

The rule in *Hastings-Bass* after *Pitt v Holt* and *Futter v Futter*¹

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Abstract

This article is a revised version of a paper written for the Trust Law Committee examining what *Pitt v Holt* decided, and arguing that the decision that there has to be a breach of fiduciary duty before the court could intervene is misconceived. The section dealing with tax, trusts and the courts has been expanded.

Introduction

1. The judgment of Lord Walker of Gestingthorpe^{2,3} in these two cases (with which all six other members of the Supreme Court agreed) is a comprehensive restatement of (i) the rule in *Hastings-Bass*⁴ and (ii) the test for setting aside voluntary dispositions on the ground for mistake.

Hastings-Bass

2. At [58] Lord Walker endorsed the distinction drawn by Lloyd LJ between errors by trustees in going beyond the scope of a power (for which he used the traditional term ‘excessive execution’) and errors in failing to give proper consideration to relevant matters in making a decision which is within the

scope of the relevant power (which he termed ‘inadequate deliberation’).⁵ It was a difficult question how to fit cases of fraud on the power (that is, acts ostensibly within the scope of a power, but done for an improper purpose) into the classification: they might need a separate pigeon-hole, somewhere between the categories of excessive execution and inadequate deliberation [62].

3. In cases of inadequate deliberation, it was ‘essential’ [73] to establish a breach of duty on the part of the trustee, because it is only a breach of duty that entitles the court to intervene. It is not enough to show that the trustees’ deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way.

4. Lord Walker approved the following statements of Lightman J and Lloyd LJ respectively:

If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect. (Lightman J in *Barr* at [23], approved at [39])

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1. [2013] 2 AC 108, on appeal from [2012] Ch 132.

2. Unless otherwise stated, references to paragraphs below (in the form of numbers in square brackets) are references to paragraphs of this judgment.

3. Although Lord Walker thought the rule in *Hastings-Bass* was a misnomer, and that the rule would more aptly be called the rule in *Mettoy*, he accepted that it was now so familiar that it was best to continue to use it. Still less should one refer to the rule in *Futter*, as Professor Richard Nolan does in his LQR casenote.

4. *Hastings-Bass* itself was explained as a case about excessive execution—though limb (2) of Buckley LJ’s celebrated statement of principle suggests he might not have agreed.

5. *Pace* Lord Walker at [120] it was not Birks who brought this principle to light, but the authors of Goff and Jones (presumably Jones rather than Goff) in the first edition of their *Law of Restitution*.

It seems to me that the principled and correct approach to these cases is, first, that the trustees' act is not void, but that it may be voidable. It will be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and to the court's discretion. The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. (Lloyd LJ in the CA at [127], approved at [62])

5. It is clear from the passages set out above that the suggestion, by reference to the well-known remarks of Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1, 16–18, that a breach of the trustee's duty of loyalty is called for (because according to Lord Millett only that is properly described as a fiduciary duty) is misconceived, and that for this purpose the duties to identify and take into account relevant considerations, and to use proper skill and care in obtaining the relevant information and advice relating to those considerations, rank as fiduciary duties. One may add a duty to follow the advice obtained: see [80] where Lord Walker refers to trustees who conscientiously obtain and follow apparently competent professional advice.

6. There is limited guidance as to what considerations are relevant:

- (1) At [65] Lord Walker reaffirmed Lloyd LJ's view that fiscal consequences may be relevant consideration. Indeed, Lord Walker went on to say that

It might be said, especially by those who still regard family trusts as potentially beneficial to society as a whole, that the greater danger is not of trustees thinking too little about tax, but of tax and tax avoidance driving out consideration of other relevant matters.

- (2) Lord Walker said that the settlor's wishes were always a material consideration in the exercise

of fiduciary discretions though the decision-making process would be open to serious question if they were to displace all independent judgment on the part of the trustees.

- (3) The older cases tended to focus, not on what should be taken into account, but on what should not be taken into account eg *Klug v Klug* [1918] 2 Ch 67, where a trustee refused to exercise a power of appointment in favour of her daughter because she disapproved of her son-in-law; consequently she had not considered whether or not it would be for her daughter's welfare that the advance should be made and made no proper exercise of her discretion.

7. There has been much debate as to the degree of materiality required before the court will intervene. The Buckley LJ formulation suggested that it had to be clear that the trustee 'would not' have acted as he did but for taking into account the incorrect considerations, and that was the test applied by Warner J in *Mettoy*. However, *Stannard* suggested a less stringent test: 'might' the trustee have acted differently. At [92] Lord Walker dismissed as 'ingenious' the suggestion that 'would not' is the appropriate test for family trusts, but that a different 'might not' test (stricter from the point of view of the trustees, less demanding for the beneficiaries) is appropriate for pensions trusts, since members of a pension scheme are not volunteers, but have contractual rights. He went on to say, however, that:

in practice the court may sometimes think it right to proceed in that way. But as a matter of principle there must be a high degree of flexibility in the range of the court's possible responses. It is common ground that relief can be granted on terms. In some cases the court may wish to know what further disposition the trustees would be minded to make, if relief is granted, and to require an undertaking to that effect ... To lay down a rigid rule of either 'would not' or 'might not' would inhibit the court in seeking the best practical solution in the application of the *Hastings-Bass* rule in a variety of different factual situations.

The resolution of the ‘would or might’ debate is, therefore, ‘it depends’. It was not according to Lord Walker an oversight on the part of Lloyd LJ that he did not deal with this point.

8. In this context, it is worth mentioning Lord Walker’s comment on *Stannard* at [34] that the Court of Appeal’s modification of the test seemed:

questionable since the legal significance of the error must have depended on the scale of the change in market value rather than on the precise nature of the trustees’ hypothetical second thoughts.

It is also worth mentioning the treatment of *Kerr* (an ill-health pension case) at [75] stressing that trustee did not have any real discretion about disability benefit, but had to exercise a judgment on an issue of fact (permanent disability from any employment). Lord Walker said:

That is an issue on which the court would be much more ready to intervene if the trustee had failed to grasp the real facts. It is an intermediate situation which is arguably closer to a mistaken judgment on an issue of fact than to the defective exercise of a discretion.

Flexibility is now the order of the day.

9. This leads naturally into the Supreme Court’s resolution of the other great debate about the rule in *Hastings-Bass*: void or voidable. This was dealt with at [93]–[94] where Lord Walker endorsed Lloyd LJ’s view (at [99] in the CA) that 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.

10. In *Abacus v Barr*, the judge had been prepared to attribute to the trustee fault on the part of its agent. But at [80] Lord Walker held that it would be contrary to principle and authority to impose a form of strict liability on trustees who conscientiously obtain

and follow, in making a decision which is within the scope of their powers, apparently competent professional advice which turns out to be wrong. And in the following paragraph he added that:

Such a result cannot be achieved by the route of attributing any fault on the part of professional advisers to the trustees as their supposed principals. Solicitors can and do act as agents in some clearly defined functions, usually of a ministerial nature, such as the receipt and transmission of clients’ funds, and the giving and taking of undertakings on behalf of clients. But they do not and may not act as agents in the exercise of fiduciary discretions.

Quaere how this ties in with *Re Beddoe* [1893] 1 Ch 547, which though not mentioned in the Appeal Cases was cited to the Supreme Court. That was a case where trustees had followed apparently competent professional advice, yet were not permitted to resort to the trust property for costs.

11. At [130] of his judgment in the Court of Appeal Lloyd LJ said that ‘one practical consequence’ of his analysis was that if in future it was desired to challenge an exercise by trustees of a discretionary power on the basis of inadequate consideration, it would be necessary for one or more beneficiaries to grasp the nettle of alleging and proving a breach of fiduciary duty on the part of the trustees. It would ‘rarely’ be appropriate for the trustees to take the initiative in the proceedings. And the proceedings would generally need to be brought by a CPR Pt 7 claim form, since it should not be assumed that there will not be a substantial dispute of fact that needs to be resolved, and statements of case will be needed in order to set out the allegation of breach of trust and the answer to that case. Lord Walker rowed back from this a little, saying at [69] that there might be cases in which there was for practical purposes no other suitable person to bring the matter before the court, but in general agreed with Lloyd LJ. Trustees should not, he said, regard such proceedings as uncontroversial one in which they could confidently expect to recover their costs out of the trust fund.

Mistake

12. The equitable jurisdiction to set aside voluntary transactions on the ground of mistake was hobbled by the *obiter dicat* of Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304, distinguishing mistakes as to the legal effect and consequences of the transaction. Those dicta have now been disapproved, as has Lloyd LJ's view that there had to be a mistake either as to the legal effect of the transaction or an existing fact basic to the transaction. The Supreme Court also rejected HMRC's argument that the mistake has to be fundamental in the same sense as in the law of contract: see *The Great Peace* [2003] QB 679. But it also rejected the idea that any causative mistake was sufficient as in cases of mistaken payments.

13. The basis of the law is now the judgment of Lindley LJ in *Ogilvie v Littleboy* (1897) 13 TLR 399, 400:

Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish that they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor . . . In the absence of all circumstances of suspicion 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.⁶

In other words, 'the true requirement is' as Lord Walker put it at [122] 'simply for there to be a causative mistake of sufficient gravity' to which he added:

as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a

transaction, or as to some matter of fact or law which is basic to the transaction.

14. Lord Walker went on to say in the following paragraphs of his judgment that the gravity of the causative mistake must be assessed 'in terms or injustice or unconscionableness'. The evaluation must (he said) be objective, and the relative prosperity of donor and donees would not be relevant except so far as it was part of the mistake. Lord Walker continued:

[126] The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion . . . The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus . . . on the facts of the particular case. That is why it is impossible, in my view, to give more than the most tentative answer to the problems posed by Professor Andrew Burrows in his *Restatement of the English Law of Unjust Enrichment* (2013) p 66: we simply do not know enough about the facts.

He rejected criticism made by the editors of Goff and Jones of:

a boundary line which may be difficult to draw in practice, and which is susceptible to judicial manipulation, according to whether it is felt that relief should be afforded – with the court's finding or declining to find incorrect conscious beliefs or tacit assumptions according to the court's perception of the merits of the claim saying that there was some force in this, although the term 'manipulation' was 'a bit harsh'.

6. (2006) 122 LQR 35, 42–2.

15. He concluded at [128] by saying that:

The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case.

Offshore legislation and Scottish Law Commission proposals

16. Two offshore jurisdictions—Jersey and Bermuda—have now legislated, in effect to reinstate a form of *Hastings-Bass* and the Scottish Law Commission has recommended legislation in respect of the defective exercise of fiduciary powers. There can be little doubt other offshore jurisdictions will follow suit—if necessary, Smellie CJ has indicated that the Cayman Islands are likely to continue as before.

Jersey and Bermuda

17. The main difference between the legislation in these two jurisdictions is that Jersey has legislated to deal with mistake as well as cases of inadequate consideration. However, the test adopted includes a requirement of a serious mistake making it just to set aside the impugned act, which does not appear to be significantly different from the *Littleboy v Ogilvie* test.

Jersey

18. In a little more detail the Jersey legislation may be summarized as follows:

(1) New Articles 47A–47J have been inserted in the Trusts (Jersey) Law 1984.

- (2) The incorporate a wide definition of mistake: Article 47B(2).
- (3) Under section 47E a transfer into trust is voidable where the settlor has made a mistake, and would not have made the transfer but for the mistake, and the mistake is of so serious a character as it render it just for the court to set aside the transfer.
- (4) Under Article 47F a transfer to a trust exercised by fiduciary power may be set aside in the circumstances specified in Article 47F(3), ie where the person exercising the power:
 - a. failed to take into account any relevant considerations or took into account irrelevant considerations; and
 - b. would not have exercised the power, or would not have exercised the power in the way it was exercised, but for that failure to take into account relevant considerations, or that taking into account or irrelevant considerations.

Article 47F(4) specifically provides that it does not matter whether or not those circumstances occurred as a result of any lack of care or other fault on the part of the person exercising the power, or on the part of any adviser in relation to the exercise of the power.

- (5) Under Article 47G the exercise of powers in relation to a trust may be set aside on the ground of mistake, again of so serious a character as to render it just to set aside the exercise of the power.
- (6) Under Article 47H the exercise of powers by trustees or non-trustee fiduciaries may be set aside in the same sort of circumstances as specified in Article 47F. Again, it does matter whether there was any fault on the part of the person exercising the power or an adviser.
- (7) The settlor or his personal representatives may make applications under Articles 47E and 47F: Article 47I(2). Applications under Articles 47G and 47H may be made by (i) the trustee, or the person exercising the power, (ii) any other

trustee, (iii) a beneficiary or enforced, (iv) the A-G in relation to charity, and (v) any other person with leave of the court.

Bermuda

19. The Bermudian legislation may be summarized as follows:

- (1) A new section 47A has been inserted in the Trustee Act 1975 conferring jurisdiction to set aside the flawed exercise of a fiduciary power.
- (2) Under section 47A(1) the court may set aside the exercise of the power either in whole or in part and either unconditionally or subject to terms and conditions, where the conditions set out in section 47A(2) are satisfied, ie that:
 - a. in the exercise of the power the holder of the power did not take into account one or more relevant consideration (whether of law or fact, or a combination) that were relevant to the exercise of the power or took into account one or more considerations that were irrelevant
 - b. but for the failure to take into account relevant considerations of taking into account such irrelevant considerations (i) would not have exercised the power, or (ii) would have exercised it on a different occasion, or (iii) in a different manner.

To the extent that the exercise of a power is set aside, it is to be treated as never having occurred: section 47A(3).

- (3) The required conditions may be satisfied without alleging or proving that the holder of the power, or any adviser to such person, acted in breach of trust or breach of duty: section 47A(4).
- (4) An application may be made by (i) the power holder, (ii) any trustee or beneficiary or enforcer under a private purpose trust, (iii) the A-G in

respect of charity, or (iv) with the leave of the court any other person.

Scotland

20. In paragraph 17 of its December 2011 *Consultation Paper on Defects in the Exercise of Fiduciary Powers* the SLC was critical of the reasoning of Lloyd LJ in *Pitt v Holt*:

We have some difficulty with this reasoning. If the trustees obtain *ex facie* proper professional advice there is clearly no breach of their fiduciary duty to obtain proper professional advice, but if that advice is wrong, with the result that the trustees take account of an irrelevant consideration (or fail to take account of a relevant consideration), it can be said that they are in breach of the separate fiduciary duty to take account of relevant considerations but not irrelevant considerations. In other words, two separate fiduciary duties appear to be involved here, and the fact that there is no breach of one duty does not mean that there is no breach of the other. In this respect, we are of opinion that the faults of the professional advisers must be imputed to the trustees; the simple fact is that when they exercised the discretion the trustees were in error as to the considerations that they should take into account, whatever the source of that error. Moreover, in other areas of the law where the issue of relevant and irrelevant considerations is material, the fact that such a consideration is ignored (where relevant) or taken into account (where irrelevant) as a result of professional advice does not matter; the decision-taker is still wrong in what it has or has not taken into account. That would apply, for example, to judicial review of a public authority's actions. Likewise in areas of the law where error is relevant, for example contracts and unilateral deeds, an error induced by defective professional advice is still an error.

21. In its final Report the SLC did not pursue that criticism, saying at paragraph 19.1 that it was 'very clear' that the decisions in *Pitt v Holt* and *Futter v*

Futter related to 'extremely technical aspects of English law' which they had no desire to incorporate into Scots law.

22. The Commission had suggested developing a new remedy in Scots law, based largely on existing Scottish authorities. They gave two main reasons, the first being that Scots law already allowed unilateral acts to be challenged. In the case of straightforward voluntary disposition, challenge was possible on the ground of essential error (a simple but for test). Further in case of the exercise of fiduciary powers by trustees challenge was already possible on grounds broadly corresponding to the grounds for judicial review of administrative action: consideration by the trustees of the wrong question, a failure of the trustees to apply their minds to the right question, perversely shutting their eyes to the fact and failure to act honestly or in good faith—see Lord Reid in the *Dundee General Hospitals*.

23. Secondly, the Commission pointed out that:

the essential feature of a fiduciary power is that it is exercisable for the benefit of others, not the donee of the power. If the power is not exercised properly, it is normally not the donee, the fiduciary, who suffers the loss but the objects of the power, that is, the beneficiaries. That situation seems to us to require possibility of challenge if there has been a defect in the exercise that prejudiced them. That appears to us to be the reasoning that underpinned the view expressed by Lord Reid in the *Dundee General Hospitals* case.

24. The SLC Report indicates that that on consultation they had received generally favourable responses, the two main objectors being HMRC and the Trusts and Succession Law Sub-Committee of the (Scottish) Law Society. (The Pensions Law Sub-Committee was in favour.) There was 'strong support' from other respondents including the Faculty of Advocates, STEP, and the judges of the Court of Session.

25. The upshot was that the Commission made the following recommendations:

101. A statutory procedure should be made available in Scots law to permit challenge to the exercise by

trustees, including executors, of any fiduciary power on specified grounds that cover, generally, cases where the power is defectively exercised.

102. Challenge to an act of a trustee should be possible on the following grounds:

- a. Consideration by the trustee of the wrong question or failure to consider the correct question;
- b. Failure by the trustee to apply his or her mind properly to the correct question, even though he or she purports to do so;
- c. Perversity, whether through the trustee's shutting his or her eyes to the facts or in some other manner; this includes unreasonableness, in the sense of a decision that no reasonable trustee, properly instructed in the facts and law, could properly have reached;
- d. Failure by the trustee to act honestly or in good faith;
- e. Fraud on a power, in the sense of the use of a power for an improper purpose;
- f. Failure by the trustee to take relevant considerations into account or taking irrelevant considerations into account.

103. The grounds of challenge should also include cases where the exercise of a power is ultra vires of the trustee.

104. In addition,

- (1) It should be possible to challenge the exercise of a fiduciary power by trustees on the ground that at the time of exercise they were subject to a material error.
- (2) Error should be relevant for this purpose when it is 'material', in the sense that but for the error the trustees would not have reached the decision that they did.
- (3) To be relevant, the error may be of either fact or law.
- (4) To be relevant, the error must relate to the legal or factual situation at the time when the power is exercised, but this includes any subsequent declaration by a court of the law as it existed as at the date of exercise of the power.

(5) Without prejudice to the generality of the notion of ‘material error’, the error may relate to the nature, effects or consequences of the exercise of the power.

105. The remedies that are available should be reduction, rectification and interdict, as appropriate in the particular circumstances of the case. The remedies of reduction and rectification should be subject to equitable considerations, in the sense in which that concept is used in Scots law.

106. The following persons should have a right of challenge: the beneficiaries or objects of the power; the trustees or donees of the power or any one such trustee or donee; the truster or granter of the power; any protector or supervisor; and any other person who has a patrimonial interest in the exercise or non-exercise of the power.

Summary of position in the jurisdictions considered above

26. Thus the Jersey States, Bermuda House of Assembly, and Scottish Law Commission have all rejected any requirement for breach of fiduciary duty, or fault. They have also rejected the restricted rules as to the standing adopted by the Court of Appeal and Supreme Court as a corollary to the breach of fiduciary duty requirement.

27. The SLC has, moreover, adopted a test of mistake free from any requirement of seriousness, or unconscionability.

Discussion

28. At [83] Lord Walker identified the policy behind the rule in *Hastings-Bass* as the need to protect beneficiaries against aberrant conduct by trustees, balancing it against the competing interests of legal certainty, and of not imposing too stringent a test in judging trustees’ decision-making. He also referred at [8] to a rhetorical question posed by Professor Charles Mitchell:⁶

Why should a beneficiary be placed in a stronger position than the outright legal owner of property if he

wishes to unwind a transaction to which he has given his consent, but which turns out to have unforeseen tax disadvantages?

In the Court of Appeal this point had particularly impressed Mummery LJ, and Lord Walker said that the Supreme Court had the opportunity of confirming the Court of Appeal’s recognition of that essential point.

29. It may be thought that holding that a breach of duty on the part of the trustee is essential, because it is only a breach of duty that entitles the court to intervene, begs the question—when will the court intervene. Given the emphasis on flexibility, it is regrettable that this threshold requirement was imposed.

30. The Supreme Court identified four policy considerations: (i) the need to protect beneficiaries against aberrant conduct by trustees; (ii) the interests of legal certainty; (iii) the interests of not imposing too stringent a test in judging trustees’ decision-making; and (iv) the need not to put beneficiaries under trusts in a stronger position than other individuals.

31. It may be that, outside the field of tax avoidance, the flexible jurisdiction described by Lord Walker will protect beneficiaries. But there will be cases where it does not do so. Take a situation like *Stannard*, where the trustees acted on legal and actuarial advice in making a transfer value based on an out-of-date valuation. The logic of the judgment seems to be that there will be no remedy. Is that really right in principle? In restricting protection to cases of ‘aberrant’ conduct on the part of the trustees the Supreme Court has limited the protection for beneficiaries. Because of the prevalence of exoneration clauses beneficiaries are unlikely to have a remedy against their trustees and whether or not they have a remedy against the trustees’ advisers will often be unclear.

32. So far as legal certainty is concerned, the resolution of the void/voidable debate in favour of voidable avoids any possibility of a challenge to an exercise of a power many years after the event (such as the

challenge to the validity of the 1976 appointment in *Breadner v Granville-Grossman* [2001] Ch 523). On the other side of the coin, the emphasis on flexibility has an obvious potential for creating uncertainty. And to the extent that a remedy for mistake depends on an unconscionableness test there is little certainty. Lord Walker has been quoted as saying extra-judicially that it may require a 100 years and five or six more cases at the highest level to work out the consequences of the decisions. That is unsatisfactory.

33. If the interests of not imposing too stringent a test in judging trustees' decision-making is based on a concern for trustees, it seems misconceived: in practice, they will almost always be protected by exoneration provisions; and they are more likely to be concerned to do the right thing for their beneficiaries. Lord Walker agreed with Lloyd LJ that trustees should not in general make *Hastings-Bass* applications. But surely a fiduciary who, or whose predecessor, has got something wrong ought to want to do whatever can be done to put it right.

34. Finally, the effect of the decision is that beneficiaries are less likely to be in a stronger position than others than before—but only if their trusts are governed by English law. If the Scottish Parliament adopt the SLC proposals even beneficiaries under Scots trusts are likely to have better protection. The essential point is, as the SLC pointed out, that trustees are acting for the benefit of others and it is, therefore, not inappropriate that they should be given a higher degree of protection.

Tax

35. I want to return to one aspect of the judgment of Supreme Court at [135] where Lord Walker said that:

Had the mistake been raised in *Futter v Futter* there would have been an issue of some importance as to whether the court should assist in extricating claimants from a tax-avoidance scheme which had gone wrong. The scheme adopted by Mr Futter was by no means at the extreme of artificiality (compare for instance, that in *Abacus Trust Co (Isle of Man) v*

National Society for the Prevention of Cruelty to Children [2001] STC 1344) but it was hardly an exercise in good citizenship. 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. Since the seminal decision of the House of Lords in *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300 there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures. But it is unnecessary to consider that further on these appeals.

36. The appellants in both *Pitt* and *Futter* had relied on cases where the court had approved under the Variation of Trusts Act 1958 arrangements designed to avoid tax, and during the course of argument Lord Walker had raised the question whether the time had come to depart from those cases. Seeing the way in which the wind was blowing, I answered Yes—but that the difficulty was knowing where to draw the line.

37. In the context of variations, the question was not a new one. In *Chapman v Chapman* [1954] AC 429, 468 Lord Morton said in support of the conclusion that the court did not have jurisdiction to approve variations that:

if the court had power to approve, and did approve, schemes such as the present scheme, the way would be open for a most undignified game of chess between the Chancery Division and the legislature. The alteration of one settlement for the purposes of avoiding taxation already imposed might well be followed by scores of successful applications for a similar purpose by beneficiaries under other settlements. The legislature might then counter this move by imposing fresh taxation upon the settlements as thus altered. The beneficiaries would then troop back to the Chancery Division and say, 'Please alter the trusts again. You

have the power, the adults desire it, and it is for the benefit of the infants to avoid this fresh taxation. The legislature may not move again.' So the game might go on, if the judges of the Chancery Division had the power which the appellants claim for them, and if they thought it right to make the first move.

38. Ironically, however, Parliament itself did not agree and by the 1958 Act conferred on the court the jurisdiction which the House of Lords did not. And beneficiaries were not slow to troop to the Chancery Division with schemes such as that put forward in *Chapman* to avoid estate duty, which became a staple of the work of the division.

39. There was a slight blip when capital gains tax was introduced in 1965, as evidenced by the decision of the Court of Appeal in *Re Weston's Settlement* [1969] 1 Ch 223, where the court was asked to bless an arrangement involving the export of the settlement. During the course of argument in that case Harman LJ is reported as asking 'What about public policy?' Counsel (Irvine Goulding, QC, of what is now Wilberforce Chambers) answered that Parliament had no doubt considered public policy and has given the court the power to use the discretion 'as it thinks fit' for the benefit of persons who cannot speak for themselves. If a scheme is legal and not contrary to any established head of public policy, it was the duty of the court to approve it. Parliament knew when the Act was passed that there was no public policy which prevented a person from arranging his affairs so as to minimize the burden of taxation. If the court in a particular case decided that the detriment to the revenue is such that a scheme should not be approved, where could the line be drawn?

40. Nevertheless, the Court of Appeal refused to approve an arrangement. Lord Denning, who as a Lord Justice had dissented in *Chapman*, said that as there was no guidance in the statute, which said the court could approve an arrangement if it thought fit, it remained for the court the best it could. He went on to say that:

Two propositions are clear: (i) In exercising its discretion, the function of the court is to protect those who

cannot protect themselves. It must do what is truly for their benefit. (ii) It can give its consent to a scheme to avoid death duties or other taxes. Nearly every variation that has come before the court has tax avoidance for its principal object: and no one has ever suggested that this is undesirable or contrary to public policy.

I think it necessary to add this third proposition: (iii) The court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit. There are many things in life more worthwhile than money. One of these things is to be brought up in this our England, which is still 'the envy of less happier lands.' I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax.

'Children' he went on to say 'are like trees: they grow stronger with firm roots', a proposition, a good example of the problems with metaphors as a form of legal reasoning.

41. But neither Lord Denning, nor either of the other members of the court, gave an answer to Irvine Goulding's question—where can the line be drawn? My submission to the Supreme Court was that the answer was to be found in the speech of Lord Goff of Chieveley in *Ensign Tankers v Stokes* [1992] 1 AC 651, 681 where he said that he approached the case:

on the basis that there is a fundamental difference between tax mitigation and unacceptable tax avoidance. Examples of the former have been given in the speech of my noble and learned friend [Lord Templeman]. These are cases in which the taxpayer takes advantage of the law to plan his affairs so as to minimise the incidence of tax. Unacceptable tax avoidance typically involves the creation of complex artificial structures by which, as though by the wave of a magic wand, the taxpayer conjures out of the air a loss, or a gain, or expenditure, or whatever it may be, which otherwise would never have existed. These structures are designed to achieve an adventitious tax benefit for the taxpayer, and in truth are no more than raids on the public funds

at the expense of the general body of taxpayers, and as such are unacceptable.

42. With hindsight, I think it was wrong to answer Yes to Lord Walker's question. It was inconsistent with settled authority, and inappropriate to create such a principle by judicial decision. Moreover, this is quite the wrong time to do so, when Parliament has legislated to introduce a general anti-abuse rule. That was the right way to tackle unacceptable tax avoidance. And if Lord Walker's suggested principle were adopted, why should it be limited to cases of setting aside? Why not rectification or indeed construction proceedings?

Conclusion

43. While it must be doubtful whether this is practical politics, because of the identification of the rule *Hastings-Bass* with tax avoidance, I would suggest

that the decision of the Supreme Court limiting that rule is wrong in principle and should be reversed. The revived mistake doctrine is not a substitute because of the uncertainties generated by the unconscionable test, which has been subject to considerable academic criticism particularly by restitution scholars. And on no account should the supposed public policy be adopted by the courts.

Postscript

This article is based on one written for, and at the request of Trust Law Committee. A version of it can be found on the Committee's website. It is referred with approval in paragraph 44 of the judgment of Deemster Doyle in the Isle of Man case of *AB v CD* (30 June 2016) containing *obiter dicta* questioning whether the decision of the supreme court represented the law of the Isle of man.

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