



Trusts and Fiduciary Group

In re The Lochmore Trust and In re The First Conferences Limited 2003 Employee Benefit Trust

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These two cases have been handed down since our briefing note *In Re The A Trust* in February 2010 which considered the basis on which the Jersey Courts will set aside a trust or disposition into trust on the ground of mistake.

In re the Lochmore Trust [2010] JRC068

In re the Lochmore Trust the settlor applied to set aside the Trust. Prior to the establishment of the Trust he had received tax advice that the transfer of property to the Trust should not take place by gift but should occur by sale with the sale price of the shares to remain outstanding as a loan. The trustee of the Trust was not privy to this advice and the shares were transferred into trust by gift. This gave rise to an inheritance tax charge of £800,000 when the error was discovered in November 2008.

The Court found that the Trust had been established by mistake and declared it invalid. It adopted the test set out in the English case of *Ogilvie v Littleboy* and the Jersey case of *In re A Trust* and held that:

- a) There had been a fundamental mistake of fact on the part of the settlor who believed that the transaction had taken place by sale but in fact had been by way of gift;
- b) The settlor would not have agreed to establish the Trust and contribute to the shares to the Trust but for the mistake. He had been advised that such a transfer by way of gift would lead to the charge to IHT and he did not wish to incur such a charge;
- c) The mistake was of so serious a character as to render it unjust on the part of the trustee and the beneficiaries of the Trust to retain the property at a time when the settlor had incurred a charge of £800,000.

The adult beneficiaries all agreed that it would not be fair for them to retain the shares when the consequences for the settlor were so serious.

In re The First Conferences Limited 2003 Employee Benefit Trust [2010] JRC055A

In re The First Conferences, the Court set aside donations of cash by the settlor company to the EBT on the grounds that these had been made by mistake. The donations had been used to establish sub-funds for the benefit of two named individuals who, it subsequently emerged, were 'Excluded Persons' under the EBT.

The Court held that if the settlor had been aware of the 'Excluded Person' status, the funds would not have been donated to the EBT. It declared the donations void and set them aside.

Comment

It is clear from these two cases that the Jersey law on mistake is steering towards the broader test for mistake as set out in *Ogilvie v Littleboy*, with three of the principal judges of the Royal Court having applied this test. The position in England appears to remain as set out most recently in *Pitt v Holt* [2010] EWHC 45 (Ch) in January 2010, namely that the narrower test in *Gibbon v Mitchell*, which distinguishes between the 'effects' and 'consequences' of a transaction with a mistake as to the former (but not the latter) being amenable to being set aside, is to be preferred.

Accordingly, it appears that there are now circumstances where the Royal Court will set aside a transaction on the grounds of mistake and equity, when the English courts would not.

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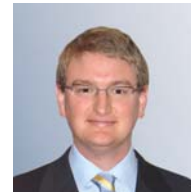
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