

X marks the spot

A recent trust judgment in Jersey could see more settlors opting for the jurisdiction of the island over that of England, says *Robert MacRae*

A fundamental difference of approach between the Jersey Royal Court and the English court could see more trust settlors opting to bring an application to have a gift into trust set aside on the ground of their mistake in Jersey, in circumstances where the case could be heard in either jurisdiction.

A recent Jersey judgment is particularly significant for trust settlors who donate a gift to a trustee, where the donation is based on poor advice and results in unforeseen financial liabilities. In this case the arguments centred on the nature of the donor's 'mistake'.

Making its mark

The Royal Court held that the mistake made by the donor could include a mistake as to the financial (usually tax) consequences, whereas judgments in similar cases in the English courts have made a significant distinction between mistakes as to consequences and 'effects' – a mistake as to the former will not lead to the gift being set aside, whereas a mistake as to the latter will.

So under English law, a donor would have to show that there was a mistake, that it was the right type of mistake (one of effect, not consequence) and that it was sufficiently serious. This principle was tested most recently in the English Court of Appeal decision in *Pitt v Holt*.

Jersey's new landmark ruling, which is contrary to the *Pitt v Holt* decision, potentially enables a settlor to reverse a transaction which results in a financial disadvantage to them.



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In the *Matter of the S Trust*, the applicant, R, was seeking to have set aside, on the ground of mistake, a gift of shares to a Jersey resident trustee and the subsequent transfer of those shares to three US trusts. The Royal Court decided it would follow the course charted in the previous Jersey case of *In Re the A Trust* (2009) and by other judges in the Royal Court in subsequent cases.

In that case, the Royal Court concluded that the right test was whether the donor's mistake was of so serious a character as to render it unjust on the part of the donee to retain the property given to him and would not have entered into the transaction but for the mistake.

In reaching its decision, the Royal Court rejected the distinction drawn by



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certain English cases between the effects of a transaction and consequences of a transaction mistakenly entered into, which had held that only mistakes as to effects could be set aside.

In *Pitt v Holt* the Court of Appeal said that: “The mistake must be of sufficient gravity as to satisfy the 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.”

Competing principles

In its judgment *In the Matter of the S Trust*, the Royal Court stated that there were two competing principles. On one hand, it should not be too easy for a donor to retrieve a gift when things did not turn out precisely as he had anticipated because legal certainty was important. On the other hand, parties should not be held to transactions into which they would not have entered had they known what the outcome would be.

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The Royal Court said the English Court of Appeal’s approach leaned toward the first principle, while the Royal Court’s approach tended towards the second.

The English Court of Appeal in *Pitt v Holt* had criticised the Jersey court for “ignoring the distinction between effects and consequences” and applying a test which is “a great deal too relaxed for the donor who seeks to recover his gift” and gives “wholly inadequate effect to the gravity of the test posed” (in the English case of *Ogilvie v Littleboy*, 1897).

The Royal Court said that, in its view, these criticisms were misplaced.

It is now clear that the test to be applied in Jersey, in considering whether a gift into trust should be set aside on the grounds of a donor’s mistake, is fundamentally different from the test applied in England.

The Jersey Royal Court has again shown that it is prepared to not follow English jurisprudence where it is satisfied that it is either wrong or conflicts with existing Jersey authority. ■

**Robert MacRae is a partner at
Carey Olsen**