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In the post-Pitt world . . .

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Abstract

In this article, we consider three remedies potentially available, since *Pitt v Holt,* when a trustee makes a mistake (including rectification) and contrast their features, particularly from a tax point of view. If you have triggered a tax charge by a payment made in breach of trust, can that be wiped away years later by the exercise of the Court's discretion to set aside the transaction? HMRC have long accepted that rectification works retrospectively, but what of transactions set aside in equity for mistake? In the second part of the article we look at developments in offshore jurisdictions in reaction to the Supreme Court's decision.

Remedies for mistake since *Pitt v Holt*

This part of our article looks at the three remedies potentially available, since *Pitt v Holt*,[1] when a trustee makes a mistake and contrasts their features, particularly from a tax point of view. The three remedies are, of course:

i. rectification;
ii. equitable relief for mistaken voluntary transactions; and
iii. relief from decisions made in breach of duty (ie what is left of the *Hastings-Bass*[2] rule after *Pitt v Holt*).

In the past it appeared that there was a substantial overlap between these reliefs. It was common to see a *Hastings-Bass* argument run in the alternative to rectification (see for example *Smithson v Hamilton*[3]) and for relief from mistake to be available as an alternative to *Hastings-Bass* [para 6]. Since *Pitt v Holt* there is less of an overlap, due to the 'old' *Hastings-Bass* rule being circumscribed, both in its sphere of operation and in its consequences.

In summary, the requirements for these reliefs are as now as follows:

1. ***Rectification***
   a. Only available for written instruments.
   b. Requires proof that the party making the instrument intended it to have a different meaning to the meaning of the actual wording.
   c. Is subject to equitable defences (laches, acquiescence etc) and third party rights (bona fide purchaser for value).
   d. If granted is fully retrospective for all purposes (including tax).
2. ***Equitable Mistake***
   a. Available for transactions undertaken by fiduciaries and non-fiduciaries.
   b. Requires the mistake to be of sufficient seriousness that it would be unconscionable for those benefitting to take advantage of it.
   c. Is subject to equitable defences (laches, acquiescence etc) and third party rights (bona fide purchaser for value).
   d. Is a flexible remedy, in that the Court has the power to decide how best and most fairly to set aside the transaction.

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1. References in square brackets are to paragraphs in Lord Walker's judgment at [2013] AC 108.
2. *Re Hastings-Bass* (Deceased) [1975] Ch 25.
3. [2008] PLR 363.

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3. ***Breach of duty in exercising a discretion***
   a. Available only for the exercise of fiduciary discretions.
   b. Depends on showing that the trustees' decision making was so defective as to constitute a breach of trust.
   c. Is subject to equitable defences (laches, acquiescence, etc) and third party rights (bona fide purchaser for value).
   d. Is a flexible remedy, in that the Court has the power to decide how best and most fairly to set aside the transaction.

The big change effected by *Pitt v Holt* is to the former rule in *Hastings-Bass*. Before *Pitt v Holt*, that rule had arguably been elevated to a rule of law. If a trustee exercised a discretion while under a mistake as to a material consideration, the exercise of discretion was a nullity in equity. Equity was seen as operating in a similar way to the way it operates when a trustee makes an excessive appointment, save that the trustee making an excessive appointment will be guilty of a breach of trust, whereas a trustee who made a *Hastings-Bass* mistake was not necessarily committing a breach of his duties. Of course, in both of those instances the legal consequences following from the challenged decision would not automatically be reversed. Where the challenged decision involved a distribution of trust assets, the legal title to those assets would fall to be recovered, but the Court would not aid this recovery if a bona fide purchaser for value had acquired them, or if an innocent beneficiary had spent them in circumstances giving rise to a change of position defence.

Since *Pitt v Holt* the law is that the Court will only intervene if the trustees' mistake constitutes a breach of trust, and where that is made out the breach of trust will be the occasion for a discretionary remedial intervention in the trust ('setting aside the decision may not be the only remedy' [para 63]). It is no longer the case that the decision will be treated as void, subject only to bona fide purchaser and change of position defences. It will be voidable [paras 43, 93 and 94], and setting aside will be subject to equitable defences *and* the Court's discretion (see the passage from Lloyd LJ quoted at [para 70]).

Under the old rule the overlap was understandable. Not so now.

Lloyd LJ sets out clearly the position at paragraphs 99 to 100 in *Pitt v Holt* in the Court of Appeal.

> 99 By contrast with the types of case to which I have referred at para 96 above [ie excessive execution defective execution and invalidity due to perpetuity], if an exercise by trustees of a discretionary power is within the terms of the power, but the trustees have in some way breached their duties in respect of that exercise, then (unless it is a case of a fraud on the power) the trustees' act is not void but it may be voidable at the instance of a beneficiary who is adversely affected. The interest of a beneficiary in the trust property continues until it is brought to an end by an act of the trustees done in accordance with the terms of the trust (or the general law). This is an incident of the beneficiary's right to have the trust duly administered in accordance with the provisions of the trust instrument and the general law: see *Target Holdings Ltd v Redferns* [1996] AC 421, 434. If the act of the trustees which purports to alter or bring to an end the interest of a beneficiary is affected by a breach of fiduciary duty, then the beneficiary is entitled to restrain the trustees from acting on it, and to have it set aside, subject always to equitable defences and discretionary factors. Of course if a third party purchaser has acquired some relevant trust property as a result, he may have an indefeasible title, if he gave value without notice of the breach of fiduciary duty, but in such a case the beneficiary's interest would attach to the proceeds of the sale. . . .
>
> 100 If no relevant person takes any steps to have such an act by the trustees set aside, then it is as valid and effective as if there had been no vitiating factor. In that respect the position is the same as if a transaction is procured by misrepresentation, undue influence or fraud. The aggrieved party may seek to avoid the transaction but, first, avoidance is not a matter of right but is subject to a discretion on the part of the Court, and secondly if there is no attempt, or no

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successful attempt, to avoid the transaction, it remains valid and effective as regards all concerned. This is also the position if a trustee enters into a transaction affected by the rule against self-dealing, for example buying an asset from the trust. That also involves a breach of fiduciary duty: see *Gwembe Valley Development Co Ltd v Koshy (No 3)* [2004] 1 BCLC 131. The transaction is not void, but it is voidable at the suit of a beneficiary.

Suppose a Court determines that an exercise of discretion to distribute funds is liable to be set aside (either for mistake or because of a breach of duty when making the decision), but that it appears that the beneficiary has a change of position defence. The Court might say there is no point in setting aside the exercise of discretion, or that it would be unfair to the beneficiary to do so. But the beneficiaries may have a very good reason for seeking to have the decision set aside *ab initio*, and that reason is tax.

Examples

i. Trustees need to appoint an offshore trustee this tax year. By mistake they appoint XYZ Co, which is UK resident. They do not find out the mistake until the next year. Rectification of the deed of appointment may be available if the mistake is as to the identity of the trustee (that is to say, they intended to appoint ABC Co, but got the name wrong). Rectification will reverse the mistake retrospectively. But if they intended to appoint XYZ Co but mistakenly believed it was UK resident, rectification will not be available. Mistake-based remedies may be available, but they will not serve the trustees' purpose—they just reverse the decision, they do not effect the alternative decision.
ii. Suppose the reverse situation, in which offshore trustees wish to appoint a replacement offshore trustee, but by mistake appoint a UK trustee. Again rectification will work if available. But potentially mistake-based remedies will also work, because it will serve the trustees if all the Court does is reverse the original decision. But assuming that the problem has already been discovered and fixed, the Court may ask why it should help if the only purpose of intervention is tax. Also, does the Court have power to reverse things with retrospective effect for tax purposes? (See below).
iii. Suppose trustees of a discretionary trust decide to appoint a life interest to A. They stop accounting for tax at the rate applicable to trusts and treat the trust as a life interest trust. Five years later, it is discovered that A was not a beneficiary at all. The appointment is a nullity, and the trustees are liable to tax at the RAT for that five-year period. But if A is a beneficiary, but the distribution is voidable because of a mistake, there is a choice. If A cannot repay the money, the beneficiaries may be (and the trustees certainly will be) better off not electing to set the decision aside. It is HMRC who would benefit from setting aside the decision.

But to what extent is it possible for an order setting aside a trustee decision on the ground of mistake to have retrospective effect for tax purposes? In other words, what is the tax consequence of avoiding a voidable transaction? If you have triggered a tax charge can that be wiped away years later by the exercise of the Court's discretion to set aside the transaction? Note that Lord Walker says [para 130], in the context of the tax effect of setting aside:

> if a transaction is set aside the Court is in effect deciding that a transaction of the specified description is not to be treated as having occurred.

Helpful though that statement is, it correctness must ultimately depend on the terms of the tax legislation in issue.

The position for IHT is clear. Section 150 of the Inheritance Tax Act 1984 makes specific provision where 'the whole or part of a chargeable transfer has by virtue of any enactment been set aside as voidable or defeasible'. Tax paid on the transfer is made repayable and the tax charged on later chargeable transfers is recomputed so as to disregard the avoided

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transaction. *Pitt v Holt* itself was an IHT case, so no problem about tax consequences arose in that case. However, there is no equivalent provision for income tax or CGT.[4]

Futter was a CGT case, involving Section 87 TCGA 1992. HMRC seem to have accepted that if the Court set aside the distribution no tax would have been payable. Tax in *Futter* was chargeable on the receipt by a beneficiary of a 'capital payment'. Case law shows that what constitutes a 'payment' for tax purposes is a question of construction of the legislation—a payment made in breach of trust, giving rise to a constructive or resulting trust back to the trust, may or may not be taxable as a payment. This is clearly illustrated by the cases of *Hillsdown Holdings Plc v IRC*[5] and *Venables v Hornby*[6] which involved Sections 601 and 600 of ICTA 1988, respectively.

Section 601 was part of the old regime for taxing exempt approved superannuation schemes. It imposed a tax charge equal to 40 per cent of the payment where:

> ...a payment is made to an employer out of funds which are or have been held for the purposes of... an exempt approved scheme.

The question was whether a payment to the employer made in breach of trust, such that equitable title did not pass to the employer, was a payment for this purpose. In *Hillsdown* the Revenue argued that it did—that transfer of the cash to the employer was all that was necessary to constitute a payment. Arden J disagreed, saying that the section was clearly aimed at a 'real' payment, and a payment where equitable title remained with the trustee was not the sort of payment contemplated by the section.

This decision should be contrasted with the later case of *Venables v Hornby* in the Court of Appeal,[7] which was on Section 600 of the same Act, which dealt with unauthorized payments to employees. Section 600(2) provided:

> If the payment is not expressly authorised by the rules of the scheme... the employee... shall be chargeable to tax on the amount of the payment under Schedule E for the year of assessment in which the payment is made.

Chadwick LJ referred to the argument that because the payment was in breach of trust no real payment had been made, and said this:

> In my view, that argument was plainly untenable. Section 600 of the 1988 Act imposes a charge to tax in circumstances where (i) a payment to or for the benefit of an employee (otherwise than in course of payment of a pension) is made out of funds which are held for the purposes of an approved scheme and (ii) the payment is not expressly authorised by the rules of the scheme. In those circumstances the employee is chargeable to tax on the amount of the payment (whether or not he was the recipient of the payment). It is axiomatic that monies or property transferred in breach of trust out of funds subject to a trust will, for so long as they are identifiable, continue to be subject to that trust until they come into the hands of a bona fide purchaser for value without notice of the equity to trace — see *Snell's Equity* (30th edition, 2000) at paragraph 13–41, pages 340–1. To hold that there had been no payment because the monies paid remained subject to the trusts of the scheme would be to defeat the obvious purpose of the taxing provision. It could not have been the intention of the legislature that the question whether or not a charge to tax arose under section 600(2) of the 1988 Act would turn upon an investigation whether or not there remained out of the monies or property transferred some monies or property which (into

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4. At para 91 of his judgment Lloyd LJ records HMRC as saying the position was the same in respect of other taxes, but without making any concession. Lloyd LJ observed 'that may not be so in every case'.
5. [1999] STC 561.
6. [2002] EWCA Civ 1277, [2002] STC 1248; [2003] UKHL 65, [2003] 1 WLR 3022.
7. Reversed in the House of Lords, but not on this point, not followed by Evans Lombe J in *Thorpe v HMRC* [2009] EWHC 611 (Ch).

whoever's hands they might have come) were still subject to the trusts of the scheme.

So we have two decisions on consecutive sections of the same Act giving the same word quite different meanings. They are a valuable reminder that in tax, construction of the statute is everything.

The above two cases were examples of payments made in breach of trust from the outset (so in traditional trusts would be akin to payments made, for example, on the basis of excessive or defective execution of a power). What then of payments or other transactions effected in circumstances where they are valid until set aside by the Court? HMRC have long accepted that rectification works retrospectively. But what of transactions set aside in equity for mistake? A good starting point is *Spence v IRC*.[8] This case sets out the tax position where a transaction is declared void—ie it will be fiscally ineffective. It should, however, be noted that that decision turned on the fact that the contract in question was void *ab initio*. It was not a case about a voidable contract.[9] In *Spence* the Revenue successfully argued that the vendor, having rescinded the contract on the ground of fraud and recovered compensation in respect of the dividends, was liable to tax on the dividends received by the purchaser. Lord Normand said:

> When a contract has been induced by fraudulent misrepresentations, it is open to the party defrauded either to sue for rescission of the contract or to sue for damages. In this case the party sued for rescission and in the end of the day he obtained a decree of reduction. The effect of that reduction was to restore things to their position at the date of the transaction reduced, with the result that as at that date and afterwards, the successful Pursuer in the action fell to be treated as having been the person in titulo of the shares which he had sold to the Defender and therefore to have been in right of the dividend.

In cases of fraud the innocent party is entitled as of right to rescind the contract, subject to making restitution and provided third party rights have not intervened. But in other cases (in cases of non-fraudulent misrepresentation, and in the case of trustee decisions voidable for mistake) the transaction is merely liable to be rescinded by the Court as a matter of discretion. The question is whether, if rescinded, these transactions also fall to be disregarded entirely for tax purposes. There is no authority directly in point, but reference should be made to the judgments of the Court of Appeal in *Morley-Clarke v Jones*.[10] That case was concerned with a variation by the Court of a maintenance order made in divorce proceedings to the effect that the husband was to make payments to the child and not, as previously, to the former wife. This variation was fiscally advantageous, and for this reason the parties sought and obtained a variation of the order made retrospective to the date when the original order had been made, some eleven years earlier. They then argued that payments previously made by the husband to the former wife should be taxed on the footing that they had been made direct to the child. It was held that the Court had jurisdiction to make a retrospective order of this sort, but that the making of such an order could not retrospectively affect the tax treatment of payments made under the order prior to its variation. As Oliver LJ said (at page 669c):

> one cannot, even by order of the Court, retrospectively overturn reality . . . I have been unable to see how the retrospective variation in this case could alter or expunge the fact that sums were paid to the taxpayer under an obligation existing at the time of payment.

Of *Re Spence* Oliver LJ said (at page 667c):

> Once the transferor in that case had elected to avoid the contract, there was no contract in existence and it followed that the shares were his property and that any

8. [1941] TC 341.
9. Although, because the contract was induced by fraud the innocent party had to elect to have it treated as void.
10. [1985] STC 660.

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dividends received were held by the recipient as trustee for him. The restitutio in integrum represented by the Court order obtained some years later did not so much reconstruct history as recognise and declare that which had all along been the legal position, although until the order the parties were in a state of some uncertainty as to what their rights were.

Sir Denys Buckley said (at page 671h):

> In that case [*Spence*] the purchaser was never entitled to receive the dividends, having never acquired a title as against the vendor to the shares.

Morley-Clarke can therefore be seen as a case where the tax consequences attached to the actual payments, and those payments could not be redirected retrospectively by a Court order.

Overall, it seems likely that Lord Walker's assurance, that a transaction set aside in the exercise of the Court's discretion will be treated for tax purposes as not having occurred, will, in most trust cases, prove to be justified. But this result will depend on the precise meaning of the taxing legislation. The beneficiaries will have to persuade the Court to make a retrospective order (rather than a purely prospective one) in order to achieve this consequence (instead of it following automatically as with old-style *Hastings-Bass*). In some cases beneficiaries may decide that certain past transactions are best left undisturbed for tax purposes.

> *In some cases beneficiaries may decide that certain past transactions are best left undisturbed for tax purposes*

Offshore developments

In this part of the article we look at developments in offshore jurisdictions in reaction to the decision in *Pitt v Holt*. The Supreme Court confirmed that relief is not precluded where the mistake relates to tax, and 'consequences (including tax consequences) are relevant to the gravity of a mistake'.[11] However Lord Walker took the view that:

> in some cases of artificial tax avoidance the Court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy.[12]

The Supreme Court's decision is, of course, highly persuasive authority in the offshore Courts and would ordinarily be very likely to be followed—particularly as the decision is that of seven JSCs and is unanimous. However, offshore Judges are not technically bound by the decision and it could be said that there are distinct political, commercial, legal, and tax considerations operating within the individual offshore jurisdictions that justify a continued application by offshore Courts of the 'old' rule as it existed before the decision in *Pitt v Holt*. The offshore jurisdictions are of course bound by decisions of the Privy Council—and there is always the possibility that a litigant will wish to pursue an appeal on the point to that final tribunal, constituted by the same judges as sit in the Supreme Court.

The offshore trusts industry is a competitive beast. What approach are individual jurisdictions taking to the issues raised in *Pitt v Holt*, perhaps in an attempt to attract trustees seeking to migrate their trusts to a more favourable environment?

Jersey

Jersey has been first out of the blocks both in terms of judicial consideration of *Pitt v Holt* and in altering its

11. At [132].
12. At [135].

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domestic legislation to re-instate the rule in *Hastings-Bass*.

Re the Onorati Settlement[13] was decided on 17 September 2013. It was the first case to be heard after the Supreme Court judgment was handed down. The trustees of the settlement had made a distribution which triggered a payment to UK tax. They had not taken any tax advice themselves but relied on assurances from a beneficiary that she had taken advice. They did not ask to see that advice. The applicant beneficiaries sought relief on the basis that the test in *Hastings-Bass* as interpreted by the Court of Appeal and the Supreme Court was satisfied. The Royal Court found breach of duty, and the transaction was set aside. The Court did not therefore have to decide whether the broader test in the 'traditional' line of case law still applied in Jersey. However the Bailiff did comment on the persuasive nature of *Pitt v Holt*, stating:[14]

> ...the position remains open, although any party wishing to submit that Jersey law should continue to plough its own furrow will have to explain why the closely reasoned judgments of Lord Walker and Lloyd LJ should not be applied.

HMRC was given notice of the proceedings but did not take part. It reserved its right to contend that any order of the Jersey Court made under the *Hastings-Bass* jurisdiction would not be recognized in England (although the governing law of the trust was Jersey law).

By the time *Onorati* was decided, the Trusts (Amendment No 6) (Jersey) Law 2013 had already been enacted by the States of Jersey on 16 July 2013. It came into force a month after the decision, on 25 October 2013. It inserts new Articles 47B-47J into the Trusts (Jersey) Law 1984 ('the 1984 Law') which enshrine in statute the law of mistake and *Hastings-Bass* for trusts governed by Jersey law. Litigants in Jersey therefore now have the option of relying on Amendment No 6; or in the event that the statutory test does not apply, perhaps relying on the 'traditional' case law the applicability of which has not been affected by the imposition of the statutory regime; or else relying on equitable mistake as an additional or alternative argument—including (following findings made *Re the B Life Interest Settlement*[15]) where it is the trustee, as opposed to the settlor, who was mistaken.

Amendment No 6 confers on the Court the jurisdiction to declare voidable a transfer into a trust or the exercise of a power in relation to a trust where the settlor or person exercising the power made a mistake, would not have made the transfer or exercised the power but for the mistake, and the mistake is so serious that it is just for the Court to make the declaration (Articles 47E and 47G) 'Mistake' is defined to include a mistake as to the effect of, any consequences of, or any of the advantages to be gained by the transfer or the exercise of the power; a mistake as to fact; or a mistake of law including a law of a foreign jurisdiction (Article 47B(2)).

There is also the power to declare voidable a transfer into a trust by or on behalf of a settlor or the exercise of a power by a trustee or other fiduciary where he or she failed to take into account any relevant considerations or took into account irrelevant considerations, and would not have entered into the transaction but for that failure. Crucially, it does not matter whether the circumstances came about as a result of lack of care or other fault on the part of the person making the transfer or exercising the power, or on the part of any person giving advice in relation to it (Articles 47F and 47H).

By Article 47B(1)(b) of the 1984 Law, the word 'power' in the new articles includes 'a discretion as to the way in which an obligation is performed'.

By the new Article 47D of the 1984 Law, the powers given to the Court by statute apply in relation to transfers to a trust or the exercise of powers over

13. [2013] JRC 182.
14. At [17].
15. [2012] JRC 229.

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trust property occurring *before or after* the coming into force of Amendment No 6.

Article 47I of the 1984 Law lists those who may make an application under the new articles and includes the settlor, his personal representatives or successors in title under Articles 47E and 47F; and under Articles 47G and 47H, the trustee or other person who exercised the power concerned; any other trustee; a beneficiary or enforcer (in the case of a non-charitable purpose trust); the Attorney General in relation to a trust containing charitable trusts, powers, or provisions; and any other person with leave of the Court. A settlor (unless also a trustee, beneficiary or enforcer) may therefore only make an application under Articles 47G and 47H with the leave of the Court.

Even if the relevant circumstances are found to exist to give rise to the jurisdiction to set aside the transaction or exercise of the power, the Court retains a discretion whether to grant the remedy. The statute does not list any factors the Court may or must weigh up in exercising that discretion but a relevant consideration will clearly be the interests of the beneficiaries, who would otherwise be left to pursue their trustees or to rely on the trustees to pursue their advisors; and no doubt the desire not to hand the trustees the much-maligned 'get out of jail free card' will feature. In many Jersey cases, including *Green GLG Trust*[16] and *Onorati*, the Court has favoured setting aside dispositions in order to avoid negligence actions and that approach seems likely to continue under the new statutory provisions.

Guernsey

We are not aware that there has been a decided case in the Courts of Guernsey, whether before or after *Pitt v Holt* in the Supreme Court, considering the application of the rule in *Hastings-Bass* and the law of mistake as a matter of Guernsey law.

The Guernsey Courts have however considered an application of HMRC to be joined to proceedings where *Hastings-Bass* relief was claimed by RBC Trust Company (Guernsey) Limited as trustee, seeking to set aside distributions made from the Abacus Global Approved Managed Pension Trust which, it was said, ought to have been made in the form of lump sum payments in order to avoid liability to UK tax. In *Gresh v RBC Trust Company (Guernsey) Limited and HM Revenue & Customs*[17] the Deputy Bailiff refused to grant permission, stating that the availability of *Hastings-Bass* relief in Guernsey would be:

> governed by Guernsey law so the Court will have to establish what the law of Guernsey in this area is; it will not simply be applying English law. In doing so, the starting point is to look at the law of similar jurisdictions . . . Hence, English decisions interpreting the *Hastings-Bass* principle will be a starting point but they will need to be considered in light of Guernsey customary and statutory law.

Since then the Privy Council has provided support for the Deputy Bailiff's remarks in *Spread Trustee Company Ltd v Sarah Ann Hutcheson & Others*[18] where Lord Clarke cited with approval a passage from the judgment of the Guernsey Court of Appeal in *Stuart Hutcheson v Spread Trustee Company Limited*[19] that:

> in importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable.

The decision of the Deputy Bailiff in *Gresh* was overruled by the Guernsey Court of Appeal and the applicant was refused permission to appeal to the Privy Council. As far as we are aware, the substantive

16. [2002/235].
17. [2009-10] GLR 216.
18. [2011] UKPC 13.
19. [2002] WTLR 1213.

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Hastings-Bass application has not yet come before the Royal Court. In the absence of legislation, or their own case law on the subject, the Guernsey Courts may be thought likely to follow the approach taken in Jersey in *Re the B Life Interest Settlement*[20] where the Royal Court stated that if it had been required to decide the application before it in light of the Jersey and English authorities as they then stood it would have held that the decisions of the Jersey Courts applying the 'old' rule in *Hastings-Bass* were wrong.

Regarding the law of mistake, Section 11(2)(d) of the Trusts (Guernsey) Law 2007 states that a trust will be unenforceable if the Royal Court declares that it was established by mistake. However the legislation does not define 'mistake'. There has been no case, so far as we are aware, in which the Royal Court has had to consider the principles arising under Guernsey law in relation to mistake (in *Arun Estate Agencies Limited v Kleinwort Benson (Guernsey) Trustees Limited*[21] and *Dervan v Concept Fiduciaries*[22] the Guernsey Court applied English law).

Isle of Man

We are not aware of any decided case in the Isle of Man Court on the application of *Hastings-Bass*. As for the law of mistake, the Isle of Man led the way in anticipating the Supreme Court's decision in *Pitt v Holt* where the wider test for setting aside voluntary transactions was adopted—see *Clarkson v Barclays Private Bank and Trust (Isle of Man) Limited*[23] and *Re Betsam Trust*[24] (followed in Jersey in *Re the A Trust*[25] and *Re the S Trust*[26]).

We understand that the Isle of Man Government is currently considering passing legislation dealing with the application of *Hastings-Bass* along the lines of that implemented in Jersey.

Cayman Islands

In Cayman, the 'old' rule in *Hastings-Bass* has been applied by the Court in recent cases such as *A v Rothschild Trust (Cayman) Limited*[27] and *Re Ta-Ming Wang Trust*.[28] As far as we are aware, no legislation is planned for the Islands to place the 'old' rule on a statutory footing.

In *A v Rothschild*, the Chief Justice referred to the Court's jurisdiction under Section 48 of the Cayman Islands Trust Law (2009) Revision[29] which provides that any trustee or personal representative may apply to the Court for an 'opinion, advice or direction on any question respecting the management or administration of the trust money'. He stated that the *Hastings-Bass* principle 'guided the Court's exercise of its statutory powers' under Section 48 and allowed the Court to interfere if it were clear that the effect of the exercise of a discretion was different from that intended because of a failure to take into account relevant considerations or a taking into account of irrelevant ones.

In his paper delivered to the International Trust and Tax Planning Summit in Miami in November 2013,[30] the Chief Justice stated that the statutory power conferred by Section 48 could in future 'potentially arise for consideration' where the decision in question is one that may be regarded as being administrative rather than dispositive in nature. He stated that:

> to the extent that the Court may be called upon in the future to remedy trustee decisions which may properly

20. [2012] JRC 229.
21. [2009-10] GLR 437.
22. [04/2013].
23. [2007] WTLR 1703.
24. [2009] WTLR 1489.
25. [2009] JLR 447.
26. [2011] JLR 117—where the Royal Court famously observed (referring to the tax authorities) that '*Leviathan can (indeed) take care of itself*'.
27. [2004-05] CILR 485.
28. [2010] (1) CILR 541.
29. Now the 2011 Revision.
30. 'Dealing with mistakes of trustees or settlors: the outlook from the offshore bench', 19 November 2013.

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> be regarded as administrative in nature, the exercise of this statutory power as guided by reference to the rubric of the second division of the old *Hastings-Bass* rule, would not be impermissible . . . one can, I think, safely venture that post *Futter and Pitt*, the Courts of the Cayman Islands will not be unduly hamstrung in the relief to be granted from unintended and unforeseen tax consequences arising from erroneous decisions of trustees.

Smellie CJ also said that he was not 'unduly alarmed' by Lord Walker's admonitions to trustees and beneficiaries for the acceptance of risk that an artificial tax avoidance scheme might go wrong because 'artificiality . . . must be in the eyes of the beholder'. There has never been direct income, capital gains or inheritance tax in Cayman Islands and it has never had the need to structure its law artificially 'so as unfairly to arbitrage the tax laws of other jurisdictions'.

> Accordingly, notions of the refusal of relief by the Court, on 'grounds of public policy' from the 'general recognition that artificial tax avoidance is a social evil' must be considered in their proper context. In the socio-political context of the Cayman Islands, there can be no presumption that an arrangement, which is otherwise within the law not only of the Cayman Islands, but also of the relevant domiciliary jurisdiction, is to be deemed 'artificial' simply because its primary aim is to mitigate the incidences of tax.

Notions of the refusal of relief by the Court, on 'grounds of public policy' from the 'general recognition that artificial tax avoidance is a social evil' must be considered in their proper context

The Chief Justice concluded by remarking that in the exercise of their wide discretion, 'depending on the circumstances' the offshore Courts may consider it appropriate to invite the views of the relevant onshore tax authority as to the consequences of setting aside a transaction.

Bermuda and British Virgin Islands

We are not aware of any reported decision of the Bermuda or BVI Courts where the 'old' rule in *Hastings-Bass* was applied. Bermuda has now passed the Trustee Amendment Act 2014, which came into force on 29 July 2014 and inserts a new Section 47A into the Trustee Act 1975, broadly speaking so as to give statutory force to the rule in *Hastings-Bass*. As a result of the amendment, the Court is empowered to set aside the exercise of a fiduciary power, in whole or in part, and either unconditionally or on such terms as the Court may think fit. If the exercise of the power is set aside, then it is to be treated as never having occurred. However, no order may be made which would prejudice a bona fide purchaser for value of any trust property who had no notice of the matters which allow the Court to set aside the exercise of the power.

An application may be made by the person who holds the power; a trustee of, or any person beneficially interested under, a trust conferring the power; the Attorney-General; or any other person with the leave of the Court.

The amendment has retrospective effect, so that the Court's jurisdiction may be exercised in respect of a fiduciary power that was either conferred or exercised before the amendment became operative. Importantly, and in line with the Jersey legislation, it need not be alleged or proved that the person who exercised the power or any adviser to that person acted in breach of trust or in breach of duty.

Finally, and somewhat closer to home, practitioners should note that the Scottish Law Commission has recommended, as part of its wide-ranging review of Scottish Trust Law, legislating to introduce *Hastings-Bass* style relief. Will England and Wales follow suit? Watch this space.

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