Jersey & Guernsey Law Review – October 2011

CASE SUMMARIES

The following key indicates the court to which the case reference refers:

JRC	Royal Court of Jersey
GRC	Royal Court of Guernsey
JCA	Jersey Court of Appeal
GCA	Guernsey Court of Appeal
JPC	Privy Council, on appeal from Jersey
GPC	Privy Council, on appeal from Guernsey

CIVIL PROCEDURE

Costs—Court of Appeal—costs against non-party

Leeds United Football Club Ltd v Phone-In Trading Post Ltd (t/a Admatch) JCA (Steel, Jones and Bennett JJA) [2011] JCA 110

R Weston, Director of The Phone-In Trading Post Ltd; PC Sinel for the respondent

Following the dismissal of the defendant company's application for leave to appeal a decision of the Royal Court, the question arose as to whether the Court of Appeal should award costs in favour of the plaintiff against the director of the defendant company who had had conduct of the appeal and who had represented the defendant in court. Costs were additionally sought against the director's wife who had also represented the defendant company in court. In both cases the plaintiff sought costs on the indemnity basis. The company itself had no assets.

Held, awarding costs against the director on the standard basis—

Costs against a non-party. The Court of Appeal has "full power to determine by whom and to what extent the costs are to be paid": art 16, Court of Appeal (Jersey) Law 1961. The general principles for the

award of costs against a non-party were set out by the Court of Appeal in *Planning and Environment Minister v Yates.*[1]

Directors. When deciding whether or not to exercise its discretion to award costs against a director personally, the court should determine what lay behind his or her involvement. Where a director promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. If, however, he can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests, it is likely that a costs order will not be made against him: *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*,[2] *per* Lord Brown of Eaton-under-Heywood, at para 29.

Non-party costs—disposal. The Royal Court had found that the defendant company had no real interest in defending the action, being a dormant shell. In these circumstances the court rejected the assertion that the proceedings had been defended for the benefit of the defendant and Mr Weston as a shareholder, rather than an individual. It was his efforts which made a defence possible; the decision to make the application for leave to appeal was taken by him; he prepared and filed the necessary papers and represented the defendant at the hearing. It was his actions, not those of other third parties, which caused the plaintiffs to incur costs in opposing the application for leave to appeal. It was just and appropriate that Mr Weston should be found personally liable for the costs of and incidental to the application for leave to appeal. However Mrs Weston was not a director or shareholder of the defendant, had only appeared on its behalf when Mr Weston was ill and no factual basis had been advanced showing that she had funded or controlled the action. Costs against Mrs Weston were accordingly refused.

Indemnity costs. In order to award indemnity costs there had to be "some special or unusual feature in the case" justifying such award: *Dixon v Jefferson Seal Ltd*;[3] *Preston v Preston.*[4] In *Marett v Marett*,[5] Pleming, JA, Sumption and Nutting, JJA concurring, said—

> "A court may make an indemnity costs order only where there has been some culpability, some abuse of process such as deceit,

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[1] 2008 JLR 486.
[2] [2004] W.L.R. 2807.
[3] 1998 JLR 47
[4] (1982) Fam. 17
[5] 2008 JLR 384

> underhanded or unreasonable behaviour, abuse of court procedures, or the submission of voluminous and unnecessary evidence ..."

In the court's view, the use of the word "only" in the above passage was a mistake. Further, the conduct throughout a litigation of a person, against whom an award for indemnity costs is sought, may be relevant to inform the court as to the character of his conduct in a particular chapter of the proceedings. On the facts, the court declined to award indemnity costs. In particular, the exercise by the defendant of its right to defend itself without appointing a lawyer did not justify ordering costs to be paid on the indemnity basis. Nor did the additional fact of failure by the defendant to comply with previous court orders, which led to the making of the unless orders and the striking out of the defendant's answer, justify an award of indemnity costs against the director.

Execution—*arrêt entre mains*

See CONFLICT OF LAWS—Liability of separate entity for sovereign debt—situs of debt

CONFLICT OF LAWS

Liability of separate entity for sovereign debt—situs of debt

FG Hemisphere Associates LLC v Democratic Republic of Congo JCA (McNeill, Pleming and Bennett JJA) [2011] JCA 141

J Harvey-Hills for the second respondent and appellant; AD Robinson for the party cited and appellant; KJ Lawrence for the respondent; the first respondent did not appear and was not represented

FG Hemisphere Associates ("Hemisphere") was the assignee of two ICC arbitration awards against the Democratic Republic of Congo ("DRC"). It sought to enforce those awards against the assets of Gécamines, a Congolese company, on the basis that Gécamines was an organ of state of the DRC and therefore liable for its debts. The assets of Gécamines included shares in a Jersey company ("GTL") and the right to certain payments due by GTL to Gécamines. The Royal Court (Page Commr and Jurats Tibbo and Kerley; *FG Hemisphere Associates*[6]) found that Gécamines was an organ of state of the DRC liable for its debts and the shares in GTL and the debt due by GTL were both assets of Gécamines situated in Jersey and thus liable to execution. The Royal Court granted leave to enforce the awards by

[6] [2010] JRC 195.

way of distraint on any assets of the DRC and Gécamines in Jersey and ordered that the Act would operate as an *acte d'arrêt entre mains confirmée* as regards the shares and the debt. Gécamines and GTL appealed separately to the Court of Appeal. Gécamines contended (i) that it was not an organ of State, in the relevant sense, of the DRC, (ii) that in reaching the contrary view the Royal Court misconstrued the requisite legal test for identifying an organ of State, (iii) that the Royal Court failed to apply the test required, and (iv) that upon the assumption that it had applied the correct test, the Royal Court's determination was not supported by the facts. By its separate appeal GTL contended *inter alia* (i) that the relevant Gécamines' assets were not situated within the jurisdiction of the Royal Court, (ii) that the interim *arrêt entre mains* was not properly made, and (iii) that the interim *arrêt entre mains* did not create an immediate proprietary interest in favour of Hemisphere.

Held, dismissing both appeals –

Appeal by Gécamines (Pleming JA dissenting).

The basic test by which a separate entity may be liable for the debt of a sovereign state. The present appeal appeared to be the first occasion on which an appellate court considered the application, to the issue as to the liability of a separate, but wholly owned, entity for the debt of a State, of the principles in *Trendtex Trading Corp v Central Bank of Nigeria*[7] as to sovereign immunity. It was not immediately obvious that that the test by which an incorporated entity is or is not to be accorded sovereign immunity should also be the test by which such an entity, wholly owned by the State, is to be found an *alter ego* of the state for the purpose of satisfying the otherwise unattainable satisfaction of the debt of a defaulting State. In the present case the parties were agreed that the *Trendex* test should apply and the court therefore proceeded on that basis. If the point were ever the subject of detailed debate, a more refined or bespoke approach might be capable of being discerned. Following *Trendex* it appeared that the appropriate test whereby a separate entity is entitled to be considered as a department of state, was (i) whether by reason of its constitutional documents the entity ought to be considered as such, or (ii) whether it should be so considered, having regard to (a) the degree of control exercised by the state taken together with either or both, (b) the functions which the entity was performing or required to perform, and (c) the activities which it was pursuing or required to pursue. It was more difficult to discern from the judgments in *Trendtex* the extent to which control and function are to be considered separately. Subject to

[7] [1977] 1 QB 529.

the Court's comments on the proper nature of relevant functions, it could, as a matter of theory, be argued that an exceptional degree of control might be an indicator that a function was being treated by a State as a governmental function and, on the other hand, that a lack of governmental control over the wholly owned entity was a counter-indicator of governmental function. For the purposes of the instant case, however, it was preferable simply to State that each element must be present.

Required characteristics of the governmental functions test. The following test of governmental functions, drawn from the authorities and satisfying requirements of objectivity and rigour, should be applied. First, the fact that the entity engages in trade or commerce is not determinative. In a sovereign debt claim the whole context surrounding the identified functions should be examined in order to determine whether the principal functions of the entity have a governmental rather than private quality. Second, what is a governmental quality is not to be appraised merely by reference to some list of functions but, rather, by reference to a broad concept of government. Third, the whole context might show that whilst the entity engaged in what, in other circumstances, would merely be viewed as ordinary trading activities, those activities, albeit significant in economic or numeric terms, were ancillary to a principal function or functions such as the carrying out of the policies of the Government: *Kensington International Ltd v Republic of Congo*[8] and *Mellenger v New Brunswick Development Corp.*[9] Fourth, the onus will be on the party seeking to establish the liability of the entity for sovereign debt to prove, on the balance of probabilities, that the entity performs governmental acts or functions to such a degree that it is properly to be considered as an arm of the government.

Required characteristics of the control part of the test. Something more than the fact that the entity is wholly-owned by the State is required; but a sham need not be proved. The authorities show that a careful balancing exercise in relation to control and freedom must be carried out in each case. It is the manner in which specific types of control are exercised which is the relevant consideration. If strategic control is not left the entity, even there is a measure of freedom as to day-to-day activities, the test will be met.

Disposal of Gécamines' appeal. On the facts as found by the Royal Court the relevant tests had been made out and the appeal by

[8] [2005] EWHC 2684 (Comm) at para 53.
[9] [1971] 1 WLR 604, at 609 F–G.

Gécamines was dismissed (save as to the calculation of interest on monies paid into court).

Dissenting judgment of Pleming JA. Giving a dissenting judgment, Pleming JA considered that the test, and the answer to the question, should not change depending on whether the entity is claiming State immunity or whether (as here) it is being held responsible for the debts of the State. He concluded that the Royal Court had misdirected itself as to the governmental functions limb of the test and had failed properly to apply that test. Hemisphere had failed to establish in the Royal Court that Gécamines was indistinguishable from and a part of, or *alter ego*, or mere department of the DRC. He would therefore allow Gécamines' appeal; and in consequence, were that to have been the decision of the majority of the Court, the orders against both Gécamines and GTL would have been set aside.

Appeal by GTL

Whether an arrêt entre mains creates a right in personam. An analysis of Terrien, Le Geyt, Routier and Pothier appeared to show that the position in Jersey was to the same effect as that in England and Wales as expounded by Lord Millett in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation*,[10] as referred to in the court below: if that analysis were correct, an *arrêt entre mains* order is not an *in personam* order against the third party, but has proprietary consequences and takes effect as an order *in rem* as against the debt owed by the third party to the judgment debtor.

Whether no arrest made. It was argued for GTL that an *arrêt entre mains* could not be effected merely by declaration of the court. However, the order was a judicial act, as is made clear by r 20/5(1) of the Royal Court Rules 2004 which provides that "an interim injunction, arrêt entre mains or other judicial act … shall be signed by the bailiff." The Court's order operated as an *arrêt entre mains* upon being signed. It authorised the distraint and, having been served on GTL there was no difficulty for the latter in being aware of the ambit of the judicial act.

Whether it can attach to future movables. An analysis of Pothier, Terrien and Routier showed that there must be something capable of identification and solemn declaration. Futures payments of debt under the relevant contract were not to be construed as future payments which were so uncertain that they could not be subject to a deposition. This was consistent with acceptance in Jersey, apparently undisputed, of the ability to arrest wages. The future debt could be traced back to

[10] [2004] 1 AC 260.

obligations under the present contract and therefore an arrest of payments "which should in the future become payable under" the relevant contract did offend the principle of certainty which importantly underlay the *arrêt*.

The proper test as to where a debt is situated. The jurisdiction of the place of incorporation of a company or of the place where the registered office is located constitutes residence for the purposes of service and, accordingly, identifies the location of the debt due by the company, irrespective of where its daily business activities are conducted or its directors happen to live or where its bank accounts are located, unless there is some competing place of residence and the contract requires performance at that place: *Kwok Chi Leung Karl v Commr of Estate Duty*.[11] The importance attached to the place of incorporation and registered office was particularly apt in the age of electronic commerce.

Disposal of GTL's appeal. Applying the above principles to the facts, GTL's appeal was dismissed.

CRIMINAL PROCEDURE

Delay

Taylor v Law Officers GCA (Nutting, McNeill and Birt JJA) No. 13/2011

J Greenfield for the appellant; Mrs F Russell, Crown Advocate

The appellant, aged 61 and with considerable experience of the insurance industry, appealed against his conviction on nine counts of money laundering, and sought leave to appeal against the sentence of 30 months' imprisonment imposed in respect of those offences.

The first count alleged that on or about 1 October 2002 the appellant had taken possession of the sum of US$11,991.75 for his own use knowing that the sum represented, wholly or in part, the proceeds of crime of Michael Summers, contrary to s 40(1) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, as amended ("the 1999 Law"). The remaining counts alleged that between 2002 and 2003 the appellant had assisted Summers to retain the proceeds of Summers' criminal conduct. Summers had pleaded guilty in England in 2006 to 33 counts of fraudulent deception arising from a "Ponzi" scheme operating over a number of years.

[11] [1988] 1 WLR 1035.

The grounds of appeal related principally to decisions made by the trial judge on applications to stay the proceedings as an abuse of process. The appellant complained about the delay between the dates of the alleged offences and his arrest in December 2009. In particular, he criticised the deliberate decision by investigators to conceal their intention to prosecute him, thereby ensuring the appellant's cooperation with the Serious Fraud Office's investigation, as being a trick leading him to provide a witness statement that he would otherwise have declined to provide.

Held, dismissing the appeal—

Delay grounds. The trial judge had reached a reasonable decision, bearing the hallmark of common sense, in concluding that time should be calculated from early 2008 and not from 2002 as claimed on behalf of the appellant. It was an essential ingredient of these money laundering offences to prove that the monies in question constituted proceeds of Summers' crimes and it was, therefore, the best and safest course to await the outcome of the Summers proceedings in England, including the contested confiscation proceedings, before commencing an investigation in Guernsey of the appellant's involvement. Moreover, any motivation for forbearing to commence that investigation relating to the fact that the appellant was a witness against Summers was not an improper motive.

In relation to the delay between early 2008 and the appellant's arrest in December 2009, the court expressed anxiety about the dropping off of the pace of investigation part-way through that period. In the absence of any bad faith or oppressive conduct, the essential test to be applied, notwithstanding such delay, is whether the appellant had a fair hearing. The court considered the principles summarised in the judgment of Rose LJ in *R v S*[12] and applied the test provided by Beloff JA in *Bach v Law Officers*[13] of whether, on a balance of probabilities, the appellant had established that, owing to that delay, he had suffered serious prejudice to the extent that no fair trial could be held. Because the proof against the appellant principally turned on consideration of contemporaneous documents, the likelihood of establishing serious prejudice is more difficult than a case involving a single incident taking place many years before the trial. There was no such prejudice in the instant case.

Sentence. The court refused the application for leave to appeal against sentence, commenting that—

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[12] (2006) 170 JP 434.
[13] 2007–08 GLR 354.

> "Financial services are the lifeblood of this island community and the future of Guernsey's finance sector depends in no small measure on the ability of the those who work in that sector to maintain Guernsey's reputation for probity and integrity. Those who launder the proceeds of crime imperil that reputation and nullify the efforts of those who endeavour to protect it. This court and the Royal Court will deal severely with those who commit crimes of this kind and in the absence of special considerations money launderers must expect to be sent to prison."[14]

Comment: [Richard McMahon QC] The significant part of this decision is the analysis of delay as a ground for an abuse of justice challenge in respect of a multi-jurisdictional fraud. The courts were alive to the reality of needing to establish as an essential element of a money laundering offence that the monies in question are indeed the proceeds of crime. As such, calculations of time need to have proper regard to when that element can properly be regarded as being capable of proof and this will often depend on the outcome of proceedings in another jurisdiction. This judgment demonstrates that the Law Officers are entitled to await developments elsewhere and also that, once foreign proceedings have concluded, they must still proceed against alleged domestic perpetrators in a timely fashion. Further, the court's robust comments on refusing leave to appeal against the sentence of 30 months' imprisonment for a man of previous good behaviour squarely indicate the importance to the Channel Islands of maintaining and enhancing the integrity of their financial services sectors. This is a welcome endorsement of efforts being made in both Bailiwicks to combat serious economic crime.

FAMILY LAW

Children—separate legal representation—guardian

In re D JCA (McNeill, Pleming and Bennett JJA) [2011] JCA 104

C Davies for the Minister; B J Corbett for the guardian

In the proceedings in the court below, the Royal Court made a care order under art 24 of the Children (Jersey) Law 2002 and also, on making the care order, appointed a person to assist and befriend the child under art 75(1)(b), but solely in relation to the question of contact. The Minister appealed, contending that, on its proper construction, an appointment under art 75(1)(b) could only be made for the purposes of the proceedings under the 2002 Law and it could

[14] Para 195.

not be made after those proceedings had been concluded. Article 75(1) reads as follows:

"75 Representation and assistance for children.

(1) Where it considers it desirable in the interests of a child to do so the court may order—

(a) that the child be separately represented in such proceedings under this Law as the court may specify; or

(b) that the child be assisted and befriended by such person, being a person independent from the Minister, as the court may specify".

Held,

On its true construction the power of the court under art 75(1)(b) to appoint a person to assist and befriend the child could not be exercised after the proceedings had ended. Article 75(1)(a) gives the court the power to order that the child be separately represented "in such proceedings", which in this case were care proceedings. If the court were not minded to exercise that power, it was given an alternative, because of the word "or", namely to appoint a person under (b). The person so appointed would then assist and befriend the child in the proceedings in which the child was involved.

The way to address the concerns of the court regarding contact was, on making the care order, to make a further order that the matter of contact be brought back to the court within a defined period of time, with the existing guardian remaining in office: *Re K (Care Proceedings) (Care Plan)*.[15]

It was the practice of counsel, following receipt of a draft judgment and before handing down, to draw the court's attention to typographical mistakes, factual errors, wrong references and other similar minor corrections: para 4 of the Royal Court's Practice Direction RC 10/01. In the instant case, the Royal Court had received no submissions as to whether it had jurisdiction to make the order it did under art 75(1)(b). In those circumstances it was incumbent on counsel to raise the matter with the court prior to handing down the judgment. Had that been done the Court of Appeal was confident that the Royal Court would not have made the order it did and the expense to the public purse of the appeal would not have been incurred.

PLANNING LAW

[15] [2008] 1 FLR 1.

High Hedges (Jersey) Law 2005—test on appeal

Brimacombe v Minister for Planning and Environment Royal Ct (Bailhache, Commr, and Jurats Le Cornu and Marett-Crosby) [2011] JRC 132

AJ Clarke for the appellants; D Mills for the respondent; Mrs Lees appeared on her own behalf

The appellants appealed against a remedial notice under the High Hedges (Jersey) Law 2008 in respect of a line of Holm oak trees. The question was raised as to the appropriate test on appeal. Article 13 of the 2008 Law provides that the owner or occupier of the land on which the "high hedge" grows "may appeal" to the Royal Court, but with no reference to the grounds of appeal such as the reasonableness of the decision (as under art 109 of the Planning and Building (Jersey) Law 2002 and other laws). Counsel for the appellants argued that the court should consider the matter on the merits *de novo* and substitute its own decision.

Held, as to the question of the test on appeal –

In *Hobbs v Minister for Planning and Environment*,[16] which had been the first appeal under the 2008 Law, it was assumed without argument that the conventional test for appeals under the Planning and Building (Jersey) Law 2002 applied. But the statutory wording was similar to appeals under art 18 of the Housing (Jersey) Law 1949, which was considered by the Court of Appeal in *Housing Cttee v Phantasie Invs Ltd*.[17] In *Phantasie* it was held that the role of appellate court where the legislation provides that a party "may appeal", without reference to the grounds of appeal, was a serious question to be considered and that certain Privy Council cases on appeal from Canada and other English cases would need to be examined in detail. The remarks of Southwell JA in *Glazebrook v Housing Cttee*[18] were *obiter* and did not address the issues raised in *Phantasie*. As the matter had not been fully argued, the court took the view that in fairness to the appellants that it treat the Law as allowing a wide jurisdiction on appeal and that the Court would accordingly examine the matter *de novo*, but with due respect being paid to the careful balancing exercise undertaken by the Minister, and to his experience and knowledge.

TRUSTS

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[16] [2009] JRC 146.
[17] 1985–86 JLR 96.
[18] 2000 JLR 381.

Mistake

In the matter of R Royal Ct (Bailhache Commr, and Jurats Clapham and Liddiard) [2011] JRC 117

RJ MacRae for the representor; ECG Bennett for the Trustee

The representor, as *de facto* settlor, sought orders that the transfer of assets by her to B Ltd, a Jersey trust company, which declared itself trustee of the assets under an English law trust, was voidable at her instance on the ground of mistake, and that subsequent transfers of assets from the trust to three new trusts established in the USA were similarly voidable at her instance. The mistake concerned unforeseen UK and US tax liabilities arising as a result of the dispositions.

Held, acceding to the application –

Applicable law. The question was raised *inter alia* as to what law should be applied to the transfer by the representor of assets to the trustee. The two contenders were English law (at the time the representor was resident and domiciled in England) and Jersey (the trustee was a Jersey company and the trust, governed by English law, was administered in Jersey). The relevant rule for conflicts purposes was the rule for restitutionary obligations: Dicey, Morris and Collins, *The Conflict of Laws*, 14th ed, Rule 330. This was not a case where the enrichment occurred in connection with a contract or with immovable property; accordingly the third option under *Dicey, Morris and Collins*, Rule 330 applied, namely that the proper law was the country where the enrichment occurred. Jersey was where the enrichment occurred and accordingly Jersey law was to be applied to the application.

Parties to the representation. The Court was concerned that HMRC had not been informed of the action so as to consider whether to apply for joinder. In *HMRC v Gresh*[19] the Guernsey Court of Appeal allowed an appeal from the decision of the Guernsey Royal Court and declared that it was just and convenient to join HMRC as a party to a *Hastings Bass* application by Mr Gresh, disapproving the *dictum* of Clyde-Smith, Commr in *Re Seaton Trustees Ltd*[20] that HMRC had no interest in a similar *Hastings Bass* application but "only in the UK tax consequences that may flow from it". Although this was not a *Hastings Bass* application, the Court expressed concern that HMRC had not been informed. In the event, however, the court was satisfied by affidavit evidence that no claim was to be made to recover

[19] 2009–10 GLR 239.
[20] 2009 JLR *N* [15]; [2009] JRC 050.

tax already paid and that UK tax would be paid on the capital if the trust were revoked. The court could also anticipate that HMRC would ask the Court to apply the decision of the English Court of Appeal in *Pitt v Pitt* and *Futter v Futter*[21](as it effectively did in *In re L*[22]) which the Court would in fact consider. It was not, therefore, necessary to inform or join HMRC.

Mistake—consideration of *Pitt v Holt*. The test applied in Jersey for the setting aside of a voluntary disposition made by mistake was: (1) Was there a mistake? (2) Would the settlor/donor have not entered into the transaction but for the mistake? and (3) Was the mistake of so serious a character as to render it unjust on the part of the done to retain the property?: *In re Lochmore Trust*[23]; *Re A Trust*[24]; the test in *Ogilvie v Littleboy*[25] was preferred to *Gibbon v Mitchell*[26]. The court had not, in particular, followed the view of Millet, J in *Gibbon* that only a mistake as to the legal effect of a disposition, and not its consequences (such its tax consequences), would enable the Court to exercise its jurisdiction to set the disposition aside.

In *Pitt v Holt* the English Court of Appeal had now reviewed the equitable jurisdiction of the English courts to set aside a voluntary disposition and had now settled the law in England: the mistake had to be as to the legal effect of the disposition, and not its tax or other consequences, or as to some existing fact which is basic to the transaction. Lloyd LJ in particular criticised the decision of the Royal Court in *A Trust* as ignoring the distinction between effect and consequences and as applying a test which was "a great deal too relaxed" and which did not give effect to the gravity of test posed by Lindley, LJ in *Ogilvie*. However the court in *A Trust* had not ignored the distinction but rather considered the matter and then declined to adopt it. Further, the test set out in *A Trust* was a significant hurdle and it was unclear, comparing it to the words of Lindley, LJ in *Ogilvie*, in what aspect of the test in *A Trust* was wanting. Indeed the spirit of the test in Ogilvie survived rather more intact in the *A Trust* than it in the test laid down in *Pitt*.

There were two competing principles in play: the first was that it should not be too easy for a donor to retrieve a gift when things do not

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[21] [2011] EWCA Civ 197.
[22] [2011] JRC 085.
[23] [2010] JRC 068.
[24] 2009 JLR 447.
[25] (1897) 13 TLR 399, CA; affirmed in *Ogilvie v Allen* (HL) (1899) 15 TLR 294.
[26] [1991] 1 WLR 1304.

turn out as anticipated (similarly the customary law principle of *donner et retenir ne vaut* did not allow a donor to retain dominion over the thing purportedly given), and the second was that parties would not in fairness be held to transactions into which they entered if they had known what the outcome would be. The English Court of Appeal's approach leant towards the first principle, that of the Royal Court to the second.

The statement by Lloyd, LJ that the jurisdiction could be invoked in relation to "an existing mistake of fact basic to the transaction" created conceptual and practical problems. If there were a category of mistakes as to existing facts, not being mistakes as to the effect of the transaction, it was difficult to see why this should be confined to mistakes of fact. The distinction between mistakes of fact and of law had in recent years been swept away in English law: *Kleinwort Benson Limited v Lincoln City Council*.[27] The court was also troubled by the weight attached in *Pitt* to the tax authority. The court had no sympathy with tax evasion; but in Jersey it was still open to citizens so to arrange their affairs, so long as the arrangement is transparent and within the law, as to involve the lowest possible payment to the tax authority. There was no reason for adopting a judicial policy which favoured the position of the tax authority to the prejudice of the individual citizen, and excluded from the ambit of discretionary equitable relief mistakes giving rise to unforeseen fiscal liabilities.

It was in any event not open to the court to follow *Pitt v Holt* unless it was convinced that the test set out by the Royal Court in *A Trust* and refined in *Lochmore* was plainly wrong. The court did not consider that test to be plainly wrong and indeed preferred it.

Disposal. Applying the established test in Jersey, the Court declared that the dispositions of property to the trustee were voidable at the instance of the representor on the ground of mistake and that the transfers of funds from the trust to the new trusts in the USA were similarly voidable at the instance of the representor on the ground of mistake.

The form of order. The form of order was unusual because the court was not asked to set aside the transactions. After a comprehensive review of the authorities, the court in *A Trust* found that the dispositions made by the settlor in that case were voidable and not void. The dispositions were therefore voidable at the instance of the representor. The representor was not entitled to sit on the fence in perpetuity (and could be treated as having affirmed the gift) but in the

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[27] [1999] 2 AC 349.

event did exercise the right to have the transfer into trust set aside and analogous results had been achieved in relation to the USA trusts. The action which avoided a gift was in equity the action of the *donor* and not the court, although the court may be asked by the donor to declare that the donor has that right: *Re Glubb*[28]; *per* Lord Atkinson, *Abram Steamship Co v Westville Shipping Co*.[29]

[28] [1901] 1 Ch 354.
[29] [1923] AC 773, at 781.