# J-P v Atlas Trust

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| **Jurisdiction:** | Jersey |
| **Judge:** | The Deputy Bailiff |
| **Judgment Date:** | 22 September 2008 |
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**Text**

[2008] JRC 159

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Allo **and** King.

In the Matter of Mr and Mrs P Capital Asset Protection Plan Trust

Between
JP
Representor
and
Atlas Trust Company (Jersey) Limited
Respondent

**Advocate** G. S. Robinson **for the Representor**.

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

**Authorities**

Trusts (Jersey) Law 1984.

Inheritance Act 1984.

Insolvency Act 1986.

*Gibbon v Mitchell* [1990] 1 WLR 1304.

*Sieff v Fox* [2005] 1 WLR 3811.

*Ogilvie v Littleboy* 13 TLR 399.

The Deputy Bailiff

1 This is an application to set aside a trust on the ground of mistake. The researches of counsel suggest that it is the first occasion on which this topic has fallen to be considered under the law of Jersey.

**Factual background**

2 Before turning to consider the relevant legal principles, it is necessary to set out the facts as we find them to be. In this respect the Court has received affidavits from the representor ("Mr P"), his wife Susan P ("Mrs P"), Ms Helga Wentworth of Hamiltons Financial Services SL, Mr Peter Watts of Continental Financial Services Limited ("Continental") and Mr Ian Swindale of Atlas Trust Company (Jersey) Limited ("Atlas").

3 Mr P is 62 and his wife is 55. They have worked hard during their lives and as a result of running a guest house which they subsequently converted into a nursing home, they built up total assets following sale of the business of approximately £1million, which they considered would be sufficient to see out their remaining years in retirement.

4 They wished to do their best to protect their assets from inheritance tax so that they could pass on the benefit of their hard work to their children and their children's families. In February 2006, whilst holidaying in Spain they picked up the brochure of a firm called Hamiltons Financial Services SL, a Spanish company which is apparently owned and managed by Mr Dean Murphy. Mr P contacted Mr Murphy on his return and said that he was interested in Hamiltons' tax strategy on inheritance tax. Mr Murphy said that his representative, Ms Wentworth would contact Mr P to arrange a meeting and this duly took

place on 4th May. Ms Wentworth introduced herself as the private client manager for Hamiltons in Spain and produced a card to that effect. In her affidavit she said that, at the relevant time, she worked as a freelance introducer to Hamiltons in Spain and carried out a similar role for Hamiltons SL Limited in the UK, of which company she was also for a brief period a director. Nothing turns on the distinction and we shall for convenience refer to 'Hamiltons' to cover the group as a whole. At the same time Ms Wentworth was also working on a freelance basis for an English company called S&G Worldwide Limited which was a company which marketed a product called the Capital Asset Protection Plan ("CAPP"). However, this latter connection was not made clear to Mr and Mrs P; so far as they were concerned she was simply representing Hamiltons.

5 Mr P made it clear that, whilst wishing to save inheritance tax, it was fundamental that he and his wife should be able to have access to their money and they would wish anything left after their death to be available for their children. Ms Wentworth recommend a CAPP and she wrote a letter on 5th May 2006 explaining what this was.

6 We would quote two extracts from that letter:-

> *"The optimum solution is for you to protect your assets with a Purpose Trust through the means of a CAPP.* This type of commercial trust can be used to instantly protect your assets from tax and creditors.
>
> *With the CAPP you exchange capital for a contract with the right to receive income.* This contract has no value on your death, but the capital held within the Offshore Purpose Trust is available for distribution by the trustees, who will have given consideration to your previous wishes. Being instantly effective for Inheritance Tax purposes, the Trust is ideal for Inheritance Tax planning.
>
> *In essence, you exchange capital for a stream of income payments to cease upon your deaths.* After your deaths other flexible trusts can then arise, which will enable the trustees to distribute tax-free funds to your family or beneficiaries.
>
> *The CAPP has been still specifically designed for investors with significant capital on deposit who wish to remove the value of these investments from their Estates thereby reducing on negating Inheritance Tax liabilities and tax on growth."*

Further down on page 3 of the letter Ms Wentworth stated:-

> *"Trustees can use trust funds to lend you money, upon commercial terms.* These loans must always be made on a purely commercial basis on terms acceptable to the trustees and the settlor. Any unpaid loans and interest outstanding on death would create a debt against the investors UK estate, thus potentially reducing Inheritance Tax further. If there is no value in the estate the debt ceases on death."

On the following page she wrote further:-

*"To summarise, the Capital Asset Protection Plan is an ideal solution for significantly reducing any Inheritance Tax liability on personally held capital and assets whilst providing for an ongoing stream of taxable (if applicable) income and tax-free loans."*

7 Subsequently Ms Wentworth sent further notes on CAPPs which explained that what was involved was the purchase of a deferred annuity with the client acting as enforcer. It was again repeated that at the request of the enforcer the trustees could provide tax-free loans to the client. Although they would have to be on commercial terms they could be made on a deep discount basis and rolled over if necessary until death. The loans would have the effect of reducing the deceased's estate for inheritance tax purposes. The notes also confirmed that, by leaving a letter of wishes, the client would be able to express to the trustees who he would wish them to benefit following his death.

8 In due course Mr and Mrs P decided to proceed. Ms Wentworth recommended Continental as trustee of the CAPP and explained that Continental was regulated by the Jersey authorities. This gave comfort to Mr and Mrs P. In due course, on 5th July 2006, the trust deed was executed by a Jersey company called Holwell Management Limited (described as 'the Founder') with Continental as trustee and Mr P as enforcer. The initial property was £10. We shall refer to the trust established by the deed as 'the Trust'.

9 It is necessary to describe some of the key provisions of the Trust. It was established as a non-charitable purpose trust in accordance with Article 12 of the Trusts (Jersey) Law 1984 ("the Law"). It is expressed to be governed by the law of Jersey and Mr P was named as the enforcer. Clause 3 defines the purpose of the Trust as follows:-

***"3.1 The Primary Purpose shall be during the Trust Period the negotiation, arrangement, execution and performance of Authorised Contracts*** .

***3.2 Subject to the following provisions of this Deed the Trustee shall hold the Trust Fund upon Trust during the Trust Period for the execution of Primary Purpose.*** ....."

10 'Authorised Contract' is defined in Clause 1.1 as follows:-

***"Any written agreement between the Trustees hereof and any other person .....:-***

***(a) by which the Trustee agrees to provide a deferred annuity to a person for valuable consideration;***

***(b) which satisfies each and every of the conditions precedent set forth in Schedule 3 hereto."***

Schedule 3 sets out various conditions precedent relating to the Inheritance Act 1984 and

the Insolvency Act 1986. It also specifies that the purchaser of the deferred annuity must be an employee or director or former employee or director of the Founder or other person approved by the Founder or any other person.

11 Clause 4 is headed 'Appointment Upon Further Trusts' and Clause 4.1 provides as follows:-

> ***"Subject always to the execution of the Trust of the Primary Purpose and subject to the following provisions of this Deed, the Trustee shall until the last day of the Trust Period have power to appoint any of the Trust Fund upon such trusts (whether or not making provision thereby for persons or classes of persons as beneficiaries or prospective beneficiaries) as the Trustee may in its absolute discretion determine PROVIDED THAT the written consent of the Enforcer shall be required as condition precedent to the valid exercise of any such power and if no such consent is provided by the Enforcer any purported exercise of any such power shall be deemed to be void and further PROVIDED THAT no Excluded Person shall be capable of receiving any benefit of any kind under such other trust."***

12 By written 'Instruments of Addition' dated 21st July and 28th July 2006, Continental accepted the sums of £870,000 and £130,000 respectively from Mr and Mrs P as additions to the trust fund of the Trust.

13 On the advice of Hamiltons, Mr and Mrs P wished the trustee of the Trust to invest the whole of the trust fund in an 'Offshore Portfolio Bond' issued by a company called Hansard International Limited, based in the Isle of Man. Monies introduced into the Bond would be invested in a range of underlying funds, all of which themselves invested solely in immovable property. Mr Watts of Continental was not happy that the monies should be invested in this way. He told Mr and Mrs P that it was putting all their eggs in one basket and that Hamiltons were not registered as investment advisers. On the advice of Ms Wentworth, Mr P as enforcer executed a deed of retirement and appointment dated 19 th September 2006 whereby Continental retired as trustee and Atlas was appointed as trustee of the Trust in its place. On 27th September 2006 Atlas issued an annuity contract to each of Mr P and Mrs P. These contracts provided for an annual income stream to be payable to Mr P on his attaining the age of 80 and to Mrs P on her attaining the age of 75. The consideration for each annuity contract was £500,000 cash. The annuity rate was stated to be 2% over the annuity rate quoted by any life office to Mr P within 6 months of the contract and the rate was to be applied to the capital value paid under the contract increased each year in accordance with the cost of living. The contracts were expressed to be governed by English law.

14 The annuity contract stated that Mr and Mrs P respectively were providing £500,000 as consideration. In fact this did not occur. The sum of £1million paid to Continental earlier had been retained on deposit and transferred to Atlas when it became trustee. Atlas treated those monies as being the purchase consideration for the annuity contracts and on 27th

September it invested that sum in the Portfolio Bond offered by Hansard.

15 In November 2007, Carey Olsen on behalf of Atlas, having reviewed the arrangements in detail, wrote to Mr and Mrs P to alert them to various flaws in the Trust and the associated annuity contracts. Further correspondence took place resulting ultimately in the present representation. Suffice it to say that the following difficulties have been identified amongst others:-

(i) It is not at all clear that inheritance tax will be avoided or minimised as Mr and Mrs P were led to believe.

(ii) There is doubt as to the validity of the annuity contracts. If the two sums of £870,000 and £130,000 had been paid to Continental (or Atlas) to hold as nominee for Mr and Mrs P pending acquisition of the annuity contracts, the sums could then have been applied on their behalf as the consideration for those contracts. However, the instruments of addition show that this is not what occurred. On the contrary the two sums were treated as gifts by Mr and Mrs P to the trustee as additions to the trust fund. The Trust does not authorise the trustee to make payments for and on behalf of Mr and Mrs P by way of purchasing annuities on their behalf. It follows that Mr and Mrs P may well have failed to provide the required consideration for the annuity contracts.

(iii) Although there is power in the trust deed for the trustee to make loans, Atlas has been advised that, in the particular circumstances of the case, it cannot properly do so. This is because the Primary Purpose of the Trust is to fulfil annuity contracts. If the trustee makes loans to Mr and Mrs P in circumstances where it knows that they will not be in a position to repay those sums, the trustee will have insufficient funds to pay the specified annuities under the annuity contracts when the time for such payments arises. Thus in practice there is no ability for Mr and Mrs P to receive any monies out of the Trust until the commencement of the two annuities, which is some 18 years in the case of Mr P and some 20 years in the case Mrs P.

(iv) Atlas has been advised that, because of the terms of the trust deed, it will not necessarily be able to appoint any funds left in the Trust following the death of Mr and Mrs P to or for the benefit of their children or remoter issue. This is because the power to make such appointments is expressly made subject to the Primary Purpose of entering into Authorised Contracts; and as long as there are any employees, officers etc of the Founder, the need to fulfil the Primary Purpose would prevent appointment of the assets.

**The Law**

16 Article 11(2) of the Law provides:-

***"(2) Subject to Article 12, a trust shall be invalid:—..... (b) to the extent that the court declares that:-***

***(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty ....."***

17 This is entirely consistent with general equitable principles as established in cases such as *Gibbon v Mitchell* [1990] 1 WLR 1304. Having reviewed the authorities Millett J summarised the position in that case as follows 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 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."

18 The most recent detailed consideration of the doctrine of mistake in the context of trusts and voluntary transactions is to be found in *Sieff v Fox* [2005] 1 WLR 3811. Although that case was concerned primarily with the Hastings-Bass principle, Lloyd LJ (sitting at first instance) also carried out a comprehensive review of the authorities on the topic of mistake at paras 94-112 of his judgment. In particular, he pointed out that, in the case of *Ogilvie v Littleboy* 13 TLR 399, in a judgment specifically approved when the case went to the House of Lords, Lindley LJ stated at 400:-

> ***"..... a donor can only obtain that 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."***

As Lloyd LJ pointed out, this case had not been cited in *Gibbon v Mitchell* or any of the other later cases and appeared to express the relevant test in somewhat wider terms than those contained in the judgment of Millett J.

19 Lloyd LJ went on to summarise his understanding of the position as follows at para 106:-

> ***"Clearly there is a jurisdiction in equity to set aside a voluntary disposition for mistake .....*** The mistake must be as to the effect of the disposition. The discrepancy may arise from a legal defect in the disposition itself (as in *Gibbon v Mitchell* [1990] 1 WLR 1304) ***or from a mistake of fact as to the position under the relevant trusts (as in*** *Lady Hood of Avalon v MacKinnon* [1909] 1 Ch 476) ***or as to the effect of the disposition in the hands of the donee:*** *Ellis v Ellis* 26th TLR 166. ***It may arise from a misunderstanding of the nature of the trusts which would affect the property after the disposition, due to a failure on the part of the advisers to explain the position properly***; *Anker-Peterson v Christensen* [2002] WTLR 313. ***According to*** *Gibbon v Mitchell* ***.....*** the mistake must be as to the effect of the disposition, and a mistake as to its consequences is not sufficient. If that is

> the correct test, Davis J's comment that the fiscal consequences of the transaction are not relevant is probably right, and a misunderstanding as to those would not justify setting the disposition aside. According to *Ogilvie v Littleboy* **.....** the test is more general, 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". That formula might allow fiscal consequences to be taken into account, if they were sufficiently serious....."

20 Lloyd LJ did not need to resolve which was the correct test or whether there was in fact a difference between them, although he pointed out that there was no decided case where a disposal by an individual of his own property had been set aside on the basis of a mistake as to tax consequences. He accepted that, if the test were limited in the way described by Millett J, there was a difference in approach between those cases where there was a disposal by an individual of his own property and those where there was an appointment by trustees (where the Hastings-Bass principle allows a mistake as to the fiscal consequences of a decision as a ground for setting aside that decision). He considered that such a difference was justifiable.

21 For the reasons set out below, we also do not need to resolve whether the test for setting aside a voluntary transaction on the ground of mistake is limited to where the mistake is as to the effect of the disposition (as stated by Millett J in *Gibbon v Mitchell*) or whether the test is more general, 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. We simply record that the matter remains open for decision in a future case where the point arises directly.

22 Before leaving the law, we should mention one point only to dispose of it. Mr MacRae very properly raised the question of whether the reference to 'mistake' in the Law, without any definition, required the Court to consider the concept of *'erreur'*, derived originally from French law. *'Erreur'* may be relevant when considering a contract governed by Jersey law but it cannot possibly, in our judgment, have any relevance in a case governed by equitable principles. The concept should be confined to matters governed by the law of contract. It would be quite wrong in principle and highly undesirable to muddy the waters by importing into cases concerning equitable principles a concept derived from a jurisdiction which does not recognise or apply such principles.

**Application to the facts**

23 We find that Mr and Mrs P were mistaken as to the effect of the scheme which they had been advised to enter into. The key mistake was that they were advised and believed that they would have ready access to their funds by means of discounted loans from the Trust. In fact, because of the way in which the Trust and the annuity contracts were established, the trustee cannot make any such loans as it would then be unable to perform the annuity

contracts because it would have insufficient funds to be sure that it was able to meet its obligations under those contracts.

24 There is another possible aspect in which Mr and Mrs P were mistaken. They were advised and believed that the funds which remained after their death could be appointed by the trustee for the benefit of their children and remoter issue. However, because of the way in which the trust deed is written, Atlas has been advised by its advocates that it may not be able to make any such appointments because of the need to fulfil the Primary Purpose of writing Authorised Contracts so long as this is possible. The Court is not entirely convinced that the trustee has been correctly advised in this respect but, in view of our finding on the mistake referred to in the preceding paragraph, it is not necessary for us to consider this aspect further. There is certainty at least a concern that the trustee will not be able to make appointments to the children as anticipated by Mr and Mrs P.

25 We are quite satisfied that, if Mr and Mrs P had known that they would not be able to receive any monies from the Trust until the commencement of the payments under the annuity contracts, they would never have contributed their funds to the Trust. They made it clear from the outset that they needed to have access to these funds because they were all that they had to live on. Their present situation is disastrous in that their life savings are frozen until commencement of the payments under the annuity contracts, which is many years away.

26 The question then arises as to exactly what is to be set aside. The representation and Miss Robinson's skeleton referred to setting aside the Trust. If this was intended to refer to the trust deed itself that would be incorrect. The deed was executed by Holwell as Founder and Continental as trustee. Holwell presumably contributed the initial fund of £10. There is no evidence before us that Holwell was acting under any mistake nor is it a party to these proceedings.

27 However, during the course of the hearing, it was agreed that what was really sought was an order that the Trust should be set aside insofar as it related to the sums of £870,000 and £130,000 contributed to the Trust by Mr and Mrs P by the two instruments of addition. In practice this comes to the same thing as, there being no suggestion that the initial property of £10 remains in existence, the Trust's sole assets are those representing the aggregate contribution of £1 million made by Mr and Mrs P.

28 It is clear from the affidavit of Mrs P that she supports the application. However, she is not technically a party to the representation. It occurred to the Court during the preparation of this judgment that she should be, because it is the contributions by Mr and Mrs P jointly to the Trust which are to be set aside. Miss Robinson has confirmed that Mrs P agrees to be joined as a party and accordingly we join her as a co-representor in the proceedings.

29 As the authorities make clear, the Court has a discretion as to whether to set aside a

transaction on the grounds of mistake. In this case there is no arguable reason for not doing so. The Trust is a purpose trust and accordingly there are no beneficiaries who might be prejudiced by setting the Trust aside; nor are there any third parties whose position would be prejudiced.

30 Accordingly, for the reasons given, we set aside the Trust insofar as it relates to the property transferred by Mr and Mrs P by the two instruments of addition. As there are no other assets in the Trust this means that the Trust as a whole will come to an end.

31 As the Trust has come to an end and as the consideration for the annuity contracts will have wholly failed, we also declare those contracts to be of no effect.

32 Finally, we consider the question of Atlas' costs. It is quite clear that both Continental and Atlas acted in good faith throughout. They were at no stage aware that Mr and Mrs P had been advised erroneously in the manner described above. Indeed, it was the legal advisers to Atlas who first brought the difficulties in the scheme to the attention of Mr and Mrs P. In the circumstances, Atlas is clearly entitled to be indemnified out of the trust fund both as to its remuneration and its legal and other costs.