Discuss the Hastings-Bass rule and the equitable jurisdiction to provide relief against the consequences of mistake in the light of the Supreme Court decision in Pitt and Another v HMRC and Futter and Another v HMRC. Is the story over?

The Supreme Court of the United Kingdom redefined the ambit of the Hastings-Bass rule and the court’s equitable jurisdiction to provide relief against the consequences of mistake in the conjoined appeals of Pitt v Holt and Futter v Futter (hereinafter, referred to as Pitt v Holt).¹ In this essay, I will first discuss the new scope of the Hastings-Bass rule following the Pitt v Holt judgment, then I will discuss the scope of the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake. I will conclude by addressing case law and statutory developments that have occurred since the Supreme Court’s judgment focusing specifically on the Crown Dependencies of the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man.

The rule in Hastings-Bass

A trustee owes a fiduciary duty to the trust beneficiaries with respect to the exercise of the powers that are vested in him/her in his/her fiduciary capacity. Trustees do not have unrestrained discretion to exercise their fiduciary powers, although the precise extent of their duties will vary depending upon the specific power in question.

More concretely, the Court of Appeal in re Hastings-Bass (deceased)² formulated what became known as the rule in Hastings-Bass as follows:

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¹ Futter and another (Appellants) v The Commissioners for Her Majesty’s Revenue and Customs (Respondent); Pitt and another (Appellants) v The Commissioners for Her Majesty’s Revenue and Customs (Respondent) [2013] UKSC 26.
² [1975] Ch. 29.
"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 has 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."

The first limb can be analysed as a situation in which the trustee erred because he acted beyond the scope of a power (excessive execution). The second limb can be analysed as a situation in which the trustee erred in failing to give proper consideration to relevant matters while ultimately making a decision that is within the scope of the relevant power (inadequate deliberation).

In the decades following the Hastings-Bass judgment, the rule had been applied expansively, predominantly in cases where tax-planning arrangements involving trusts had gone wrong, and particularly with respect to the second limb (inadequate deliberation). These developments were greeted sceptically by the English judiciary, leading to the Supreme Court’s recognition that the law had taken a “seriously wrong turn.”

Lord Walker delivered the judgment of a unanimous Supreme Court in Pitt v Holt. Lord Walker held that courts must undertake a purely objective analysis of the trustee’s failure

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3 [1975] Ch. 25 at 41.

4 Pitt v Holt (n 1) [60].

5 Pitt v Holt (n 1) [9].
to take into account relevant matters when considering a Hastings-Bass application. Thus, the analysis does not concern “what the trustees would have thought and done if they had known about the problem” but rather, whether what was done by the trustees is capable of being regarded (objectively) as beneficial to the intended object. "If it is so capable, then it satisfies the requirement of the power that it should be for that person’s benefit. [If it cannot be regarded as beneficial to the intended object] it would follow that it is outside the scope of the power” and cannot be reversed under the Hastings-Bass rule.

Therefore, the rule in Hastings-Bass does not concern itself with the question of whether the trustees exceeded their powers and acted ultra vires. Rather it concerns "trustees who make decisions without having given proper consideration to relevant matters which they ought to have taken into consideration” — instances of “inadequate deliberation”.

Lord Walker held that it is necessary to establish a breach of duty on the part of a trustee, as this is the only circumstance that allows a court to intervene. The trustee must have:

“failed to consider what he was under a duty to consider. 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

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6 Pitt v Holt (n 1) [9], quoting with approval Lloyd LJ's judgment in the Court of Appeal.
7 Pitt v Holt (n 1) [9], quoting with approval Lloyd LJ’s judgment in the Court of Appeal.
9 Pitt v Holt (n 1) [2].
10 Pitt v Holt (n 1) [40-41], [73]: “Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees 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.”
decision cannot be impugned merely because in fact that information turns out to be partial or incorrect.”\textsuperscript{11}

In other words, it is not enough for the trustees to have fallen short of the highest possible standards, or for the trustees to have – with hindsight – preferred to have acted differently. The duty that must be breached is the fiduciary duty 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”.\textsuperscript{12} Notably, it is more than just a breach of the duty of loyalty.\textsuperscript{13} Where the trustee relies on the advice given by an apparently trustworthy source, he/she will not be found to have breached his/her fiduciary duty for failing to consider a relevant matter even if it later turns out that the advice was materially wrong.\textsuperscript{14} In these cases, the beneficiaries (and potentially the trustee) may have a remedy in damages for breach of professional duties of care against the financial advisers that issued the incorrect advice or may raise the issue of mistake as a ground to rescind the transaction.\textsuperscript{15} Lord Walker was unwilling to find that an error on the part of the advisers could be attributed to the trustees, on the basis that the advisers were acting as agents for the trustees/principals.\textsuperscript{16} Significantly, therefore, a trustee that seeks professional advice (for example on the tax consequences of a proposed transaction), has fulfilled his/her duty to take into account relevant matters (in this case, by consulting an expert), so that he/she cannot be taken to have breached the

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\item \textsuperscript{11} Pitt v Holt (n 1) [41], approving the judgment of Lightman J in Abacus Trust Co. (Isle of Man) v Barr [2003] Ch. 409.
\item \textsuperscript{12} Robert Ham, “The rule in Hastings-Bass after Pitt v Holt and Futter v Futter” (2016) 22 Trust & Trustees 971, 972.
\item \textsuperscript{13} This position had been advocated by Millett LJ in Bristol & West Building Society v Mothew [1998] Ch. 1, [16-18]. In response to the criticism that the core element of fiduciary obligations is that of loyalty, Lord Walker commented that: “the obligation of proper deliberation is certainly an equitable obligation, not a common law duty of care, and that it is so much part and parcel of the exercise of fiduciary powers that it would be perverse not to regard this subsidiary obligation as being fiduciary also.” Robert Walker, ’When will the Court grant relief for Trustees’ mistakes? Pitt v Holt and Futter v Futter’ (Lecture at the University of Hong Kong, 24 February 2014) \url{http://www.hkcfa.hk/filemanager/speech/en/upload/133/20140224%20-%20Walker%20-%20When%20Will%20The%20Court%20Grant%20Relief%20For%20Trustees%20Mistakes.pdf} accessed 1 October 2017.
\item \textsuperscript{14} Pitt v Holt (n 1) [70], quoting with approval Lloyd LJ’s judgment in the Court of Appeal.
\item \textsuperscript{15} Pitt v Holt (n 1) [41].
\item \textsuperscript{16} Pitt v Holt (n 1) [61].
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duty – even if it appears that the advice was wrong and that there are disadvantageous tax consequences to the beneficiaries of the trust.¹⁷

Importantly, because the rule of Hastings-Bass is now premised on the breach of a fiduciary duty to take into account relevant matters, a claim cannot be brought against the holder of a non-fiduciary power.¹⁸ Moreover, the Hastings-Bass rule can only be used to set aside an erroneous action of the trustee – it does not apply to a mistaken failure by the trustees to act when they should have acted.¹⁹

Where the Hastings-Bass rule is properly invoked, it renders the trustee’s disposition voidable and not void ab initio.²⁰ This differs, for example, from an instance of fraud on a power which is voidable ab initio as it is an act beyond the scope of the power.²¹ In a three-partite scenario, in which there is an innocent third party that deals with a trustee in connection with a decision that could be invalidated on account of inadequate deliberation (under the Hastings-Bass rule), it is necessary for that third party to have been privy to the trustee’s breach of duty before that transaction can be rescinded vis-à-vis the third party.²²

Lord Walker clarified that “fiscal consequences” are relevant considerations which may trigger the application of the Hastings-Bass rule, especially in the case of offshore trusts.²³ Nevertheless, because of the requirement that there be a breach of duty, a far

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¹⁷ McGhee (n 8) para 10-033.
¹⁸ McGhee (n 8) para 10-033.
¹⁹ McGhee (n 8) para 10-033: “Though failure to exercise a power may be culpable, the courts have not asserted any general jurisdiction to act in place of a fiduciary and exercise a power vested in him”.
²⁰ Pitt v Holt (n 1) [93-94].
²¹ Pitt v Holt (n 1) [93]; McGhee (n 8) para 10-034.
²² McGhee (n 8) para 10-034: “what may perfectly well justify rescission of a decision and its consequences as between trustee and beneficiary does not, without more, justify rescission as between the trustees and a third party”.
²³ Pitt v Holt (n 1) [65-66].
smaller number of defective exercises of powers will be unwound under the Hastings-
bass rule – to the relief of HMRC.\textsuperscript{24}

Even in those rare cases where all the elements necessary to bring a Hastings-Bass
claim are present, setting aside the trustee’s exercise of a power will not be the only
course available.\textsuperscript{25} Moreover, a Hastings-Bass application will be subject to the broad
spectrum of equitable defences.\textsuperscript{26} This may be particularly relevant in the case of
transactions with unwarranted tax consequences, in which it becomes important to
determine whether – notwithstanding compliance with all the formal elements required
for bringing a Hastings-Bass application – the transaction should be set aside given that
it negatively affects HMRC.\textsuperscript{27}

Importantly, in the interests of flexibility and greater clarity, Lord Walker brushed aside
prior case law that had distinguished between a trustee that “would not “ have acted as
he/she did but for taking into account the incorrect considerations, and a trustee that
“might not” have acted as he/she did. Lord Walker considered that these considerations
were too formalistic, and that it was preferable to retain flexibility.\textsuperscript{28}

Ultimately, Lord Walker clarified how a typical exoneration clause (such as the one
present in the Futter Settlements that specified that “in the professed execution of the
trusts and powers hereof no trustee shall be liable for a breach of trust arising from a
mistake or omission made by him in good faith”) would not be sufficient to exonerate the

\textsuperscript{24} McGhee (n 8) para 10-035: “The Revenue is much better protected under the new law than the old, because far fewer
transactions will breach the rule in \textit{Pitt v Holt} than breached the old understanding of \textit{Re Hastings-Bass}.”

\textsuperscript{25} \textit{Pitt v Holt} (n 1) [63].

\textsuperscript{26} \textit{Pitt v Holt} (n 1) [70] quoting with approval Lloyd LJ’s judgment in the Court of Appeal.

\textsuperscript{27} McGhee (n 8) para 10-035.

\textsuperscript{28} \textit{Pitt v Holt} (n 1) [92].
trustee and oust the application of the Hastings-Bass rule if it were otherwise applicable.  

In conclusion, the Hastings-Bass rule as reformulated in *Pitt v Holt* applies only to actions that are within the scope of a fiduciary power (rather than *ultra vires*), and focuses on the process which the trustees implemented to reach a particular decision. The law prior to *Pitt v Holt* was perceived as particularly accommodating to trustees, as it allowed them to liberally *undo* the consequences of actions that they subsequently regretted. The reformulation of the law is less favourable to trustees, as they will now need to allege a breach of a fiduciary duty amounting to a breach of trust. Because such a finding may expose trustees to liability, they may be far less willing to bring an action or cooperate with beneficiaries to bring an application under the Hastings-Bass rule.

**Mistake**

With respect to law on mistake, Lord Walker set out a flexible test whereby in order for a court to exercise its equitable jurisdiction to set aside a voluntary transaction on the ground of mistake, there must be a “causative mistake of sufficient gravity.” A mistake must be distinguished from mere ignorance or inadvertence and mis-predictions. Nevertheless, forgetfulness, inadvertence or ignorance can lead to a false belief or assumptions which the law will recognise as a mistake. Therefore, a fine distinction can be drawn between a mistake and “causative ignorance” in other words, “if the claimant has never had in mind, actively or passively, the incorrect fact or law, he cannot

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29 *Pitt v Holt* (n 1) [89].
30 McGhee (n 8) para 10-033.
32 McGhee (n 8) para 10-033.
33 *Pitt v Holt* (n 1) [122].
34 *Pitt v Holt* (n 1) [104].
35 *Pitt v Holt* (n 1) [105].
say that he was mistaken about it and is not entitled to relief.”36 The new standard for mistake can be satisfied “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.”37 In fact, Lord Walker explained that:

“[t]he 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.”38

Therefore, the evaluation of what is unconscionable should be objective.39 Importantly, Lord Walker disapproved of the prior distinction drawn between mistakes as to the legal effect or consequences of the transaction, as these would leave the “law in an uncertain state.”40

In summary, Lord Walker clarified that “[t]he 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

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37 Pitt v Holt (n 1) [122].
38 Pitt v Holt (n 1) [126].
39 Pitt v Holt (n 1) [125].
40 Pitt v Holt (n 1) [123], with reference to the test formulated in Gibbon v Mitchell [1990] 1 WLR 1304.
about the justice of the case."\(^{41}\) In this respect, tax consequences can be relevant considerations for a claim of mistake.\(^{42}\) Nevertheless, Lord Walker highlight how:

“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 the grounds of public policy … 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.”\(^{43}\)

Furthermore, a question that has not been fully resolved is the exact tax effect of a transaction that is set aside on the basis of mistake. Lord Walker held that if a transaction is set aside the court is effectively ruling that the transaction did not take place.\(^{44}\) Nevertheless, whether the rescission of a transaction triggers tax consequences (and the extent to which it will do so), seems to largely depend upon the specific tax law provisions applicable to the transaction by virtue of the country of tax residence of the affected parties.\(^{45}\) It is submitted that a similar uncertainty is also present with respect to a transaction that is set aside pursuant to the Hastings-Bass rule.

\(^{41}\) Pitt v Holt (n 1) [128].
\(^{42}\) Pitt v Holt (n 1) [129-132].
\(^{43}\) Pitt v Holt (n 1) [135]. This statement has stirred criticism in the offshore trust context (e.g. Boyd v Rozel Trustees (Channel Islands) Limited [2014] JRC 056 [25]; AB v CD [2016] CHP 7 [41]), and has been difficult to apply in practice. Van Der Merwe v Goldman and HMRC [2016] EWHC 790 (Ch) [42]: “The parties’ skeleton arguments in advance of the trial addressed the question whether this was a case of artificial tax avoidance where the court ought to withhold relief on the ground of public policy, a possibility which was mentioned by Lord Walker in Pitt v Holt [2013] 2 AC 108 at [135]. The parties’ arguments were of considerable interest but in the course of closing submissions, HMRC accepted that it was unrealistic for them to ask a judge at first instance to give effect to Lord Walker’s suggested possibility on the facts of this case… Having considered the arguments in the skeleton arguments, I can say that I do not think it appropriate for me to hold, on my own initiative, that it would be contrary to public policy to grant relief in this case.”
\(^{44}\) Pitt v Holt (n 1) [130].
\(^{45}\) Rodney Stewart Smith, ‘Trustee Mistakes still need not be fatal’ (2014) 12 Trust Quarterly Review 16, 20 argues that “following rescission of a transaction [not], all resulting tax liabilities will be neatly annulled. In the absence of an express provision like s150 IHTA 1984, it is a question of statutory construction to determine what tax is chargeable following the avoidance of a particular disposition.”
In conclusion, the Supreme Court’s assessment of mistake is premised upon flexibility and unconscionableness in not rectifying the transaction in question.  Moreover, a claim for equitable mistake is voidable and not void ab initio, and is subject to equitable defences (laches, acquiescence) and third party rights (bona fide purchaser for value). The apparent flexibility in the new doctrine of mistake has been criticised for undermining the restraint drawn in the new Hastings-Bass rule.

Reactions to the Pitt v Holt Judgment

While the Supreme Court judgment has clarified the scope of the Hastings-Bass rule and the doctrine of mistake as a matter of English and Welsh law, it has not been adopted wholesale in offshore trust jurisdictions. More specifically, a number of jurisdictions have responded by implementing domestic legislation that negates the Supreme Court’s ruling. In the following section, I will briefly address legislative and case law developments in several offshore jurisdictions focusing specifically on the Crown Dependencies of the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man.

Jersey

Prior to the Pitt v Holt judgment, the Royal Court of Jersey had ruled that:

"Decisions of the English courts in matters of this kind [i.e. the Hastings-Bass rule] are always likely to be of considerable interest to the Royal Court and will frequently be treated as highly persuasive. Nonetheless, it remains the case that the Royal Court is not subordinate to the English Court of Appeal. The Island of

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46 This flexibility has been criticised for lacking clarity. Burrows (n 36): “It suggests that something more serious than a mere ‘but for’ test is required to rescind gifts and voluntary dispositions but it does not explain what that more serious test is other than by a resort to the justice of the case on the facts.”

47 Smith (n 45): “The effect of the decision [Pitt v Holt] in narrowing the scope for intervention by the court under the rule [Pitt v Holt] has been drastically reduced by its liberal reformulation of the equitable jurisdiction to set aside voluntary transaction on the ground of mistake.”
Jersey has its own separate legal jurisdiction and it remains open to the Royal Court, subject to any authority from the Jersey Court of Appeal or the Privy Council, to reach its own conclusions on the law. It may be that from time to time an issue will arise for determination where the Court’s decision will be much influenced by issues of domestic policy and the relevant circumstances affecting that policy are quite different in Jersey from those which may appertain in the United Kingdom. The freedom of the Royal Court in this respect to follow the line it considers appropriate is one which has been long and firmly established in the constitutional rights of the Island and its citizens.”  

Such statements assume particular relevance when one considers the contrasting interests of offshore and onshore jurisdictions with respect to the administration of trusts. It is clear that the Supreme Court’s veiled endorsement of UK public policy interests will not be greeted with equal zeal offshore. As was held by Commissioner Sir Philip Bailhache of the Royal Court of Jersey:

“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. We accordingly see no reason to adopting a judicial policy in this country which favours the position of the tax authority to the prejudice of the

48 In the Matter of the B Life Interest Settlement [2012] JRC 229 [14].
individual citizen, and excludes from the ambit of discretionary equitable relief mistakes giving rise to unforeseen fiscal liabilities.”

Given these comments, it is not surprising that shortly after the *Pitt v Holt* judgment was rendered by the Supreme Court, the Trusts (Amendment No. 6) Jersey Law 2013 came into force codifying the former Hastings-Bass rule in Jersey trust law. Under the newly introduced Article 47E of the Trusts (Jersey) Law 1984, a transfer or other disposition of property to a trust is voidable and has such effect as the court may determine where there settlor has made a mistake in relation to the transfer, and would not have made that transfer but for the mistake, and the mistake is of so serious a character as to render it just for the court to set aside the transfer. Mistake is defined to include a mistake as to the effect of, any consequences of, or any of the advantages to be gained by a transfer or exercise of the power; as well as a mistake as to a fact existing before or at the time of a transfer or other disposition of property to a trust, or a mistake of law including the law of a foreign jurisdiction.

Under Article 47F, a transfer to a trust can be set aside if 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 so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations. Significantly, Article 47F(4) does not require the breach of a fiduciary duty or fault before the transaction can be invalidated.

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49 *In the Matter of the Representation of R* [2011] JRC 117 (39). While the judgment referred to the remedy of mistake, the reasoning can be easily analogized to the Hastings-Bass rule.

50 Trusts (Amendment No. 6) (Jersey) Law 2013 art 47B(2).
Article 47G provides that the exercise of powers in relation to a trust (other than in the capacity of a trustee) may be set aside where the trustee or person exercising a power (a) made a mistake in relation to the exercise of the power, and (b) would not have exercised the power, or would not have exercised the power in the way in which it was so exercised, but for the mistake, and (c) the mistake is of so serious a character as to render it just to set aside the exercise of the power.

Article 47H provides that a power that has been exercised (other than in the capacity of the trustee) can be set aside where the powerholder failed to take into account any relevant considerations or took into account irrelevant considerations, and would not have exercised the power, or not in the way in which was exercised, but for such failure.

In short, the amendments in Jersey law address the case of transfers into trusts (Article 47E and Article 47F), and the exercise of powers in relation to existing trusts (Article 47G and Article 47H). The Hastings-Bass rule is codified without reference to the requirement of a fault-based breach of fiduciary duty.

In the case of Re Onorati Settlement,51 decided shortly before the introduction of the Trusts (Amendment No. 6)(Jersey) Law, the Royal Court ruled that the trustee had breached its fiduciary duty by failing to have regard to the tax consequences of the appointment of the trust fund to the beneficiaries.52 Consequently, it was not necessary

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51 In the Matter of Re Onorati Settlement [2013] JRC 182.
52 [2013] JRC 182 [41]: “Its conduct in this case amounted, in our judgment, to a very clear breach of fiduciary duty. The evidence shows clearly that, if the trustee had known (or recalled) the tax consequences of an appointment to the children when it made the appointment in October, it would not have made the appointment …”
for the Royal Court to rule on whether it should follow English and Welsh law (under *Pitt v Holt*), or its own jurisprudence.

A number of judgments in Jersey have addressed the issue of mistake since the *Pitt v Holt* judgment. *In the matter of Strathmullan Trust* and *In the matter of the S Trust and In the Matter T Trust*, the Royal Court considered Article 11 of the Trusts Jersey Law, which relates to the invalidity of the trust as a whole (whereas, Article 47E, relates to a mistaken transfer made to an existing trust). The judgments clarified that there is a difference between the legal tests required to prove mistake under Article 11 and 47E. In the recent judgment of *In the Matter of the D, E and F Trusts*, the Royal Court of Jersey set aside transfers to three Jersey trusts on the basis of mistake under Article 47E. In this case the Royal Court found that a contingent (rather than existing) tax liability could be a mistake that is so serious that it mandates the court’s jurisdiction to intervene and set the transfers aside.

**Guernsey**

The Royal Court of Guernsey in *Gresh v RBC Trust Company (Guernsey) Limited and HMRC* held that *Pitt v Holt* had not altered the law applicable in Guernsey in the case of mistake. Therefore, the Royal Court ruled that the relevant assessment is whether the mistake was of sufficient gravity to justify it being set aside on the ground that it would be

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55 More specifically, the difference concerns the third limb of the assessment. Under the case law test for article 11 set out in *Lochmore Trust* [2010] JRC 068 para 11, the third limb concerns whether a mistake is of so serious a character to render it unjust on the part of the donee to retain the property, whereas Article 47E provides for a "mistake of so serious a character as to render it just for the court to make a declaration under this Article".
56 [2016] JRC 166C.
57 Nigel Sanders, ‘Settings aside subsequent transfers to trusts-Jersey’s statutory law of mistake in operation’ (2017) Trust & Trustees 393, 399. Mr. Sanders comments how the Royal Court’s willingness to “take account of contingent prejudice… demonstrates that the jurisdiction remains one where the Court will consider the overall justice of the circumstances it is presented with, when it has first determined that a mistake has been made, but for which the transfer would not have been made.”
unjust or unconscionable to leave it uncorrected. On the facts of the case, the beneficiary of a pension plan received a distribution that triggered significant adverse tax consequences. The beneficiary had previously sought independent tax advice from a professional adviser, who had erroneously informed him that distributions would be received tax-free. The Royal Court drew support from the fact that the beneficiary was the sole person that would be affected and that the beneficiary had separately sought legal advice, in ruling that it would not be appropriate to exercise the Court's jurisdiction to set aside the distribution and that it was not unconscionable for the beneficiary to retain the proceeds of the distribution (notwithstanding the grave tax consequences).\(^{59}\)

Importantly, Bailiff Sir Richard Collas followed the \textit{Pitt v Holt} position (and implicit policy judgments) in providing that not all mistakes as to the tax consequences of a transaction will be sufficient to trigger the court's equitable discretion to set aside a transaction based on the doctrine of mistake.

In \textit{Whittaker v Concept Fiduciaries Ltd}, the Royal Court\(^{60}\) exercised its equitable discretion to set aside a transfer of shares into a trust that would have resulted in disastrous tax consequences for the settlor. The Lieutenant Bailiff argued that “artificial tax avoidance transactions” may be situations in which equitable relief should not be provided – in line with Lord Walker's comments in the \textit{Pitt v Holt} judgment. Nevertheless, the Royal Court believed that the present arrangement did not constitute tax avoidance, and that the transfer would not have been carried out if the settlor had been aware of the correct tax consequences, so that relief under the doctrine of mistake was justified.\(^{61}\)

\(^{59}\) 6/2016 [57].
\(^{60}\) 15/2017.
Isle of Man

The High Court of Justice of the Isle of Man ruled in *AB v CD*[^2] on whether a number of call options that had been put in place by a trustee in favour of the settlor/beneficiary could be avoided because the trustee had failed to appreciate the UK capital gains tax should the settlor/beneficiary relocate to the United Kingdom. The Court found that the trustee “failed to have regard to material tax considerations” to the extent that this constituted a breach of fiduciary duty (so that the *Pitt v Holt* standard was met).[^3]

Nevertheless, as a moot point, the Court also expressed “serious reservations” as to whether *Pitt v Holt* was the law in the Isle of Man,[^4] particularly because:

> “it would be a mistake to assume that Manx law would automatically follow English law especially in respect of a decision which appears largely driven by UK policy and UK tax revenue considerations.”[^5]

The High Court recognised that “Manx law and Jersey law do not always "accord with English law", just as English law does not always accord with Manx or Jersey law. The Isle of Man, Jersey and England have separate legal systems.”[^6] Furthermore, the High Court also ruled that the specific facts in question justified the court’s equitable jurisdiction to rescind the transaction on the basis of mistake.[^7]

Notable developments in other Jurisdictions

Bermuda introduced a new Section 47A in the Trustee Act 1975, conferring jurisdiction on a court to set aside the flawed exercise of a power, either in whole or in part, and

[^3]: *AB v CD* (n 62) [89], [94].
[^4]: *AB v CD* (n 62) [47], [87].
[^5]: *AB v CD* (n 62) [53]. This view was welcomed by the legal community: John Rimmer, “How far have the Manx courts been affected by the Futter and Pitt cases?” (2017) 23 Trust & Trustees 520, 525.
[^6]: *AB v CD* (n 62) [14].
[^7]: *AB v CD* (n 82) [95-97].
either unconditionally or on such terms and subject to such conditions as the court may think fit; if (a) in the exercise of the power the holder did not take into account one or more relevant considerations (whether of law or fact 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; and (2) but for the failure to take into account one or much such relevant consideration or his having taken into account one or more irrelevant conditions, the powerholder (i) would not have exercised the power; or (ii) would have exercised it on a different occasion or in a different manner. Notably, there is no requirement to prove that the party exercising the power was in breach of trust or breach of duty.\textsuperscript{68}

Conclusion

The judgment of \textit{Pitt v Holt} has provided a clear assessment of the state of the law in England and Wales with respect to the Hastings-Bass rule and the scope of the court’s equitable jurisdiction to set aside a voluntary disposition on the ground of mistake. The Supreme Court has significantly narrowed the scope of the Hastings-Bass rule through the introduction of a fault-based requirement. Conversely, it has introduced greater flexibility into the assessment of mistake – through an emphasis on unconscionability.

These developments have not been uniformly followed across the Crown Dependencies of the Isle of Man, Jersey and Guernsey. Several offshore jurisdictions, including Jersey and Bermuda, have introduced legislation that overrules the fault-based requirement of the Hastings-Bass rule. Judgments in the Isle of Man and Guernsey have not been

\textsuperscript{68} Bermuda Trustee Act 1975 s 47A(4).
required to address directly the conflict between local law and English and Welsh law – insofar as the fact patterns in dispute involved a breach of fiduciary duties. Nevertheless, obiter in these judgments indicate that it is far from certain that Manx law will necessarily adopt the Pitt v Holt reformulation of the Hastings-Bass rule. There has been less opposition with respect to the Supreme Court’s analysis of mistake – other than with respect to role that HMRC’s interest plays in denying relief under the doctrine of mistake. In conclusion, therefore, the law after Pitt v Holt is far from settled, and we are likely to see further developments.

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Bibliography: Discuss the Hastings-Bass rule and the equitable jurisdiction to provide relief against the consequences of mistake in the light of the Supreme Court decision in Pitt and Another v HMRC and Futter and Another v HMRC. Is the story over?

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