Case Note

Bhaur and others v Equity Trustees and others [2023] EWCA Civ 534—when will equity set aside a voluntary disposition for mistake?

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Abstract

On 18 May 2023, the Court of Appeal handed down its decision in ***Bhaur and others v Equity Trustees and others* [2023] EWCA Civ 534**. The Court declined to grant equitable relief to set aside the transfer of the Claimants' family wealth into an employment benefit trust. This was despite the fact that the Claimants had acted on dishonest advice and the catastrophic financial consequences of the transaction. The Court found that as the Claimants were aware of the nature of the tax avoidance scheme, it would not be unconscionable to refuse equitable relief.

Introduction

1. On 18 May 2023, the Court of Appeal delivered its judgment in ***Bhaur and others v Equity Trustees and others [2023] EWCA Civ 534*** ("***Bhaur***") following a two-day hearing on 7 and 8 February 2023. Lord Justice Snowden delivered the Court's unanimous judgment, with Lord Justices Lewison and Arnold concurring.

2. The Court upheld the High Court decision of Mr Justice Marcus Smith delivered on 28 September 2021 ("***HC Judgment***").

Background

3. The background is helpfully set out in ***Bhaur*** at paragraphs 4–32 and in the ***HC Judgment*** at paragraphs 15–79.

4. Mr Bhaur emigrated to the UK from India in the 1960s. Mr Bhaur initially worked as a bus conductor and soon amassed considerable wealth through a clothing and property business. Mr Bhaur and Mrs Bhaur had two children, Mandeep and Baldeep.

5. In 2006, Mr Bhaur began making succession plans following a stroke.

6. Mr Toole, a solicitor at Aston Court, recommended Mr Bhaur to transfer his family wealth into an employee benefit trust ("EBT"). An EBT enjoys generous tax concessions including inheritance tax. Strict conditions in the ***Income Tax Act 1984*** ("IA") apply for an EBT to qualify. In particular, the assets in the EBT must only be applied for the benefit of the employees, section 13 ***IA***.

7. There was a belief that EBTs could legitimately be used to avoid inheritance tax. The idea was that once the participants, persons who owned more than 50% of the shares of the Trustee, passed away, persons connected to the former participants could benefit free from inheritance tax. Mr Justice Roth sitting at the High Court in ***Barker v Baxendale Walker [2016] EHWC 664*** upheld this view of EBTs.

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 https://doi.org/10.1093/tandt/ttad059

8. In 2007, Mr Bhaur transferred his family wealth into Safe Investments UK ("Company"). Mr and Mrs Bhaur were the directors and shareholders in the Company. The aim was that on their death, their sons Mandeep and Baldeep would be able to inherit the family wealth free of inheritance tax.

9. The Company transferred the family wealth to Gooch Investment, a wholly owned BVI subsidiary.

10. In March 2007, the Company disposed of its shares in Gooch Investment to a BVI trust company ("Transaction"). The shares were to be held on trust for the benefit of employees of the Company. This was despite the fact that the Company did not require any employees. The First Staff Remuneration Trust ("First Trust") was created. From this moment, Mr and Mrs Bhaur lost control of their family wealth.

11. In July 2010, HMRC challenged the First Trust.

12. In 2010 and 2011, Aston Court, by way of a complicated transaction, created the Second Staff Remuneration Trust ("Second Trust").

13. In 2012, the family wealth was transferred to a Mauritian trust.

14. In December 2017, the Court of Appeal held that EBTs could not be used to avoid inheritance tax, ***Baxendale Walker v Barker [2017] EWCA Civ 2056***. Lady Asplin stated at paragraph 47 (emphasis added):

> ***the implausible intention that an employee benefit trust could be used for dynastic estate planning*** *and enable the family of the owner of a major shareholding in a company to benefit from the proceeds of sale of that holding entirely tax free after the owner's death.*

15. In May 2018, against the wishes of the Claimants, and under pressure from HMRC, Aston Court unwound the Second Trust.

16. On 9 October 2018, the Claimants issued a Part 8 Claim against the Defendants to set aside the Transaction for mistake. Mr Bhaur argued that he made a mistake about the Transaction, namely he believed it to be reversible at will and that his losses would be limited to the fees of Aston Court, for which it had given a guarantee. Instead, the Transaction nearly extinguished the entire family wealth due to tax, penalties and interest.

The High Court trial

17. The High Court trial took place for over six days in April and June 2021 before Mr Justice Marcus Smith.

18. There were several unusual features about the trial:

> 18.1. Firstly, none of the Respondents opposed the application to set aside the Transaction;
>
> 18.2. Secondly, Mr O' Toole and Aston Court did not participate so many documents were not disclosed, paragraph 214 ***HC Judgment***;
>
> 18.3. Thirdly, the Claimants, rather than being cross-examined, gave their evidence during the case opening of their counsel. They were permitted to give evidence together in reflection of the fact that they made decisions together.

The HC judgment

19. Marcus Smith J carefully considered the evidence and paid particular attention to the subjective state of mind of Mr Bhaur in entering the Transaction. **Was Mr Bhaur really mistaken that the Transaction was an artificial tax avoidance scheme?**

20. Marcus Smith J considered:

> 20.1. that the decision was not "*ill-considered and quickly made*" but rather carefully made having regard to a considerable volume of transactional documents, paragraph 217(2)(f)
>
> 20.2. Mr Bhaur's comments to a letter from Aston Court of 2 May 2007 [Mr Bhaur's comments are emphasises bold], paragraph 154:
>
> *. . .3. Expected level of payments from the trust to employees, i.e. once a year, once every month, etc. Will you use the trust to supplement wages, pay bonuses, pay for Christmas parties, or sales related prizes, etc?*

Once every month and ***no plan to use the trust to supplement wages, bonuses, and parties, etc***

20.3. a letter from Aston Court to Mr Bhaur of 10 July 2017 which stated [emphasis added]:

*. . .****Your instruction to your solicitors to build your staff incentive vehicle was not motivated by tax concerns*** *but purely by a desire to build a staff incentive vehicle.*

20.4. Mr Bhaur's conduct after HMRC challenged the First Trust. Marcus Smith J stated at paragraph 218(1) [emphasis added]:

[Aston Court told Mr Bhaur]. . .[*t*]*he essential reason why the Scheme would fail. . .because this was an employee remuneration trust intended to benefit employees.* ***Mr Bhaur's response was not to say that an employee remuneration trust was never intended*** *and not his desire. . .. But to explore other ways in which to deliver the tax benefits.*

21. Marcus Smith J refused to grant relief for mistake. His Lordship came to the firm conclusion that the Claimants, paragraph 217(2)(d) ***HC Judgment*** (emphasis added):

21.1. did not make a mistake about the tax avoidant nature of the Transaction, paragraph 217(c)(ii):

[The Claimants] *were not mistaken in the essential tax evasiveness of the Scheme. The Scheme was an employee remuneration trust in form only, and the Bhaur Family knew and endorsed this approach.*

21.2. made a misprediction as to the consequences of the Transaction, paragraph 217(2)(d):

I accept that Mr Bhaur and the Bhaur Family miscalculated in terms of the consequences to them if the Scheme went "wrong*", i.e. if the tax authorities became involved. Their thinking, as I find, was that the Scheme could simply be reversed and that they could opt back into the tax regime that they had sought to evade. The only downside, to their way of thinking, was the fees that they had paid to Aston Court; and that explains why they repeatedly stressed the importance of the fee refund offered by Aston Court and accepted by them.* ***This was undoubtedly wrong, but it was not a mistake. It was a misprediction****. . .*

Court of Appeal

22. The key ground of appeal was that the High Court erred in finding that the Claimants' mistake as to the tax consequences of the Transaction was a misprediction and not a mistake.

Mistake

23. The Court reviewed the law of equitable mistake at paragraphs 55–75. The Court carefully considered the leading authority, the Supreme Court's judgment in ***Pitt v Holt [2013] AC 108*** ("***Pitt v Holt***"). The Court at paragraph 56 stated that the requirements for equitable mistake to set aside a voluntary disposition were (emphasis added):

1. *a mistake, which is*
2. *of the relevant type, and*
3. ***sufficiently serious so as to render it unjust or unconscionable*** *on the part of the donee to retain the property given to him. The third part of that framework was derived from a dictum of Lindley LJ in* ***Ogilvie v Littleboy (1897) 13 TLR*** *399 at 400.*

24. The Court discussed the difference between mistake and a misprediction at paragraphs 57 to 63. The Court:

24.1. referred at paragraph 58 to Lord Walker's speech at paragraph 109 of ***Pitt v Holt***:

A misprediction relates to some possible future event, whereas a legally significant mistake normally relates to some past or present matter of fact or law.

24.2. quoted at paragraph 66 the words from ***Birks, Introduction to the Law of Restitution*** which was approvingly cited by the Privy Council in ***Dextra Bank v Bank of Jamaica [2001] UKPC 50*** at paragraph 29 [emphasis added]:

> *To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been mistaken* ***you are merely asking to be relieved for a risk knowingly run****. . .*

25. The Court noted at paragraph 61 "[*t*]*he fineness of the distinction*" between a mistake and misprediction. This is exemplified by ***Re Griffiths [2009] CH 162*** in which Lewison J set aside a transaction in 2004 for mistake as at this stage Mr Griffiths was suffering the onset of cancer, and therefore was mistaken in thinking he would survive a further 7 years. Lewison J refused to set aside the transactions in 2003 as at that stage Mr Griffiths was not yet suffering cancer. He simply made a misprediction about his life expectancy.

26. The Court referred at paragraph 64 to the previous distinction between mistakes as to the effect of a transaction and the consequence of a transaction which had arisen following ***Gibbon v Mitchell [1990] 1 WLR 1304***. The Court noted that this distinction had caused confusion and thankfully had been brought to an end by ***Pitt v Holt***.

Mistakes regarding tax

27. The Court noted that relief would not be granted for all types of mistakes. It had to be a mistake of the relevant type, paragraph 67. The Court at paragraph 68 explained that this stemmed from ***Ogilvie v Littlebow 1897 13 TLR 999*** in which Millett J stated that in order for the equitable remedy of mistake to set aside a voluntary disposition, a mistake of sufficient seriousness was required so that it would be unjust to allow the transaction.

28. In deciding whether to grant relief, the Court may have to engage with the merits of the claim and whether the parties were deserving of relief, paragraphs 70 and 71.

29. The Court considered previous case law in which equitable relief was sought to set aside voluntary transactions due to mistake regarding adverse tax consequences:

29.1. [71] in ***Pitt v Holt***, the Supreme Court granted relief as it found that Mrs Pitt had made a mistake that there would be no adverse tax effects. Interestingly, the High Court had found that Mrs Pitt merely made a misprediction about the tax consequences of the transaction and not a mistake as to the nature of the transaction, ***Pitt v Holt [2010] EWHC 45 (Ch)***. The Supreme Court found that Mrs Pitt was deserving of relief as the sums in question related to the compensation her husband received following a catastrophic road traffic accident. There was no question of artificial tax avoidance.

29.2. [72 and 73] in ***Futter v Futter***, which was heard with ***Pitt v Holt***, the Supreme Court refused permission for the claimants to argue on appeal that the transaction should be set aside for mistake. In any event, the Court said that relief was unlikely to be granted since the scheme concerned an unlawful tax avoidance scheme.

29.3. [75] in ***Ven der Merwe v Goldman [2016] EHC 790*** Morgan J sitting at the High Court granted relief for mistake. The case concerned a husband and wife setting up a remuneration trust to hold their freehold property. HMRC conceded that it was not open to the court to find that the scheme constituted an artificial tax avoidance scheme, see paragraph 42 of that judgment.

29.4. [75] in ***Dukeries Healthcare Limited v Bay Trust International Limited [2021] EWHC 2086 (CH)*** Deputy Master Marsh refused to grant relief for mistake as the scheme was an artificial tax avoidance scheme, at paragraph 139. He also found that inadequate evidence had been provided of the claimant's state of mind to support a mistake claim, paragraph 135.

Mistake due to dishonest adviser

30. Lord Justice Snowden stated that the remedy of mistake was not automatically available to victims of dishonest advice. His Lordship appeared to be inspired by a flood-gates style argument, paragraph 90 (emphasis added):

> ***The victim of a dishonest adviser*** *may have other remedies, but in my view it simply* ***cannot be a basis for invoking the equitable jurisdiction in mistake*** *that they later discover, contrary to their belief at the time,*

that the adviser had acted dishonestly. . . ***were this to be a basis for invoking the equitable jurisdiction in mistake, it would open the door to any gratuitous disposal being set aside*** *on the basis of the negligence of the professional adviser.*

Analysis

31. The Court found that it was "***difficult to imagine a more artificial construct***" than the First Trust and the Second Trust, paragraph 104. This was because, paragraph 103:

. . . [the] *company. . .had no business reason to employ any persons. . .*[the Claimants]*. . . had no intention whatever that those non-family members should benefit in any way from the trust. . .*

32. Lord Justice Snowden considered the Claimant's knowledge of the Transaction. His Lordship stated:

*[101] . . .****Mr. and Mrs. Bhaur deliberately chose to implement what they knew to be a tax avoidance scheme which, to their knowledge, carried a risk of failure and possible adverse consequences. Their mistake was to think that those adverse consequences could be avoided by the reversal of the transactions and the reclaim of the fees paid to Aston Court under the Fee Guarantee****. That mistake might well have had an important influence on their decision-making, and I do not lose sight of the fact that it may well have been the result of bad or misleading advice from Aston Court. However, these factors do not alter the fact that in* ***implementing the Scheme Mr. and Mrs. Bhaur knew there was a risk and decided to take it anyway****.*

33. Lord Justice Snowden **placed particular emphasis** on the fact that the Transaction **related to an artificial tax avoidance scheme**:

[102] *It also seems to me to be of* ***considerable weight*** *that the Scheme was, on any objective view of the facts, an* ***entirely artificial tax avoidance scheme****.*

[105] *. . .tax avoidance is not unlawful. . .but I agree with Lord Walker's observations in Pitt v Holt at [135] that* ***artificial tax avoidance is a social evil*** *that puts an unfair burden on the shoulders of those who do not adopt such measures.[this is]. . . a very weighty factor against the grant of any relief.*

Dishonesty findings

34. The Court criticised at paragraph 119 the High Court's finding that the Claimants had tacitly assented to Ashton Court's scheme. The Court stated that this arguably amounted to a finding of dishonesty even if Marcus Smith J had expressly stated he was not making such a finding. The Court noted the seriousness of a finding of dishonesty and that the requirements in ***Ivey v Getting Casinos [2018] AC 391*** had to be satisfied. The Court said that whilst it had concerns about this issue, that the appeal would not be allowed on this basis given the finding that the Claimants were aware of the tax avoidance scheme which meant that in any event relief would not be granted.

35. The Court refused permission for Mr O'Tool to participate in the appeal to challenge the Judge's findings of dishonesty against him since he had not participated in the hearing below.

Comment

36. ***Bhaur*** emphasises that the courts have considerable discretion in deciding whether a party is deserving of equitable relief to set aside a voluntary disposition for mistake. For public policy reasons, it is unlikely that relief will be granted in relation to transactions relating to tax avoidance schemes. ***Bhaur*** can be distinguished from ***Pitt v Holt***, as although both concern mistakes about the tax consequences of a transaction, in ***Bhaur*** the Claimants were motivated to artificially avoid inheritance tax. This has overtones of the maxim that equity does not assist those with unclean hands.

37. The ***Bhaur*** family sadly lost their fortune built up over decades after being misled by dishonest advice. It is unlikely that they could seek adequate compensation through a professional negligence claim against Mr

O'Tool and Aston Court. Although the Claimants acted on dishonest advice and may have made a mistake and not a misprediction, the Court of Appeal refused relief as the Claimants were aware of the tax avoidance scheme. This underscores the importance of seeking independent legal advice prior to transferring property into a trust for tax saving reasons.

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