The B Life Interest Settlement

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	12 December 2012
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Text

[2012] JRC 229

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**, Deputy Bailiff, **and**Jurats Le Cornu**and**Crill.

IN THE MATTER OF THE REPRESENTATION OF RBC TRUST COMPANY (JERSEY) LIMITED

AND IN THE MATTER OF THE B LIFE INTEREST SETTLEMENT

RBC Trust Company (Jersey) Limited
Representor
and
A
First Respondent

C
Second Respondent
D
Third Respondent
Simon Andrew Franckel (acting on behalf of E, the minor beneficiary)
Fourth Respondent

Advocate J. P. Speck **for the Representor**.

Advocate S. A. Franckel **in Person**.

Advocate R. J. MacRae **as Amicus Curiae**.

Authorities

In Re Hastings Bass [2007] JLR 660 .

In the matter of the A Trust [2009] JLR 447 .

In the matter of the R Remuneration Trust [2009] JRC 164A .

Pitt -v- Holt .

Futter -v- Futter [2011] EWCA Civ 197 .

In the matter of the S Trust [2011] JRC 117 .

Re the Lochmore Trust [2010] JRC 068 .

JP -v- Atlas Trust Company (Jersey) Limited [2008] JRC 159 .

Trusts (Jersey) Law 1984.

Marett & O'Brien [2008] JLR 384 .

Deacon -v- Bower [1978] JJ 39 .

Mauger [1870] 195 Ex 37 .

Vibert -v- Vibert (1890) 48 H. 462 .

Le Jeune -v- Le Jeune (1900) 49 H. 182 .

Valpy -v- Channing (1946) H. 290, 294 .

Simon -v- Page (1905) 49 H. 279 .

Abdel Rahman -v- Chase Bank (CI) Trust Co Limited [1991] JLR 103 .

Wyatt -v- Tyrrell [2010] EWHC 3633 .

In the matter of the S Trust [2011] JLR 375 .

In re Griffiths (Deceased) [2009] Ch 162 .

Avalon -v- Mackinnon [1909] 1 CH 476 .

Sieff and Others -v- Fox and Others [2005] EWHC 1312 (CH) .

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

Taxation of Chargeable Gains Act 1992.

Representation of Friedman [2006] JRC 187 .

Leumi Overseas Trust Corporation Limited -v- Howe [2007] JRC 248 .

Seaton -v- Morgan [2007] JRC 206 .

In the matter of Seaton Trustees Limited [2009] JRC 050 .

In the matter of the V Settlement [2011] JRC 046 .

Mettoy Pension Trustees Limited -v- Evans (1990) 1 WLR 1587 .

Re the R Trust [2011] JRC 085 .

Re the S Settlement [2001] JLR N 37 .

Settlement — representor seeks orders to set aside various documentation dated 3rd and 23rd April, 2008.

The Deputy Bailiff

1 On 25 th May, 2012, the representor (the “trustee”) commenced these proceedings by which it seeks orders setting aside and/or confirming to be invalid as having been made by mistake a deed of amendment dated 23 rd April, 2008, a deed of exclusion and a deed of appointment of the same date, and a deed of exclusion, and a deed of appointment both dated 3 rd April, 2008. In the alternative, the trustee sought an order for rectification. The grounds for these applications are set out below. The Court ordered the respondents to be convened and appointed Advocate Franckel to represent the interests of a minor child who was a beneficiary of the settlement to which reference will be made, and also the unborn and unascertained beneficiaries. In accordance with indications given by the Court, the trustee notified Her Majesty's Revenue and Customs that the application was being made and advising HMRC of the date on which the application would next be called. On 24 th June the Court adjourned the matter further and directed that the Attorney General should appoint an *amicus curiae* to assist the Court and a date be fixed for argument. In the event

the Attorney appointed Advocate MacRae, and the Court has been much assisted by all counsel in this matter.

The Facts

2 The settlement was established by a trust instrument dated 25 th October, 1994, with B as settlor ("the settlor") and the representor as trustee. It is an irrevocable life interest trust with qualified overriding discretionary provisions, and is governed by Jersey law. The class of beneficiaries is defined under the settlement as the settlor, his spouse, his children and remoter issue and such persons as might be added to the class of beneficiaries in the exercise of a power conferred upon the trustees. The settlor, who died in September 2011, was the first life tenant and the successor life tenant was the first respondent, his wife. He is survived by his wife and two children, the second and third respondents. Advocate Franckel is appointed as the representative of the settlor's grandchild, the minor son of the second respondent. The trustee has not exercised its power to add beneficiaries.

3 The present difficulties arise out of a restructuring arrangement in 2008 the purpose of which was to mitigate the incidence of inheritance tax in the United Kingdom. Extensive advice was taken from UK counsel, UK tax advisers and Jersey counsel. For reasons which will become apparent, the best laid plans can however go wrong. The trustee asserts that things went wrong because of a mistake which it made and which it seeks to rectify in the best interests of the beneficiaries. The respondents agree with what is proposed. The Bailiff directed the Attorney General to appoint an amicus to argue one issue which arose on the representation, namely the status of the *Hastings Bass* rule, in order that the Court would have the benefit of contested argument.

4 No change could be made to the dispositive provisions affecting the life tenants without their consent in writing. In essence, what happened was as follows:-

(i) On 3 rd April, 2008, 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. Before that deed was executed, the settlor and the first respondent had written to the trustee to refer to a provision of the trust instrument which conferred on the trustee powers to override the trusts declared but only with the prior written consent of the life tenants, and in that letter they irrevocably disclaimed any powers they had to give or withhold consent to the exercise of those powers. Having received that letter, the trustee made the deed of exclusion on 3 rd April excluding the spouse of the settlor from benefit under the terms of the Trust.

(ii) 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.

5 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.

6 As a result, the trustee proceeded as though the documents executed on 3 rd April, 2008, were of no consequence. On 23 rd April, 2008, the trustee made a 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.

7 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 relevant UK tax legislation. The restructuring would reduce the value of the settlor's estate for the purposes of inheritance tax but would only be fully effective if the settlor lived for a period of seven years from the date of the restructuring.

8 The trustee asserts 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. It claims that it would not have undertaken the restructuring had it known that the settlor was not fit and healthy. Unfortunately, it transpired that the settlor was in fact suffering from an aggressive and ultimately fatal form of Alzheimer's disease which was not diagnosed until November 2008, and as a result of which he died in September 2011. The trustee claims 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. If the 2008 arrangements are not set aside, there will be an inheritance tax liability associated with the appointments made amounting to approximately £3.7 million.

Mistake

9 The law as to when dispositions into trust made by mistake can be set aside (as opposed to rectified) is currently well settled in Jersey. In *In the matter of the A Trust* [2009] JLR 447, the Royal Court declared invalid a trust as having been made on the grounds of mistake as to the resulting liability to inheritance tax. The Court held that a voluntary disposition by a donor or a settlor could be set aside on the ground of mistake if the donor or settlor had been under a mistake, whether of fact or of law, that was so serious as to render it unjust on the part of the donee to retain the property given to him. The Court had to be satisfied that the donor or settlor would not have entered into the transaction ***"but for"*** the mistake.

10 In *In the matter of the R Remuneration Trust* [2009] JRC 164A, the Royal Court was faced with an application by the trustee to set aside a trust and certain gifts to that trust on the grounds of mistake. In adopting the principles set out in *In the matter of the A Trust*, the Court said this:-

> ***"32. The Court has a discretion as to whether to set aside a transaction entered into under a mistake. Two factors which the Court will take into account in deciding whether to exercise the discretion to set aside a settlement on the grounds of the mistake of the settlor as to its legal effect are first, whether it would be unjust on the beneficiaries for the settlement to be set aside and second, whether the position of third parties would be prejudiced if the settlement were to be set aside."***

11 In that case, the Royal Court applied English law to the facts of the case that being the proper law of the trust. As a result of the decision in *Pitt -v- Holt* and *Futter -v- Futter* [2011] EWCA Civ 197, English law has developed since that time.

12 The proper approach to an application to set aside a Jersey trust made by mistake was confirmed in the matter of the *S Trust* [2011] JRC 117, where the Court considered at length the rationale for the rule laid out in *Pitt -v- Holt* and the criticisms made by the Court of Appeal of the decision of the Royal Court *In the matter of the A Trust*. Notwithstanding those criticisms, the Royal Court confirmed that it would follow the decision in the *A Trust*, the detail of which had in fact been refined by Birt, Bailiff, in *Re the Lochmore Trust* [2010] JRC 068 where he said:

> ***"10. The law regarding the setting aside of a trust on the ground of mistake has been considered in depth and clarified in the recent decision of the Royal Court in*** *Re the A Trust* [2009] JRC 245 . ***In that judgment, Commissioner Clyde-Smith reviewed the different tests as set out in*** *Gibbon -v- Mitchell* ***… and*** *Ogilvie -v- Allen* ***… and adopted the test set out in the latter case, namely whether the donor or settlor was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.*** In applying that test, the Court must be satisfied that the donor or settlor would not have entered into the transaction "but for" the mistake…
>
> ***11. It follows that the Court has to ask itself the following questions:-***
>
> ***(i) Was there a mistake on the part of the settlor?***
>
> ***(ii) Would the settlor not have entered into the transaction "but for" the mistake?***
>
> ***(iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?"***

13 The case of *Pitt -v- Holt* concerned both the law of mistake and what is known as the rule in *Hastings Bass*. We are advised that the decision of the English Court of Appeal is to be taken to the Supreme Court, and argument is to be heard in the spring of 2013. We have assumed that the matters to be raised on appeal will include both the law of mistake and the rule in *Hastings Bass*.

14 Decisions of the English courts in matters of this kind 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 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.

15 There is a long established rule that where there is a coordinate decision of the Royal Court on the point in issue, the Court should not depart from the earlier decision unless convinced that it is plainly wrong, or unless there has been some intervening decision from a higher court or a change in legislation since. We note that there has been no change in legislation in relation to the law of mistake, and we are not satisfied that the decision in the matter of the *S Trust* was plainly wrong. Accordingly, notwithstanding the criticisms made in *Pitt -v- Holt*, we apply Jersey law on the subject of mistake, which we consider to be settled in the Royal Court. We do not consider the decisions of the Royal Court on this subject to be plainly wrong. However, given the possibility that sooner or later the issue may arise in the Jersey Court of Appeal or the Privy Council, we wish to add a few words of our own on one limited aspect.

16 The Royal Court, broadly speaking, has followed its construction of English decisions on the matter of mistake until *Pitt -v- Holt*. Whether it was appropriate to do so was we believe first raised in the case of *JP -v- Atlas Trust Company (Jersey) Limited* [2008] JRC 159. The issue was whether a trust should be set aside on the ground of mistake and much of the argument was concerned with whether the test for setting aside a voluntary transaction on the ground of mistake is limited to where the mistake is as to the effect of the disposition (as stated by Millet J in *Gibbon -v- Mitchell*) or whether the test is more general, namely whether the donor or settlor was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him. The Court recorded that the matter remained open for decision in a future case where the point arose directly, but on the facts of that case, the Court found that, whichever test was applied, the settlors were mistaken as to the effect of the scheme which they had been advised to enter into, because they were advised and wrongly believed that they would have ready access to their funds by means of discounted loans from the trust; and therefore the trust was set aside. It is arguable that that part of the judgment to which we now turn was not part of the ratio of the

decision, and can be treated as being obiter. At paragraph 22 of the Court's judgment, Birt DB, said this:-

> ***"Before leaving the Law, we should mention one point only to dispose of it.*** Mr MacRae very properly raised the question of whether the reference to "mistake" in the Law, without any definition, required the Court to consider the concept of "erreur" derived originally from French law. "Erreur" may be relevant when considering a contract governed by Jersey law but it cannot possibly, in our judgment, have any relevance in a case governed by equitable principles. The concept should be confined to matters governed by the law of contract. It would be quite wrong in principle and highly undesirable to muddy the waters by importing into cases concerning equitable principles a concept derived from a jurisdiction which does not recognise or apply such principles."

17 These comments were noted, seemingly with approval, by Clyde-Smith, Commissioner, *In the matter of the A Trust* [2009] JLR 447, at paragraph 81.

18 The reference to "the Law" was a reference to Article 11(2) of the Trusts (Jersey) Law 1984 ("the Law") which provides:-

> ***"(2) Subject to Article 12, a trust shall be invalid:—***
>
> …
>
> ***(b) To the extent that the Court declares that :-***
>
> ***(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty…"***

19 The question at issue therefore in *JP -v- Atlas Trust Company (Jersey) Limited* was whether the word ***"mistake"*** is to be construed having regard to English equitable principles, or whether it is to be construed having regard to the Jersey principles of *erreur*. In this analysis, it is perhaps important to recognise that there may be a distinction between setting aside a trust and setting aside a gift into trust. In many cases, the setting aside of a gift would nonetheless leave the trust intact. This will depend on the facts. The distinction is capable of having important consequences, not least because it may call for determination the question of whether the gift is voidable or void *ab initio*. If it were a matter of contract, a finding that the contract was avoided on grounds of *erreur* would apparently result in it being void *ab initio* – see *Marett & O'Brien* [2008] JLR 384 at paragraph 59. The reference in *Marett* to a *vice du consentment* leading to nullity *ab initio* might be the subject of further consideration. There appear to be a number of authorities not referred to in that case which might point in the other direction – *Deacon -v- Bower* [1978] JJ 39 is the most recent of these, where the Court considered the earlier authorities of ex parte *Mauger* [1870] 195 Ex 37, *Vibert -v- Vibert* (1890) 48 H. 462, *Le Jeune -v- Le Jeune* (1900) 49 H. 182 and *Valpy -v- Channing* (1946) H. 290, 294; and *Simon -v- Page* (1905) 49 H. 279.

20 We have not been addressed on this subject because the application of the law of mistake to gifts into trust is, as we have said, settled at the level of the Royal Court; and, in any event, in the present case there is no argument that the original gift into trust be voided for mistake. However, there may be more in the argument than appears on the face of *JP -v- Atlas Trust Company (Jersey) Limited*.

21 We entirely share the views expressed by the Royal Court in that case that cases involving the administration of a trust and the equitable principles which arise as a result cannot reasonably be considered by having regard to a system of law which does not recognise those equitable principles in the first place. Nonetheless there may be a distinction between the appropriate principles to apply to questions surrounding the validity of a transfer into trust on the one hand from the principles which apply to the administration of the trust on the other. By way of example, in *Abdel Rahman -v- Chase Bank (CI) Trust Co Limited* [1991] JLR 103, one of the issues was whether or not gifts into trust by the settlor were void for breach of the rule that *donner et retenir ne vaut*. That rule is a rule of customary Jersey Law affecting gifts, and the fact that the gift was a gift into trust did not prevent the rule being applied to such a gift. Indeed, it took an amendment of the Law in 1989 to provide by statute that gifts into trust were no longer to be subject to this particular rule. The *Abdel Rahman* case therefore demonstrates that the mere fact that the argument in the case concerns a trust does not of itself prevent the application of rules of customary law.

22 Once a trust has been properly constituted, the bundle of rights which thereby arises is determined by reference to Jersey Law and it is entirely understandable that the Royal Court turns, in its application of the Law, to the system of law from which the trust has been imported. That line of argument would give support to the view taken by Birt DB in *JP -v- Atlas Trust*. Nonetheless there is at least one, probably more than one, significant difference between the Jersey and English Laws on gifts. By contrast with English Law, under Jersey Law, a gift can amount sometimes to a contract, a concept that may be regarded as impossible under the Law of England given the requirement for consideration in a valid contract. As the Law of Jersey does not require consideration for a binding contractual undertaking, but instead will give validity to a contract where there is a proper cause, the position may be quite different. It may well be thought that when a settlor places assets into trust, he does so by a contract of gift which, if the gift is not effected, the trustees could, if necessary, enforce in a court of law. Whatever the position in terms of contract, the settled assets do arrive in the hands of the trustees by a gift. It is to be noted that whilst the Law excludes some material from the Jersey Law of gifts from having any application to gifts into trust, like the maxim of *donner et retenir ne vaut*, there is no wholesale exclusion of those principles.

23 It seems to us therefore that it may well be arguable that where one is considering whether a gift into trust is avoided for mistake, the true principles to be applied may include consideration of the customary law of gifts including the contractual rules of *erreur*, which would amount to a *vice du consentement* which would result in the gift being set aside, whether as a void or a voidable disposition, and that Article 11 of the Law might be

construed accordingly.

24 We emphasise that these comments do not apply to the instant case in any event. In the present case, the gift into trust has already been completed – it was completed many years ago. What is currently under review is not Article 11(2) of the Law, which is concerned with the validity of the trust, but is rather the question as to whether an appointment by trustees of a validly constituted trust can be set aside for mistake.

25 The Jersey cases to which we have referred are on the whole cases concerning the setting aside of gifts into trust on the grounds of mistake rather than the setting aside of an exercise of a power of appointment by the trustees where there already exists a validly constituted trust. In relation to the latter, we do not think that the Royal Court should be looking at questions of *erreur*. Although it is true that new trusts may be created as a result of the exercise of the power of appointment, there is no gift by the trustees in the ordinary sense of that word, and thus the customary law on gifts would not apply. Instead, the nature of the transaction is that there is an exercise of trustee discretion. This is, therefore, absolutely the territory where we agree with the approach of Birt DB in *JP -v- Atlas Trust* that it would be highly undesirable to muddy the waters by applying not the equitable principles derived from a jurisdiction from which the importation of the trust has taken place even if subsequently developed differently, but instead some other legal principles from a jurisdiction which does not recognise trusts at all.

26 It has been suggested that the rule in *Hastings Bass* and the law of mistake as developed in the English courts have separate objects – the former laying down the basis upon which appointments by trustees can be reviewed and set aside by the Court, and the latter rules which go to whether or not a gift into trust by a settlor can be so set aside. Our reading of the English authorities does not suggest that that is an appropriate distinction. In our judgment, the rule in *Hastings Bass* pre *Pitt -v- Holt* conferred an additional jurisdiction on the Court to that which it already had in relation to mistake. In passing, we note that in *Pitt -v- Holt* itself at first instance, Mr Robert Englehart QC, sitting as a Deputy High Court judge in the Chancery Division held that the settlement and the assignment were to be set aside under the *Hastings Bass* rule, though he would not have come to the same conclusion on the basis of mistake. Indeed, the relief sought before him was put alternatively on the basis of *Hastings Bass* or on mistake, which seems also to point to the proposition that the two were considered, at least by counsel, to be quite separate jurisdictions and either can be applied to actions taken by trustees.

27 Indeed, Lloyd LJ in *Pitt -v- Holt* makes it plain that the equitable jurisdiction arises in this way:-

> ***"165. The jurisdiction of equity to protect parties against fraud, undue influence, unconscionable bargains and related conduct including abuse of confidence is long established and well known. Equity does not limit fraud, in this context, to actual dishonesty such as would give rise to an action in deceit at common law. Equitable fraud takes account of any***

breach of the sort of obligation which is enforced by a court that from the beginning regarded itself as a court of conscience: see Viscount Haldone LC in *Nocton -v- Lord Ashburton* [1914] AC 932 ***at 954*** .

166. The jurisdiction now in point is of the same kind. It is quite distinct from, and ought not to be confused with, common law remedies for mistake…"

28 There is nothing in these comments which suggest that the equitable jurisdiction to relieve against mistake arises only in relation to gifts into trust and does not arise in relation to actions taken by trustees of a validly constituted trust. Suppose, for example, a beneficiary of a discretionary trust approaches the trustee and requests the exercise of a discretion in his favour. He spins a yarn, indicating great apparent hardship. The trustee, in good faith and having made all reasonable enquiry, accepts the false statements – they may be such as to fall short of fraud itself or they may cross the line – and makes an appointment. On discovering the mistake, the trustee seeks to have the appointment set aside. It seems to us that there is no reason in principle why equity should not relieve a trustee, and thus in some cases also other beneficiaries of the trust, of the consequences of a mistake in the same way as it would relieve a settlor. The same legal test falls to be applied.

29 We note that in *Wyatt -v- Tyrrell* [2010] EWHC 3633, the Court had to consider whether to set aside a deed of exclusion. The grounds advanced were variously rectification, mistake and the rule in *Hastings Bass*. The claimants were the trustees. Henderson J dealt with those various claims on their merits. He did not disallow the application on the ground of mistake because that relief was not available to trustees but rather because the facts did not support the application of the Court's jurisdiction to set aside a deed on that ground.

30 The test by Birt DB in *Re the Lochmore Trust* (at paragraph 12 supra) needs to be reformulated where one is dealing with the application of the law of mistake to an appointment by trustees. The Court has to ask itself the following questions:-

(i) Was there a mistake on the part of the trustee?

(ii) Would the trustee not have made the appointment ***"but for"*** the mistake?

(iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property or interest appointed?

31 It is on this legal basis that we consider the present application insofar it is based on the law of mistake.

Mistake and the Present Application

32 We now apply the Jersey Law of mistake to the present application.

33 As indicated at paragraphs 12 to 15 above, the settled position is that set out *In the matter of the S Trust* [2011] JLR 375. A voluntary disposition by a donor or settlor can be set aside for mistake if there was a mistake on the part of the donor or settlor, whether of fact or of law, if the donor or settlor would not have entered into the transaction but for the mistake, and if the mistake was of so serious a character as to render it unjust on the part of the donee to retain the property. The rule is equally applicable to trustees and the questions which the Court should ask of itself are those set out at paragraph 30 above.

34 In asking ourselves these questions, we have regard to the principle referred to at paragraph 28 of the judgment of Sir Philip Bailhache, Commissioner, in *Re The S Trust* where he said:-

> ***"There seem to us to be two competing principles in play.*** The first is that it should not be too easy for a donor to retrieve a gift when things do not turn out precisely as he had anticipated. As Lawrence Collins, J expressed it in the passage quoted above at para 22, equitable relief for mistake should be kept within reasonable bounds so that "it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them .
>
> ***Similarly, the customary law principle donner et retenir ne vaut did not allow that a donor should retain dominion over the thing purportedly given.*** In both cases, one of the underlying principles is that legal certainty is important. The second principle is, however, that parties should not in fairness be held to transactions into which they would not have entered if they had known what the outcome would be. The English Court of Appeal's approach leans towards the first principle whereas this Court's approach tends rather to the second."

35 Later on in his judgment, Bailhache Commissioner said this at paragraph 32:-

> ***"Secondly, it is suggested that the A Trust test is "a great deal too relaxed for the donor who seeks to recover his gift"…Lloyd, LJ is again perfectly entitled, of course, to express this view, but we respectfully doubt whether it stands up to close scrutiny.*** We agree that a relaxed approach to the setting aside of voluntary dispositions on the grounds of mistake would be entirely inappropriate… even if the court is satisfied that the settlor/donor has done something which, if he had been properly informed or advised, he would not have done, the court has still to be satisfied that the mistake was of so serious a character that it would be unjust for the donee to retain the property. This requires a balancing of competing interests on the basis of fairness, which seems to us to be a perfectly proper exercise of an equitable jurisdiction. The burden is on the party seeking to set the transaction aside to show that it would be unjust for the transaction to stand. This does not seem to us to be a relaxed

approach to the issue."

36 Advocate Speck submits that the trustee made a mistake in the administration of this trust. The supposed mistake was that when it entered into the series of documents in relation to the trust, it did so in the mistaken but reasonable belief that the settlor, a man in his mid-50s was fit and healthy. In fact, unknown to the trustee, the settlor was already displaying some of the symptoms of an undiagnosed Alzheimer's disease from which he died well before the requisite seven years had elapsed, thus giving rise to a substantial liability to tax if the transactions cannot properly be unwound.

37 Before we go any further on the facts, it would be right for us to make one point clear. In his submissions as to why the transaction should be set aside on the application of the Hasting Bass principles, Advocate Speck conceded that his client trustee had been in breach of duty. We do not know whether this concession was properly made and nothing in this judgment should be taken to suggest that it was. We have not heard *viva voce* evidence on the point in question, and there has not been that mutual discovery of documents which would have been made had there been a contested claim by the beneficiaries against the trustee seeking a reinstatement of trust funds for breach of trust.

38 It is right to make this point because, unlike in many other cases where adverse tax consequences have flowed, the trustee in this case took all material tax advice. Furthermore, there does not appear to be any suggestion that the tax advice was in any sense wrong or misplaced. The mistake said to have been made by the trustee is that it reasonably believed the settlor to be fit and healthy whereas in fact he was not.

39 There is little doubt that the family of the settlor were aware in outline of the settlor's health problems. In her affidavit, the first respondent very frankly admits that she had noticed certain changes in her husband, the settlor, prior to the restructuring, and that privately she had a deep fear that he was showing the early signs of Alzheimer's disease. She did not share her concerns with her husband's advisers or with the trustees. She described how her husband had been a fit and health conscious man who kept himself in good shape, but that from 2005 onwards she began to notice small changes in him – he would become unusually panicky about losing things when on holiday; he would misplace personal items from time to time and became obsessed with knowing where they were; he became forgetful in general conversation and had lapses in memory even in respect of things which they had been discussing only days before; he was on occasion withdrawn and unusually quiet, by contrast with his earlier behaviour.

40 She discussed the matter from time to time with her sons, who probably thought she was overreacting; but by April 2007, she had insisted that her husband see his General Practitioner. Indeed she went with him on at least one occasion and she asked whether her husband might be suffering from dementia. An MRI scan in November 2006, conducted following a routine eye test which the settlor had failed, showed nothing adverse on the scan, which was of some comfort.

41 However following an incident on the golf course in June 2008, the settlor and first respondent went back to the General Practitioner in June 2008; and the settlor was referred to the consultant neurologist who arranged for a second MRI scan, again without any adverse consequences. The settlor was referred to a neuropsychologist who concluded that he was suffering from a form of dementia and a second opinion was then sought from Professor Neary at the Cerebral Function Unit. Professor Neary examined the settlor on 13th November, 2008, and he concluded that he was suffering from Alzheimer's disease and given some palliative medication.

42 Until after the restructuring had been completed, none of these family concerns was brought to the attention of the trustee or any of the advisers. They believed that a fit and healthy man of 57 years of age would be likely, all things being equal, to survive for the requisite seven year period.

43 It was seemingly this aggressive but undiagnosed Alzheimer's disease which caused the settlor's death at such an early age; but it could just have easily have been an undiagnosed heart condition which led to a fatal heart attack, or an undiagnosed cancer; or the settlor might have died completely unexpectedly as a result of a road traffic accident. The last of these potential causes of death would not have given rise to any suggestion that the trustee made the arrangements they did in April 2008 by way of mistake. What the road traffic accident as a potential cause of death illustrates, however, is that it would presumably have been open to the trustee to have obtained insurance on the life of the settlor for the requisite period. It appears that this was considered at the relevant time in this case, some nine months before the restructuring took place. Arranging that insurance was left to the settlor, and there is a letter from the trustee to the settlor and second respondent among our papers to this effect. It was said in argument that another mistake made by the trustee was that it did not arrange life insurance – the hypothesis being that had it sought life insurance, the medical problems would have been ascertained because the insurance company would have insisted upon a medical certificate of good health, and once problems with obtaining such report had been ascertained the trustee would not have taken the risk that it did without life insurance cover in place. Accordingly it was contended by Advocate Franckel that the trustee's concession that it had acted in breach of trust was properly made, and indeed that even if the beneficiary had been an apparently fit 25 year old, it would have been necessary for the trustee to have obtained satisfaction as to his present health coupled with insurance against unforeseen death and it would have been negligent not to have done so.

44 Advocate Speck put it to us that the Jurats would have to be satisfied:-

> (i) That had the matter of the settlor's state of health been raised by the trustee, the General Practitioner of the settlor would have referred him to a neuropsychologist; and

(ii) That such a person would have made the diagnosis which was actually made in November of 2008 giving a three to eight year life expectancy.

45 Advocate MacRae submits on the facts that there was no diagnosis of early Alzheimer's symptoms until the summer of 2008 and there was no evidence that as at the material dates in April that diagnosis would have been made. Indeed, even in July, the settlor was to one of the consultants something of a diagnostic puzzle. As a result, the evidence therefore would not have revealed in April 2008 any relevant considerations that the trustee should have taken into account. This submission was made in the course of addressing why the *Hastings Bass* rule, even if a valid principle to be applied in theory, could not reasonably have been applied in this case.

46 Before turning to our conclusions, we must refer to the English case of *In re Griffiths (Deceased)* [2009] Ch 162. In that case, in order to mitigate the effect of inheritance tax on his death, Mr Griffiths had executed in 2003 and early 2004 three potentially exempt transfers by which certain property was transferred into various trusts. In late 2004 he was diagnosed with lung cancer and unfortunately he died in April 2005. As he had not survived for more than three years since the transfers were made, all three transfers were chargeable for inheritance tax purposes. Had he not made the transfers, inheritance tax would not have been payable immediately. Mr Griffiths' executors applied to set aside the transfers on the grounds that they had been made under a mistake of fact, namely his mistaken belief that at the time the transfers were made, there was a real chance he would survive for the required period whereas in fact at that time, unknown to him, his health was such that he had no real chance of surviving for that long. It was contended that had he known the life expectancy was so short, he would not have made the transfers.

47 It was held by Lewison J that the equitable jurisdiction to set aside a voluntary transaction on the ground of mistake included not only a mistake about the effect of the transaction but also a mistake of a sufficiently serious nature about a fact which existed before or at the time of the transaction. Lewison J said at paragraph 25:-

> ***"It is plain in my judgment that a mistake of fact is capable of bringing the equitable jurisdiction into play.*** All that is required is a mistake of a sufficiently serious nature. In my judgment a mistake about an existing or pre-existing fact if sufficiently serious is enough to bring the jurisdiction into play. If and to the extent that Millett J intended to restrict the scope of the equitable jurisdiction to a mistake about the effect of a transaction, I respectfully disagree."

48 In reaching this conclusion, the Learned Judge had regard to the case of Lady Hood of *Avalon -v- Mackinnon* [1909] 1 CH 476. In that case, Eve J set aside an appointment under a settlement. He did so on the basis that the appointor made an appointment which she would not have made had she not forgotten the earlier appointment. He said, at page 482:-

> ***"It seems to me that when a person has forgotten the existence of a pre-existing fact, and assumes that such fact did not pre-exist, he is labouring***

under a mistake, and he acts on the footing that the fact really did not pre-exist."

49 In his commentary on *Re Griffiths* in *Pitt -v- Holt*, Lloyd LJ, having referred to the fact that one of the recommendations of those giving advice had been that term insurance should be taken out to cover the risk that Mr Griffiths might not survive between three and seven years but this was not acted upon, at paragraph 198, Lloyd LJ said this:-

> ***"I wonder whether the judge would have come to the same conclusion on the law (quite apart from the facts) if the case had been argued in a fully adversarial manner.*** It seems to me that there would have been a strong argument for saying that, having declined to follow the recommendation that he should take out long-term insurance, Mr Griffiths was taking the risk that his health was, or would come to be, such that he did not survive. If that was the correct view, it seems to me that the answer to the *Ogilvie -v- Littleboy* ***test would have been that it was not against conscience for the recipients of the gift to retain it*** . *Ogilvie -v- Littleboy****was cited by the judge, but he did not pose the question derived from that case in terms when he came to state his conclusion.*** I do not criticise the judge, given the limited argument before him, but I do question his conclusion. I do not see what there was in the case that could have justified a favourable answer to the*Ogilvie -v- Littleboy****test."***

50 All parties contend before us, on the application of the Jersey Law of mistake, that *Re Griffiths* is a clear example of a case where the Court should intervene to set aside dispositions that were made, the circumstances of the present case being not very dissimilar to those which applied in the case of *Re Griffiths*. The trustee contends that it simply proceeded on the basis that the settlor was 57 years old, apparently fit and healthy, and accordingly there was no reason for the trustee to consider reasonably that he would not survive seven years. We add that we accept that a mistake of fact is theoretically sufficient to bring into play the Court's equitable jurisdiction to set aside a voluntary transaction on the ground of mistake.

51 The Court has given the most anxious consideration to this matter, conscious that significant sums will be due by way of inheritance tax if the trustee's application is refused. In the event, we regret that we have not been able to find that the requirements of the Jersey Law of mistake are adequately made out such that the various deeds described in paragraph 6 of this judgment should be set aside. This comes down to fine margins but the reasons for these conclusions are as follows:-

(i) The burden of proof in relation to the questions which are detailed at paragraph 30 of this judgment lies on the trustee.

(ii) The Court cannot conceive that the question of whether or not the settlor would survive for seven years did not occur to anyone in the course of making these arrangements. Indeed, at some point in 2007, it was clear it did because the question

of life insurance was canvassed. Of course, the whole purpose of the arrangement was tax driven, and in particular was designed to ensure that it was a potentially exempt transfer in the context of which the seven year period was critical.

(iii) As thought was given to the need that the settlor survived seven years, then it is hard to see why appropriate life insurance was not put in place. It was clearly considered, at least by June 2007. It may be this required some action by the settlor – on the papers before us, we cannot tell.

(iv) In the circumstances, although the mistake was of a serious character, it does not appear to us to be unjust that the donees of the interests appointed on 23 rd April, 2008, retain the property or interests so appointed. They were aware collectively of the generality of the medical problems which beset the settlor. One or more of them and/or the settlor could have informed either the advisers or the trustee. If, conversely, the trustee was under a specific duty to make enquiry of the settlor's health and be satisfied it was good – a matter which we leave over in case it should need to be adjudicated upon in other proceedings – again it cannot be said that there is injustice if the donees retain the interests so appointed because the trustee will have to account for some or all of the relevant tax.

52 For the avoidance of doubt, we accept that the trustee would not have made the appointments in question had it been aware of the settlor's real state of health at the time in April 2008. We do not accept that any reasonable enquiry at that time would necessarily have revealed his real state of health. In the circumstances, this is too tenuous a basis for saying that the dispositions should be set aside on grounds of mistake.

Hastings Bass

53 We now turn to the rule in *Hastings Bass*, as it exists in Jersey at present.

54 In *Sieff and Others -v- Fox and Others* [2005] EWHC 1312 (CH), Lloyd LJ said this at paragraph 119 of his judgment:-

> ***"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 advisors 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 seems to me to require further consideration in the light of early 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."

55 Before coming to consider the analysis of the rule in *Hastings Bass* in *Pitt -v- Holt* and *Futter -v- Futter*, it would be right to track the Jersey cases on this subject. The first occasion on which the *Hastings Bass* principle appears to have been considered is in *In the matter of the Green GLG Trust* [2002] JLR 571. That case concerned a settlement governed by Jersey law under which the trustees had purportedly made four appointments of capital to the principal beneficiary, and subsequently sought a declaration that these appointments were void. They had been made on the basis of advice of English counsel on the issue of taxation, and the trustees later became aware that under the relevant fiscal statute in the United Kingdom, a transfer of value made at a time when there was outstanding borrowing by the trustee, which had not been used for normal trust purposes, was deemed to be a disposal of the trust fund at market value followed by an immediate reacquisition. Under the Taxation of Chargeable Gains Act 1992, such gains could be attributed to the settlor even if no payment had been made to him. The trustees and the protector of the trust contended that they would never have made, or consented to, respectively, the appointments, if they had been aware of the capital gains tax consequences which would arise.

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:-

"26. In our judgment, the Hastings Bass decision merely elaborated the position by making it clear that a decision of a trustee was similarly liable to be quashed where the trustee has not taken account of relevant factors or has ignored relevant ones. In this respect, there is a parallel with the well known grounds of judicial review for quashing the decision of a public authority .

27. We consider that the Hastings Bass principle is entirely consistent with precedent and principle. The Trusts (Jersey) Law 1984 draws substantially on general principles of English trust law and we see nothing in the

decisions that we have described which is inconsistent with Jersey law. On the contrary, they seem entirely consistent, and, accordingly, we hold that what is described as the Hastings Bass principle is equally a principle of Jersey law .

28. 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."

57 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.

58 In the *Representation of Friedman* [2006] JRC 187, the Court was faced with an application for a declaration that certain sale agreements and associated instruments executed some 10 years earlier should be declared invalid and void *ab initio*. The relief was sought by the trustees essentially upon the *Hastings Bass* principle. An issue for the Court arose as to whether or not the Court was satisfied that the *Hastings Bass* principle would be applied in the Cook Islands, which was relevant for the purposes of the facts of that case. The Court found that because the *Hastings Bass* principle had been adopted in New Zealand, Australia, Jersey, Guernsey and England, the Court was satisfied that the conclusion would be recognised and applied in the Cook Islands as well.

59 Once again, apart from a reference to the Jersey case of *Re the Green GLG Trust*, reference was made by the Court exclusively to English cases in reaching its conclusion.

60 *Leumi Overseas Trust Corporation Limited -v- Howe* [2007] JRC 248 was a case involving an application by a trustee to have set aside certain investments and loans made by a previous trustee. The Royal Court was satisfied that the investments and the loans would not have been made by the trustee if it had been aware of the true tax consequences in the United Kingdom. Following the *Hastings Bass* principle, the Royal Court therefore set aside the action taken in the exercise of a discretion given under the trust deed because the effect of the exercise was so different from that which had been intended. The Royal Court

had the advantage of a joint opinion from counsel, and interestingly paid significant respect to the decision of Lloyd LJ in *Sieff -v- Fox*. At paragraph 30 of the Court's judgment, Clyde-Smith Commissioner said this:-

> ***"30. We find the joint opinion of counsel very persuasive and agree with their conclusion that 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 the light of the authorities (e.g. in Re Abraham's Will Trust) in which no breach of trust was or could reasonably have been established. We declined, 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 Re Green GLG Trust 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***.
>
> ***31. It is in the interests of those before the Court that the decision of the trustee be set aside and we have heard no argument to the contrary. Consistent with his duty, Mr Dessain has considered arguments he could think of for saying that the principle should not be applied. An alternative to applying the principle would be for the matter to be settled by litigation between the Settlor, the Trustee and the professional advisors, a suggestion that did not as a matter of policy attract the Court in the case of Green GLG Trust."***

61 It is of interest that here the Royal Court likens the *Hastings Bass* jurisdiction to that of mistake and concludes in particular that there is no requirement in Jersey Law to find any fault or breach of duty on the part of the trustee before the jurisdiction can be exercised.

62 *Seaton -v- Morgan* [2007] JRC 206 concerned a similar application to the Court to set aside certain agreements entered into as trustee under the principle of *Hastings Bass*. At paragraph 12 of the Court's judgment, Commissioner Clyde-Smith said this:-

> ***"12. We agree that in applying the Hastings Bass principle to a Jersey trust we should apply Jersey law. The principle operates within the domestic confines, so to speak, of the trust examining the processes by which the trustee arrives at its decision. What is not clear from the authorities is the extent to which the principle could be applied where bona fide third party purchasers for value are affected. It would lead to uncertainty in our view in contractual dealings between third parties and trustees if agreements with trustees could be set aside, not on the grounds to which all contracting parties are subject such as say (in this jurisdiction) fraud, duress or mistake but on the ground of deficiencies in the internal decision making process of the trustee. We doubt therefore whether the Hastings Bass principle could be invoked to the prejudice of such third parties. We doubt further whether this Court, applying the***

Hastings Bass principle under Jersey law, could set aside an agreement with third parties which is governed by foreign law. The issue does not arise in this case because the other parties to the Novation and Assignment Agreements have agreed to the remedy being sought by the Trustee."

63 Commissioner Clyde-Smith applied the dicta of Birt, Deputy Bailiff, in the *Green GLG* case. On the other matters which arose on the facts of *Seaton -v- Morgan*, he applied the English authorities.

64 The next occasion on which the Court in Jersey has considered the *Hastings Bass* principle is *In the matter of Seaton Trustees Limited* [2009] JRC 050. In that case, the trustee incorrectly interpreted tax advice which had been obtained and it was clear that the misunderstanding of that advice informed the decisions which were subsequently made. At paragraph 13, Clyde-Smith, Commissioner said this:-

> ***"The Hastings Bass principle is well established under Jersey law having been applied in five cases namely*** *Green GLG Trust* [2002] JLR 571 , *Freidman -v- Asia Trust* [2006] JRC 187, *Seaton -v- Morgan* [2007] JRC 206, *Leumi -v- Howe and Others* [2007] JRC 248 and *Representation of Vistra Trust Company (Jersey) Limited* [2008] JRC 111.
>
> *Leumi Overseas Trust Corporation Limited -v- Howe* ***was a case involving an application by a trustee to have set aside certain investments and loans made by a previous trustee."***

65 The Court considered that the trustee would have acted differently had it appreciated correctly the tax position. It determined that there is no requirement under Jersey law to find that the trustee was at fault, but noted in any event that misunderstanding the tax advice given and failing to consider the tax implications of the two methods of accessing the funds put forward would constitute a fault. The Court accordingly set aside the relevant decision and declared it to be of no effect, thus side stepping the third issue in *Sieff*, namely whether a decision caught by the principle was void *ab initio* or simply voidable.

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?

67 On the evidence in that case the Court found that the test for the application of the *Hastings Bass* principle was met and accordingly it set aside the 2008 appointment.

68 We note the *Hastings Bass* principle was also applied in *Re the R Trust* [2011] JRC 085. That case involved setting aside an appointment of P as protector of the trust which had unwittingly caused her to become an excluded person. The principle was held to apply to protectors as well as trustees.

69 We turn now to the decision in *Pitt -v- Holt*.

70 The leading judgment was that of Lloyd LJ. Lord Justice Longmore indicated that he was "entirely persuaded by the remarkable judgment of Lloyd LJ which demonstrated that the law had taken a seriously wrong turn, which had been acted upon over a 20 year period before now being put back on course". Mummery LJ summarised the judgment of Lloyd LJ in this way:-

> ***"231. I agree that both appeals should be allowed. In his very fine comprehensive and clarifying judgment, with which I agree, Lloyd LJ convincingly demonstrates, by reference to principle and authority, that (a) the ratio in Hastings Bass is not authority for the rules successfully invoked at first instance in the two cases under appeal and in a line of other cases since Hastings Bass; (b) a disposition by a fiduciary is void if it is a misapplication of property outside the four corners of the discretion, a disposition of property to a non-object of the power, for instance, being ultra vires and without any legal or fiscal effect; (c) a disposition is not void if it is intra vires even if the manner in which the discretion was exercised was "legally flawed" by the fiduciary's failure to take into account a relevant consideration, such as the correct tax consequences of the disposition; (d) in proceedings to invalidate a disposition on the ground that the fiduciary has left a relevant consideration out of account or has taken an irrelevant consideration into account, a breach of fiduciary duty has to be established; (e) a claim for breach of fiduciary duty would not normally be made by a fiduciary (as has happened in practice under the Hastings Bass rule) but rather against a fiduciary by a person claiming to be an object of the power; and (f) the Court's jurisdiction to grant a discretionary remedy, such as rescission of the disposition, or other remedies for breach of trust, is subject to equitable defences."***

71 Returning directly to the ratio of *Hastings Bass*, Lloyd LJ described it at paragraph 64 of his

judgment as follows:-

> ***"Trustees considering an advancement by way of sub-settlement must apply their minds to the question whether the sub settlement as a whole will operate for the benefit of the person to be advanced.*** If one or more aspects of the provisions intended to be created cannot take effect, it does not follow that those which can take effect should not be regarded as having been brought into being by an exercise of the discretion. That fact, and the misapprehension on the part of the trustees as to the effect that it would have, is not by itself fatal to the effectiveness of the advancement. (That involves the rejection of the Revenue's fourth submission). If the provisions that can and would take effect cannot reasonably be regarded as being for the benefit of the person to be advanced, then the exercise fails as not being within the scope of the power of advancement. Otherwise it takes effect to the extent that it can."

72 We agree. It appears to us that the original *Hastings Bass* decision is essentially only at the margins about relieving a trustee of his mistaken exercise of power. It is really about severance. As exercised, the power used was incapable of being used to achieve what was done in its entirety because the appointment was void for perpetuity; but that part of what was done which was not void – the life interest in possession – was severed and found valid.

73 We have had to consider whether it is necessary for the Royal Court to determine what course it should follow in relation to what I might call the historic *Hastings Bass* principle as extended by *Mettoy Pension Trustees Ltd -v- Evans* (supra), given that that principle has, as first understood, been applied consistently by the Royal Court since in *Re Green GLG Trust*, and given that that principle has now been thoroughly disapproved by the Court of Appeal in England in *Pitt -v- Holt*. That question is an open one, in respect of which the rival submissions were these.

74 Advocate Speck submits that Jersey has its own set of principles in relation to *Hastings Bass* and that Jersey law is settled. He submits that the Court should only depart from that position if satisfied that these principles are plainly wrong. The essence of his submission was that the Royal Court has focused its emphasis to date on protecting the interests of the beneficiaries and that to change that emphasis, in effect requiring them to sue the trustee or the other professional advisors, would not be fair. On his analysis, there had to be a breach of duty of some kind, or the *Hastings Bass* jurisdiction would never be engaged in the first place. If the trustee on the facts had taken reasonable care, there was an issue as to whether the apparent breach of duty fell away. However, at the end of the day, the submission made by Advocate Speck, was that the matter clearly fell within *Pitt -v- Holt* anyway. In his submission it could not matter less whether the Royal Court applied that case or the Jersey cases. The higher test was satisfied and the Court's jurisdiction was thus engaged, whatever the merits of the debate.

75 As to whether the transaction was void or voidable, his submission was that it was

voidable, but retrospectively voided as at the date the appointments were made. It was open to the Court to take that step because to find a transaction voidable enabled the Court to take into account any equitable interest which had adversely been affected in the interval, but he contended these would not include the interests of Her Majesty's Revenue and Customs, for example.

76 Advocate Franckel submitted that the fundamental principle was the protection of beneficiaries. Lloyd LJ accepted that principle in *Pitt -v- Holt* and Mr Franckel asserted that the Jersey authorities showed that the Island placed even greater emphasis on that principle than Lloyd LJ had done. It was not in the interests of the beneficiary to leave him exposed to the dangers of litigation against the trustee, and in terms of policy, there would be a seriously detrimental effect if the Court were to follow Lloyd LJ in *Pitt -v- Holt* in relation to the *Hastings Bass* principles, because the result would be that beneficiaries would be encouraged to attack their trustees for any mistake that were made, and that would be bad generally for the relationship between trustees and beneficiaries.

77 Advocate MacRae considered that, on the facts, this case fell within the law of mistake and outside the rules of *Hastings Bass*. As to the principles of *Hastings Bass*, however, he submitted that the root of this jurisdiction comes from a 1975 decision which has simply been misunderstood. He contended that there is no need for the Royal Court to deal with the issue because this particular transaction could be set aside on the grounds of mistake, which would make a decision in relation to *Hastings Bass* obiter in any event, and besides which the Court in Jersey would be no doubt greatly assisted by a decision by the Supreme Court in due course. Finally he submitted that in any event, Lloyd LJ was right in *Pitt -v- Holt* to make the criticisms of the *Hastings Bass* principle, as developed, which he did.

Discussion

78 We have set out above at paragraph 70 Mummery LJ's summary of the leading judgment of Lloyd LJ. It is in our view a convenient summary of the main principles that are to be derived from the exhaustive analysis of case law which Lloyd LJ performed. The latter set out his statement of principle at paragraph 127 of the judgment:-

> ***"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, 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 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."

79 On this analysis, it would not be the trustees coming to Court pleading the mistake which it had made and seeking to have their decision set aside accordingly. The nature of the action would be different. It would be an action by beneficiaries against trustees seeking, very possibly in the alternative, recompense from the trustee for breach of trust or the setting aside of the trustees action as having been taken in breach of fiduciary duty. Such an approach at least has the advantage that the pleadings set out clearly what has been done wrong, and by whom as opposed to a position where trustees will paint their canvas with such a delicate brush that these rather crucial considerations may be difficult to discern, and all one is left with, by way of stark contrast, is a clear statement of the consequences – usually fiscal consequences – which have flowed and what needs to be done to put them right. One of the papers put before us was an opinion by Chancery counsel as to the state of English law following *Pitt -v- Holt*. In it, counsel refers to ***"the new formulation of the rule in****Re Hastings Bass*". *Advocate Speck's submissions seemed to be to similar effect.* With some diffidence, we do not consider the case of*Pitt -v- Holt* to reformulate the rule in *Re Hastings Bass* at all because that case now does not establish any new rule but is simply an example of an old rule, namely that what is good can sometimes be salvaged by severance from what is bad.

80 There is no doubt that the decisions of the Royal Court in this area so far have simply been to apply the historic *Hastings Bass* rule as developed at first instance in other English decisions, and we would have followed those decisions of the Royal Court, were it not for the decision in *Pitt -v- Holt* in the English Court of Appeal. If that decision stands, then a departure from the line of reasoning in the judgments of the Royal Court based on the previous authorities is inevitable. Either the Court has to follow the changed approach of the English courts to the *Hastings Bass* doctrine, or it has to adopt some other reasoning for continuing to follow the historic approach. We add that if we are to have any similar rule to that which has previously been applied, it can only be because it is legitimate to assert it by extrapolation of what we do have, or by enunciation of principle.

81 We consider now whether, on historic *Hastings Bass* principles, the arrangements made on 23 rd April, 2008, would be set aside if that test were to be maintained – because if the answer to that question is in the negative, there is no need to resolve the baseline question as to whether the historic *Hastings Bass* test continues to apply.

82 We address the three *Mettoy* questions.

What was the trustee under a duty to consider?

83 The whole purpose of the arrangements made in April 2008 was the saving of inheritance tax. The trustee had a duty to consider whether those arrangements would reasonably be expected to accomplish that purpose. If that was not the reasonable expectation, the whole rationale in the exercise of the trustees' discretion was flawed. Consideration of that question required the trustee to have regard to appropriate fiscal advice, and to any factual matters which might be relevant to that advice. It is clear from the advice that was provided on this occasion that the survival of the settlor for the requisite period, ideally seven years, to achieve the saving of inheritance tax was a key part of those arrangements. It seems to us to follow that the trustee was under a duty to consider whether the settlor was likely to survive that period.

Did the trustee fail to consider the effectiveness of the arrangements proposed, and the risks?

84 The trustee had advice on the matters which had to be achieved in order to make the arrangements effective for saving inheritance tax, and there is not alleged to be anything wrong with that advice. In our judgment, the trustee took the settlor's state of health generally into account. It did not take into account that his real or actual state of health was poor, because it did not know that that was so.

85 In our judgment it would not have been unreasonable for the trustee to have expected the settlor or his family to bring to the trustee's attention such of the health problems of the settlor of which they were aware.

86 On the material put before us, we think it was unwise of the trustee to proceed as requested by the settlor or his advisers without being satisfied that life insurance on the life of the settlor was available but the trustee was entitled in our view to rely on the settlor's age and apparent state of good health, particularly in circumstances where the trustee had been advised the previous summer that the settlor was arranging such insurance.

87 In the circumstances we do not think that the trustee failed to consider anything which it was under a duty to consider, and thus it is unnecessary to go onto the third *Mettoy* question. For these reasons, if we were to apply the historic *Hastings Bass* principle, we would exercise our discretion not to afford the relief sought on this ground.

88 Because we have reached this conclusion, it might be thought unnecessary to consider today whether the Royal Court should reject the historic *Hastings Bass* principle. At some future date, that question may have to be resolved definitively. It is to be hoped that at such

time the Supreme Court's decision on the pending appeal in *Pitt -v- Holt* will be available, as that will clearly be an important decision for the Royal Court to consider at such time.

89 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.

90 The *Hastings Bass* principle in England has been described as a 'get out of jail free card' for trustees, to be applied whenever convenient. In the exercise of a power of appointment, trustees may consider there is some tax advantage to be gained, or at least no disadvantageous tax consequence to be suffered. Subsequently they find that they were incorrect. *Hastings Bass* allowed them to apply to the Court to have the matter put right. Their belief may have been based on no advice or bad advice, or advice which was good advice but turns out to be wrong. Never mind. The 'get out of jail free card' can be played. It can be played regardless of whether the trustees have been substantially at fault, or indeed at fault at all. It can be played when the transaction into which they have entered could not possibly have been undone had they not been trustees. The beneficiaries for whom the trustees' action has been performed have, at one stage removed, been conferred a right of undoing the adverse tax consequences, which they would not have been able to achieve had they acted on their own account. Looked at from afar, this seems to us to be a surprising step for a court of equity to take. Most people have to bear the consequences of the steps they take; but apparently not trustees. In 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.

91 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. That is necessary because it would be impractical to contemplate that the Courts be available to administer all trusts. Thus has developed, by way of example, the rules around the blessing by the Court of a proposed ***"monumental decision"*** of the trustee summarised in *Re the S Settlement* [2001] JLR Note 37, a decision which has been applied many times by the Royal Court.

92 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.

93 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.

94 It is interesting to look, if simplistically, at the other side of the same coin from the perspective of settlors and beneficiaries. A settlor can come to Court and indicate that he did not intend to make the gift on the terms he did, and that he made a mistake. He asks the Court to undo it. The settlor may come to Court to say that the trustee is not performing properly the trust upon which the settlor made the gift in the first place. A beneficiary can come to Court and allege that the trustee is in breach of trust and should put matters right; or sometimes that the trustee is proposing to do something which would amount to a breach of trust and should be enjoined from completing it. Yet there is nothing on this reverse side of the coin which indicates that a settlor or beneficiary can come to Court and say that they have participated in whatever has been done exactly as intended, but things have not turned out quite as they should.

95 In our judgment the approach of the Royal Court should be to ensure that loss lies where it should. If trustees take a decision which is outwith their powers, there is no basis in law for it, and the Court should void it. Once one reaches the position where the decision taken by the trustees is one which they are entitled to take, the analysis is rather different. No longer can it be said the trustees are not entitled to do what they have done. What can sometimes be said is that while they were entitled to do it in the sense that it was within their powers, the doing of it is nonetheless a breach of their duty in one form or another; or that they have made a mistake in respect of which the court in equity will grant relief. At that point, if there has been a breach of duty or a mistake made, the law provides a remedy.

96 Tax considerations seem to us to be a good example. Trustees are in our judgment under a duty to their beneficiaries to have regard to material tax considerations in exercising their trustee powers and discretions. If they fail to do this, they may be in breach of trust, and, if so, have to make good losses sustained by the trust as a result.

97 Such an approach puts the responsibility for what may be an avoidable loss where it belongs. But 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 may be in some circumstances that trustees might be in breach of their duty if they did not sue the professional advisers. It is to be assumed that as the trustees have a duty to have regard to material tax considerations, trustees would routinely ensure that the professional advisers would be retained by them and perhaps as well by the beneficiaries

and that the terms of engagement would ensure that such actions could be taken on their merits without artificial exemption clauses in respect of the advisers' culpability.

98 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.

99 First of all, an exclusive focus on the rights of beneficiaries would be potentially unfair to trustees and third parties, and ultimately at some point would be capable of leading to confusion as to the rights of which beneficiaries would be preferred inter se. Indeed, this is reflected in the comments of Clyde-Smith, Commissioner, in *Seaton Trustees Limited -v- Morgan* (supra) cited at paragraph 62 above.

100 Secondly, if there has been loss arising from negligent advice, then on the principle that the loss lies where it should, the beneficiaries themselves will not be taking steps to enforce their rights because the trustees will do it on their behalf. In that way, the beneficiaries are protected, and indeed the trustee would personally be at risk if it did not take proper steps in such circumstances.

101 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.

102 Fourthly, 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.

103 Fifthly and finally, it seems to us that the Jersey Law of mistake in these cases will provide equitable relief in the cases where it should.

104 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.

The status of the appointments made on 3rd April 2008

105 At paragraph 4 of this judgment reference is made to the first set of arrangements which the settlor and trustee made on 3 rd April, 2008. The effect of those arrangements was to exclude the first respondent from any benefit under the terms of the trust from then on. The trustee realised shortly thereafter it had made a mistake and purported to ignore those arrangements when making the deeds it did on 23 rd April.

106 By contrast with our conclusions in relation to the deeds of 23 rd April, the Court is in no doubt whatever on the papers that the trustee made a mistake on 3 rd April. The mistake lay in its failing to recognise that by making those deeds it would cut out the first respondent from benefit. We are in no doubt that the trustee would not have made those arrangements but for the mistake. We are also in no doubt that it would be unjust both to the first respondent and to the other respondents for the recipients of those life interests to retain the entirety of the benefit of those appointments. Accordingly the Court sets aside the deed of exclusion dated 3 rd April, 2008, and the deed of appointment dated 3 rd April, 2008, such that the terms of the settlement should be read as if varied only by the deed of amendment, the deed of exclusion and the deed of appointment executed on 23 rd April, 2008.