

Mistake: Setting aside voluntary dispositions

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Given the favourable tax regimes in play across the Channel Islands, it is not surprising that incorrect tax advice is a common feature in what is becoming a steady stream of applications to be heard by the courts across both Islands.

Applications of this nature are often finely balanced and shrouded with political sensitivity. Advisers (and their insurers) have often viewed the mistake and Hastings-Bass applications as 'get out of jail free cards' where the Court is able to set aside the transaction and the adviser is able to avoid liability for what would be, at first blush, a negligent act.

The Royal Court of Guernsey recently considered the application of the principle of mistake in light of the UK Supreme Court decisions in *Futter -v- HMRC*; and *Pitt-v- Holt* [2013] UKSC 26 in the recent case of *Gresh -v- RBC Trust Company (Guernsey) Limited* and *The Commissioners for Her Majesty's Revenue and Customs*.

Key facts

In February 2016 The Royal Court handed down judgment in relation to the Applicant's application which sought to invoke the equitable jurisdiction of the court to set aside a voluntary disposition on the grounds of mistake ("the Application").

Mr Gresh was the recipient of a £1.4m distribution, paid to him, at his request, by the trustee of his pension fund. He had obtained professional tax advice that the distribution to him would be tax-free provided that the distribution was not remitted to the UK. As it later transpired, that advice was wrong and the distribution was subject to a 40% income tax liability in the UK. These core facts were agreed between the parties.

Within the proceedings, Counsel for all parties also agreed the following issues:

- That under the law of Guernsey, there is jurisdiction to set aside a voluntary transaction as a result of a mistake;
- That the principles established by the English Supreme Court in *Pitt v Holt* [2013] UKSC 26, although not binding, will be highly persuasive in Guernsey; and
- That a voluntary disposition made as a result of a mistake is not void, but may be set aside by the Court in the exercise of its discretion.

Findings

The Court held that the legal test to be applied is that laid down by the Supreme Court in the judgment delivered by Lord Walker in *Pitt v Holt*, and summarised by the Chancellor of the High Court in the later decision of *Kennedy v Kennedy* [2014] EWHC (Ch). Lord Walker of Gestingthorpe said:

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"the gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated dispositions...The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus on the facts of the particular case. [para 126]

"the court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case." [para 128]

Applying the above principles to the instant case, the Court found that there was a distinct mistake that the Applicant had undoubtedly relied on. The tax advice turned out to be incorrect and the mistake was distinguishable from mere ignorance, inadvertence or misprediction of some future event. The mistake was causative in that it is what caused Mr Gresh to request the trustee to make the distribution to him. The incorrect tax advice was said to be the central factor in the transaction.

The Court considered that "unconscionable" is to be interpreted as being synonymous in this context with "unjust or unfair" and that it is not necessary to look for a specific conscience that would be affected if the transaction were not set aside.

In considering the issue of injustice or unfairness the Court looked at the consequences of setting aside, or not setting aside, the disposition. The Court identified that Mr Gresh was the only person to be affected by the mistake, in that he alone will have a tax liability if the mistake was not corrected. By contrast, in other cases of this nature where relief has been granted by the courts, including *Pitt v Holt*, there have been multiple parties (family members and such like) whose interests were also affected.

Because of this, the Court held that it would not be an appropriate exercise of the Court's jurisdiction to set aside the distribution. It is not unconscionable (unjust or unfair) that he should have to retain the proceeds of the distribution made by the trustee to him.

So what happened?

Ultimately the Royal Court opted to follow the principles set out by the UK Supreme Court in *Futter-v- HMRC*; and *Pitt -v- Holt*.

This decision certainly helps set boundaries about where the Court considers 'unconscionable' to be, and appears more restrictive than some assumed it to be.

In the *Gresh* case, in reaching its decision, the Court gave significant weight to the fact that only Mr Gresh would be affected if the mistake was not corrected. The impact on Mr Gresh was undoubtedly severe, namely a 40% tax liability on the £1.4m disposition, yet the Court held that it was not unconscionable to leave the mistake uncorrected.

Contrast this with the case of *In the matter of the S Trust and the T Trust* [2015] JRC 259 where the Royal Court of Jersey granted the relief sought in similar circumstances, citing the stress of litigation against professional advisers as a factor that

required the Court's intervention notwithstanding the fact that the applicant had already obtained an indemnity from his tax adviser before applying for relief.

It remains to be seen if Mr Gresh will appeal the decision of the Royal Court.

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