



Looking after Leviathan: Setting Aside trustee decisions on the grounds of mistake

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Re the S Trust (2011) 14 ITELR 663

“The preference accorded to the interests of the tax authority in the UK is not one, however, with which we are sympathetic. In our view, Leviathan can look after itself. We should not be taken as indicating any sympathy for tax evasion, which we regard as fraudulent and as entirely undeserving of any favourable discretionary treatment. But in Jersey it is still open to citizens so to arrange their affairs, so long as the arrangement is transparent and within the law, as to involve the lowest possible payment to the tax authority. We see no vice in this approach.”



HMRC v Trusts and Trustees: the playing field

Remedies for tax mistakes:

- The (so called) rule in *Hastings-Bass*
- Rescission for equitable mistake
- Rectification



The (so called) rule in *Hastings Bass*

The elements of the “rule” (as it was understood):

- The trustees must be acting under a discretion given by the terms of the trust.
- The effect of the exercise of discretion is different from that which they intended.
- They must have taken into account irrelevant considerations or failed to take into account relevant considerations.
- They would not have taken the action but for this failure.



***Pitt v Holt* [2012] Ch 132: 1-0 to HMRC**

“.....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.”



Mistake: The *Ogilvie v Littleboy* Test

“Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish 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.”



***Pitt v Holt* [2012] Ch 132: 2-0 to HMRC**

“I would therefore hold that, for the equitable jurisdiction to set aside a voluntary disposition for mistake to be invoked, there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction. (I leave aside cases where there is an additional vitiating factor such as some misrepresentation or concealment in relation to the transaction, among which I include *Dutton v Thompson* 23 Ch D 278.) Moreover the mistake must be of sufficient gravity as to satisfy the *Ogilvie v Littleboy* test 13 TLR 399, 400, which provides protection to the recipient against too ready an ability of the donor to seek to recall his gift. The fact that the transaction gives rise to unforeseen fiscal liabilities is a consequence, not an effect, for this purpose, and is not sufficient to bring the jurisdiction into play.”



The Offshore reaction

- Jersey: *Re the S Trust* (2011) 14 ITELR 663 and Articles 47E to I of the Trust (Jersey) Law 1984.
- Bermuda: Section 47A of the Trustee Act 1975
- Cayman: *Av Rothschild Trust Cayman Ltd* [2004-05] CILR 485 and *Re Ta-Ming Wang Trust* [2010] 1 CILR 541



Jersey: Article 47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake

- (1) In this paragraph, “person exercising a power” means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property.
- (2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and – (a) has such effect as the court may determine; or (b) is of no effect from the time of its exercise.
- (3) The circumstances are where the trustee or person exercising a power – (a) made a mistake in relation to the exercise of his or her power; and (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, and the mistake is of so serious a character as to render it just for the court to make a declaration under this Article.



Jersey: Article 47H Power to set aside the exercise of fiduciary powers in relation to a trust or trust property

- “(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and – (a) has such effect as the court may determine; or (b) is of no effect from the time of its exercise.
- (3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power – (a) failed to take into account any relevant considerations or took into account irrelevant considerations; and (a) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations.
- (4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.”



Bermuda: Section 47A of the Trustee Act 1975

- (1) If the court, in relation to the exercise of a fiduciary power, is satisfied on an application by a person specified in subsection (5) that the conditions set out at subsection (2) are met, the court may— (a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and (b) make such order consequent upon the setting aside of the exercise of the power as it thinks fit.
- (2) The conditions referred to in subsection (1) are that— (a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and (b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power— (i) would not have exercised the power; (ii) would have exercised the power, but on a different occasion to that on which it was exercised; or (iii) would have exercised the power, but in a different manner to that in which it was exercised.
- (3) If and to the extent that the exercise of a power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred.
- (4) The conditions set out in subsection (2) may be satisfied without it being alleged or proved that in the exercise of the power, the person who holds the power, or any adviser to such person, acted in breach of trust or in breach of duty."



Futter v Futter [2013] 2 AC 108: 2-1 to HMRC

- No rule in *Hastings-Bass*: breach of fiduciary duty required and in both cases the trustees relied on legal advice.
- Rescission for equitable mistake requires “a causative mistake of sufficient gravity”: see [122].
- The Court will in principle relieve against tax mistakes: see [142]
- The Court reserved its position in relation to mistakes in the implementation of tax avoidance schemes: see [135].



The test: *Kennedy v Kennedy* [2015] WTLR 837 (followed in *Freedman v Freedman* [2014] EWHC 4129 (Ch))

- (1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or 'misprediction' Forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake.
- (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the trustee unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
- (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property.
- (4) 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.



The Offshore Reaction: Jersey

- *Re Onorati ST* [2013] JRC 182 (before the amendment to the 1984 Law): Trustee had been in breach of fiduciary duty in failing to take tax advice.
- *Re the Strathmullan Trust* [2014] JRC 56 (decided under the Trusts Law but on mistake and *Futter* followed).
- *Re Robinson Annuity Investment Trust* [2014] JRC 133 (again decided under the Trusts Law on mistake).
- Note: for HMRC's position: see *Re Onorati ST* at [46] and [47]



The Offshore Reaction: Guernsey

- *Dervan v Concept Fiduciaries Ltd* (2013) (applied *Pitt* in CA on mistake but the transaction set aside).
- *Nourse v Heritage Corporate Trustees Ltd* (2015) (applied *Futter* on mistake in SC and transaction set aside)
- *HCS Trustees Ltd v Campiero Legal and Fiduciary Services* (2015) (applied *Futter* on mistake in SC and transaction set aside)
- No consideration of *Hastings-Bass*



The Offshore Reaction: Other Jurisdictions

- *Cayman*: In a conference in June 2015 Anthony Smellie QC CJ stated that the applicability of the rule in *Hastings-Bass* would have to be reconsidered in the light of *Futter* in the SC.
- *Isle of Man*: has always adopted the wider test for mistake in *Futter* but may be considering similar legislation to Jersey.
- *Bermuda*: no decisions on section 47A.



The Hard Question

Where a trustee or beneficiary applies to set aside a transaction but the test for mistake in *Futter* cannot be satisfied or where the test for mistake is satisfied but the relevant mistake took place in relation to a tax avoidance scheme, will the English Court recognise the judgment?



The Traditional Answer: *Memec plc v IRC* [1996] STC 1336 at 1348j

"When an English tribunal has to apply the provisions of an United Kingdom taxing statute to some transaction, arrangement or entity which is governed by a foreign system of law, the tribunal must take account of the rules of that foreign system (properly proved if not admitted) in order to determine the nature and characteristics of the transaction, arrangement or entity. But having informed itself in this way, the tribunal must then apply the taxing statute as part of English law."