

## Representation of Wilkes and Wilkes [2015] JRC 200

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The latest application dealing with the law of mistake has been decided by the Jersey Royal Court. It is yet another application that has arisen from the activities of the firm of English Solicitors Baxendale Walker which is no longer in existence.

Mr and Mrs Wilkes wished to raise a loan against their home (**the Property**) partly to pay off a business loan and partly to provide cash.

Upon the advice of Baxendale Walker, the Wilkes entered into a scheme whereby (they were told) they would each be able to receive an annuity income from the date that each of them respectively reached 75 years of age.

In summary, the scheme required i) the establishment of a trust in Jersey (**the Trust**) with an offshore trustee (**the Trustee**) and ii) the entering into by each of the Wilkes of an Estate Annuity Purchase Deed (**EAPD**) whereby the Trustee would pay the Wilkes an annuity as consideration for the transfer by each of the Wilkes to the Trustee of a 50% beneficial interest and equity of redemption in the Property.

The Wilkes also wished to invest in a property on a buy-to-let basis (**the Investment Property**). The Investment Property was bought by a company called Cheveral Investments Limited and all fees and legal charges were provided by the Trustee with finance agreements being entered into by one of the Wilkes.

There are no longer any assets in the Trust and the Property is in negative equity. All that is left is the Investment Property but this is still held in the name of Cheveral Investments Limited.

The Court has intervened to set a number of similar schemes aside upon the grounds of mistake.

Notwithstanding that the EAPDs involved were said to be governed by English law, the Trust itself was governed by Jersey law. Accordingly, the Court applied the Jersey law of mistake to the application pursuant to article 9(1) of the Trusts (Jersey) Law 1984 (**the Law**) which provides that the validity of a Jersey trust and validity and effect of any transfer of property into a Jersey trust shall be determined in accordance with the law of Jersey with no rule of foreign law affecting such a question.

The Court was willing to consider the creation of the EAPDs alongside the creation of the Trust on the basis that the two were inextricably linked in that the EAPDs were an essential part of the scheme.

The Court confirmed that the test for mistake is the same whether it is approached under Article 11 or Article 47(e) of the Law and reaffirmed the test for mistake as set out in *Re Lochmore Trust*<sup>1</sup>, namely:

- was there a mistake on the part of the settlor?
- would the settlor not have entered into the transaction “but for” the mistake?
- was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

The mistake was attributed to the scheme itself. The Court held that the Wilkes had been mistaken when they entered into the scheme on the basis that it would have been unlawful for the Trustee to pay the annuity on the basis that it was not in possession of a permit authorising the Trustee to carry out long term insurance business. The EAPDs were therefore classed as illegal contracts. Secondly it was impossible for the annuity to be paid at the level set out in the EAPDs as it was found that there would always have been insufficient assets in the Trust.

The Court was satisfied that the above findings constituted a mistake made by the Wilkes as they entered into a scheme that was incapable of performance. Furthermore the Court held that the Wilkes would not have entered into the scheme ‘but for’ the mistake made and that the mistake was of so serious a character as to render it unjust on the part of the donee to retain the property. The Court noted that there were no beneficiaries of the Trust who would suffer from it being set aside.

The Court declared the Trust and the EAPDs to be invalid and that the assets of the Trust (including the Investment Property held by Cheveral) were held on bare trust for the Wilkes and were so held at all times.

This case is further clarification that, whether the matter is approached under article 11 or the more recently drafted article 47(e) of the Law, the Court will most likely apply the same test. It is also noteworthy that the mistake was not based on adverse tax consequences as we have seen on many occasions but rather on the scheme’s incapability of performance.

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