trustee is to hold the trust fund upon trust to execute the primary purpose. Subject to execution of the primary purpose, the trustee is, pursuant to clause 4.2, to hold the trust fund upon trust to execute the secondary purpose. The family members are defined in clause 1.1 as "the Enforcer" of the Trust.
- 17 Clause 3.1 defines the primary purpose as the "undertaking of the Security Undertaking". By clause 1.1 of the deed, "the Security Undertaking" means "the management and discharge of Debt Obligations". "Debt Obligation" is defined to mean "any debt liability of any kind (whether secured or unsecured) which is owing at any time during the Trust Period by the Founder to any person or persons". "The Founder" is defined as the Company and accordingly the primary purpose of the Trust is to manage and discharge any debt of the Company.
- 18 The secondary purpose is defined in clause 4.1 as "undertaking of the Business". By clause 1.1 of the trust deed "the Business" means "(i) the business of acquiring, holding, investing in and trading in shares and/or securities of bodies corporate incorporated in any

jurisdiction in the world; (ii) any commercial undertaking with a view to profit by utilisation of the property from time to time subject to the Purpose Trusts". Thus the secondary purpose is essentially investment in shares and securities and any commercial undertaking.

- 19 From this it can be seen that there are no defined beneficiaries and there is no ability to apply the trust fund for the benefit of any individual; in particular there is no ability for descendants of the family members nominated by them to receive benefits after their respective deaths.
- 20 Furthermore, although under paragraph 1.12 of Schedule 1 of the trust deed, the trustee has power to lend any part of the trust fund to any person whether or not taking security for the same and on such terms as the trustee may think fit, clause 14 of the deed provides as follows:-

" 14.1 The Trustee shall not by any means whether directly or indirectly exercise any power, duty or obligation vested in the Trustee by this Deed (or any amendment or modification thereof) nor otherwise allow, arrange or procure that any Excluded Person obtains any factual benefit whatsoever (whether in money or otherwise) from the Trust Fund which is or has been or becomes at any time held by the Trustee upon the Purpose Trusts.

14.2 Without prejudice to the generality of clause 14.1, no Excluded Person shall by any means be provided with any factual or legal advantage (including any property, interest, power or right) nor shall any Excluded Person enjoy the remission (in whole or part) of any factual or legal disadvantage or liability from the utilisation by any means of any part of the Trust Fund."

- 21 Under Schedule 2 of the trust deed, "Excluded Persons" include the Founder, any person connected with the Founder, any participator in the Founder, any person connected with any such participator, the Enforcer and any person connected with the Enforcer. It is clear that each of the family members is an Excluded Person within this definition, as is the Company.
- 22 Following the establishment of the Trust, loans were made to the mother (totalling £76,010), the son (totalling £27,000) and the Company (totalling £10,000). The terms on which the loans were made were those advised by Baxendale Walker. The loans were unsecured and were issued on what was referred to as a "deep discount" basis. Thus no periodic interest was payable but the amount payable on maturity of the 10 year loan was very much greater than the amount originally loaned and the increased sum was calculated by reference to notional interest.
- 23 Atlas retired as trustee on 29th February, 2008, in favour of Nautilus Trust Company Limited ("Nautilus"). Nautilus considered that the terms of the Trust did not permit it to make loans of the type which had been made and it retired in favour of Apex on 20th January,

2009. However Apex too has concluded that the trust deed does not permit loans to be made on the basis originally envisaged. Apex has been advised and accepts that, unless loans on the terms in question could be obtained from a commercial lender, they would constitute a benefit arising to the Company or to the family member and accordingly are not permitted under the deed. It is accepted that loans on the “deep discount” terms on which the previous loans were made would not be available from a commercial lender.

24 Thus the upshot is that the family members cannot obtain access to any of the Assets, on the basis that to allow them to do so would constitute a benefit and that is not permitted by the trust deed. Furthermore, there is no ability on the part of the trustee, after the death of a family member, to distribute the trust property to any descendant or other person nominated to receive benefit by the family member. In effect, the Assets are locked into the Trust for its duration and can only be used for the primary or secondary purpose, neither of which permits the Assets to be applied for the benefit of the family members or any person they wish to benefit after their respective deaths. The Company was operating under these two mistakes when it entered into the Deed of Assignment.

25 The Company asserts that it would not have created the Trust and gifted the Assets by means of the Deed of Assignment had it known that this was the position. The Court accepts that that is so.

Jersey law and English law

26 A question arises as to whether the Court should apply Jersey law or English law to the issue of whether the Deed of Assignment may be set aside on the ground of mistake. It is therefore necessary to summarise very briefly the differences between the two systems.

27 Under English law, following the decision in [Gibbon -v- Mitchell \[1990\] 1 WLR 1304](#), in order for a gift to be set aside, a mistake on the part of the donor had to be one as to the effect of the transaction itself and not merely as to the consequences or advantages to be gained by entering into it (see Millett J at 1309).

28 Following an exhaustive review of the authorities, the Court of Appeal in *Pitt -v- Holt* [2011] 3 WLR has upheld this distinction between a mistake as to effect and one as to consequences. In order 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. A mistake as to a consequence (in which the court included fiscal liabilities) is not sufficient. Furthermore the mistake must be of so serious a character as to render it unjust on the part of the donee to retain the property given to him, thereby endorsing the test set out in the case of *Ogilvy -v- Littleboy* ([13 TLR 399](#)).

29 Jersey law has followed a different course. In *Re the A Trust* [\[2009\] JLR 447](#) the Court

(Commissioner Clyde-Smith) rejected the distinction in [Gibbon -v- Mitchell](#) between an effect and a consequence and held simply that the test was as set out in *Ogilvy -v- Littleboy*, 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 that test the Court had to be satisfied that the donor or settlor would not have entered into the transaction “but for” the mistake. The decision in *The A Trust* was followed by further cases such as *Re the Lochmore Trust* [\[2010\] JRC 068](#) where it was said at paragraph 11 that the Court had to ask itself the following three 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 donee to retain the property?”

- 30 Following the decision of the English Court of Appeal in *Pitt -v- Holt*, the Royal Court reconsidered the Jersey law of mistake in *Re the S Trust* [\[2011\] JRC 117](#). After a thorough review of *Pitt -v- Holt*, the Court (Bailhache Commissioner) preferred the approach developed in *Re the A Trust* and *Re the Lochmore Trust* and accordingly continued to reject the distinction between effects and consequences.
- 31 There remains therefore a material difference between English law and Jersey law.
- 32 However, we do not think that it makes any difference to the outcome of the present case as to which system of law is applied because we are quite satisfied that the two mistakes made by the Company were both mistakes as to the effect of the transaction. The Company believed, following the advice it had received from Baxendale Walker, that the effect of the Trust was that the family members would be able to benefit from the Assets contributed to the Trust by means of the power on the part of the trustee to make loans. That is not so. Secondly, based on the advice received from Baxendale Walker, the Company believed that the trust deed permitted monies to be paid out to individuals whom the family members could nominate to receive trust property after their respective deaths. The trust deed does not permit that. Both of these mistakes were mistakes as to the legal effect of the Trust and, accordingly, the legal effect of the gift of the Assets to the Trust.
- 33 Furthermore, there is no question of the mistake being as to the fiscal consequences of the transaction. Whilst it is true that the transaction as a whole was undertaken originally to obtain fiscal advantages in terms of capital gains tax and inheritance tax, there is no suggestion that these advantages have not accrued. On the contrary, the family members and the Company accept that, if the Deed of Assignment is set aside (so that the Assets remain in the ownership of the Company) full disclosure will be made to HMRC and the Company and/or the family members will face additional tax liabilities as a result. The

mistakes relate to the legal effect of transferring the Assets to the Trust in terms of the ability of the family members to benefit from those Assets and the ability of individuals nominated by the family members to benefit after their respective deaths.

- 34 Accordingly, even if English law were to apply, there would be jurisdiction to set the Deed of Assignment aside on the ground of mistake.

The applicable law

- 35 Although, for the reasons stated, it may make no difference to the outcome in this particular case, the Court nevertheless needs to decide which system of law is applicable to the issue which it has to determine and apply that law to the facts of the case.
- 36 In the absence of the provision of the 1984 Law to which we shall refer in a moment, there are arguments in support of both English law and Jersey law. In support of English law is the fact that the Deed of Assignment is expressed to be governed by English law and it is therefore arguable that English law should determine whether the donation to the Trust effected by the Deed of Assignment should be set aside on the ground of mistake.
- 37 On the other hand, it can be argued that mistake goes to the issue of whether the Deed of Assignment is valid at all and, if it is not valid, the choice of English law in the Deed was not valid either and should not determine the issue. Furthermore, it could be argued that the underlying mistakes relied upon relate to the terms of the Trust i.e. the terms upon which the trustee (as donee) will hold the Assets transferred. The Trust is governed by the law of Jersey, the trustee is resident in Jersey and the Trust is administered in Jersey. Article 11 of the 1984 Law – which relates to Jersey trusts established as a result of a mistake – might be said clearly to imply that it is Jersey law which will be applicable to determine whether the trust has been established as a result of a mistake.
- 38 However we do not need to determine these issues because it seems to us that the matter is covered by statute. Article 9 of the 1984 Law applies to all trusts governed by Jersey law. The relevant provisions of Article 9 read as follows:-

" 9 Extent of application of law of Jersey to creation, etc of a trust[5]

(1) Subject to paragraph (3), any question concerning –

...

(b) the validity or effect of any transfer or other disposition of property to a trust;

...

shall be determined in accordance with the law of Jersey and no rule of

foreign law shall affect such question.

...

(3) The law of Jersey relating to –

...

(b) conflicts of law ,

shall not apply to the determination of any question mentioned in paragraph (1) unless the settlor is domiciled in Jersey.

...

(7) Despite Article 59, this Article applies to trusts whenever constituted or created.”

- 39 This seems to us clear and unambiguous in its terms. Article 9(1) provides that Jersey law is to apply to any question concerning the validity of a transfer of property to a trust and no rule of foreign law shall affect such question. Were it not for Article 9(3), it could be argued that Jersey law in this context includes its rules as to the conflict of laws. So, for example, if the Jersey conflict of law rules were to say that the validity of a transfer is governed by its proper law and the proper law of the transfer in question were (as in this case) English law, Article 9(1) could be understood to say that the validity of the transfer must be determined in accordance with the system of law which Jersey law (including its conflict of law principles) provides i.e. on the above example, English Law.
- 40 However, paragraph (3) makes it clear that this is not the case. Paragraph (3) states specifically that the reference in paragraph (1) to the law of Jersey is, in effect, to the domestic law of Jersey excluding its conflict of law principles.
- 41 Thus, Article 9(1) requires that, whenever the validity of a transfer or other disposition to a trust governed by a Jersey law is in question, the issue must be determined in accordance with the domestic law of Jersey i.e. the law of Jersey without reference to its conflict of law principles. So where the validity of a transfer is challenged on the ground of mistake, the effect of Article 9(1) is that it is the Jersey law of mistake which is to be applied; and no rule of English law shall affect such question.
- 42 We therefore apply the Jersey law of mistake in the present case. We have described earlier the three questions which must be considered under Jersey law to determine whether the Deed of Assignment should be set aside on the ground of mistake (see para 29 above). Our answer to all three questions is in the affirmative. First, there were two mistakes on the part of the Company as described at paras 24 and 32 above. Secondly, as we have found at para 25, the Company would not have entered into the Deed of Assignment “but for” the mistakes. Thirdly, we are quite satisfied that the mistakes were of so serious a

character as to render it unjust on the part of the trustee to retain the Assets. The effect of the mistakes had been disastrous. The family members cannot gain access to the Assets, which they need to maintain themselves during their lives. Furthermore the Assets cannot be applied for the benefit of any of their descendants or other individuals who they may nominate after their deaths. In effect, the Assets are locked up for the duration of the Trust without the ability to benefit any particular individual.

43 We therefore set aside the transfer of the Assets to the Trust.