RECTIFYING MISTAKES AFTER THE SUPREME COURT DECISION IN FUTTER V FUTTER AND PITT V HOLT

Harriet Brown[1]

1. Mistakes of trustees – what remains of the law in Hastings-Bass?

1.1 The progress through the courts of *Pitt v HMRC* and *Futter v HMRC* has been followed closely by trustees and those advising them. The decision of the Supreme Court, handed down on 9 May 2013 and reported at [2013] STC 1148, is the end of the line for those cases, and possibly for the principle known as the principle in *Hastings Bass* in the form which we know it (the rule provides a possible remedy for trustees who have made a decision without having properly considered relevant matters, or have improperly considered irrelevant matters).

1.2 The two cases, both in the context of the use of the rule where, very broadly speaking the trustees sought to have decisions set aside which had given rise to unintended tax consequences, involved the issue of the scope of the "rule in *Hastings Bass*".

1.3 *Pitt* also considered the court's equitable jurisdiction to set aside a voluntary disposition on the ground of mistake. While the Supreme Court's dicta on this point are obviously important, the law of mistake is not covered here.

Factual background to the cases: Pitt v Holt

1.4 In this case the claim for relief was brought by the personal representatives of Derek Pitt. Mr Pitt had lost mental capacity following a

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1 Harriet Brown, Tax Chambers, 15 Old Square, Lincoln's Inn, London, WC2A 3UE. Tel: (020) 7242 2744

road accident in 1990. He died in 2007. The decision in question was made by Mrs Pitt in her capacity as her husband's receiver, rather than as trustee.

1.5 Mr Pitt had brought a claim in damages for his injuries and this claim was compromised by a structured settlement. Mrs Pitt had sought advice in a written report from solicitors as to the form of that settlement. This advised that damages should be paid into a discretionary settlement and this was done with the approval of the Court of Protection. The report however, failed to address the issue of inheritance tax. The effect of this omission was that although the trust could easily have been set up as a special kind of "disabled" trust with advantageous inheritance tax treatment, this was not done. There was an immediate charge to inheritance tax upon the property being put into settlement, as well as potential exit and ten-yearly charges under the relevant property regime.

Factual background to the cases: Futter v Futter

1.6 The case involved a private family trust. In 1985 Mark Futter created two settlements. Initially both settlements had non-resident trustees, but in 2004, two UK residents were appointed as trustees. One of these trustees was a partner in the firm of solicitors acting for the trustees and gave tax advice to the settlements. Acting on his advice, in 2008 the trustees distributed:

1.6.1 the entire trust capital of one settlement to Mr Futter; and

1.6.2 monies from the other settlement to Mr Futter's children.

1.7 In doing so the trustees (following professional advice) had not considered recent legislation. As a result of this legislation Mr Futter and his children had unexpected capital gains tax liabilities.

The decisions in the Court of Appeal and House of Lords

1.8 In 2011 the Court of Appeal's decision in *Pitt v Holt* and *Futter v Futter* [2011] STC 809 limited the scope of the rule in *Hastings Bass*. Lloyd LJ gave the lead judgment and held that where trustees have relied on professional advice (even negligent advice) they are unlikely to have been acting in breach of trust and therefore their decision cannot be said to be void or voidable.

1.9 The effect of this was that, unless made in breach of trust, such a decision would stand regardless of any unpalatable or unforeseen tax

consequences. In giving the lead judgment, Lloyd LJ said:

> *Suppose, then, that the trustees, being aware that what they are thinking of doing could have tax consequences, take advice from appropriate and reputable advisers and are given what appears to be clear and pertinent advice that if they proceed in a particular way, tax liabilities will not be incurred, whether by them or by the beneficiaries, or at any rate that the liabilities incurred will be as small as can be hoped for. Suppose also that the trustees follow that advice and proceed in the way suggested, but that it then turns out that the advice was wrong, for example because (as in Futter v Futter and as in Sieff's case) a particular section was overlooked, and liabilities are incurred, whether they could easily have been avoided (as in Pitt v Holt) or not.* The trustees have discharged properly their duty to take advice, as a matter of skill and care. It could be said, however, that in preparing to exercise their discretionary power they failed to take into account a relevant matter, namely the true fiscal consequences of their action. Can it be said that those trustees were acting in breach of trust when, on that advice, they made the particular advancement or appointment …
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> *Accordingly, in my judgment, in a case* where the trustees' act is within their powers, but is said to be vitiated by a breach of trust so as to be voidable, if the breach of trust asserted is that the trustees failed to have regard to a relevant matter, and if the reason that they did not have regard to it is that they obtained and acted on advice from apparently competent advisers, which turned out to be incorrect, then the charge of breach of trust cannot be made out …
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> (Emphasis added).

1.10 The Court of Appeal's decision effectively put a stop to the relatively common practice of trustees who had made a mistake as to the tax consequences of their actions bringing successful applications to the lower courts to have their decisions set aside as voidable under the rule in *Hastings Bass*. There followed appeals from the taxpayer appellants to the Supreme Court, and these were, unsurprisingly, contested by HMRC. The Supreme Court, with a lead judgment from Lord Walker, dismissed both appeals insofar as they related to the rule in *Hastings Bass*. It allowed the appeal in *Pitt v Holt* on the issue of mistake.

1.11 The effect of the decision regarding the rule in *Hastings Bass* is that, in order to rely on the rule, an applicant will need to show a breach of fiduciary duty or breach of trust on the part of the fiduciary or trustee. The Supreme Court confirmed the judgment given by the Court of Appeal, i.e. that there is unlikely to be a breach of fiduciary duty where that

fiduciary has obtained and followed professional advice.

1.12 In his judgment dismissing both appeals, Lord Walker confirmed his general agreement with Lloyd LJ's judgment in the Court of Appeal insofar as it related to *Hastings Bass*. This had held that the most recent statements of the rule in *Hastings Bass* were wider than the true principle expressed in the original decision.

1.13 Lord Walker agreed with Lloyd LJ that a distinction should be drawn between two kinds of situation:

1.13.1 an error made by trustees who fail to give proper consideration to relevant matters but where the decision is within the scope of a trustee's power (characterized as "inadequate deliberation"); and

1.13.2 an error made by trustees which goes beyond the scope of their power (characterized as "excessive execution").

1.14 Lord Walker noted a further category of decision, where a fraudulent appointment has been made for an improper purpose. The rule in *Hastings Bass* applies only to the decisions within the inadequate deliberation category.

1.15 Lord Walker also endorsed the key aspect of Lloyd LJ's judgment, i.e. that in order to be able to set aside the transaction under the rule in *Hastings Bass*, the inadequacy of the decision must be sufficiently serious as to amount to a breach of duty (for example a breach of fiduciary duty or a breach of trust). Lord Walker said:

It would set the bar too high (or too low depending upon the spectator's point of view) to apply the Hastings-Bass rule whenever trustees fall short of the highest standards of mature deliberation and judgment.

1.16 Lord Walker also found that except in exceptional circumstances, a breach of trust is necessary to invoke the rule in *Hastings Bass*. it would not be enough for a court to look at a transaction and decide that the court would have acted in a different way in the same position. This is because where there is no breach the court will not normally have jurisdiction to intervene.

1.17 Lord Walker also agreed with Lloyd LJ that when considering inadequate deliberation and the matters which a trustee should consider, relevant considerations include the fiscal consequences of a transaction. The fiscal consequences should not, however, be the sole consideration, notwithstanding that they are a *"constant preoccupation"* of trustees.

1.18 Lord Walker also considered the position of the trustees' advisors. He explained:

> *Trustees may be liable, even if they have obtained apparently competent professional advice, if they act outside the scope of their powers (excessive execution), or contrary to the general law (for example, in the Australian case, the law regulating entitlement on intestacy). That can be seen as a form of strict liability in that it is imposed regardless of personal fault. Trustees may also be in breach of duty in failing to give proper consideration to the exercise of their discretionary powers, and a failure to take professional advice may amount to, or contribute to, a flawed decision-making process. But* it would be contrary to principle and authority to impose a form of strict liability on trustees who conscientiously obtain and follow, in making a decision which is within the scope of their powers, apparently competent professional advice which turns out to be wrong.
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> Such a result cannot be achieved by the route of attributing any fault on the part of professional advisers to the trustees as their supposed principals. *Solicitors can and do act as agents in some clearly defined functions, usually of a ministerial nature, such as the receipt and transmission of clients' funds, and the giving and taking of undertakings on behalf of clients. But* they do not and may not act as agents in the exercise of fiduciary discretions. *As I said in Scott* ...
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> > *'It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts*

1.19 The fiduciary discretion can only be exercised by the trustees or fiduciaries, not their advisors. Lord Walker also summarily rejected a submission that the trustees' duty to take into account relevant considerations should be interpreted as a duty only to follow correct advice. There is no requirement for trustees to be infallible.

What remains of Hastings Bass?

1.20 The decisions in *Pitt v Holt* and *Futter v Futter* are not entirely bad news. While it is true that the scope of the rule in *Hastings* Bass has been significantly circumscribed in relation to the circumstances in which it applies there are a number of positive points for trustees (though perhaps not their advisors). First, where trustees have received advice which is wrong, and which has been followed, the trustees will not have a strict liability against them, i.e. it has been confirmed that there is no automatic breach. This gives trustees a measure of protection in terms of

actions for breach of fiduciary duty. The corollary is that they will not then be able to use *Hastings Bass* to correct an error.

1.21 The position now is likely to be that trustees will need to bring a negligence claim against professional advisors, with all the associated lack of certainty of succeeding that this entails. In circumstances where, however, an action for negligence is unsuccessful (i.e. where there is no negligence of the trustees), there will not necessarily be inadequate deliberation, so in some cases it is likely that there is no change.

1.22 Applications made under the rule in *Hastings Bass* are, perhaps, now more likely to be made by beneficiaries, and can of course only be made where a breach of trust can be found. Trustees may be reluctant to bring such applications as to do so would be to necessarily admit their own breach of trust. Such trustees are unlikely to recover their costs. Notwithstanding this, any trustee who has breached trust as a result of an inadequate deliberation, which may be susceptible to the rule in *Hastings Bass*, may have a duty to bring such an application in order to set matters right.

1.23 The decision may also affect the way in which trustees choose to take professional advice. Ultimately trustees cannot simply point to errors in that advice to absolve themselves and this may make them more careful in the advisors they instruct. Similarly, solicitors and other advisors may be more alert to these issues as they may be facing a negligence action rather than the comfort offered by *Hastings Bass*. It is also possible that in future trustees may do better to look to put applications within the equitable remit of mistake rather than under the rule in *Hastings Bass*.

1.24 Finally, it should be noted that Lord Walker did note that the cases in question were fact specific, and that future there may be "*cases in which small variations in the facts lead to surprisingly different outcomes.*" Thus it may not be the end for *Hastings Bass* in England and Wales and we may see more cases further defining the scope of *Hastings Bass* in the future.

2. Jersey law: enactment of the Hastings-Bass principle

Introduction: the development of the rule in Hastings Bass under Jersey law

2.1 The principle in *Hastings Bass* is also a principle applied in

other jurisdictions, including Jersey and Guernsey. Its relevance in Jersey was first confirmed in 2002 (in *In the Matter of the Green GLG Trust* [2002] JLR 571). There has, however, been a number of judgments on the principle since then and the rule now represents one area in which it can be seen that Jersey law and English law have diverged.

2.2 The tests applied in *In the Matter of the Green GLG Trust* were: what were the trustees under a duty to consider; did the trustees fail to consider it (or what did they consider that they should not have considered); would (or might) the trustees not have taken the action if they had considered what they had failed to consider (or had not considered what they should not have considered).

2.3 Having set out the test (and gone on to consider several other English authorities) the court confirmed that where the requirements set out above were met the court would set aside an action of the trustees.

2.4 The principle was again considered in *Seaton Trustees Limited v Morgan, In the Matter of the Winton Trust* [2007] JRC 206. Commissioner Clyde-Smith applied the principle to set aside[2] a Manx law agreements, which had been entered into by the trustee when the trustee had misconstrued the tax implications of the transactions. The first point arising was whether the Manx law agreements could be dealt with by the Jersey courts, but it was successfully argued that the agreements fell within the ambit of TJL, Article 9(1)(b)[3]; the defect was in the exercise of the trustees of a Jersey law trust and not in the agreements themselves. Thus, the court applied *Hastings-Bass* to the Jersey law trust.

2.5 The next question which arose was the potential impact of *Hastings-Bass* on the other parties to the agreements. In this case it was not necessary to consider the point, because the third parties had consented.

2.6 Thus this case did not extend the ambit of the principle, in relation to its impact on third parties because as Commissioner Clyde-Smith identifies, it is due to the consent of the parties involved. It was not due to

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2 While declining to answer the question whether transactions set aside under the principle were void or voidable.

3 At the time TJL, Article 9 provided:

Subject to paragraph (3), any question concerning –

…

(b) the validity or effect of any transfer or other disposition of property to a trust;

…

a wide interpretation of the rule that it was possible to apply the principle to the Winton Trust. A more significant departure is the decision to which the principle was applied.

2.7 In Seaton Trustees the court was also compelled to consider whether the principle could apply where the trustee was accepting an addition to the trust fund, rather than exercising a discretion. This point was easily overcome because, while the trustee was accepting an addition, it had exercised its discretion to agree to be bound by the terms of the agreement. It was also put to the court that *Hastings-Bass* could not apply because the decision was administrative, rather than dispositive. This was dismissed, however, Commissioner Clyde-Smith finding that he couldn't "*see any reason in principle to distinguish between dispositive and administrative discretions*." Thus in Jersey the principle in *Hastings-Bass* has been applied equally to dispositive and administrative discretions.

2.8 Finally, the court was directed to HMRC Tax Bulletin TB 83 June 2006[4]. This bulletin, which suggests that the extent of *Hastings-Bass* should be limited to a discretion of the court, and to rendering decisions voidable has not found favour with the Jersey courts in this, or subsequent, cases.

2.9 In relation to HMRC Tax Bulletin TB 83 June 2006 Commissioner Clyde- Smith rejected the idea that, as a matter of policy, a line should be drawn between cases which involved tax decisions and those which did not. This must, especially in light of the fact that HMRC is the tax authority of a foreign jurisdiction, be a distinction which it is reasonable for the courts to refuse to draw.

2.10 In *Leumi Overseas Trust Corporation v Howe* [2007] JRC 248, the courts considered the question of whether or not fault of the trustees was a necessary part of the *Hastings-Bass* principle. The facts arose from the same amendment to the Taxation of Chargeable Gains Act 1992 as in *In the Matter of the Green GLG Trust* [2002] JLR 571. The question of whether fault was required arose from the difference in approach taken by Lightman J in *Abacus Trust Co v Barr* [2003] Ch 409 and the approach take in *Sieff v Fox* [2005] EWHC 1312 by Lloyd LJ. The court held that fault was not required, pointing out that in the English line of authorities it had not been required, prior to Lightman J's

4 For the full text of HMRC Tax Bulletin TB 83 June 2006 see: http://www.hmrc.gov.uk/bulletins/tb83.htm

judgment, and that it had not previously been required in Jersey. The court followed the views of Lloyd LJ adopting the approach that in Jersey the principle could be applied where there was merely mistake, rather than requiring a breach of duty. Commissioner Clyde-Smith held:

... the approach of Lloyd LJ in Sieff-v-Fox, which sees the principle as founded on mistake rather than breach of duty, is correct, particularly in light of the authorities (e.g. In re Abraham's Will Trust [1969] 1 Ch 463) in which no breach of trust was or could reasonably have been established. We decline therefore to follow Abacus-v-Barr in this respect. We appreciate that the matter has not been the subject of adversarial argument before us but we find that the Hastings-Bass principle under Jersey law remains as set out in the Green GLG Trust case and that, when applying the principle, there is no requirement under Jersey law to find fault or breach of duty on the part of the trustee or its agents ...

2.11 This indicates that while the principle in Jersey had been developed along separate lines to that in England and Wales, the Jersey courts still had regard to decisions in the English courts (though in this case, merely to affirm the formulation of the principle as set out by the Royal Court in *Green GLG*). Secondly, it confirms that, at least in Jersey law, fault of the trustee is not a requirement for the application of the principle.

2.12 The principle has since been extended. In *In the Matter of Seaton Trustees Limited* [2009] JRC 050 the court again agreed to apply the *Hastings-Bass* principle. The application was made to alter the way in which funds had been withdrawn from Canada Life by the trustees. The court followed the decision in *Seaton Trustees Limited v Morgan, In the Matter of the Winton Trust* [2007] JRC 206 by applying the principle to an administrative decision and again was reliant on consent of a third party to set aside a transaction. Commissioner Clyde-Smith said:

"*... the Court was concerned with the propriety of its seeking by order to set aside a transaction governed by foreign law at the instance of only two parties to that transaction. Such an order would not bind Canada Life who had neither submitted to the jurisdiction nor consented to the order being sort...*"

2.13 The Commissioner wished to avoid making an order that the court knew would be of no effect and which may infringe the principles of comity.

However, following the hearing but before the decision, Canada Life gave their written consent to the order and once again this issue did not have to be decided by the court.

2.14 The court clearly rejected the implication that HMRC had any interest, or right to be considered, in the case, notwithstanding that the UK tax implications of the decision would impact on them. This is in accordance with the previous treatment by the Jersey courts of HMRC Tax Bulletin TB 83 June 2006, but not with the Guernsey Court of Appeal case of *Gresh*.

2.15 In In the matter of the B Life Interest Settlement [2012] JRC 229, the Royal Court again reconsidered the status of the rule in *Hastings-Bass* in Jersey. The facts in the case were that it was desired to undertake certain restructuring of a trust such that the trustee executed an irrevocable deed of exclusion as a result of which it excluded the settlor and the first respondent from benefitting in any way from the trust fund. On the same day, the trustee made a deed of appointment in effect dividing the substantial asset of the Trust into three parts, such that the settlor would have a life income in one third, and each of the second and third respondents would similarly have a life income in one third.

2.16 Shortly after the execution of the documents, it was realised that the trustee had made a mistake. It had been intended that the first respondent would remain as a successive life tenant after the death of the settlor (but like him in respect of one third of the Trust only) but she had been excluded completely.

2.17 As a result, the trustee proceeded as though those documents were of no consequence. The trustee made a subsequent deed of amendment, deleting from clause 4 of the settlement the restrictions on the exercise of its powers under that clause which required the consent of the settlor and his spouse, a deed of exclusion by which the settlor and his spouse were excluded from 2/3 of the shares in the principal company of the Trust, and a revocable deed of appointment by which the trustee appointed one fund for the benefit of the second respondent, a second fund for the benefit of the third respondent, leaving the remainder of the shares held by the settlement for the benefit of the settlor and thereafter his spouse as successor life tenant.

2.18 The intended effect was to transfer life interests in 2/3 of the Trust to the settlor's sons free of the life interests of the settlor and his spouse, thus creating new transitional interests under the English Inheritance Tax Act 1984. For this planning to be tax efficient it was necessary for the settlor to survive the amendment by seven years.

2.19 The trustee asserted that it undertook the restructuring in the mistaken

belief that the settlor was a fit and healthy 57 year old man with a life expectancy which at that time would have exceeded seven years. Unfortunately, the settlor was in fact suffering from an aggressive and ultimately fatal form of Alzheimer's disease which was not diagnosed until November 2008. The settlor died in September 2011. The trustee asserted that if a medical examination had been carried out in April 2008 with the result that the settlor's Alzheimer's disease had been diagnosed, it would not have undertaken the restructuring, as the risk of it not being tax effective was too great.

2.20 In relation to the application of the principle in *Hastings-Bass* Bailhache DB said (at paragraph 56):

The Royal Court applied the English law principle of in Re Hastings Bass, and having summarised the relevant English cases, Birt DB said this:-

...

It is clear that the limits of the principle are still to be developed. As we have observed earlier, it is certainly not every decision by trustees which they later come to regret that can be declared void. In particular there is some discussion in the English cases as to whether, before declaring a decision void, the Court has to be satisfied that the trustees would not have taken the decision if they had known the correct facts, or whether it is sufficient that the trustees might not have come to the same decision. It is not necessary for us to resolve this difference in the present case because of our decision that, on the facts of this case, the higher test is met; but we incline to the view that "would" is the correct test rather than "might" and we note that that was the word used by Buckley LJ in Hastings Bass itself."

It is clear from the last paragraphs of the judgment in that case that the Royal Court also accepted two points which may or may not be of relevance to the matters we now have to decide. The first was that the Court was not generally in favour of leaving the decision of a trustee to stand if the consequences were to condemn the beneficiaries to litigate with the trustee alleging negligence. The second was that the Court was in favour of following the decisions of the English courts in relation to the application of this principle.

(Emphasis added).

2.23 The Deputy Bailiff continued (at paragraph 66):

In Re the V Settlement [2011] JRC 046 the Royal Court was faced with a further Hastings Bass application. The Court noted that the Hastings Bass principle was well established under Jersey law having been applied in a

number of cases. The Court adopted the summary of the principle conveniently taken from the judgment of Lloyd LJ in Sieff-v-Fox. The Court adopted the provisional view of Lloyd LJ and of Commissioner Clyde-Smith in Leumi to the effect that there was no requirement for there to have been any fault or breach of duty on the part of the trustees for the principle to be applicable. The Court considered the right questions to ask were those posed by Warner J in Mettoy Pension Trustees Limited-v-Evans (1990)

1WLR 1587:-

(i) What were the trustees under a duty to consider?

(ii) Did they fail to consider it?

(iii) If so, what would they have done if they had considered it?

…

2.24 Thus the Deputy Bailiff confirms that in his view the correct considerations are what the trustee had a duty to consider, whether or not they failed to consider it and if they had failed to consider something they were under a duty to consider, would they have done something differently if they had considered it.

2.25 In applying the three criteria in *Mettoy* the Deputy Bailiff held that they were not met and that there was no need to consider whether or not the test as previously stated by the Jersey courts was correct, because on the facts (i.e. the settlor's apparent good state of health relative to his age) the trustee had not failed to consider something which it should have considered. Consequently, his subsequent analysis (at paragraph 89 et seq) was *obiter*:

Nonetheless, and subject to the caveat that the following remarks are obiter *as not necessary to the decision in this Court on the point, we think it is right to* express our provisional views *on the matter, given the argument that has taken place and the extensive materials put before us.*

… [i]n theory, the rule encourages sloppy decision taking by both trustees and their professional advisers. The latter might well say of course that tax legislation is today so opaque that some misreading of the primary or secondary legislation is almost inevitable, or that sometimes one can only guess as to what is intended. If that is so, the answer lies not in seeking the assistance of the Court to undo what has become financially disadvantageous as a result, but to apply pressure on politicians and parliamentary draftsmen to set out the taxation legislation with clarity…

…

> … beneficiaries are entitled to proper administration of the trusts of which they are beneficiaries. *This is an important policy consideration especially in this jurisdiction. It seems to us that the law should strive for a position where more beneficiaries will obtain more benefit from well administered trusts, and* it is counter intuitive to permit a rule where sloppy trust administration is forgiven and the consequences put right whenever necessary if an application is made to Court.

2.26 This seems, in my view, too narrow an approach to take to the rule in *Hastings-Bass*. While the rule (in the formulation currently applied in Jersey) may in certain circumstances apply where there has been a poor decision making process this will depend on the facts. It may also apply in cases where there has been a competent and diligent decision making process. Where there has been sloppy decision making an action for breach of trust is still open to trustees.

2.27 It also seems short-sighted to suggest that trustees would be encouraged to have a sloppy decision making process because of the existence of the rule. Applying to court for the application of the rule (especially when it is a discretionary remedy and one furthermore, currently of uncertain application) will be the subject of cost, which will, one would anticipate, fall on the trustees where there is a sloppy decision making process. The need to make such an application because of sloppy procedure, may also be seen as an incentive to beneficiaries and settlors to take their trustees elsewhere, and this will be of particular relevance to professional trustees (in relation to which, the Deputy Bailiff seems to have a particular eye in making these statements).

2.28 The Deputy Bailiff continued:

> *The Court has an inherent jurisdiction as a court of equity to supervise the administration of trusts, themselves a creation of the Court's equitable jurisdiction. That, however, has been achieved over the years by reference to a set of rules which the Court has developed …*
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> *These are examples of a trustee coming to Court and indicating a proposal that the trustee take a particular step, or follow a particular course, and asking for the Court's guidance. Sometimes the trustee comes to Court and indicates that it has a conflict of interest, and seeks directions. Sometimes the trustee comes to Court and says that it has made a mistake and asks for the Court to undo the consequences of that mistake.*
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> *It is to be noted that the jurisdiction which the Royal Court exercises in all these cases is rather different from* the jurisdiction which it is asked to exercise in a Hastings Bass application, where the trustee comes to court

to say that it has done exactly what it intended to do in terms of entering the transaction or making the appointment, but the results have not turned out very well whether by its fault or not, and the Court should please exercise its discretion to undo what the trustee has done.

…

(Emphasis added).

2.29 The underlying principle of the rule in Hastings-Bass is not to allow trustees a "do over" because they do not like what has happened (i.e. they could not/did not foresee the consequences of their actions, and do not like them when they become apparent) but to provide protection for beneficiaries where trustees have failed to consider something relevant. As has been held previously (see above) "*… fiscal consequences are generally matters trustees should take into account …*". Given that many of the decisions in relation to this rule relate to fiscal consequences, it is easy to see how the above formulation is arrived at but it is not, in my view, a proper understanding of the principle. It may be that the rule is too wide, but it should not be restricted on the erroneous interpretation that it is only applicable where the trustees are not happy with what they have done.

2.31 The Deputy Bailiff continued:

… [b]ut what is the position where the fault lies not with the trustees who have correctly identified that they have a duty to have regard to material tax considerations, but with their professional tax advisers who have given them the wrong advice, on which the trustees have acted? Applying the principle that the loss should lie where it should, trustees should sue the professional advisers and claim the damages which the trust has sustained as a result…

It appears to us that the strongest argument against this line of reasoning is that the focus of the Royal Court should be on protecting beneficiaries. *We accept that the protection of beneficiaries is a very proper focus for the Royal Court; after all, the Court's equitable jurisdiction was engaged in the first place to protect those who did not have the rights at common law to take the action which enabled them to protect themselves. In our view, however,* the balance comes down now in a different way.

…

(Emphasis added).

2.32 What then, for example, of the beneficiaries who (via the trustee) sue their professional advisors and lose, because while the advice given turns out to

be wrong, but was not negligently given (for example, in the event that the law was uncertain on that point and has since been clarified). Would this be a suitable circumstance in which to protect the beneficiary from loss?

2.33 The next statement of the Deputy Bailiff seems to suggest that it would not:

> *Thirdly, there seems to us to be* no reason in principle why a person should be in any better position as a beneficiary of a trust where the trustees have taken a particular step than he would have been in had he taken the same step personally *in relation to his own legal interests*.

2.34 This may be a reasonable argument. It may, however, also be reasonable to consider that the difference between a beneficiary and someone acting in their personal capacity is the unique relationship between trustee and beneficiary, and that in certain circumstances, trustees who have taken on a fiduciary duty may themselves be entitled to protection. It may, of course, be the case that such protection is not relevant in the context of a jurisdiction where trustees are overwhelmingly professional. Again, however, this would be a matter of clearly defining the parameters of the remedy, and possibly significantly reducing them.

2.35 Finally, the Deputy Bailiff said:

> *Fifthly and finally, it seems to us* that the J ersey Law of mistake in these cases will provide equitable relief in the cases where it should.
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> *For all these reasons we consider that if we had been required to decide the point in the light of the Jersey and English authorities as they currently stand,* the decision would have been that the previous decisions of the Royal Court in connection with applications under Hastings Bass were clearly wrong. It is obvious, however, that if the Supreme Court in Pitt-v-Holt were to endorse the historic Hastings Bass approach or something similar to it, then the rationale previously adopted by the Royal Court for its decisions on this point could not be impeached and one would expect that the Court at first instance would follow them.
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> (Emphasis added).

Enactment of a Hastings-Bass principle into Jersey law

2.36 Consequently, at the time that *In the matter of the B Life Interest Settlement* [2012] JRC 229 was heard, the position of the rule in *Hastings Bass* was uncertain. This uncertainty was only increased by the decision in *Pitt v Holt* and *Futter v Futter* (which while not binding on the Jersey

Royal Court, might be persuasive) and the Guernsey case of *Gresh*. Consequently, the States of Jersey have started the process to enact a principle similar to the principle in *Hastings-Bass* in the legislation of the Island. This enactment takes the form of the insertion of new Articles 47B – 47J into the Trusts (Jersey) Law 1984. Under these provisions a transaction will be voidable rather than void.

2.37 The new Articles do not prevent an application being made under the customary law principle in Jersey law. Applications may, therefore, take the form of both an application under the new Articles, combined with an application under the customary law principle.

2.38 Unfortunately the new Articles do not yet have the force of law. However, in the recent decision in *In the matter of the Onorati Settlement* the Royal Court of Jersey considered the rule in *Hastings Bass* for the first time following the judgment of the Supreme Court of the United Kingdom in the cases of *Pitt v Holt* and *Futter v Futter*. The Royal Court set aside an instrument of appointment and declared it to be invalid on the basis that the trustee was in breach of its fiduciary duty. Consequently, at present it appears likely that both *Hastings Bass* as conceptualized in Jersey, and the new statutory remedy, will both potentially be available to beneficiaries and/or trustees seeking to "wind back" mistakes.