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CASENOTE: LEGAL LOOPHOLES IN THE LAW OF UNINTENDED CONSEQUENCES

A Consideration of the Decision in *Re Griffiths*¹

Lesley Austen

Introduction

How far should an individual be protected from the consequences of his actions when these turn out to be not as he intended? What follows is a brief consideration of the equitable doctrine of mistake and its application in recent cases.

Background

There is an equitable jurisdiction which allows a court to set aside a voluntary disposition where a donor shows that he made the disposition as a result of a mistake of a serious nature. This was applied in *Re Griffiths*, in which it was held by the High Court that a transfer was voidable having been made at a time when the donor was suffering from terminal cancer which, if he had known about it, would have persuaded him not to make the gift. This jurisdiction may be contrasted with the *Hastings-Bass* line of cases which affects trustees.² In the exercise of their fiduciary powers trustees have a duty to take into account all relevant factors, including the taxation implications, and a failure to do so may lead to the setting aside of the exercise of those powers.

The Facts of *Re Griffiths*

Inheritance tax planning for wealthy individuals will often involve making lifetime gifts with the object of reducing liability to inheritance tax (IHT) on death. A gift made to an individual is a potentially exempt transfer (PET). Provided the donor survives for a period of seven years from the date of the gift, the PET will become fully exempt for IHT. Conversely, the failure to survive for this period results in the transfer becoming chargeable to IHT. Mr Griffiths was 73 and, as a result of tax planning advice he had received, he made three PETs, hoping to survive for seven years. He made two transfers in April 2003 and in February the following year he made a further gift of £2.6m. In autumn 2004 he was diagnosed as suffering from lung cancer from which he

¹ *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2009] Ch 162.

² *In re Hastings-Bass, decd* [1975] Ch 25.

died in April 2005. All three PETs became chargeable to IHT and the tax payable exceeded £1m. In addition to making the lifetime gifts, Mr Griffiths had made a will in which he left a life interest in the rest of his estate to his (younger) wife. Gifts to a spouse, provided they are domiciled in England and Wales, are exempt for IHT. Therefore, had he not made the PETs, there would have been no IHT payable on Mr Griffiths' estate on his death. The medical evidence disclosed that Mr Griffiths was not suffering from cancer in 2003 but that he was in 2004.

The executors were successful in their application to set aside the February 2004 gift on the grounds of mistake, namely that, at the time he made the gift, Mr Griffiths had believed that there was a real chance that he would survive for seven years. In fact, as a result of the particularly aggressive form of cancer from which he was suffering, there was no such chance. Had he known that his life expectancy was so short he would not have made the gift. Lewison J held that a mistake of fact is capable of bringing the equitable jurisdiction into play provided it is so serious that it would be unjust to allow the donees to retain the gift. Could it then be shown that if Mr Griffiths had been aware of the true facts he would not have acted as he did?

On the facts there was no evidence that the transfers in 2003 were made under a mistake. Mr Griffiths was not ill at the time the gifts were made. However, at the time of the 2004 transfer he had been ill. Had he known in February 2004 that he was suffering from lung cancer he would have realised that his chance of surviving for seven years was remote. In those circumstances he would not have acted as he did in making the gift and, applying the jurisdiction, it was appropriate to set the 2004 gift aside. It should be noted that the executors' application was not opposed by the donees and HMRC had declined an invitation to intervene in the proceedings. There was therefore no adversarial argument either on the law or the facts and no argument as to the correct test to apply. Was it sufficient to show that there had been a serious mistake, or that the mistake was as to the effect of the transaction, rather than its consequences?

The Development of the Jurisdiction and the *Hastings-Bass* Line of Cases

In *Griffiths*, on the equitable jurisdiction to set aside, Lewison J cited Lindley LJ in *Ogilvie v Littleboy*³:

...[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

Lewison J conceded that the distinction between effects and consequences was ‘a difficult one to grasp’ but that he did not need to concern himself with it since he did not accept that the jurisdiction was restricted to a mistake about the effect of a transaction. The donor understood that the transfer was potentially exempt and what that entailed. He concluded instead that the relevant mistake was a mistake about Mr Griffiths’ state of health. That was mistake about a fact existing at the time of the transaction, not a mistake about the transaction itself.

In *Griffiths* the voluntary disposition had precisely the effect intended and the donor was aware that tax would be payable if he failed to survive for seven years. In support of this approach, Lewison J cited Eve J in *Lady Hood of Avalon v Mackinnon*⁴ in which Lady Hood had appointed sums of money to her daughters intending to achieve equality between them. She had forgotten, however, that she had already made appointments to her elder daughter some years before. Eve J discussed at length whether forgetting an existing fact could amount to a mistake and concluded that it could.

In *Gibbon v Mitchell* Millett J identified a distinction between the effect of a transaction and its consequences:⁵

It will be set aside for mistake whether the mistake is a mistake of law or fact, so long as the mistake is to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.

But the facts of *Griffiths* distinguish it from *Gibbon v Mitchell* where the intention in surrendering a life interest was to accelerate the entitlement of the beneficiary’s children whereas the result was to give rise to a discretionary trust. This was an entirely different arrangement from the one intended.

³ (1897) 13 TLR 399 (CA) at para.19.

⁴ [1909] 1 Ch 476.

⁵ [1990] 1 WLR 1304 at para.1309

The jurisdiction was also applied in *Wolff v Wolff*⁶ where taxpayers had carried out a complex tax planning exercise which they had not understood and which would have resulted in their becoming homeless. In relation to *Hastings-Bass* jurisdiction, it is sufficient to show that there has been a mistake as to the consequences of a transaction. In *Sieff v Fox* Lloyd LJ reviewed the cases and concluded that *Hastings-Bass* relief had developed differently from the cases on relief for mistake, but observed:⁷

There is an understandable common theme of restricting the circumstances in which an apparently valid disposition can be set aside

Was the disposition void or voidable?

Lewison J held that as the purpose of the jurisdiction is to relieve against the consequence of a mistake, unless and until the transaction is set aside (or relief is given) it has legal effect. The transaction was therefore voidable rather than void *ab initio*.

Mistake in future

Earlier this year, a case involving a voluntary disposition made in consequence of a mistake resulted in the setting aside of a deed of trust purporting to distribute the beneficial interest in property and entered into by a settlor on the erroneous assumption that it would lead to the mitigation of IHT.⁸ The settlor's lack of understanding of relevant legal principles was a persuasive factor in the decision as was her limited ability to read and speak English.

Notwithstanding the observations of Lloyd J in *Sieff v Fox*, if, as may appear to be the case, there is a willingness on the part of the courts to allow equity to intervene to set aside voluntary dispositions, it will be interesting to see whether this approach can be maintained. In the face of increasingly complex legal transactions required to mitigate the worst effects of draconian and often retroactive changes to trust law and taxation seen in recent years not to mention moves to deregulate the legal profession, the potential for unintended consequences seems set to rise.

⁶ [2004] STC 1633.

⁷ [2005] 1 WLR 3811 at para.108.

⁸ *Shantaben Durgashanker Bhatt v Hasmita Durgashanker Bhatt & 7 Ors* [2009] EWHC 734 (Ch).