Judgment 18/2010 **Arun Estate Agencies Ltd v Kleinwort Benson (Guernsey) Trustees Ltd – in re the Arun Estate Agencies Ltd Employee Benefit Trust – Royal Court (Civil Action File 1461) – 7 April 2010**

Trusts (Guernsey) Law, 2007 – Royal Court Civil Rules, 2007 (Rule 35) – trust set up to provide retirement benefits for employees – mistake as to ability to claim deductions for UK Corporation Tax purposes – application to set aside the trust and return assets to the Applicant which had been paid by it into the trust – proper parties to the present action – Court required by the Trust Deed to apply English law to determine the present application – held that the Court had no power to attach conditions to the relief sought – application granted on the grounds that the Trust Deed contained a fundamental error which prevented the purpose of the trust being put into effect.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1461

The 7th day April 2010, before Richard John Collas, Esquire, Deputy Bailiff and Alan Cecil Bisson, David Osmond Le Conte, Niall David McCathie, Esquires, Jurats

Re: THE ARUN ESTATE AGENCIES LIMITED EMPLOYEE BENEFIT TRUST

Between

ARUN ESTATE AGENCIES LIMITED

Applicant

and

KLEINWORT BENSON (GUERNSEY) TRUSTEES LIMITED

Respondent

Whereas on 22nd March the Court considered an application to;

(i) to set aside the Arun Estate Agencies Limited Employee Benefit Trust (the "Trust") established by a Trust Deed ("the Trust Deed") between the Applicant and Kleinwort Benson (Guernsey) Trustees Limited ("the Trustee") dated 13th September 2004; and

(ii) for an order that all monies and property donated by the Applicant to be held on the terms of the Trust be returned to the Applicant

and having heard thereon Advocates St J A Robilliard and M G A Dunster counsel for the Applicant and Respondent respectively, granted the said application, the Court this day handed down the reasons for its decision in the terms attached hereto.

S M D ROSS
H M Deputy Greffier

Approved Judgment
7 April 2010

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Re: THE ARUN ESTATE AGENCIES LIMITED EMPLOYEE BENEFIT TRUST

Between	**ARUN ESTATE AGENCIES LIMITED**	**Applicant**
	and	
	KLEINWORT BENSON (GUERNSEY) TRUSTEES LIMITED	**Respondent**

Date of hearing: 22nd March 2010
Judgment handed down: 7th April 2010

Before: Richard John COLLAS Esq., Deputy-Bailiff and
Jurats: A C Bisson, D O Le Conte, N D McCathie

Advocate for Applicant: **St J A Robilliard**
Advocate for Respondent: **M G A Dunster**

Cases, texts, legislation and other material referred to:
Gresh v RBC Trust Company (Guernsey) Limited and HMRC (Guernsey Court of Appeal, 16th September 2009)
Re Hastings-Bass [1975] Ch 25
In the matter of the H. Sossen 1969 Settlement (Royal Court of Guernsey, 28th May 2004)
Royal Court Civil Rules 2007, Rule 35
Gibbon v Mitchell [1990] 1 WLR 1304
Dent v Dent [1996] 1 WLR 683
AMP (UK) plc v Barker [2001] PLR 77
Anker-Petersen v Christensen [2002] WTLR 313
Wolff v Wolff [2004] WTLR 1349
Bhatt v Bhatt [2009] EWHC 734 (Ch)
Lady Hood of Avalon v Mackinnon [1909] 1 Ch 476
Ogilvie v Littleboy (1897) 13 TLR 399 CA
Ogilvie v Allen (1899) 15 TLR 294
Sieff v Fox [2005] 1 WLR 3811
In re Butlin's Settlement Trusts [1976] Ch 251
Ellis v Ellis 26 TLR 166
Clarkson v Barclays Private Bank & Trust (Isle of Man) Ltd [2007] WTLR 1703
McBurney v Betsam Trust (Isle of Man High Court) CP 2007/115
Re the A Trust, B v C, D and E [2009] JRC 245
In re Griffiths deceased [2009] Ch 162
Fender v National Westminster Bank plc [2008] EWHC 2242 (Ch)
Re Strain (deceased); Allnutt and Another v Wilding and others [2007] EWCA Civ 412; 9ITELR 806
Racal Group Services Ltd v Ashmore [1995] STC 1151 (CA)
Snamprogetti v Phillips [2001] EWCA Civ 869

Background

1. Arun Estate Agencies Limited ("the Applicant") is applying:

   (iii) to set aside the Arun Estate Agencies Limited Employee Benefit Trust (the "Trust") established by a Trust Deed ("the Trust Deed") between the Applicant and Kleinwort Benson (Guernsey) Trustees Limited ("the Trustee") dated 13th September 2004; and

   (iv) for an order that all monies and property donated by the Applicant to be held on the terms of the Trust be returned to the Applicant

   by reason of the mistake under which the Applicant was labouring when it established the Trust and made payments to the Trustee.

2. The Trust was set up to enable the Applicant to provide an incentive scheme to reward the performance or loyalty of selected employees and to provide retirement benefits for such employees. The Applicant's intention was that it would make payments to the Trust from time to time, out of its profits, earmarked for specific employees and that after a period of some five years the Trustee would exercise its discretion to apply such sums for the benefit of the relevant employees by making payments from the Trust to personal or approved pension schemes held for such employees.

3. Initially there were five employees who were to benefit and in respect of them the scheme was backdated to March 2004. Subsequently another four employees have been added to the scheme. On entry into the scheme, each employee received from the Applicant a letter, termed an 'Allocation Letter', advising the employee of the purpose of it and the benefits that could be expected. At the date of the hearing, the value of the funds in the Trust was in the region of £3 million.

4. On behalf of the Applicant, Advocate Robilliard stressed to the Court that the scheme was not driven by tax issues but the original understanding of the Applicant was that when monies were appointed out of the Trust, the Applicant would be entitled to claim a deduction for Corporation Tax purposes in the United Kingdom. Based on the affidavit evidence produced, the Court accepts that was the Applicant's understanding although the Court notes that in separate litigation in the English courts, between the Applicant and the solicitors who advised on the establishment of the scheme, that point is not accepted by the solicitors.

5. In advance of the Trustee making the first appointments out of the Trust, the Applicant made enquiries as to how the distributions were to be effected in order to obtain the intended benefits. Those enquiries resulted in a letter from Her Majesty's Revenue and Customs dated 10th March 2009 advising that in the opinion of HMRC: *"No corporation tax deduction will be available to the [Applicant] when the [Trust] makes the proposed contribution to the employees' personal pension schemes"*.

6. The Applicant took further expert advice on how to remedy the situation, including from Andrew Thornhill QC who advised that there was another, more fundamental, defect in clause 23.1.5 of the Trust Deed which provides as follows:

   "23. No discretion or power conferred on the Trustees or any other person by this Deed or by law shall be exercised, and no provision of this Deed shall operate directly or indirectly: ……

   23.1.5 so as to provide 'relevant benefits' within the meaning of Section 612(1) of the Income and Corporation Taxes Act 1988."

7. Additional advice has been obtained by the Applicant and by the Trustee who both agree that, as a matter of English law, this restriction in the Trust Deed prevents the Trust from being utilised for the purpose for which it was intended.

8. That advice has led the Applicant to make the present application to the Royal Court ("the Application") to have the Trust set aside and to have returned to it the monies paid by it into the Trust. The Applicant has said that if the Application is successful, its intention is to use the money to make alternative arrangements for the benefit of the selected employees.

Parties to the Application

9. The Application commenced after the Guernsey Court of Appeal delivered its decision in *Gresh v RBC Trust Company (Guernsey) Limited and HMRC* (16th September 2009) allowing the appeal of HMRC to be joined to proceedings as an intervener. Those proceedings concerned an application under the rule in *Re Hastings-Bass* [1975] Ch 25 that a distribution made by a trustee from a trust to a beneficiary thereof be declared void *ab initio* in circumstances where the distribution would attract tax in the UK that had not been envisaged when the trustee resolved to make the distribution. HMRC sought leave to be joined to the proceedings under Rule 37 of the Royal Court Civil Rules 2007 on the grounds *inter alia* that the issue of the validity of the distribution affected its right to tax the beneficiary and that as it was the only party that would be adversely affected if the distribution was declared to be void, the proceedings would not be properly defended unless it was joined.

10. Turning to the present Application, at an interlocutory stage the Deputy-Bailiff was advised that HMRC would be made aware of the Application. The Deputy-Bailiff agreed with counsel that the Application was clearly distinguishable on its facts from the case of *Gresh*. He therefore did not consider it necessary to make an order, in the absence of HMRC, that it be joined as a party.

11. At the substantive hearing on 22nd March, Advocate Robilliard advised that HMRC had been told of the hearing date and had not sought to be joined nor had it requested, as it does sometimes in *Hastings Bass* applications, that the Applicant undertake to draw certain matters or authorities to the Court's attention.

12. The only parties before the Court at the hearing on 22nd March were the Applicant and the Trustee. An issue was raised, on behalf of the Trustee, both by Advocate Dunster in his skeleton argument and in the written Opinion of Daniel Hochberg, the Trustee's English legal counsel, as to whether the beneficiaries, or any of them, should be parties to the Application.

13. The background to that issue is that the Trust is a discretionary trust and although only nine employees have been told they will receive benefits from the Trust, the class of beneficiaries includes all employees and ex-employees of the Applicant's group of companies, their spouses, widows and widowers as well as their children and step-children under the age of 18 years. There are 900 employees and 200 former employees who qualify and an unknown number of other family members, totalling perhaps several thousand individuals.

14. The letter of wishes executed by the Applicant in favour of the Trustee at the date of creation of the Trust indicates that the Trustee would be asked to make distributions only to specified employees who will have received an Allocation Letter or to their surviving spouse. The Court was told that only nine individuals had been issued with an Allocation Letter, all of whom are still alive. Therefore, they are the only individuals who could expect to receive benefit from the Trust.

15. Each of the nine had received a letter from the Trustee, carefully drafted by Carey Olsen the Trustee's Guernsey Advocates, advising him or her of the Application. In response thereto, each of the nine had signed a consent letter, again drafted in appropriate terms by Carey Olsen, indicating that he or she consented to the setting aside of the Trust and the return of the funds to the Applicant. In those circumstances, the Court agreed with Mr Hochberg that there was no need for any of the nine specified beneficiaries to be convened.

16. There was no suggestion from the Applicant that anyone else had any prospect of benefiting. The number of members of the class of beneficiaries was so great that they could not be contacted individually. However, the issue raised by Mr Hochberg was whether the Court should make a representation order appointing one or more beneficiaries to represent the interests of the members of the class of beneficiaries other than the nine who had consented.

17. Mr Hochberg referred to two decisions of the Royal Court of Jersey. In *Re DSL Remuneration Trust* [2007] JRC251, the settlor applied to set aside an employee benefit trust. The trustee was a defendant. Evidence was served on behalf of the employees indicating they had no expectation of deriving any benefit from the trust. In those circumstances, the court did not require them to be convened. Mr Hochberg contrasted that case with the decision of the Royal Court in *Re the R Remuneration Trust* [2009] JRC 164A in which the Court observed that the starting point was that the beneficiaries should be given an opportunity to be heard in opposition to the claim, even though the trustee had sought to represent the interests of the beneficiaries and the Court noted that the trustee had taken its obligation to look after the interests of the beneficiaries very seriously.

18. In addition to those Jersey authorities, Advocate Robilliard drew attention to one decision of the Guernsey Royal Court, In the matter of the *H. Sossen 1969 Settlement* (Royal Court of Guernsey, 28th May 2004). In that case, the settlement deed made no provision for a successor trustee to receive remuneration from the trust fund. Affidavits were obtained from the widow of the settlor and his two daughters. The Deputy-Bailiff ordered that enquiries also be made of the settlor's four minor grand-children by an independent Advocate appointed to represent their interests. He added, at paragraph 10 of the judgment:

> *"In light of the provisions of the Letter of Wishes I did not deem it necessary to hear from any other potential beneficiaries. I did not consider that they would have different legal arguments to put forward and in all the circumstances I did not consider it appropriate to increase the legal costs which would be incurred in making this application to the Court."*

19. The question of who should be a party to the present Application, being a matter of procedure, was for the decision of the Deputy-Bailiff alone. He took account of Rule 35 of the Royal Court Civil Rules 2007:

> *"35. (1) An action may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ("the beneficiaries").*
>
> *(2) Any judgment or order given or made in the action is binding on the beneficiaries unless the Court orders otherwise in the same or other proceedings."*

20. The Deputy-Bailiff ruled that there was no need for any other parties to be joined to the Application on the basis:

    a) that the nine specified employees had consented to the Application and they are the only persons expecting to benefit from the Trust;

    b) the Trustee had made its own enquiries and taken advice from English counsel as to whether there were grounds for setting aside the Trust and the gifts of money transferred by the Applicant to the Trustee to be held on the terms of the Trust;

    c) it appeared that there were no other separate views that could be represented to the Court by other members of the class of beneficiaries;

    d) the number of members of the class of beneficiaries are too numerous to be contacted individually;

e) the appointment of one or more beneficiaries to represent the others would add to the costs of the Application but was most unlikely to identify any fresh arguments; and

f) by reason of Rule 35, the decision of the Court would be binding upon all the beneficiaries even if no representation order was made.

Jurisdiction

21. The Royal Court has jurisdiction to hear the Application both by virtue of clause 22.2 of the Trust Deed which provides that the courts of the place of residence of the Trustee is the forum for administration of the Trust and also by virtue of section 4 (1) (b) of The Trusts (Guernsey) Law, 2007.

22. However, clause 22.1 of the Trust Deed provides that the proper law of the Trust is that of England and Wales.

23. Counsel agreed that in deciding whether to grant the relief sought in the Application, the Court was required to apply English law. To assist the Court in establishing the relevant principles of English law, we had Opinions from Mr Studer on behalf of the Applicant and from Mr Hochberg on behalf of the Trustee. Fortunately for the Court, they were in agreement on the legal issues that are relevant to the determination of the Application.

Gibbon v Mitchell

24. English counsel agreed that an English court would have jurisdiction to set aside the Trust under the principle set out in *Gibbon v Mitchell [1990] 1 WLR 1304*, provided the court was satisfied that the evidence supported the application of such principle. In that case, Millett J declared:

> *"…wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."*

25. In his very helpful Opinion, Mr Studer said that the principle enunciated by Millett J, together with the distinction it draws between mistakes as to the effect of the transaction and mistakes as to its consequences, has been followed and applied on numerous occasions. He then illustrated that remark by reference to a number of cases, and the facts of each of them: *Dent v Dent* [1996] 1 WLR 683; *AMP (UK) plc v Barker* [2001] PLR 77; *Anker-Petersen v Christensen* [2002] WTLR 313; *Wolff v Wolff* [2004] WTLR 1349; and *Bhatt v Bhatt* [2009] EWHC 734 (Ch).

26. He also referred to the much older decision in *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476. Lady Hood exercised a power of appointment over property in her marriage settlement in favour of her elder daughter with the intention of placing her in the same position as her younger daughter in whose favour she had already made a number of appointments. However, she had forgotten that she had previously made a large appointment to her elder daughter. The court held that the appointment to the elder daughter would be set aside because Lady Hood was labouring under a mistake, since the effect of the appointment *"was to bring about that which Lady Hood never intended and never contemplated"* (at page 335G-336C of the report).

27. Mr Studer then advised:

> *"2.5 It follows that in English law there is a well-established jurisdiction for the Court to set aside a voluntary disposition if, on the evidence, it is satisfied that the disponor has entered into it under a fundamental mistake or misapprehension as to its effect. It may not necessarily be any bar to relief*

that, had the disponor understood the nature of the transaction, he would nevertheless have entered into it, albeit that in such circumstances the Court may in its discretion decline to exercise the equitable remedy: see Anker-Petersen v. Christensen.

2.6 In the present case, if when establishing the Settlement Arun believed that the Settlement's terms would permit trust funds to be paid or applied by the making of contributions into the personal or registered pension schemes of beneficiaries, then it was labouring under a mistake as to the Settlement's effect in the sense used by Millett J in Gibbon v Mitchell and exemplified in the cases noted in paragraph 2.3 above. This was because Clause 23.1.5 of the Settlement contained an express direction precluding the exercise of any power or discretion by the Trustees or any other person, or the operation of any provision of the Settlement directly or indirectly, so as to provide "relevant benefits" within the meaning of section 612(1) of the Income and Corporation Taxes Act 1988, and "relevant benefits" as so defined for the purposes of the Settlement meant:

> *"…any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death, or in anticipation of retirement, or, in connection with past service, after retirement or death, or to be given on or in anticipation of or in connection with any change in the nature of the service of the employee in question, except that it does not include any benefit which is to be afforded solely by reason of the disablement by accident of a person occurring during his service or of his death by accident so occurring and for no other reason."*

The relevant mistake would accordingly have been one directly concerning the proprietary effect of the Settlement itself.

2.7 In my opinion, therefore, an English Court called upon to determine Arun's application for an order that the Settlement be set aside could manifestly invoke the Gibbon v Mitchell jurisdiction to make such an order if duly satisfied that:

2.7.1 in making the Settlement, Arun believed that the terms would permit the making of distributions from trust funds for the benefit of employee beneficiaries by payments into their personal or registered pension schemes; and

2.7.2 had Arun known at the time of its making the Settlement that the terms as drafted would preclude the making of any such distributions, it would not have executed the Settlement."

28. On behalf of the Trustee, Mr Hochberg agreed with that analysis of the *Gibbon v Mitchell* principle under English law.

Enlargement of the Gibbon v Mitchell Principle: Mistake as to the Consequences

29. Mr Studer also considered whether the principle in *Gibbon v Mitchell* has been enlarged by the courts so that a voluntary transaction could now be set aside on the ground that the operative mistake was one as to the *consequences* of the transaction (as opposed to its *effect*), in particular a mistake as to its fiscal consequences.

30. He referred to a line of cases, starting with the judgment of Lindley LJ in the Court of Appeal in the case of *Ogilvie v Littleboy* (1897) 13 TLR 399 CA and reported in the House of Lords as *Ogilvie v Allen* (1899) 15 TLR 294. (Neither of those reports was cited before Millett J.) Mr Studer said the following in his Opinion:

"3.3 In the case of Ogilvie v Littleboy mentioned by Lloyd LJ the issue was whether the plaintiff was entitled to have set aside (rather than merely rectified) certain charitable trust deeds executed by her, on the grounds that she had not fairly understood their nature and effect. In the Court of Appeal, Lindley LJ had said inter alia:

> *"Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and done, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor…*
>
> *In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him"*
>
> .

3.4 In the House of Lords in the Ogilvie case, Lord Halsbury LC referred to –

> *"circumstances when misunderstanding on both sides may render it unjust to the giver that the gift should be retained",*

but he agreed entirely with the judgment of Lindley LJ, as also did Lord Macnaghten.

Lloyd LJ concluded from this that the Ogilvie case therefore set out:

> *"a broad principle of injustice as the test for setting aside a voluntary disposition, in the absence of any circumstances of suspicion such as Lindley LJ mentioned"*

31. In *Sieff v Fox* [2005] 1 WLR 3811 Lloyd LJ, sitting at first instance, suggested that the *Gibbon v Mitchell* principle may have been too narrowly expressed. He said, at paragraph 106 of the report:

> *"106 Clearly there is a jurisdiction in equity to set aside a voluntary disposition for mistake (as there is also to rectify such an instrument to accord with the donor's true intentions: In re Butlin's Settlement Trusts [1976] Ch 251. The mistake must be as to the effect of the disposition. The discrepancy may arise from a legal defect in the disposition itself (as in Gibbon v Mitchell [1990]1 WLR 1304) or from a mistake of fact as to the position under the relevant trusts (as in Lady Hood of Avalon v Mackinnon [1909] 1 Ch 476) or as to the effect of the disposition in the hands of the donee: Ellis v Ellis 26 TLR 166. It may arise from a misunderstanding of the nature of the trusts which would affect the property after the disposition, due to a failure on the part of the advisers to explain the position properly: Anker-Petersen v Christensen [2002] WTLR 313. According to Gibbon v Mitchell [1990] I WLR 1304 the mistake must be as to the effect of the disposition, and a mistake as to its consequences is not sufficient. If that is the correct test, Davis J's comment that the fiscal consequences of the transaction are not relevant is probably right, and a misunderstanding as to those would not justify setting the disposition aside. According to Ogilvie v Littleboy 13 TLR 399 the test is more general, namely whether the donor or settler "was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him". That formula might allow fiscal consequences to be taken into account, if they were sufficiently serious.*

> *There is no case concerning a disposal by an individual of his or her own property which has turned on the relevance, or otherwise, of tax consequences. In Gibbon v Mitchell [1990] I WLR 1304 the mistake as to the legal effect of the deed did mean that it had different tax consequences, but this would not have sufficed for Millett J to have set it aside in the absence of the mistake as to legal effect."*

32. Mr Studer said that since *Sieff v Fox*, considerable attention has been paid to Lloyd LJ's remark that there is *"a broad principle of injustice as the test for setting aside a voluntary disposition, in the absence of any circumstances of suspicion"*. He said it is suggested the proper test may now be *"whether, in entering upon the relevant transaction, the donor or settlor in question was labouring under some mistake of so serious a character as to render it unjust on the part of the done to retain the property given to him."*

33. He quoted two decisions of the High Court of the Isle of Man: *Clarkson v Barclays Private Bank & Trust (Isle of Man) Ltd* [2007] WTLR 1703 (a judgment of Deemster Kerruish); and *McBurney v Betsam Trust CP* 2007/115 (Deputy Deemster Corlett) in which the court adopted the broader *Ogilvie* test.

34. Also, the Jersey Royal Court has adopted the Ogilvie test as representing the law of that island in the case of *Re the A Trust, B v C, D and E* [2009] JRC 245.

35. Having reviewed the law in those two jurisdictions, Mr Studer considered the present position under English law. He said he was *"not aware of any case where the English court has yet had to consider specifically whether a voluntary disposition may be set aside exclusively on the ground of the disponor's mistake as to the tax treatment of his disposition."* However, he cited two cases that had adopted a broader test: *In re Griffiths deceased* [2009] Ch 162; and *Fender v National Westminster Bank plc* [2008] EWHC 2242 (Ch). He concluded that the ingredients of the test appear to be that:

> *"(i) the disponor has entered into the transaction under some mistake of so serious a character as to render it unjust for the transaction to be upheld; and*
>
> *(ii) the person affected by the mistake would not have acted as he had done if he had been aware of the true facts."*

36. The conclusion reached by Mr Studer was:

> *"5.0 Conclusions*
>
> *5.1 There can be no doubt but that a voluntary transaction which has been made under a fundamental mistake or misapprehension as to its effect (in the sense used by Millett J in Gibbon v Mitchell and exemplified in the cases noted in paragraph 2.3 above) is amenable to the jurisdiction to set it aside if the Court is satisfied that the disponor did not intend the transaction to have the effect which it did. On this basis, an English Court called upon to determine Arun's application here could in my view manifestly invoke the Gibbon v Mitchell jurisdiction to set the Settlement aside if duly satisfied of the matters mentioned in paragraphs 2.7.1 and 2.7.2 above.*
>
> *5.2 With regard however to the effect of Arun's understanding of the tax treatment and fiscal consequences of its disposition at the time of creating the Settlement, it seems to me that, in determining the proper test, an English judge now called upon to decide the present application would also have to decide between the principle enunciated by Millett J in Gibbon v Mitchell and the "broader test" deriving from Ogilvie, as applied by Lewison J in Griffiths.*

5.3 This is because it does not seem to me to be in doubt but that Millett J in Gibbon v Mitchell did indeed intend to restrict the scope of the equitable jurisdiction to a mistake about the effect of a transaction, and there is therefore a direct conflict on the point between Griffiths and Gibbon v Mitchell, decided by judges of co-ordinate jurisdiction. Whilst the recent Isle of Man and Jersey cases are of persuasive authority, they are not binding upon an English court. The judge in question would thus be entitled to choose between the two decisions, possibly to follow Griffiths as the most recent in point of time, or to make up his or her own mind independently.

5.4 In the present conflicting state of the English authorities (and given the hesitancy evinced even by Mummery LJ in the Court of Appeal in the rectification case of Strain in expressing any opinion as to whether that case was one where the settlement could have been set aside for mistake), I regret that I do not feel able to predict with certainty how such an English judge would now resolve the difficulties relating to a voluntary disponor's mistake as to the tax treatment of his disposition. Nevertheless, the way is certainly open to develop the "broader" test deriving from Ogilvie.

5.5 At all events, however, in those cases such as Fender and Re the A Trust where the facts can equally support a claim based upon the existing (narrower) test in Gibbon v Mitchell, that jurisdiction remains undisturbed, for the purposes of English law, to permit the setting aside of a voluntary transaction by which one party intends to confer a bounty on another, if the court is satisfied that the disponor did not intend the transaction to have the effect which it did, and provided that the mistake is as to the effect of the transaction itself."

37. In his Opinion produced on behalf of the Trustee, Mr Hochberg addressed the issue as to whether there is a broader test (at paragraphs 7 and 8):

"7. The question whether there is as a matter of English law a wider jurisdiction to set aside a voluntary transfer or disposition of property, in cases where the transferor or disponor was under a mistake of a sufficiently serious character as to render it unjust on the part of the transferee or donee to retain the property given to him, even if the mistake was as to the consequences of the transaction, and not merely as to its effect, was specifically left open by Lloyd LJ in Sieff v Fox [2005] 1 WLR 3811. The argument is based on statements in the decision of the Court of Appeal in Ogilvie v Littleboy (1897) 13 TLR 399, and, on appeal, that of the House of Lords in Ogilvie v Allen (1899) 15 TLR 294. It is important to note that the actual decision in the Ogilvie litigation was that the transferor was not under a mistake which engaged the jurisdiction to set aside the transaction. Therefore, the observations of Lindley LJ in the Court of Appeal and Lord Mcnaghten in the House of Lords do not carry as much weight as they would have done if the transaction had been set aside. But in Re Griffiths, Deceased [2009] Ch 162, Lewison J held that a mistake on the part of the transferor or disponor of a sufficiently serious nature, irrespective whether it was a mistake as the nature of the transaction itself, or was as to the consequences (including tax consequences), was capable of bringing the equitable jurisdiction to set aside a voluntary transaction. The mistake in Re Griffiths, Deceased which engaged the transaction was, however, a mistake as to the transferor's own state of health and life expectancy, not a mistake as to the tax consequences of the transaction. Lewison J held that, in order for a transaction to be set aside, it had to be established that the transferor or disponor would not have acted as he had done if he had been aware of the true facts. The decision Re

> *Griffiths, Deceased was followed in the case of Fender v National Westminster Bank plc [2008] EWHC 2242 (Ch).*
>
> *8. In the present case, the mistake on the part of Arun in believing that the Trustee of EBT had power to apply funds from the EBT for the purpose of making payments to the personal or registered pension schemes of the beneficiaries, when the provisions of clause 23 of the EBT prevented the Trustee from applying funds for that purpose, satisfies the narrower test as set out in Gibbon v Mitchell, and as a matter of English law the Court has jurisdiction to set aside the EBT, and the transfers of substantial assets into the EBT made under the same mistaken belief. If the jurisdiction to set aside a transaction is engaged on the narrower ground, as set out in Gibbon v Mitchell, then it is irrelevant whether it might be engaged on the wider ground as set out in Re Griffiths, Deceased."*

38. We have summarised the arguments of counsel in some detail, without quoting them in full and apologise if in so doing we have in any way misrepresented the arguments. The Deputy-Bailiff directed the Jurats that determination of matters of English law was a factual matter for him alone. He accepted the advice of Mr Hochberg that if relief was granted on the basis of the *Gibbon v Mitchell* test, it was irrelevant as to whether there was also a broader test under English law and therefore it was not necessary to reach a conclusion as to what an English court might decide in these circumstances. That question will, quite properly, be left for the English courts if required to do so. It is to be noted that the Court was not being asked to determine what would be the law of Guernsey on these issues; that question can also be deferred to a future case. Any analysis of Guernsey law will, no doubt, start with a consideration of the Norman customary law, as applied in Guernsey, with regard to *Donations* and may or may not reach a conclusion that is similar to English law.

Rectification

39. Mr Hochberg considered whether the Trust could be rectified to allow payment into the beneficiaries' pension plans. He noted that:

> *"The doctrine of rectification of a document involves demonstrating that, due to a mistake in the drafting of the document, it does not embody the transaction which the relevant party or parties intended. The Court does not rectify transactions; it rectifies documents so that they are consistent with the transactions they were intended to embody."*

40. He referred to the general observations as to the rectification of documents made by Peter Gibson LJ in *Racal Group Services Ltd v Ashmore* [1995] STC 1151 (CA) at page 1154g-1155c. Mr Hochberg observed that rectification of documents is *"a discretionary remedy which must be cautiously watched and jealously guarded… Convincing proof is required to counteract the cogent evidence of the parties' intention displayed in the instrument itself."*

41. He also referred to the observations of Tuckey LJ at paragraphs 34 and 35 of *Snamprogetti v Phillips* [2001] EWCA Civ 869 and said:

> *"By analogy, where the form of a trust deed is drafted and settled by an experienced lawyer acting on his client's instructions and advising the client as to the documents, there is a presumption that the client intends the transaction to be governed by the precise words used."*

42. Mr Hochberg concluded that, in the present matter, there was no evidence before him to support a case for affirming the transaction and rectifying the documents. Similarly, the Court is satisfied that there is no evidence before the Court that would support an application for rectification and, consequently, Advocate Robilliard was correct in not asking the Court to do so.

The Decision of the Jurats

43. The Deputy-Bailiff directed the Jurats that the questions for them to consider are as set out at paragraphs 2.7.1 and 2.7.2 of the Opinion of Mr Studer. He reminded them that the burden of proof was on the Applicant and that the standard of proof was the civil standard of the balance of probabilities.

44. The relevant evidence was to be found in the affidavit of Mr Matthews and the documents exhibited thereto, and summarised in the opening paragraphs of this judgment.

45. The Jurats were satisfied, unanimously, that:

    i) in making the Trust, the Applicant believed that the terms would permit the making of distributions from the Trust funds for the benefit of employee beneficiaries by payments into their personal or registered pension schemes; and

    ii) if the Applicant had known at the time of making the Trust that the terms as drafted would preclude the making of any such distributions, it would not have executed the Trust.

46. The court was asked by Advocate Dunster whether, if it was minded to allow the application, it would wish to do so subject to imposing conditions. The issue was raised by Mr Hochberg in his Opinion

    "21. On the assumption that the EBT is set aside, a very large proportion of the funds now held by the Trustee will be held on bare trust by the Trustee for Arun. Even if those funds remain held by the Trustee and are segregated from Arun's other assets, it is difficult to see how they could be protected from the claims of a liquidator of Arun, or the claims of any creditors of Arun unless and until a new trust was fully constituted for the benefit of the Relevant Beneficiaries. Furthermore, the constitution of a new trust and transfer of assets to the trustee by Arun would itself be subject to the provisions of English insolvency legislation, if Arun was itself insolvent at the time of the establishment of the new trust, or the establishment of the new trust made it insolvent.

    22. A possible solution conferring protection on the Relevant Beneficiaries would be for the court's order to be drafted so that the existing EBT would only be set aside with effect from the date that another trust (or trusts) became constituted for the benefit of the Relevant Beneficiaries, and the trust fund of the EBT was paid and transferred by the Trustee to the trustee of such new trust or trusts (or held by the existing Trustee). This ought to have effect that the existing trust fund would remain held for the Relevant Beneficiaries until such time as it could be transferred by the Trustee into a new trust also held for them, without becoming part of Arun's assets. I am aware that Arun would need time to take advice on the appropriate structure for any new trust or trusts, so as to ensure that the best tax position would be obtained, and it would obviously be desirable for such advice to be obtained as soon as possible. Equally, the trust fund consists of very nearly £3M, and the accounts for Arun show that this is a significant sum compared with Arun's balance sheet. Therefore, it is desirable for the trust fund not to fall back into Arun's balance sheet, in which case it would become available to meet other, general liabilities or Arun. The drafting of the order will have to be carefully considered so that the risk of the assets reverting to Arun can be eliminated, or reduced as much as possible."

47. Advocate Robilliard who, we understand saw the Opinion for the first time on 19th March, noted that Mr Hochberg had quoted no legal authority to confirm that the Court had the

jurisdiction to impose such conditions. He also said that, having looked at all the decisions of which he was aware in which courts had set aside a voluntary transaction on the ground of mistake, they had never imposed conditions.

48. The Deputy-Bailiff directed the Jurats that they were to assume they did not have the jurisdiction to impose conditions when granting the relief sought. He did so on the basis that the Royal Court is applying English law and was being asked to determine, as a matter of fact, what is the relevant English law. There was no evidence before the Court to show that an English court would have such power in similar circumstances, or if it would have the power, what factors it should take into account in deciding whether to exercise the power. In the absence of such evidence, the Deputy-Bailiff was not in a position to decide what powers an English court might have and therefore had to direct the Jurats that they could not impose conditions.

49. Nevertheless, the Jurats remained concerned as to whether there should be some additional protection for the nine employee beneficiaries to guard against any risk that after the Applicant has received back from the Trustee the sum of approximately £3 million, it might decide to use all or part of the money for some purpose other than what had been promised to the employees. (The Court accepted that there were no conditions that could be imposed that would safeguard the money from creditors or a liquidator if the Applicant became insolvent.)

50. A reason for concern was that although the present Application had been in preparation for some time, the Applicant had not finalised the arrangements that were to be put in place if the relief was to be granted. For example, in an email from Advocate Robilliard dated 12 March 2009 to Advocate Dunster, he enclosed an extract from the solicitors advising on the alternative scheme in which it was said that the details of the establishment of a proposed replacement Employee Benefit Trust were still under discussion.

51. An option for the Court was to consider adjourning determination of the Application until such time as the alternative arrangements had been finalised and were ready to be implemented immediately.

52. The Jurats rejected that option for the following reasons:

    i) None of the employee beneficiaries had requested any conditions. They had all consented unconditionally to the Application even though the Trustee had alerted them to the potential risk in its letter advising them of the Application.

    ii) The employees, being the senior employees of the Applicant, were best placed to know whether there was any risk that the Applicant might renege on its promises.

    iii) Good faith is to be presumed and there was no evidence before the Court to rebut that presumption.

Conclusion

53. The Court granted the application to set aside the Trust and ordered that the monies held on the terms of the Trust be returned to the Applicant and it did so unconditionally. In doing so, the Court applied the test in *Gibbon v Mitchell*, having been satisfied that clause 23.1.5 of the Trust Deed contained a fundamental error that prevented the purpose of the Trust being put into effect in that it prevented the Trustee from making distributions from the Trust to the pension funds of employee beneficiaries.

