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Mistake in Jersey trust law - sometimes ignorance is bliss

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In giving its reasons for setting aside transfers into a Jersey trust on grounds of mistake, the Royal Court of Jersey has provided a helpful distinction between the law of mistake as it applies in Jersey as against its English law counterpart such that it is now expressly clear that in Jersey, relief can be granted for a mistake made out of mere "causative ignorance". The Court also confirmed that it has a real discretion when deciding whether or not it is just to make a declaration that a transaction be set aside on grounds of mistake.

Background to the Application

In the Matter of the G Trust [2019] JRC 056 concerned a Jersey law discretionary trust which had been established by the Representors for the benefit of themselves, their three adult children and their four grandchildren with provision for future issue. Over the years, various transfers were made into trust; however, between November 2008 and January 2014 the Representors made four transfers to two BVI companies solely owned by the trustee, from two different UK bank accounts (maintained by a banking arm of the trustee entity) which was held in the Representors' joint names (the **Transfers**). The evidence before the Court was that the Representors did not contemplate that the Transfers would expose them to a UK tax liability; neither of the Representors were British citizens, nor were they resident, ordinarily resident or domiciled in the UK. Further, neither the Trustee nor the bank had given them any warning as to the potential tax consequences of the Transfers. Indeed, the evidence was clear that had the Representors been aware of the tax exposure, expert advice would have been sought and the Transfers structured so that monies came from non-UK accounts. Accordingly, the Representors applied to the Royal Court, seeking orders that the Transfers were made by mistake and should be set aside. HMRC was notified of the application and the Attorney General was convened; however, neither participated.

Questions for the Court

Whilst the application was made under both [Article 11](#) and [Article 47E](#) of the [Trusts \(Jersey\) Law 1984](#) (as amended), there was no suggestion that the establishment of the Trust itself was a mistake and therefore matters proceeded under Article 47E. The Court was therefore required to ask itself:-

1. Whether the Representors made a mistake in relation to the Transfers?;
2. Whether the Transfers would have been made "but for" the mistake?; and
3. Whether the mistake was of so serious a character as to render it just to make a declaration?

What constitutes a "mistake" for the purposes of [Article 47E](#) is defined in [Article 47B\(2\)](#) and includes a mistake as to the effect, consequences or advantages to be gained by a transfer into trust.

The Difference between the Jersey and English Law Approach

In considering these three questions, the Royal Court thought it important to distinguish the Jersey law of mistake from its English law counterpart, which is governed by the Supreme Court's decision in [Pitt -v- Holt](#) [2013] UKSC 26. English law distinguishes between three different situations, namely:-



- i. Incorrect conscious belief;
- ii. Incorrect tacit assumptions; and
- iii. Mere causative ignorance.

In *Pitt -v- Holt*, the Supreme Court held that in equity, the Court has no power to grant relief for a claimant who has acted as a result of mere causative ignorance and this remains the position under English Law. Conversely, the Royal Court said that this is not the position to be taken under Jersey law when considering applications under Article 47E, as the jurisdiction to give statutory relief requires the Court to decide whether there was any mistake, as defined by Article 47B(2). In Jersey, the *manner* of the mistake is irrelevant and it is therefore inappropriate to make the distinctions applied under English law. The Royal Court further noted that the phrase “*mere causative ignorance*” is not one which can be said to reflect the reason why mistake applications are presented to the Court - ignorance does not cause a transfer to be made and cannot really be regarded as being causative of much. Rather, the cause of the transfer is usually the intention to benefit the trust and that wish will rarely be removed by ignorance on the part of the person making the transfer.

The Question of Justice

Having established that the English law distinctions have no place in Jersey law, the Royal Court added some further commentary as to the third question it must ask itself in considering applications under Article 47E, namely whether the mistake was so serious as to render it just for the Court to make a declaration. The Court stated that the grammar of the question made clear that there were two component parts and that, whilst the seriousness of the mistake will often be analysed by reference to the effect on the transferor and, potentially, on the trustees and other beneficiaries, the question of justice is more nuanced. The Court reviewed a number of its own previous judgments and was clear that in deciding the question of justice, there was a real discretion to be exercised by the Court, having considered the full facts available.

The Court's Decision

Turning to the facts of *In the Matter of the G Trust*, the Court held that the Representors had made a mistake in making the Transfers and that but for the mistake, they would not have transferred monies from UK accounts. Given the level of tax liability occasioned by the mistake, the Court held that the mistake was so serious so as to require it to exercise its discretion and declare the Transfers voidable.

Comment

Not only does this case make an important distinction as between Jersey law and English law, it also highlights the Court's desire to achieve a fair outcome for all. The Court has frequently stated that it is there to assist, through its broad supervisory jurisdiction in relation to matters concerning trusts, and its flexible approach to the law of mistake only serves to reinforce this.

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