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REPORTS OF THE DEATH OF THE RULE IN HASTINGS-BASS ARE EXAGGERATED:

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The eagerly awaited judgment of the Supreme Court in Pitt v Holt; Futter v Futter overruled the English Court of Appeal and vindicated the judgments of the Royal Court in In re A Trust and In re S Trust in relation to rescission for equitable mistake. It laid down a new approach, however, in relation to the so-called rule in Hastings-Bass, aligned to the obiter comments of the Royal Court in In re B's Life Interest Settlement. Statutory intervention in these areas in Jersey may not have been wise.

Introduction

1 The decision of the Supreme Court of the United Kingdom in the conjoined appeals in *Pitt v Holt; Futter v Futter*,¹ which was handed down on 9 May 2013, was eagerly awaited by trusts practitioners for the provision of clarification concerning two important remedies—

(a) declaratory relief for the unravelling of transactions under the so-called rule in *Hastings-Bass*;² and

(b) rescission for equitable mistake in the context of voluntary dispositions.

2 Both aspects of the decision were potentially of interest in Jersey—

(a) Would the Supreme Court uphold the decision of the English Court of Appeal in refusing *Hastings-Bass* relief where a trustee had relied on negligent advice? If so, what impact would there then be in Jersey, given the very powerful, *obiter* comments of William Bailhache, DB in support of the outcome in *Pitt (CA)*, in the most recent *Hastings-Bass* case here, *In re B Life Interest Settlement*?³

¹ [2013] EWSC 13. In this article, the Supreme Court decision is referred to as “*Pitt (SC)*”, the Court of Appeal decision at [2011] EWCA Civ 197 as “*Pitt (CA)*”, and the case generally as “*Pitt*”.

² After *re Hastings-Bass dec'd, Hastings v IRC* [1974] STC 211.

³ [2012] JRC 229.

(b) Would the Supreme Court perpetuate, as the English Court of Appeal had done, the distinction in the authorities between the effect of a transaction and its consequences, based on the *ex tempore* judgment of Millett, J (as he then was) in *Gibbon v Mitchell*,⁴ or would it finally opt for the (far simpler) formulation of the test in the *Ogilvie* litigation,⁵ as the Royal Court immediately did when the point first came before it in *re A Trust*⁶, and the cases in that line?⁷

3 In short, the Supreme Court did follow the English Court of Appeal as regards *In re Hastings-Bass* and, in light of *In re B Life Interest Settlement*, the Royal Court would have been poised to follow that lead when next the matter arose. However, it did bring the English test for rescission for mistake into line with the law in Jersey. But hot on the heels of the decision has come the adoption (on 16 July 2013) of the new arts 47B–47J of the Trusts (Jersey) Law 1984, will place both jurisdictions—*Hastings-Bass* and mistake—on a statutory footing in Jersey.⁸

4 In this article, it is argued that, although this legislation may be a crowd-pleaser which gives the Island a competitive advantage that is not dependent on the decision of a court which is susceptible to being overruled, the underlying message that the Island gives in taking a different line from *Pitt (SC)* is worth a thought. Furthermore, there are other lessons to be taken from *Pitt (SC)* which are at risk of being overlooked, but which ought to inform the true construction and proper application of the statute when relief is sought under its provisions.

5 In this article the following structure is adopted—

(a) A short review of the *Hastings-Bass* jurisdiction pre-*Pitt*;

(b) A factual summary of each of the cases considered in *Pitt*, *i.e.* *Pitt v Holt* and *Futter v Futter* and a short summation of the outcomes at first instance;

⁴ [1990] 1 WLR 1304.

⁵ *Ogilvie v Littleboy* (1897) 13 TLR 399 (CA), affirmed *sub nom Ogilvie v Allen* (1899) TLR 294 (HL).

⁶ [2009] JLR 447.

⁷ *In re R Remuneration Trust* [2009] JRC164A; *In re Lochmore Trust* [2010] JRC 068; *In re S Trust* 2011 JLR 375; and *In re B Life Interest Settlement* [2012] JRC 229.

⁸ The Act of the States amending the 1984 Law which was adopted on 16 July 2013 awaits Privy Council sanction.

(c) A detailed look at the reasoning for the decisions in *Pitt (CA)* and *Pitt (SC)* on the *Hastings-Bass* jurisdiction;

(d) A short review of the power to order rescission for mistake both in Jersey and now in England in light of *Pitt (SC)* (I have not seen the need to undertake a detailed review of the Supreme Court’s discussion of mistake; to Jersey eyes, no new ground is being made there: it is merely being cleared);

(e) A summary of the new legislation;

(f) A discussion of the new legislation in light of the above and in view of policy considerations.

Hastings-Bass: the pre-Pitt position

6 The so-called rule in *Hastings-Bass* originated in the summary given by Buckley, LJ in that case⁹—

“where by the terms of a trust . . . a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he achieved is unauthorised by the power conferred upon him or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.”

7 The paradigm application of the rule has been under the second limb of the summary, where the court is asked to restore the *status quo ante* after a transaction following a trustee’s decision, which has had or will have unforeseen tax consequences. In such a situation there have been both academic and extrajudicial commentaries critical of a wide application of the rule,¹⁰ and debates in the case law of at least Jersey and England as to whether—

(a) The decision should be regarded as void or voidable;

⁹ At 221.

¹⁰ By way of example only, Prof Charles Mitchell, *Reining in the rule in In re Hastings-Bass*, (2006) 122 LQR 35, and Lord Neuberger of Abbotsbury, “Aspects of the Law of Mistake: *re Hastings-Bass*”, *Trusts & Trustees*, vol 15, p 44.

(b) The trustee's decision needs to be one that would not have been taken if the true position had been known, or merely one that might not have been;¹¹

(c) The trustee's decision has to amount to a breach of duty, or can merely be based on a mistaken premise.

8 In England, the courts had vacillated about whether the impugned decision should be viewed as voidable¹² not void (voidness having the attraction that the remedy could be regarded as a safe harbour¹³), had concluded that "would" rather than "might" was the better threshold to apply,¹⁴ and that neither breach of duty nor a fundamentally mistaken premise was required in order to ground relief.¹⁵

9 In Jersey the position has been similar,¹⁶ although ostensibly the void/voidable debate had been sidestepped by describing the relief as "setting aside the decision and declaring it to be of no effect"¹⁷.

¹¹ "Might" was introduced (*obiter*) in *Stannard v Fisons Pension Trusts Ltd* [1991] Pen LR 225 (CA).

¹² Not all fact patterns obviously required this to be decided—see, e.g., *Pitt v Holt* [2010] EWHC 45; compare *Abacus Trust Co (IoM) v Barr* [2003] EWHC 114 (voidable); *Gallaher Ltd v Gallaher Pensions* [2005] EWHC 42 (voidable); *Sieff v Fox* [2005] EWHC 1312 (*dubitante*); *Futter v Futter* [2010] EWHC 449 (void); *Pitt* (CA) (voidable).

¹³ There is a question over whether this is inevitably so if the remedy is acknowledged as equitable, such that matters of conscience affect the grant of relief: see *Futter v Futter* at first instance ([2010] EWCH 449), in which Norris, J, holding the transaction to have been void, also held that Lewison, J in *Re Griffiths (decd)*; *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch) at para 34 had been wrong to hold that if relief is discretionary it must follow that the relevant transaction is voidable and not void. This reasoning seems effectively to have been doubted by Lloyd, LJ in *Pitt* CA (para 101), in the writer's view, correctly.

¹⁴ *Sieff v Fox* (*ibid*).

¹⁵ *Sieff v Fox* (*ibid*), *Pitt v Holt* (*ibid*) (by consent), compare *Abacus Trust v Barr* (*ibid*).

¹⁶ *Green GLG Trust* 2002 JLR 571; *Leumi OTC v Howe* 2007 JLR 248; *Representation of Seaton & Morgan, In re Winton Investment Trust* (cited as *Seaton v Morgan*) [2007] JRC 206 (deciding also that the decision need not be beset by a fundamental mistake as to effect); *In re Seaton Trustees Ltd* [2009] JRC 2009; *In re Vistra Trust Co* [2008] JRC 111; *In re V Settlement* [2011] JRC 046; *In re R Trust* [2011] JRC 085; *In re B Life Interest Settlement* (*ibid*).

¹⁷ *Winton* (*ibid*).

However, the first limb of this uses the language of voidability; in the same case it was doubted that the principle could operate if *bona fide* purchasers for value would be affected, suggesting that the court wished to retain a discretion in order to circumnavigate potential injustices to third parties.¹⁸ It has also been decided here that decisions taken pursuant to administrative as well as dispositive powers are subject to the rule,¹⁹ albeit that not all administrative powers are fiduciary (*i.e.* concerned with the allocation of trust property) and so not of a kind where it is actually necessary to take into account all relevant and no irrelevant considerations.²⁰

The facts of each case

10 *Pitt v Holt* concerned a structured settlement which was set up after Mr Pitt was seriously injured in and permanently incapacitated by a road traffic accident. On the basis of professional advice given to his wife as his receiver under the Mental Health Act 1983, and further to authority granted to her by the Court of Protection, in 1994 she placed the £1.2m award of damages, which took the form of a lump sum and monthly payments, into a discretionary settlement.²¹ The structuring advice considered the potential tax treatment of the settlement from the perspective of income and capital gains tax, but not inheritance tax, even though such a liability arises on establishment of discretionary trusts. Had the advisers considered s 89 of the Inheritance Tax Act 1984, they would have identified without much or any difficulty that they could have established a so-called “disabled” discretionary trust with no immediate IHT liability. It later became apparent that on creation of the trust there had been an immediate IHT liability of £100,000, and there was a charge on any capital paid out, a 10-year charge in 2004, and an actual liability on the death of Mr Pitt who died in 2007. By the time the litigation commenced, the IHT that would be due with charges and penalties was a significant proportion of the original award, and well outstripped what remained in the trust. A claim was brought to declare the settlement void or voidable, under the rule in *Hastings-Bass* and on the basis of mistake.

¹⁸ Compare fn 11 above.

¹⁹ Not the position in England: see *Donaldson v Smith* [2007] WTLR 421.

²⁰ A view expressed by Professor Paul Matthews in his last set of notes for the Trusts Law module at the Institute of Law, at 4.95.

²¹ An act that attracted a fiduciary duty in her position; compare *In re R Trust* [2011] JRC 085, in which an appointment by a protector (also primary beneficiary) of herself as new trustee, which had the effect of making her an excluded person, was set aside.

11 In *Futter v Futter*, a firm of solicitors, in which one of the trustees was a partner, gave erroneous tax advice to the trustees of two offshore trusts (who were individuals). The advice was to the effect that although “stockpiled” capital gains would become chargeable on the redomiciliation of these trusts, and attributed to the recipient beneficiaries on any exercise of powers of enlargement and advancement, these could be offset in their hands by allowable losses. The intention had been to make tax-free distributions by the exercise of these powers, but instead the recipients became liable to a hefty charge to tax. Only the *Hastings-Bass* jurisdiction was invoked to unravel the situation.

12 Mrs Pitt’s *Hastings-Bass* claim succeeded at first instance but her claim in mistake failed. The Futter settlement trustees’ application to set aside the exercises of power also succeeded at first instance. Neither judge made a finding that there had been a breach of fiduciary duty.²²

13 Appeals against both first instance decisions were made to the Court of Appeal by HMRC,²³ who argued that, having regard to the ratio in *In re Hastings-Bass* and to general principles, it was “wrong to treat the acts of Mrs Pitt or the Futter settlement trustees as vitiated by the fact that the fiscal consequences of what was done were different from what was expected”.²⁴ In *Pitt*, Mrs Pitt cross-appealed on her claim in mistake. That failed, but HMRC won their appeals on *Hastings-Bass*. HMRC would have prevailed wholesale in the Supreme Court as well, but for the fact that, eventually, Mrs Pitt’s claim in mistake succeeded there.

Pitt (CA) and (SC): Hastings-Bass reasoning

14 The rule in *Hastings-Bass* was subjected to a masterly examination in the Court of Appeal by Lloyd, LJ, who had previously had occasion to examine the principle in his earlier decision in *Sieff v Fox*,²⁵ hitherto the leading judgment on the topic. Lord Walker of Gestingthorpe, giving the only speech of the seven-man court, agreed with almost all of Lloyd, LJ’s conclusions on this part of the case and with Lloyd, LJ’s critique of his own decision in *Sieff v Fox*.

²² It was conceded that none was required in *Pitt v Holt*, *ibid*, para 22, and there was no express determination in *Futter* [2010] STC 982; compare para 86 in *Pitt* (SC).

²³ These were the first instances of HMRC participating in an appeal since *In re Hastings-Bass* itself.

²⁴ *Pitt* (CA), para 23.

²⁵ *Ibid*.

15 The nub of the matter is that, as Buckley, LJ himself identified in the summary cited at para 6 above, a distinction must be drawn between cases where a trustee or other fiduciary “go[es] beyond the scope of the power (. . . ‘excessive execution’)” and those where he “fail[s] to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power (. . . ‘inadequate deliberation’)”.²⁶ The first group of cases are about “the existence and extent”²⁷ of a fiduciary power. The second group of cases concern “the manner of exercise” of that power.²⁸

16 As to the first group of cases, it was held that a determination outside the four corners of a power is void,²⁹ and this will be so whether the defect is procedural, for example, a decision taken without due formality or protector consent, or substantive, as in the case of a decision the trustee has no power to make or for purposes outwith the scope of the power.³⁰ In *In re Hastings-Bass* itself, the issue arose from the effect of the general law on the appointment—the fact that the rule against perpetuities caused part of the appointment to be void. The question was whether there was any valid advancement at all: there was in part, because (applying principles of severance) the effective element of the scheme was not proved to be outwith the interests of the beneficiary.³¹ Therefore it was an outcome within the scope of the trustee’s powers and valid. *Hastings-Bass* has to be understood as the last chapter in a line of almost obsolete cases dealing with the consequences of making a mistake concerning the common law rule against perpetuities whilst utilising the statutory power of advancement, as does another case often cited in harness with it, *In re*

²⁶ *Pitt* (SC), para 60.

²⁷ *Pitt* (CA), para 233.

²⁸ *Pitt* (CA), para 234.

²⁹ *Pitt* (CA), para 233.

³⁰ *I.e.*, a fraud on the power.

³¹ The reader may find it interesting to know that Captain Peter Robin Hood Hastings-Bass, the deceased appointor, was the journalist Clare Balding’s maternal grandfather and the 16th Earl of Huntingdon; the appointee, her uncle William, now the 17th Earl. All were named Robin Hood because the original Robin Hood was said to be the first Earl. The trust fund came out of an inheritance from Captain Peter’s uncle, Sir William Bass of the Bass brewing dynasty. Her grandmother was so unimpressed by the vulgar provenance of this wealth that she refused to join her husband in agreeing to hyphenate her married surname: Balding, *My Animals and Other Family*, pp 3–6, p 194 and elsewhere.

Abrahams Will Trusts,³² in which the issue was in essence the same, but the outcome different because the element of the advancement valid for perpetuity was nonetheless void because it could not be said to be for the benefit of the beneficiary.

17 The second group of cases are explained as involving dispositions or decisions which are voidable at the instance of a beneficiary who has been adversely affected, who, in right of his entitlement to have the trust duly administered in accordance with the trust and the law, may make complaint.³³ The remedy lies at the discretion of the court (and is subject to equitable defences). The precondition to its grant is that it must be shown that the decision was made or act was undertaken in breach of the fiduciary duty owed by the trustee. One only needs to articulate this to see that *In re Hastings-Bass* was never such a case at all, and accordingly that the so-called rule in *In Hastings-Bass* is a misnomer.³⁴ Nor was it founded in the law of mistake³⁵ albeit that there is some overlap.

18 So far as concerns our paradigm case, both courts confirmed it is a fiduciary duty to take into account all relevant matters before taking a decision, with fiscal consequences most certainly being a relevant matter.³⁶ Almost invariably, trust decisions require the trustee to have regard to the tax consequences both for the trust and for the beneficiary. The trustee is duty-bound to obtain appropriate tax advice to inform the decision, and its terms may be decisive as to “whether” and “how”. If the advice is seriously wrong, so that the trustee would not have taken the decision had he known the true position, then the argument has hitherto been that he failed to take into account the relevant matter of the true tax consequences.

19 The English courts have finally determined against this argument because of the recognition that the trustees are only obliged to go through the right processes, not to take responsibility for the elements used in those processes. Rather, “it is . . . for advisers to advise, and

³² [1969] 1 Ch 463.

³³ *Pitt* (CA), para 99 citing *Target Holdings v Redfern* [1996] AC 421, at 436.

³⁴ As Lloyd, LJ points out in *Pitt* (CA) at para 66, any consideration of the state of the trustees’ minds in entering the scheme of this kind, and what they would have done if they had known of the true state of the law, is otiose because in all such cases where the vitiating circumstance is an external factor like tax law, the trustees would invariably have acted to avoid the problem arising.

³⁵ Compare *Leumi OTC v Howe*, *ibid*, para 30.

³⁶ *Pitt* (CA), para 127; *Pitt* (SC) at para 65.

for trustees to decide . . .”³⁷ Their discretion is not delegated to the adviser, and nor does the adviser act as agent in respect of this aspect of decision-making; therefore any errors cannot as a matter of principle be attributed to the trustee.³⁸

20 On the other hand, where a decision may be vitiated, breach of trustee duty is the threshold, because it is only a shortcoming of this magnitude that justifies the court’s intervention.³⁹ However, both courts point out that it is a nice question as to when less-than-perfect deliberations have sufficiently serious shortcomings as to amount to a breach of duty.⁴⁰ It is certainly not enough to show that the court would itself have acted differently. Rather, it would appear that the answer to this must bear relation to the nature of the power being exercised, and the broader context, and “the nature and circumstances of what is proposed”.⁴¹ It comes down to whether there has been, in all the circumstances, “a fair consideration” of the relevant factors, and this is perhaps a less onerous way to articulate taking all relevant matters and no irrelevant matters into account.⁴² It certainly gives the lie to the notion that there could ever be a duty to act only on correct advice, that is to say, to come to the right conclusion every time. The court does not require the trustee to be infallible—“the duty of supervision is not [generally] extended to the accuracy of the conclusion arrived at”.⁴³

21 There are some additional points also worth recording—

(a) As regards causation it was thought better that the would/might debate should be left unanswered to allow the court flexibility to respond as the facts justify;

³⁷ See *Pitt* (SC) at para 81, citing *Scott v National Trust* [1998] 2 All ER 705 at 717.

³⁸ The position can in theory be different in Jersey: art 25(1) of the *Trusts (Jersey) Law* 1984 allows, if the trust so provides, for delegation of the execution or exercise of powers both dispositive and administrative. But if the Jersey trust was thus drafted, and the adviser did decide, such that a wrong decision could be attributed to the trustee, it will make no odds after Amendment No 6, with the introduction of the wide jurisdiction for relief.

³⁹ *Pitt* (SC), para 73.

⁴⁰ See *Pitt* (SC) para 68, and also *Pitt* (CA), para 90.

⁴¹ The learned discussion in *Pitt* (CA) at paras 102–113 justifies reading in this regard; see also paras 117–118.

⁴² *Pitt* (CA) para 109.

⁴³ *In re Beloved Wilkes’ Charity* (1851) 3 Mac & G 440 at 448, cited in *Pitt* (SC) at para 88.

(b) Breaches of trust can arise regardless of relevant, skilled professional advice having been taken, if they result from a decision that, judged objectively, goes beyond the power of the trustee and is detrimental to the trust⁴⁴ or is contrary to the general law. There is not necessarily any fault in this situation. The trustee might have defaulted in the process of taking advice or acting on it, or might even fail to consider exercising certain powers available to him. Thus, advice does not save every situation and nor does it invariably mean that relief will not be available;

(c) Setting aside the decision is not the only remedy available to the court where a trustee has made a decision based on inadequate deliberation. Here the court is being called upon, in effect, to execute a trust power, and the manner of its so doing may be as best calculated to give effect to the trusts;⁴⁵

(d) The majority of the reported cases demonstrate that hitherto, trustees have asserted and relied on their own failings in order to obtain relief, and worse, propounded their own breach of duty.⁴⁶ That will no longer be regarded as appropriate and the claim will need to be brought by an affected beneficiary save in exceptional cases.⁴⁷ It is not thought that a typically drafted exoneration clause should interfere with that.⁴⁸

22 All in all, then, the position in England after *Pitt (SC)*, is that the so-called *Hastings-Bass* jurisdiction remains available, but only to relieve trustees of any egregious failures of deliberation—*i.e.* those which amount to breach of duty—and (in effect) to impose on them an obligation to sue any third party adviser whose negligent advice causes loss. Obviously, a *Hastings-Bass* application was never and will not in future be needed to relieve against excessive execution: declaratory relief suffices there, if anything judicial is needed at all. Ironically, therefore, a beneficiary is better off with a trustee who is unconscientious enough to take no advice whatever, or poor advice, rather than with a prudent one who seeks respectable professional input at appropriate moments.

Mistake: the test

⁴⁴ *Pitt (SC)*, para 78.

⁴⁵ Compare *Pitt (SC)*, para 63.

⁴⁶ See *re B Life Interest Settlement*, for example.

⁴⁷ *Pitt (SC)*, para 69; *Pitt (CA)*, para 130.

⁴⁸ *Pitt (SC)*, para 89.

23 So far as concerns the test for mistake, under Jersey law the *In re A Trust* line of cases⁴⁹ establish that there are three cumulative questions to answer: (a) was there a mistake on the part of the disponent (whether of fact or law)? (b) would the disponent not have entered into the transaction but for the mistake? (c) was the mistake of so serious a character as to render it unjust for the donee to retain the property (this last flowing from the judgment of Lindley, LJ in the *Ogilvie* litigation⁵⁰)?

24 *In re A* was directly considered in *Pitt (CA)*, where Lloyd, LJ appears to have regarded it as having fallen into the same error perceived for the Manx decision of *Clarkson v Barclays Bank Private Bank & Trust (Isle of Man) Ltd.*⁵¹ This decision had appeared to elide the second and third limbs of the test for mistake, so that any mistake which was causal would *per se* be sufficiently serious to warrant relief.⁵² Lloyd, LJ regarded this as giving “wholly inadequate effect to the gravity” of the *Ogilvie* test and posing a test which is “a great deal too relaxed”.⁵³ For this reason and because it “ignored” the distinction between the effect of a transaction and its consequences, he disavowed *In re A*. However, *In re A* was, on any fair reading, never guilty of any of the mischief attributed to it—other than that it contained a reasoned rejection of the effects/consequences distinction—as the judgment of Sir Philip Bailhache, Commr in *In re S Trust*⁵⁴ makes clear.

25 In *Pitt (SC)*, the test for equitable rescission of voluntary dispositions has been held simply to require a “causative mistake of sufficient gravity”, with some additional guidance being given as to what will be sufficiently grave: the mistake will usually be serious enough if the mistake is as to “the legal character or nature of a transaction,⁵⁵ or as to some matter of fact or law which is basic to the transaction” and/or if it causes injustice or unconscionable results in one or other direction.⁵⁶ Ultimately, the question is highly fact-sensitive and involves an appraisal of where justice lies. This is on all fours with the Jersey position.

⁴⁹ See fn 6 above.

⁵⁰ *Ibid.*

⁵¹ [2007] WTLR 1703.

⁵² See *Pitt (CA)*, paras 207–209.

⁵³ *Ibid.*

⁵⁴ [2011] JLR 375, especially paras 31–33.

⁵⁵ Which is what *Gibbon v Mitchell (ibid)* means by “effect”: see para 119, *Pitt (SC)*.

⁵⁶ See *Pitt (SC)*, paras 124–128.

26 On the case-law as it stood before the proposed statutory amendments, the most interesting current issue in Jersey concerning the law of mistake was whether (a) initial voluntary dispositions by settlors (that is to say, those dispositions which cause trusts to be established) and/or (b) subsequent dispositions into existing trusts ought to be capable of being vitiated on the basis of *erreur*, and if so, the potential interplay between the test for *erreur* and that for mistake by trustees in the exercise of a power or trust power. That was discussed (*obiter*) in *In re B Life Interest Settlement*,⁵⁷ and the argument (certainly as regards the former) has yet to be made and resolved. However, this debate has potentially been impacted by the new legislation, to which I now turn.

New arts 47B–47J of the Trusts (Jersey) Law 1984

27 These may be summarised as follows. First, so far as concerns mistakes regarding transfers or other dispositions of property to a trust, or mistakes in the exercise of a power over or in relation to a trust or trust property—

(a) These have been defined as widely as may be in art 47B(2). Mistakes can extend to the effect, the consequences or any advantages to be gained from the disposition or the exercise of such power, and includes mistakes of pre-existing or contemporaneous facts, or law (including foreign law);

(b) Under art 47E, settlors or their successors in title or heirs may apply for a declaration from the court that a transfer or disposition into a trust by the settlor or his or her agent⁵⁸ is voidable, and either of no effect or such effect as the court may determine, if and only if, the donor made a mistake (as defined) in relation to the transaction, he would not have effected the transaction but for the mistake, and the mistake is of so serious a character as to render it just for relief to be given;

(c) Under art 47G, donees of a power (be they trustees or otherwise), the trustee, or a beneficiary or enforcer of an affected trust,

⁵⁷ Such discussion followed on from the observation by Birt, DB (as he then was) in *JP v Atlas Trust Co (Jersey) Ltd* [2008] JRC 159, that this essentially contractual, civilian concept should not be grafted onto cases where living trusts were involved to which equitable principles applied, rooted in a different system of law.

⁵⁸ The settlor may act “in person (whether alone or with any other settlor)” or through “a person exercising a power . . . to transfer or make other disposition of property to a trust on behalf of a settlor”: art 47E(1) and (2).

the Attorney General where the affected trust is charitable, or any other person with leave of the court, may also apply for a declaration that the exercise of a power by a trustee or other fiduciary, or a donee of a power, over or in relation to a trust or trust property, is voidable as aforesaid, on the equivalent grounds.

28 As regards the statutory *Hastings-Bass* remedies—

(a) Article 47F concerns transfers or dispositions of property to a trust which occurs in consequence of the exercise of a fiduciary power. Settlers or their successors in title or heirs may apply for a declaration from the court that a transfer or disposition into a trust by their fiduciary⁵⁹ is voidable, and either of no effect⁶⁰ or such effect as the court may determine, if and only if the power was exercised in such a way that the donee (a) failed to take into account all relevant considerations or took into account irrelevant considerations; and (b) would not have exercised the power, either at all or in the manner it was so exercised but for that failing, it being irrelevant whether there was any lack of care or fault by the donee or any person giving advice in relation to the exercise of the power;

(b) Article 47H applies to simple exercises of power over or in relation to a trust or trust property. Donees of a power (be they trustees or otherwise), the trustee, or a beneficiary or enforcer of an affected trust, the Attorney General where the affected trust is charitable, or any other person with leave of the court, may also apply for a declaration that the exercise of a power by a trustee or other fiduciary over or in relation to a trust or trust property, is voidable as aforesaid, on the equivalent grounds.

29 It is further provided that—

(a) “the doctrine of *erreur* . . . shall not apply to any question concerning the meaning of ‘mistake’ for the purposes of determining applications under art 47E or 47G” (art 47C);

(b) The provisions are expressed not to extend to testamentary dispositions (art 47B(1)(a));

(c) The various heads of relief are of retrospective effect (art 47D);

⁵⁹ The settlor may act “(whether alone or with any other settlor) through a person exercising a power . . . to transfer or make other disposition of property to a trust on [his] behalf . . . [such person owing] a fiduciary duty to the settlor in relation to the exercise of his or her power”: art 47F(1) and (2).

⁶⁰ Negating it for tax purposes as a matter of English law, and no doubt other laws as well.

(d) The court may make consequential related orders as well, such as orders for the recovery of distributions, or as to what the trustee should next do⁶¹ (art 47I(3));

(e) No declaration may be made which would prejudice any *bona fide* purchaser for value of any trust property without notice of the matters which render the transfer, disposition or exercise of power voidable (art 47(I)(4)); and

(f) No other available remedies are prejudiced (art 47J). Finally,

(g) It is of interest that the draftsmen considered excluding from this protection any trusts whose proper law had been changed simply to take advantage of it, but concluded, no doubt correctly, that the court would set its face against opportunistic forum shopping and exercise its discretion accordingly.⁶²

Discussion

30 The first point to note is that arts 47E and 47G (mistake) do not actually add anything to the position enabled by the general law. The definition of what might constitute a mistake needed neither widening nor clarification in this jurisdiction; and the test for relief as set out in the case-law is simply transposed into statutory form. A collateral benefit of potentially clarifying—or extending—the prescription period for the remedy has not been realised, as the statute is silent there and art 57 is not apt to cover it. That said, no mischief is done by the enactment, either. Since the provisions are discretionary the court still has scope, for example, to elect against giving relief to a careless mistaken party who could be said to have assumed the risk of his own mistake,⁶³ as to which see more below.

31 Staying with the theme of mistake, the second point relates to the treatment of *erreur*. William Bailhache, DB set up in *B Life Interest Settlement* a potentially tenable distinction between mistakes made in the course of trust administration, in relation to which only the equitable definition of mistake ought to have currency as had previously been expressed in the case of *JP v Atlas Trust*,⁶⁴ and mistakes made in the founding of a trust by settlement, where art

⁶¹ Compare *Pitt* (SC) at para 92: Lord Walker observes the court might well want to know this.

⁶² See the Report to the States. However, in the Hansard Report of the States debate, the prospect of this occurring was cited as advantageous by the Minister.

⁶³ Compare *Pitt* (SC), para 114.

⁶⁴ *Ibid.*

11(2)(b)(i) of the Law⁶⁵ might be engaged, and in circumstances where the Jersey law of contract (where there is no requirement for consideration) may operate to so as to make the gift enforceable. The *JP v Atlas* observations mean that the court needed no statutory assistance to exclude *erreur* where the mistakes were of the art 47G kind. As for art 47E, on one construction, a provision which bars consideration of *erreur* on any question concerning the meaning of mistakes relating to transfers, *etc* “to a trust”, might not go far enough to exclude it where the trust does not pre-exist, but is formed as a result of, or at the time of, the transfer. There may on occasion be very good reasons for exploiting this construction: I do not explore these here, but the possibility of doing so should not be regarded as having been removed by the legislation.

32 As regards applications under arts 47F and 47H,⁶⁶ which are the former *Hastings-Bass* type applications—

(a) First and most obviously, the language of these provisions is not apt to save cases of excessive execution, whether procedural or substantive: nor should it be. It is clear from *In re B Life Interest Settlement*⁶⁷ that the court will be retaining that firmly in mind;

(b) Where the case is one of inadequate deliberation, these articles enable the court, if the threshold tests are met (which are, but for one major exception, the same as they were under the general law predating *Pitt (CA)*) to unravel the exercise of power and any consequential dispositions, unless the interests of an equity’s darling would thereby be prejudiced. The major exception, which should be emphasised, is that there is no mention at all of the trustee or fiduciary either needing to have breached the duty owed as a prerequisite for relief, or relief being unavailable if they have. Thus the effect of the

⁶⁵ “. . . a trust shall be invalid . . . (b) to the extent that the court declares that—(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty . . .”

⁶⁶ These could with a little adjustment have been a single provision, because the mischief being redressed relates to the operative decision-making. The difference between them is that art 47F transfers or dispositions are of property over which a fiduciary has a power to make dispositions on behalf of a settlor, the destination of which is the settlor’s trust; whereas art 47H catches all powers relating to a trust or trust property (regardless of the destination if it involves a distribution) but only so long as they are fiduciary powers (see art 47H(1)), in this way reducing the scope of the doctrine as interpreted by the courts, though probably correctly: see para 9 and fn 18 and 19 above.

⁶⁷ See, *e.g.*, para 95 of that judgment.

legislation is to empower the court to intervene, even though the usual threshold for judicial intervention, as explained in *Pitt (SC)* and set out in para 20 above, has not been reached, and even if there is an alternative remedy on the basis of mistake.

33 It is of course open to legislators to depress the threshold for intervention, particularly if circumstances require. But do they so require as a matter of policy in Jersey (which may of course often be different from the policy requirements of England)? The principle behind the *Hastings-Bass* rule as originally articulated was “the need to protect beneficiaries against aberrant conduct by trustees”.⁶⁸ In England and Jersey alike, beneficiaries are still protected to the extent that if a cause of action arises against the trustee for inadequate deliberation they do not need to sue him but can rely on the rule in *In re Hastings-Bass*. In England, if they have no such claim but the trust has a claim against a third party, then the trustee must pursue it. But for any Jersey trust behind the art 9 firewall, the position is that, at greater cost to the principle of legal certainty,⁶⁹ and by virtue of there being no requirement for a breach of duty, trustees are protected also from non-actionable situations (and are, at minimum, given a boost in the maintenance of their client relations). Furthermore, professional advisers—and not even necessarily those in this jurisdiction—are to have their slates wiped clean of liability for sloppy conduct or negligent advice at the expense, in our paradigm case, of the tax authorities. Whilst, no doubt, their intentions in doing so were altruistic so as to ensure beneficiaries could avoid the uncertainty, delay and cost of a negligence claim, the fact is that it was also clearly in the interests of industry itself to support this amendment (as the report to the States made clear that they have done).

34 Now, as is so emphatically pointed out in *In re B Life Interest Settlement*, such generosity under the law will not tend to facilitate a culture of professional excellence in local financial services (and to that extent, query how well beneficiaries are actually being protected in the round). Yet the professional excellence and depth of experience of the Channel Islands industry is one of the most commonly cited differentiators on the OFC stage. Perhaps the answer to this is that, if there would in any case be relief in circumstances where a trustee has

⁶⁸ *Pitt (CA)*, paras 83 and 128. As is often observed, they are better protected than if they owned their trust property outright—but that is, actually, part of the point of having a trust.

⁶⁹ Not only is the gateway for applications wider because more decisions may be unwound, there are also many more people with standing to bring a claim than simply the beneficiaries (as is the position in England).

committed a breach of duty, standards are not, in fact, at significantly greater risk.

35 Then it may be observed that preferring the interests of, in particular, professional advisers to the interests of HMRC may coincide well enough with the preferences of settlors (who would otherwise fear higher fees brought about by higher insurance premiums), but in the paradigm case, it does not sit quite so well with protecting Jersey from those who would heap moral opprobrium on offshore jurisdictions for facilitating tax avoidance. Usually the industry answers those critics by pointing to our repugnance for tax evasion, demonstrated by our regulatory commitments to EU and G20 standard, our enforcement record, our transparent approach with TIEAs and US and UK FATCA, and the fact that clients come to Jersey as much for our excellent and sophisticated wealth management and succession planning capability as any tax advantage. But it does not usually in terms assert that, in a world of differential taxation, critics of tax avoidance are misguided. However, the practical effect of this legislation in the paradigm case is to enable unexpected tax to be avoided, and the new law is receiving no little publicity.

36 There are two answers to this. First, the Hansard report of the States debate on 16 July demonstrates that not only industry, but the Economic Development Department and Jersey Finance likewise think that the amendments will strengthen Jersey's overall position. It is fair to say that they of all people, and not the courts, are best placed to make an assessment of this kind, taking everything into account, albeit that their assessment was not tested by any debate that day.

37 The second answer lies, ironically enough, back with the courts. In *In re S Trust*,⁷⁰ the court acknowledged that Jersey public policy took no issue with citizens arranging for transparent and lawful tax mitigation. It is suggested these views would accommodate GAAR principles (under which only structures which it is a reasonable course of action to establish, are permitted). But it is highly likely that in any appropriate case brought for relief under the new sections, the Jersey court will take note of Lord Walker's observation in *Pitt (SC)*, where he said—

“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 supposed expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground

⁷⁰ *Ibid*, at para 39.

that discretionary relief should be refused on grounds of public policy . . . [as] a social evil . . .”⁷¹

And thus it appears that our judges may perforce find themselves entrusted with what could be a very public judgment call on a highly politically charged and defining issue.

38 One final thought: in *Pitt (CA)* it was argued that trustee exoneration clauses will usually preclude a beneficiary suing the trustee for tax losses flowing from a breach of trust. But in neither England nor Jersey do they need to, because the *Hastings-Bass* remedy or a mistake claim would likely be available. As to third party claims, both in the Court of Appeal and in the Supreme Court submissions were made by the trustees as to whether the adviser’s duty of care would ever be owed to the beneficiaries, so as to enable all losses (and not just those of the trust) to be recovered. Clearly, the task now in England is for trustees to ensure that professional advice is obtained on the right terms. The benefit of the advice, even if sought by the trustee, needs to be available to all potential losers (easily done by retaining the adviser on terms that the beneficiaries are within the scope of their duty of care), and the common, exhaustive exclusions of liability have to be negotiated away. If this is unrealistic, then it is in this arena—in which professionals charge to give advice at a level that suggests they are assuming a risk, but are not prepared to warrant the accuracy of that advice in any meaningful way—where a problem lies that justifies legislation. To the extent that the paradigm Jersey case is much more likely to concern English or foreign tax law rather than our own, the heavy lifting in this regard is in any event likely to be done elsewhere, and Jersey trustees can and should take advantage of that when it occurs.

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⁷¹ At para 135.