

KEY POINTS

What is the issue?

The ability to apply to court on equitable grounds to set aside a transfer of assets into trust where the settlor has made a mistake has proved very useful.

What does it mean for me?

Typically, the mistake is a tax mistake and unravelling matters can provide a more straightforward remedy for the settlor than potentially costly and uncertain litigation against advisors.

What can I take away?

The remedy has been statutory in Jersey since 2013. This article examines the Jersey provisions and the lessons that can be learned from how the Royal Court of Jersey has applied them in practice.



Seven years on

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TRUSTS ESTABLISHED BY MISTAKE

The *Trusts (Amendment No. 13) (Jersey) Law 2013* introduced statutory versions of two important rules derived from English equity.¹ The first concerns the setting aside of voluntary dispositions into a trust on the ground of the settlor's mistake. The second, conventionally known as the rule in *Hastings-Bass*,² concerns the setting aside of decisions made by fiduciaries after inadequate deliberation.

More than seven years since its implementation, it seems an appropriate time to take stock, to examine some of the issues that have arisen in practice and to note the differences that have emerged with English law.

In practically all cases of mistaken transfer into trust, the transfer is unfortunate because it has given rise to an unforeseen UK tax liability. Therefore, one scenario that has arisen on several occasions is where a settlor, neither domiciled nor resident in the UK, has transferred money into a Jersey trust from a UK bank account. They could have easily used non-UK resources, but the use of the UK account has caused an unexpected liability to UK inheritance tax.³ The settlor might seek to sue their advisors, if at all possible, but in most cases a quicker and less risky option is to seek to have the transfer into trust set aside on the ground of mistake, using the statutory jurisdiction in Jersey.

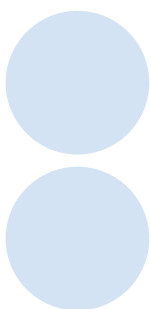
BACKGROUND

The decision to put both rules on a statutory footing was made as the litigation in the leading case of *Pitt v Holt, Futter v Futter* was making its way through the English courts.⁴ The England and Wales Court of Appeal's judgment in *Pitt* explained both rules more restrictively than had been understood in England and Jersey.⁵ Decisions of English courts are not binding in Jersey, but they carry persuasive weight. In the period before the disposal of the ultimate appeal in *Pitt* by the UK Supreme Court in 2013, the decision was taken in Jersey to place both rules on a statutory footing, the principles being based on the pre-existing understanding of the law.

THE STATUTORY PROVISIONS

The statutory mistake and *Hastings-Bass* jurisdictions were inserted as arts.47A to 47J of the *Trusts (Jersey) Law 1984* (the Law). This falls within Part 2 of the Law, which applies only to trusts whose proper law is the law of Jersey.⁶ Close attention is required in order to identify exactly which provision will be best suited to the particular facts. Cases can sometimes be argued on alternative or cumulative bases.

The provisions dealing with mistake provide a potential solution to situations where a transfer of property into trust has ➤➤



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been made by or on behalf of a settlor by mistake and where the exercise of powers under a trust has been carried out by mistake.⁷ The *Hastings-Bass* provisions add to this the ability to impugn similar transactions made by trustees and other fiduciaries after inadequate deliberation.⁸

Since these provisions were introduced, almost twice as many applications have been made seeking relief for mistake than those made on the basis of the *Hastings-Bass* provisions.

THE STATUTORY TEST

The basic statutory test for the Royal Court of Jersey's (the Court's) intervention on the ground of mistake follows, for practical purposes, the test that the Jersey courts had already applied prior to 2013. This test, in turn, is drawn from the England and Wales Court of Appeal decision in *Ogilvie v Littleboy*.⁹ In most respects, the test has now been affirmed by the UK Supreme Court in *Pitt* as the appropriate test in English law, but there are still some important differences with Jersey, outlined below.

There are two parts. First, the person making the transfer of assets into trust or exercising powers under a trust must have made a causative mistake. This requires that they would not have acted as they did but for that mistake. Second, the mistake must be 'of so serious a character as to render it just' for the court to exercise its powers.

WHAT TYPE OF MISTAKE?

'Mistake' for this purpose is defined very broadly in the Jersey legislation and includes a mistake as to the effect or consequences of the action concerned and any advantage to be gained from it. It also expressly includes a mistake of law as well as fact. It has been confirmed many times that this includes mistakes relating to tax; indeed, practically all the applications to date have been tax-related. Likewise, in *Pitt*, Lord Walker rejected Her Majesty's Revenue and Customs' (HMRC's) submission that a purely tax-related mistake could never be set aside on equitable grounds.

When the legislation was drafted there was still doubt as to whether the anticipated judgment of the Supreme Court in *Pitt* would affirm the requirement in English law, deriving from the England and Wales Court of Appeal decision in *Gibbon v Mitchell*,¹⁰ that the mistake must relate to the legal effect or nature of the transaction and not merely its consequences (which might be tax consequences). The Jersey provisions addressed this by expressly stating that the mistake can relate to consequences as well as effect. In the event, the UK Supreme Court departed from *Gibbon* by

declining to constrain the doctrine to the legal effect of a transaction. The result in English law is, therefore, similar to the statutory position in Jersey.

The Court helpfully applies a simpler approach to the nature of mistake than the UK Supreme Court, it being held inappropriate to make the fine distinctions made in England after *Pitt* between mistakes that are caused by 'incorrect conscious beliefs', 'incorrect tacit assumptions' and 'mere causative ignorance', the last being insufficient in English law.¹¹ In the Court's view, such distinctions were artificial. Instead, the Court's focus is on applying the statutory test to the particular facts.

WHEN IS IT JUST FOR THE COURT TO INTERVENE?

With regard to seriousness, the Court has expressed the view that a tax mistake may not be regarded as sufficiently serious if the quantum of exposure is small compared to the trust or remaining assets of the settlor.¹²

Delay is a further matter that may affect the court's view of the seriousness of the mistake or, alternatively, the equity of granting discretionary relief. There are no set time limits, but to avoid difficulty applicants should act promptly on becoming aware of the mistake. In one Jersey case, a delay of a year was said to be 'on the margins of what is acceptable'.¹³ In another, there was a delay of more than five years, but the court did not consider it would be right to penalise the applicants: they had been badly let down by advisors and had not acted unreasonably in taking time in deciding how to proceed. This should, however, be regarded as an exceptional case.¹⁴

The question of what is just has vexed the Court where the trust is part of a foreign tax avoidance scheme. The Court has expressed misgivings about using equitable principles to aid a party whose tax avoidance scheme has in the event created a tax liability.¹⁵ Nevertheless, the Court will look at the position of the parties closely; it will consider the question of justice on the facts and in the round. Even in a case where the applicants had negotiated an indemnity from their negligent tax advisors, the court was prepared 'by a small margin' to grant the relief.¹⁶ More recently, the Court has emphasised that it has a real discretion to exercise.¹⁷ To date, the relief has never been refused in Jersey on the ground of the artificiality of a tax avoidance scheme; and though notice is given to HMRC, it has not sought to intervene in proceedings. Clearly, much depends on being able to present a persuasive case to the court based on the overall justice to the individuals concerned.

ARTICLE 11 APPLICATIONS

Mention may also be made of art.11(6) of the Law, which additionally enables the Court to declare a Jersey trust invalid to the extent that it was established by mistake. Article 11(6) is considered to relate to the whole trust, whereas the power of the Court under art.47E is to set aside particular dispositions into trust. Where those dispositions comprise all the trust assets, the result is the same. Whether it is possible to proceed under art.11(6) in other cases depends on a close analysis of the facts.

CONSEQUENTIAL ORDERS

In common with the position in England, a disposition into a trust set aside on the ground of mistake is voidable rather than void, but its exact effect is subject to the discretion of the Court. The Court may declare that the disposition:

- has such effect as the Court may determine; or
- is of no effect from the time of its exercise.¹⁸

Which order is appropriate is fact-dependent and requires close analysis. Several consequential orders are often required,¹⁹ but the position of a bona fide purchaser for value of trust property cannot be prejudiced. The Court will also allow a trustee acting in good faith to retain fees and absolve it from liability arising solely from the Court's order setting aside the disposition in question.

#JERSEY #TAXATION #TRUSTS

¹ For the purposes of this article, all references to the law of England and Wales are shortened to 'England', and the expression 'English' likewise means 'English and Welsh'.
² *Re Hastings-Bass* [1975] Ch 25. The description of the rule is a misnomer for the reasons explained in *Pitt v Holt, Futter v Futter* [2013] 2 AC 108.
³ For example, *Representation of L re the M Trust* [2020] JRC 237.
⁴ *Pitt v Holt, Futter v Futter* [2013] 2 AC 108.
⁵ The decision in *Pitt v Holt, Futter v Futter* is reported at [2012] 2 Ch 132.
⁶ In relation to a non-Jersey trust, the Court will still have jurisdiction under art.5 of the *Trusts (Jersey) Law 1984* where the trustee is resident in Jersey, trust assets are situated in Jersey or the administration of the trust is carried out in Jersey. The statutory *Hastings-Bass* and mistake provisions are not available but the Court may reach the same result applying foreign law (as in the recent case of *In the matter of the Mileham Discretionary Trust* [2020] JRC 045) or non-statutory Jersey law depending on the conflicts of law analysis.
⁷ arts.47E and 47G, respectively.
⁸ arts.47F and 47H.
⁹ (1897) 13 TLR 399.
¹⁰ *Gibbon v Mitchell* [1990] 1 WLR 1304.
¹¹ *In the Matter of the G Trust* [2019] JRC 056.
¹² See note 8.
¹³ *In the Matter of the B Trust* [2019] JRC 035.
¹⁴ *In the matter of the Mileham Discretionary Trust* [2020] JRC 045; the Court was in this case applying English law.
¹⁵ See, most recently, *In the Matter of the G Trust* [2019] JRC 056. The same point is made by Lord Walker in *Pitt* at para.135.
¹⁶ *In the Matter of the S Trust and T Trust* [2015] JRC 259.
¹⁷ See note 8.
¹⁸ The options under i. include declaring the transfer to be voided from the time of its having taken place but nonetheless having such effect as the court may determine and declaring the transfer to be voided from a date subsequent to the time of its having taken place: *BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others* [2018] (2) JLR 175.
¹⁹ This can include orders ratifying or confirming otherwise unauthorised actions. The different types of possible ratification and confirmation were considered by the court in the case of *In the matter of the Z Trust* [2016] JRC 048.