



In The Royal Court

Zillah Howard of Bedell Cristin highlights some of 2011's Royal Court decisions in relation to trusts.



Zillah Howard,
partner,
Bedell Cristin

A review of the trusts cases published in Jersey around the mid-year mark shows that there have already been several significant decisions: this article considers a small selection of cases which highlight topics of interest in the private wealth arena.

Hastings-Bass relief

Following the re-casting of the Hastings-Bass rule by the English Court of Appeal in *Pitt v Holt* [2011] EWCA Civ 197, it will be interesting to see what approach the Jersey courts take in relation to future applications for this form of relief.

At the time of writing, the most recent Jersey decision is that of *In the matter of the Representation of L Representation of Mrs P* and in the matter of the *R Trust* [2011]JRC085 which was decided before the Court of Appeal's decision in *Pitt v Holt*, albeit the Royal Court's reasoned judgment was not released until

afterwards. In this case, the protector of a settlement obtained tax advice to the effect that she should exercise her power of appointment of trustees in order to appoint herself and another as new trustees. However, the trust instrument provided that trustees were excluded persons and her appointment as a trustee therefore meant that, notwithstanding her position as the primary beneficiary, she was unable to take any benefit under the settlement. An application was accordingly brought for Hastings-Bass relief to undo her appointment as a trustee.

Reference was made to *Re Green GLG Trust* 2002 JLR 571, as being the first occasion on which the Hastings-Bass principle was applied in Jersey, where the court stated that it was "... but a manifestation of the general principle that a trustee must act in good faith, responsibly and reasonably ... the Hastings-Bass decision merely elaborated the position by making it clear that a

decision of a trustee was similarly liable to be quashed where the trustee has taken account of irrelevant factors or has ignored relevant ones.”

Noting that the principle applies equally to other fiduciaries (such as protectors) and not just to trustees, the court was satisfied that the representor would not have exercised her powers to execute the deed of appointment of new trustees if she had been aware that, by so doing, she would exclude herself from the ability to take any benefit from the settlement and, also, incur a substantial tax liability. Hastings-Bass relief was accordingly granted.

Rectification

Another form of relief frequently sought in Jersey is that for rectification. This can be an extremely useful and powerful remedy as it allows for a document to be rectified with retrospective effect, the idea being that it is “corrected” to reflect what was originally intended.

In the case of *In re A* [2011] JRC008, the Royal Court rectified an error in an instrument of appointment and retirement of trustees: The appointment should have been made by the retiring trustee but was instead expressed to be made by the protector (when there was, in fact, no protector). The court referred to the test for this remedy being well settled:

- the court must be satisfied that as a result of a genuine mistake the trust deed does not carry out the true intentions of the parties;
- there must be full and frank disclosure;
- there should be no other practical remedy.

With regard to the requirement that there should be no other practical remedy, the court noted that the retiring trustee (which should have

exercised the power to appoint a new trustee) had been struck off the register of companies and considered that its reinstatement was not now feasible. The court also considered the possibility of exercising a power conferred upon it by the trust instrument to appoint a new trustee, but concluded that the only practical remedy, in view of its retrospective effect, was that of rectification.

In earlier cases where the court has looked at this element of the test for rectification, the view has also been expressed that rectification is to be preferred to an order for mistake because rectification (unlike mistake) allows for the preservation of what a settlor intended to establish, and that (in circumstances where a mistake has been caused by professional advisers) to require a settlor to bring proceedings against his advisers is not a sufficiently practicable alternative to rectification.

Charitable trusts

The decision in *In re H* [2011] JRC070 gives judicial consideration, for the first time in the Island, to the test to be applied for convening parties to an application regarding a charitable trust.

The court has expressed the view that someone with just a general interest in a charity should not be given leave to intervene, but someone with an interest which is materially greater than, or different from, that shared by ordinary members of the public could be convened. Given the importance attached to the wishes and intentions of the settlor in relation to a charitable trust, a settlor of such a trust normally would have such an interest.

In view of the increasing interest in philanthropy and in the establishment by high net worth

individuals of charitable trusts, this indication of the Jersey court’s views towards those who establish such structures is very helpful indeed. The indication is that the Royal Court will be keen to ensure that a settlor and his heirs, executors and legatees are given an opportunity to be heard in proceedings regarding a charitable trust in circumstances where they can throw light on the settlor’s wishes and intentions and so can assist the court in making decisions regarding the trust.

Nominees

Lastly, a recent decision in relation to nominee shareholders is worth mentioning. In the case of the *Representation of Publicis Graphics* [2011] JRC089, the court noted the widespread use of nominee shareholders and the reliance placed upon them, and recognised the importance of maintaining confidence in such shareholders by requiring strict and immediate compliance with the terms of the declarations of trust pursuant to which nominees act. The court noted that those who have shares held for them by nominees expect to be able to deal with them as if they were held in their own name. In this case, the *Trusts (Jersey) Law 1984* as amended (the “*Trusts Law*”) required the bare trustee to exercise his powers only in the interests of the beneficial owner and in accordance with the terms of the declaration of trust.

The court ordered the nominee to execute documents in accordance with the declaration of trust and provided that, should he fail to do so within 7 days, the Viscount should be directed to do so on his behalf (pursuant to Article 52 of the *Trusts Law*). ■