A and B v Confiance Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2013] JRC 182

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **and**Jurats Kerley**and**Milner.

Between

IN THE MATTER OF THE ONORATI SETTLEMENT

A and B
Representors
and
Confiance Limited
Respondent

Advocate A. J. N. Dessain **and Advocate** R. O. B. Gardner **for the Representors.**

Advocate M. H. Temple **for the Respondent**.

Authorities

Hastings-Bass -v- IRC [1974] 2 All ER 193 .

Sieff -v- Fox [2005] 3 All ER 693 .

Re Barr's Settlement Trusts [2003] 1 All ER 763 .

Pitt -v- Holt .

Futter -v- Futter [2011] 2 All ER 450 .

Mettoy Pension Trustees Limited -v- Evans [1991] 2 All ER 513 .

In the matter of the Green GLG Trust [2002] JLR 571 .

Re the B Life Interest Settlement [2012] JRC 229 .

In the matter of the Howe Family Number 1 Trust [2007] JLR 660 .

AC -v- DC [2013] 15 ITELR 811 .

Trust — application made under the Hastings-Bass principle that a declaration of appointment made by the respondent should be voidable and set aside.

Bailiff

THE

1 This is an application by the representors, as beneficiaries of a sub-fund of the Onorati Settlement, for a declaration that a deed of appointment dated 4 th October, 2010, made by the respondent ("the trustee") as trustee is voidable and should be set aside. The application is made under the so-called *Hastings-Bass* principle ("the principle").

2 The principle has recently been the subject of detailed consideration by both the English Court of Appeal and the Supreme Court of the United Kingdom. Accordingly, before turning to the facts, we propose to summarise the law as it appears to be at present.

The law

3 We shall begin by referring to some of the English cases because they have been relied upon by this Court when it has applied the principle.

4 Over the last twenty years or so, the English courts have developed a principle which was said to be derived from the case of *Re Hastings-Bass*, *Hastings-Bass -v- IRC* [1974] 2 All ER 193. The principle is concerned with decisions of trustees where they have failed to take into account relevant considerations or have taken into account considerations which they ought not to have. In most instances, it has been the trustees themselves who have sought to have their decision set aside on the basis of the principle.

5 It is not necessary for the purposes of the present case to refer to the various cases which developed the principle. A convenient summary of the principle (as it was understood to be) is to be found in the judgment of Lloyd LJ (sitting at first instance) in *Sieff -v- Fox* [2005] 3 All ER 693, at [119]:–

> ***"I will however summarise the re** Hastings-Bass **principle as I see it, as follows:***
>
> > ***(i) The best formulation of the principle seems to me to be this.*** Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.
> >
> > ***(ii) …***
> >
> > ***(iii) It does not seem to me that the principle only applies in cases where there has been a breach of duty by the trustees, or by their advisers or agents, despite what Lightman J said in** Abacus Trust Co (Isle of Man) v Barr* .
> >
> > ***(iv) His conclusion that, if the principle is satisfied, the act in question is voidable rather than void is attractive, but it seems to me to require further consideration, in the light of earlier authority.***
> >
> > ***(v) I am in no doubt that, as a general proposition, fiscal consequences are among the matters which may be relevant for the purposes of the principle.***
> >
> > ***(vi) There are limits to what trustees have to consider in such a situation."***

6 Thus it was that, in a number of cases, decisions of trustees which had unexpected adverse tax consequences (either because the trustees had not considered the matter or because they had received incorrect tax advice) were set aside in pursuance of the principle; although not all the cases were concerned with tax, see for example *Re Barr's Settlement Trusts* [2003] 1 All ER 763, where the trustees failed to have regard to the true wishes of the settlor.

7 In *Pitt -v- Holt*; *Futter -v- Futter* [2011] 2 All ER 450, the principle was reviewed for the first time by the Court of Appeal with the benefit of contribution by Her Majesty's Revenue and Customs as a party. The decision of the Court of Appeal (the leading judgment being given by Lloyd LJ) on this aspect has essentially been upheld by the Supreme Court [2013] STC 1148 in a judgment delivered by Lord Walker of Gestingthorpe.

8 Both courts held that *Hastings-Bass* is not in fact authority for the principle to which it has given its name. As Lord Walker explained at [60] of his judgment, there is a very important distinction between an error by trustees in going beyond the scope of a power (for which he used the traditional term “excessive execution”) and an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power (for which he used the term “inadequate deliberation”). As both courts concluded, *Hastings-Bass* was in fact a case of excessive execution (linked with an issue of severance), whereas the principle, as it was subsequently developed, is concerned with inadequate deliberation.

9 Both courts held that the law had taken a wrong turn and that the principle was more restricted than had been articulated by courts at first instance. We should add that, as Lord Walker pointed out at [1] of his judgment, reference to the rule in *Hastings-Bass* is a misnomer because the principle in fact developed from the case of *Mettoy Pension Trustees Limited -v- Evans* [1991] 2 All ER 513 as a result of a misunderstanding of the decision in *Hastings-Bass*. However, Lord Walker went on to say that the misnomer is by now so familiar that it is best to continue to use it, inapposite though it is. Accordingly, for convenience, we shall continue to refer to the *Hastings-Bass* principle or the rule in *Hastings-Bass* in the same way as the Supreme Court did.

10 In a passage, which has essentially been approved by the Supreme Court, Lloyd LJ summarised the correct principle at [127] of his judgment in the Court of Appeal as follows:–

> ***“The cases which I am now considering concern acts which are within the powers of the trustees but are said to be vitiated by the failure of the trustees to take into account a relevant factor to which they should have had regard — usually tax consequences — or by their taking into account some irrelevant matter.*** It seems to me that the principled and correct approach to these cases is, first, that the trustees' act is not void, but that it may be voidable. It will be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set aside at the suit of a beneficiary but this would be subject

to equitable defences and to the court's discretion. The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. Fiscal considerations will often be among the relevant matters which ought to be taken into account. However, if the trustees seek advice (in general or in specific terms) from apparently competent advisers as to the implications of the course they are considering taking, and follow the advice so obtained, then, in the absence of any other basis for a challenge, I would hold that the trustees are not in breach of their fiduciary duty for failure to have regard to relevant matters if the failure occurs because it turns out that the advice given to them was materially wrong. Accordingly, in such a case I would not regard the trustees' act done in reliance on that advice, as being vitiated by the error and therefore voidable."

11 It seems to us that the two key differences as compared with the principle as it was understood to be at the time of *Sieff -v- Fox* are as follows:–

(i) The inadequate deliberation on the part of trustees must be of sufficient seriousness as to constitute a breach of fiduciary duty. If there is no breach of fiduciary duty, the Court cannot intervene. Furthermore, there will not be a breach of such duty where trustees have conscientiously obtained and followed apparently competent professional advice even if such advice turns out to be wrong (Lord Walker at [73] and [80], Lloyd LJ at [127]).

(ii) An application to challenge the exercise of a discretionary power on the basis of the principle should normally be made by one or more beneficiaries. Thus Lord Walker said at [69]:–

> ***"There may be cases in which there is for practical purposes no other suitable person to bring the matter before the court, but I agree with Lloyd LJ's observation (at [130]) that in general it would be inappropriate for trustees to take the initiative in commencing proceedings of this nature.*** They should not ***regard them as uncontroversial proceedings in which they can confidently expect to recover their costs out of the trust fund."***

12 However, it is clear from both the Court of Appeal and the Supreme Court that it remains the case that, when considering the exercise of a discretionary power, trustees are under a duty to take relevant matters into account and are equally under a duty not to take account of some irrelevant matter and a failure to do so will be a breach of fiduciary duty (see Lloyd LJ at [127] cited above at para 10). The fiscal consequences of a decision will often be a relevant matter that trustees are under a duty to consider. As Lloyd LJ said at [115]:–

> ***"In Sieff's case I said that I was in no doubt that 'fiscal consequences may be relevant considerations which the trustees ought to take into account' … I remain of that view.*** Although it is often said that decisions as regards the creation and operation of trusts ought not to be dictated by considerations of tax,

> the structure and development of personal taxation in the United Kingdom over the past decades, the use of trusts in order to deflect or defer the impact of taxation, and in turn the development of taxation as it applies to property held by trustees, have been such that there can be few instances in which trustees of a private discretionary trust with assets, trustees or beneficiaries in England and Wales could properly conclude that it was not relevant for them to address the impact of taxation that would or might result from a possible exercise of their discretionary dispositive powers."

It follows that any failure to have regard to relevant tax consequences will normally amount to a breach of fiduciary duty; but that will not be the case if the trustees have taken and followed apparently competent professional advice.

13 Having considered the position under English law, we turn to the position in Jersey. The first case to apply the *Hastings-Bass* principle was *Re Green GLG Trust* [2002] JLR 571. The Court declared the principle in similar terms to that in which it was thought to exist in England and Wales at the time.

14 Subsequently, there have been a number of cases which have applied the principle. These were helpfully summarised in the judgment of William Bailhache DB in *Re the B Life Interest Settlement* [2012] JRC 229 at paras 55–58. In essence this Court has applied the principle in the terms in which it was thought to exist in England and Wales and which were encapsulated in *Sieff -v- Fox* in the passage set out above at para 5. In particular, in *Leumi Overseas Trust Corporation Limited -v- Howe* [2007] JLR 660, the Court (Clyde-Smith Commissioner) held that it was not necessary for there to be a breach of duty on the part of the trustees before the principle could be brought into play.

15 It follows that Jersey law as hitherto declared differs from English law as it has now been clarified by the Court of Appeal and the Supreme Court in *Pitt -v- Holt*.

16 So what should be the effect in Jersey law of the changes (or perhaps more accurately in English law terms, the corrections) to the principle brought about in *Pitt -v- Holt*? So far, there has only been one case which has come before the Royal Court since the decision of the Court of Appeal in *Pitt -v- Holt*. That was the case already referred to of *Re B Life Interest Settlement*. The Court in that case found on the facts that, even if the Court were to apply the historic *Hastings-Bass* principle (i.e. the principle as it was expounded in *Sieff -v- Fox*) the application did not succeed. Accordingly it was unnecessary to go on to consider whether the Royal Court should adapt the principle so as to be in conformity with the decision of the Court of Appeal in *Pitt -v- Holt*. Nevertheless, the Deputy Bailiff made some obiter observations to the effect that, had it been necessary to decide the point, the Court would have rejected the previous Jersey decisions and applied the principle as it was declared to be in *Pitt -v- Holt*.

17 Whilst reserving the right, should this become necessary, to argue that Jersey law should

not follow the latest developments under English law, Advocate Dessain has been content to accept that we should apply the law as declared by the Supreme Court and Court of Appeal in *Pitt -v- Holt* because, he says, he succeeds on the facts of this case even applying the principle as therein described. As will become clear, we agree with him. It has therefore not been necessary to consider whether Jersey law in relation to the principle should be modified so as to accord with the current state of English law. We propose to say nothing further on the topic therefore other than to say that the position remains open, although any party wishing to submit that Jersey law should continue to plough its own furrow will have to explain why the closely reasoned judgments of Lord Walker and Lloyd LJ should not be applied.

The Facts

18 The Onorati Settlement was established by deed dated 16 th January, 1980, between the settlor and Hong Kong and Shanghai Bank Trustee (Jersey) Limited as original trustee. The settlement is a discretionary trust in conventional form governed by the law of Jersey. The class of beneficiaries comprised the settlor and her children and remoter issue.

19 By deed dated 30 th March, 1987, the then trustee divided the trust fund into three equal parts with one part being held for the family of each of the three children of the settlor, who had by then died. Under the 1987 deed, each one third part was to be held subject to the same trusts powers and provisions as the original settlement except that the class of beneficiaries in respect of each one third part was henceforth to be confined to the relevant child and the issue of that child.

20 We are concerned with the share to which we shall refer as “N's Fund”. N (“the daughter”) was one of the three children of the settlor and N's fund is accordingly held on discretionary trusts for the daughter and her issue. We shall refer to N's Fund as “the Trust”. The only living beneficiaries of the Trust comprised the daughter and the representors, who are her only children and are adults. They have no children of their own.

21 There have been various changes of trustee but the trustee was appointed as trustee of the Trust on 27 th May, 2004. The trustee is a trust company carrying on business in Guernsey.

22 By deed dated 4 th October, 2010, (“the 2010 deed”) the trustee exercised the power of appointment conferred on it by the terms of the Trust so as to appoint the entire capital of the N's fund to the representors in equal shares absolutely.

23 The daughter is resident in England but is domiciled in Italy (although she is deemed domiciled in the UK for the purposes of inheritance tax). The representors are resident and domiciled in the UK.

24 The value of the assets of the Trust at the time of the 2010 deed was some £1.136 million. The consequence of the appointment effected by the 2010 deed is that the representors have incurred a tax liability (income tax and capital gains tax) in the UK calculated at £398,337 (excluding penalties and interest) (i.e. some 35% of the trust fund). It is said that the trustee failed to have regard to the tax consequences of appointing the trust fund to the representors and that it would not have done so had it had regard to the correct tax position. In the circumstances, the representors apply to have the 2010 deed set aside on the basis of the *Hastings-Bass* principle.

25 In order to consider that application, the Court has received evidence by way of affidavit from the Rrepresentors, from the daughter and from Mr Michael Brown on behalf of the trustee. From that evidence and from the documents produced, the circumstances leading up to the execution of the 2010 deed would appear to be as follows.

26 In early 2010, the daughter telephoned Mr Brown, who was the officer of the trustee responsible for looking after the Trust, to say that she was thinking of buying a house in France for her family's use and enjoyment and wished the trustee to consider exercising its powers as trustee to make funds available for the purchase. She said that she anticipated the purchase price to be approximately the same value as the trust fund and accordingly Mr Brown and she agreed that there would be no reason for the Trust to continue and that accordingly, should the trustee make the distribution, the Trust would be wound up.

27 On 16 th March, 2010, the daughter emailed Mr Brown confirming that she had found a house in France and that she would like the Trust to be wound up in October. She asked about the tax implications.

28 Following a telephone conversation, Mr Brown replied by email on 22 nd March stating that he could not give tax advice but outlining a few thoughts, which he said she might wish to discuss with her tax adviser. He pointed out that the Trust contained initial capital, accumulated income and capital gains and that, as a non-domiciled UK resident, she would pay tax on any income or gains remitted to her in the UK although, if she paid the £30,000 fee, income and gains could be remitted to her outside the UK without tax.

29 The daughter responded by email the same day confirming that she was non-UK domiciled but was resident in the UK. She also asked about giving the money to her children and whether the trustee would be able to send the money direct to the children in the UK.

30 Mr Brown replied by email later the same day stating that, as UK domiciled individuals, the children did not have the option of paying the £30,000 and that accordingly, if any funds went to them direct from the Trust, they would be liable to tax. He said that what should happen was that the money should be paid to the daughter and she could then gift the sum to her children. Should that occur, no tax would be payable as long as she lived a further seven years.

31 So far as the trustee was concerned, there was no further communication about the matter until some five months later on 12 th August. On that date the daughter wrote a letter stating that “after careful consideration and after consulting my UK accountants as to the tax implications, I have decided to donate the fund to my children and would therefore like the trustees to wind up my settlement and to send the proceeds to my children's bank account in France.”

32 There appears to have been no response from the trustee at this stage despite the apparent change of plan, but on 23 rd August, the daughter sent a further email stating that she had re-read the email from Mr Brown of 22 nd March and noted that the funds should not go direct to the children from the Trust. She therefore asked whether she should open a bank account in France at the same bank as the children's account so that the monies could go into her account first.

33 Later that same day, Ms Maggie Hannis, a manager at the trustee, responded confirming that the trustee would be happy, on termination of the Trust, to remit the proceeds to an account held in the daughter's name in France. At this stage therefore, the matter was back on track.

34 The following morning on 24 th August, the daughter telephoned Bev Allen, an employee of the trustee, to confirm that the funds should be moved from the Trust to the daughter and then from the daughter to a joint account in the children's name.

35 On 2 nd September Ms Allen confirmed to the daughter that the relevant securities had been sold so that the trust fund was now available in cash. The daughter responded by email saying “ *I will let you know the number of the children's account to pay the funds to on maturity as soon as possible*.”

36 On 27 th September, the daughter sent a further email to Ms Allen in which (amongst other things) she asked that the funds be transferred to a joint account in the name of the children at Barclays in Jersey.

37 This change of plan does not seem to have set any alarm bells ringing in the trustee. A draft deed appointing the trust fund in equal shares absolutely to the representors was drawn up and in due course executed on 4 th October. On the same day the total trust fund at £1,136,039.71 was paid to the nominated bank account with Barclays, Jersey held in the names of the representors. We have been shown a form which was apparently produced to those who were to formally resolve on behalf of the trustee to make the appointment and execute the deed. In paragraph 10 of the form it states:– “ *Consider the tax consequences for the beneficiaries.* Seek professional tax advice if necessary. *Attach advice*.” Against that there is a manuscript note stating “ *Beneficiaries have sought their own tax advice*.”

Someone has then circled " *No*", which is presumably in answer to the point as to whether the trustee should seek professional tax advice.

38 In her letter of 12 th August, the daughter indicated that she had taken tax advice. In her affidavit for these proceedings, she has disclosed details of that advice. The advice was given by Janet Wilkins of Trevor Jones, UK accountants. Although the advice covered a number of different aspects, it is clear that Mrs Wilkins had advised that, if the children were to benefit directly under the trust deed, they would be liable to UK tax. The daughter has confirmed in her affidavit that when, in her 12 th August 2010 letter, she had referred to the trustee sending the proceeds to her children's bank account in France, she had overlooked not only the email Mr Brown had sent on 22 nd March, 2010, but also the tax advice she had received from Janet Wilkins, both of which made it clear that, if she wished to donate funds to the children, those funds should not be appointed by the trustee to the children but rather appointed to her and then donated separately by her to the children. Although she had recollected the correct position by the time of her email of 23 rd August, she appears to have again forgotten or not fully understood the position when she suggested in her email of 2 nd September and subsequently 27 th September that the money should be paid direct to the children.

39 The representors now bring this application on the ground that the decision to appoint the trust fund to them is voidable as the trustee failed to have regard to the adverse tax consequences of the 2010 deed and was thereby in breach of its fiduciary duty. The representors accept that, if the appointment is set aside, they will hold the trust fund on constructive trust for the trustee and will have to repay the sum appointed to them; they are in a position to do so.

Application of the law to the facts

40 We have no hesitation in concluding that the trustee was in breach of fiduciary duty by failing to have regard to the tax consequences of the appointment of the trust fund to the representors rather than to the daughter as originally envisaged. We so conclude for the following reasons:–

(i) The appointment of the trust fund to two beneficiaries who were resident and domiciled in the United Kingdom clearly required the trustee to consider the tax consequences of any such appointment.

(ii) The trustee at no stage took any professional advice on the tax consequences of the appointment. It is true that it was informed by the daughter that she had taken advice, but the trustee never asked to see that advice. In some circumstances, provision of written advice obtained by a beneficiary will be sufficient for a trustee to act on the basis of that advice. But the trustee will always need to see the advice in order to satisfy itself that the advice is appropriate and is based upon a correct

understanding of the facts. That was not the situation here. Although there is reference, in the form provided to the directors of the trustee, to the fact that " *the beneficiaries*" had taken their own tax advice, it was in fact only the daughter who had taken advice, and in any event that advice had never been seen or called for by the trustee. It is wholly insufficient and is a breach of duty for a trustee to rely on oral confirmation from a beneficiary that he or she has received appropriate tax advice.

(iii) These matters alone would be sufficient to find a breach of fiduciary duty on the part of the trustee. However the position is even worse than that. As is shown from the email of 22 nd March, Mr Brown, as the senior representative of the trustee concerned with the administration of the Trust, was fully aware that appointment of the trust fund to the children would have adverse UK tax consequences as compared with an appointment to the daughter. It is clear that, at that time, the intention was to appoint to the daughter and this was re-affirmed as late as 23 rd August, at which time Miss Hannis was looking after the matter on behalf of the trustee. Matters go wrong after that. The daughter erroneously suggests on 2 nd September and 27 th September that the payment should be directly to the children. By then she is dealing with a junior employee of the trustee who simply accedes to her wishes. The trustee clearly gives no adequate consideration thereafter to the tax consequences of an appointment to the representors and in due course a deed is drawn up to effect such an appointment, notwithstanding the earlier decision in principle by Mr Brown that any appointment should be to the daughter.

(iv) The appointment has resulted in an unnecessary tax charge of some £398,000 as compared with a charge of £30,000 had the trust fund been appointed to the daughter as originally envisaged.

41 It is an unfortunate story. Whilst the trustee's decision ultimately to appoint direct to the children may have been contributed to by the daughter's errors and misunderstandings, responsibility for deciding on the appointment and considering the tax consequences of any such appointment rested firmly with the trustee. 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; it would have appointed the trust fund to the daughter, leaving her to do what she wished in relation to any gift to the children.

42 We turn then to consider the other requirements of the *Hastings-Bass* principle as laid down in *Pitt -v- Holt*. First, the application in this case has been brought by the representors as beneficiaries (not the trustee) as suggested in *Pitt -v- Holt*.

43 Secondly, *Pitt -v- Holt* confirmed that, 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 the trustees' act is not void, it is voidable. This means that it is subject to the Court's discretion and to any equitable defences.

44 In our judgment, our discretion in this case should be exercised in favour of setting the appointment aside. It is clear that the representors did not take their own tax advice and they bear no responsibility for what has occurred. They have incurred a substantial unnecessary tax burden amounting to some 35% of the sum appointed to them. It may be that they could bring an action against the trustee but it would not necessarily be entirely straightforward given the involvement of the daughter. The trustee might well seek to join the daughter to any proceedings brought against it or to rely on an exemption clause. More generally, we are not attracted by the proposition that beneficiaries should be left to a remedy of bringing litigation against trustees or professional advisers. The beneficiaries are usually not at fault and have already incurred loss by reason of unnecessary tax charges. To force them to incur further expense in what may be uncertain litigation when the law allows for the avoidance of a decision made in breach of the trustees' duties seems unnecessary, undesirable and unjust.

45 It follows that we see no reason in this case not to exercise our discretion in favour of avoiding the appointment and every reason to do so. We therefore set aside the 2010 deed and declare it to be invalid.

46 For the sake of completeness, we should add that HMRC was notified of the hearing and was asked whether it wished to make arrangements to attend the hearing. HMRC declined to do so but drew attention to the obiter dicta of William Bailhache DB in the *B Life Interest Settlement* case. We have of course considered the contents of the letter from HMRC and the dicta of the Deputy Bailiff and taken them fully into account but, for the reasons we have given, we consider that the facts of this case fall fairly and squarely within the principle as articulated by the Supreme Court.

47 The letter goes on to say that HMRC reserves the right to contend that, so far as any UK tax consequences are concerned, any decision of the Royal Court setting aside the 2010 deed on the basis of the rule in *Hastings-Bass* should not be recognised in England. That is of course entirely a matter for HMRC, but the consequence of our decision is that, under the proper law which governs the Trust, the 2010 deed having been avoided, it is as if it never existed.

48 This is entirely consistent with English law. In *Pitt -v- Holt* at [129] and [130] Lord Walker said as follows:–

> ***"[129] In this Court Mr Jones applied for and obtained permission to raise two points which had not been raised below.*** The first… was that a mistake which relates exclusively to tax cannot in any circumstances be relieved. This submission, for which no direct authority was cited, was said to ***be based on Parliament's general intention, in enacting tax statutes, that tax should be paid on some transactions of a specified type, whether or not the taxpayer is aware of the tax liability.*** Mistake of law is not a defence, Mr Jones submitted, to tax lawfully due and payable.

> ***[130] In my opinion that submission begs the question, since if a transaction is set aside the Court is in effect deciding that a transaction of the specified description is not to be treated as having occurred…"***

49 To like effect is the decision of Mostyn J in *AC -v- DC* [2013] 15 ITELR 811 at [31]:–

> ***"The law of tax is not an island entire of itself.*** Unless a taxing statute says to the contrary the right of the state to charge tax in relation to a given transaction is subject to the effect of that transaction as defined by the general law. In the specific context with which I am concerned there is long-standing authority from the Court of Session (First Division) in Scotland , *IRC -v- Spence* (1941) 24 TC 312, ***never doubted in subsequent tax cases in the English courts, which says that the tax effects of a transaction will be annulled retrospectively if it is subsequently found to be voidable, and is declared void…"***

50 As a matter of the proper law of the Trust (which is the only system of law which governs the validity of the Trust and any appointments made under it), the trust fund is still held upon the terms of the Trust and does not belong (and, as a result of the 2010 deed being set aside, has never in law belonged) to the representors.