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Make no mistake

Alison Ozanne et al. review the doctrine of mistake and Hasting-Bass applications: a comparison between recent decisions in Jersey and Guernsey

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It is now a little over 11 years since the UK Supreme Court (the Supreme Court) handed down its decision in the conjoined appeals in *Pitt v Holt* and *Futter v Futter*.^[1] This article looks at the current state of play in the law and practice in Guernsey and Jersey in the areas of 'mistake' and *Hastings-Bass* applications.

For the purposes of the use of the terms in this article (and by way of broad reminder), the doctrine of mistake has typically been applied by the courts to set aside transfers of property into trust made on a mistaken understanding as to the effect of the transfer. Whereas, the rule in *Hastings-Bass* gave the court discretion to set aside an exercise of a power if the trustee failed to take into account relevant considerations that it ought to have when exercising the power or if the trustee took into account considerations that should have been disregarded.

Applications that are brought to seek orders to set aside trusts or dispositions into trust, or the exercise of a power within a trust on the grounds of mistake, often have at their core a complaint that advice (typically tax advice) was not obtained or was wrong or incomplete. The doctrines are therefore incredibly helpful in circumstances where the only alternative avenue for relief would be for settlors or trustees to litigate against professional advisors or beneficiaries to sue their trustees. As recognised by the courts on many occasions when noting that as an alternative, settlors and/or beneficiaries are generally not at fault in such circumstances and yet face the risk of loss through avoidable 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 or by reason of mistake, seems unnecessary, undesirable and unjust.^[2]

The approach in the Crown Dependencies has been different, with Jersey opting for a legislated regime and Guernsey continuing to consider mistake and *Hastings-Bass* applications by reference to case law. An update on how those different approaches have been playing out in practice follows.

The position in Jersey: what can amount to a mistake?

The concept of mistake is well established in Jersey law. The original jurisdiction in Jersey law derived from earlier English and Welsh authority (some dating back to the 19th century) and by virtue of customary law.^[3] There were also relatively frequent applications seen before the Jersey court where trusts had been set aside on the grounds of mistake, pursuant to the provisions in art.11 of the *Trusts (Jersey) Law 1984 (as amended)* (the Jersey Law). However, in 2013, the *Trusts (Amendment No.6) (Jersey) Law 2013* (the Amendment) enshrined into statute the doctrine of mistake as a matter of trust law. The Amendment introduced a suite of provisions into the Jersey Law (at arts.47B to 47J) that addressed the then-potential for uncertainty caused by the growing divergence between Jersey and English case law in respect of the *Hastings-Bass* jurisdiction. As a result, Jersey has a separate statutory framework for the law of mistake (provided by arts.47E and 47G), within which the ability to

bring *Hastings-Bass* applications (provided by arts.47F and 47H) is preserved.

The test for mistake

The definition of a 'mistake' in the Jersey Law is broad and includes, but is not limited to, a mistake as to the effect of, any consequences of, or any of the advantages to be gained by, a transfer or other disposition of property to a trust, or the exercise of a power over (or in relation to) a trust or trust property.

When considering the court's jurisdiction to set aside a transfer of property onto a trust on the grounds of mistake, one of all of arts.11, 47E and 47G of the Jersey Law may be utilised, although the benefit of the new provisions is that they expressly provide for the ability to apply to set aside dispositions into trust as opposed to setting aside the entire trust. The latter can be the appropriate course where the creation of the trust has caused an unforeseen tax consequence; however, that is not always the case and later contributions of assets to a trust fund could themselves require setting aside (but not the entire structure).[\[4\]](#)

For all practical purposes, the statutory tests are identical to the customary law test and require a:

- mistake (of fact or law) by the settlor;
- finding that the settlor would not have entered into the transaction 'but for' the mistake; and
- finding that the mistake was of so serious a character as to render it unjust on the part of the donee to retain the property.

What constitutes a mistake?

An important point to note when ascertaining whether a mistake has been made is that it is not necessary for the court to determine precisely how the mistake arose. A unilateral, self-induced mistake may be grounds for relief just as much as an externally induced mistake or a shared mistake, provided it is serious and causative. The statutory provisions, like the equitable doctrine of mistake, do not distinguish between these two scenarios. The key issue is whether there was a false belief or assumption.[\[5\]](#)

Accordingly, it is not necessary for the court to ascribe blame for how the mistake arose, still less to determine whether the mistake arose from any breach of a duty of care and skill or a fiduciary duty. Article 47(4) of the Jersey Law expressly provides (in the context of what was a *Hastings-Bass* application) that:

'[i]t does not matter whether or not the ... [failure to take account of a relevant consideration or taking account of

irrelevant considerations] ... occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power’.

This is an important feature of Jersey's statutory provisions as there had long been a tension arising where trustees were required to effectively admit to being in breach of duty in order to be able to seek relief. Ultimately, however, the Jersey court will take a careful look at the facts and circumstances of an application when determining if the final limb of the test has been met, namely whether it is just to grant relief.

Those general points aside, the following principles have emerged from recent decisions of the Jersey courts, which demonstrate how the law is being applied in practice:

- A lack of advice taken and, arguably therefore, some degree of ignorance on the part of the settlor does not undermine the fact of the mistake that was made. This situation was considered in *In the matter of the K Trust*;[6] *Representation of A In the Matter of the G Trust*;[7] and *In the Matter of the G Trust*. [8] The circumstances were that settlors had transferred funds from UK-situs bank accounts to offshore trusts on the recommendation of their bankers but on the assumption that tax issues would necessarily have been taken into account or that, if advice were needed, the settlor would have been told. Orders were made, setting aside the trusts and/or transfers to the trusts where, as a consequence of the transfers, avoidable inheritance tax (IHT) liabilities were caused; that was notwithstanding that advice was not sought or was assumed to have been obtained but had not been.
- Where a settlor accepts advice that might have put them on notice that they should seek more detailed advice but ignores it, the court can still find it just to grant relief. In *In the Matter of the B Trust*, [9] the settlor had received incomplete advice from a trust company at the time of transferring funds to a trust, which had failed to address the impact of the settlement on the settlor including, specifically, the potential for IHT liabilities to arise as a result of what he was later advised to be his domicile status (namely that he had not obtained a domicile of choice outside the UK at the time he made the gifts). The Royal Court of Jersey (the Jersey Court) declared the transfers by the settlor to the trust to be voidable and of no effect (although, would not go so far as sought by the settlor, refusing to order the return of funds to the settlor's wife, which would have potentially assisted in improving the settlor's tax position).
- A party can be aware of a possible risk but if that party is not aware of the extent of the risk, a mistake may have been made. The position could be different if the party ran a deliberate risk of being wrong. In *Representation of Q re The R, S, T and U Trusts*, the applicant was the settlor of four Jersey-law-governed trusts. [10] It was submitted that those trusts had been established in 2009, based on advice from the trustees and counsel in respect of the settlor's domicile, which was argued at the time of the application to have been ‘seriously deficient’ in not advising, or

not properly advising, on the nature and level of risk associated with the settlor's claim to be domiciled in Hong Kong or the ramifications of that not being the case. The settlor contended that, in light of the advice received, he was mistaken for the purposes of the Jersey Law.

Specifically, the settlor did not recall being advised:

- that there was a 'real risk' that His Majesty's Revenue and Customs (HMRC) would argue he was UK-domiciled in 2009;
- of the monetary ramifications; and
- that there was any real risk that HMRC might argue he had never lost his UK domicile of origin.

The Jersey Court found that the settlor did not believe, and had not been advised, that there was a risk of HMRC declaring that he had never lost his UK domicile. The Jersey Court said that the first part of the test was met on this ground alone. Further, however, the Jersey Court held that the settlor had been advised that there was only a negligible risk that HMRC may declare his domicile had reverted to his UK domicile of origin, whereas in fact the risk was high. It was noted that there was no analysis in Jersey as to whether an operative mistake can exist, notwithstanding that the relevant person was aware of some risk.

The position in Guernsey

Unlike Jersey, Guernsey does not have legislation providing rules and principles that apply to *Hastings-Bass* and/or mistakes claims. This is not to say such applications cannot be brought without any basis. In Guernsey, the Guernsey Court of Appeal (the Guernsey Court) has explained that Guernsey law should follow the revised approach to the *Hastings-Bass* jurisdiction as set out in *Pitt v Holt*.

***Hastings-Bass* jurisdiction**

Dealing first with the *Hastings-Bass* jurisdiction, the leading authority in Guernsey on this subject is the Guernsey Court case of *M v St Anne's Trustees Limited*.[\[11\]](#)

The facts of *St Anne's* were broadly as follows. M was the beneficiary of a retirement scheme from which he needed to borrow money to fund his making of a payment to his ex-wife under a divorce settlement. Advice was taken by M from his personal tax advisor regarding making repayment of the loan (which had to be done before M could receive any pension payments from the scheme), by transferring the shares in two companies each holding investment properties into the scheme. The advice he received was to the effect that he could do so without any adverse tax consequences. St Anne's Trustees, having neither taken their own tax advice nor enquired whether M had obtained his own, put the transaction into effect, which resulted in a potential UK tax liability for M of GBP1.8 million. At first instance, Lieutenant Bailiff Hazel Marshall KC refused to exercise her discretion to set

aside the transfers of the shares in the property holding companies.

The Guernsey Court, while not expressly deciding the point, given that neither party argued against the first instance finding on it, approached the appeal on the basis that Guernsey law would follow the revised approach to the *Hastings-Bass* jurisdiction, as set out in *Pitt v Holt*.

The important aspect of the Guernsey Court's decision, however, is its departure from the strict requirement of Pitt v Holt regarding the need for a finding that there has been breach of fiduciary duty for a Hastings-Bass application to be able to be brought.

Rather, in Guernsey law, a finding that a breach of duty (such as in this case, a breach of the duty of adequate deliberation), whether fiduciary or not, will be enough provided it is of sufficient seriousness for the Guernsey Court to exercise its discretion.

Although the Guernsey Court considered that the scope of the rule in *Hastings-Bass* applies in Guernsey to be of 'like effect' as in England, there remains scope for further development of the rule by the Guernsey Court. The Guernsey Court paid tribute to the first instance decision; however,^[12] there were a number of aspects of the judgment that were held to be wrong and were overturned. Some of these were as follows.^[13]

- It is necessary for there to be a breach of duty but not one that has a causal connection to damage to any beneficiary; the court will have jurisdiction to grant relief as a matter of discretion but, in the exercise of that discretion, the issue of loss or prejudice to the trust or its beneficiaries will be a material factor.
- The breach of the duty of adequate deliberation by the trustees in this case was sufficiently serious as to amount to a breach of fiduciary duty.
- Upon a finding of breach of duty, the decision in question is voidable and, accordingly, the court then has a discretion to exercise. However, it is not correct that the discretion can only be exercised, and the transaction in question set aside, where it is unconscionable not to do so.
- There are no additional hurdles for the court to exercise its discretion: '*...the discretion should be exercised in favour of avoidance when the court feels it just to do so. There is no requirement for an "extreme" case*'.
- The fact that, where there is a breach of trust, a beneficiary may be in a better position than an ordinary individual is not a reason for exercising the discretion against setting aside a transaction.
- Trustees are not under a duty to be right on every occasion. Whether there has been a breach of duty sufficient to engage the jurisdiction is dependent on whether it is of sufficient gravity, as

once the threshold of seriousness is reached, the jurisdiction to grant relief arises. The seriousness of the breach is not then revisited by the court when deciding whether to exercise its discretion.

- The availability of a claim against professional advisors could potentially be of relevance when considering the exercise of discretion, although the cases will be very rare and the weight given to that factor should be small.

Having found that the lower court had erred in principle, the Guernsey Court considered that it was open to exercising its own discretion, which it did in favour of avoiding the transaction. The Guernsey Court stated that it was not possible to articulate an 'overriding test for the exercise of discretion', as every case will be fact-specific and it 'must be a decision for the court as to the outcome which it considers fair and reasonable', noting the likelihood that, absent relief, the beneficiaries will be left having to bring legal actions against the trustees and/or professional advisors.

Mistake

As regards the doctrine of mistake (generally), the Guernsey Court tends to apply *Pitt v Holt*. By way of reminder, in *Pitt v Holt*, the Supreme Court explained that a 'mistake must be distinguished from mere ignorance or inadvertence, and also from what scholars in the field of unjust enrichment refer to as 'misprediction' and that 'forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake'. Lord Walker, when assessing what type of mistake will trigger the court jurisdiction and exercise of discretion, concluded that:

'the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction'.

Once a mistake has been established, the gravity of the causative mistake also needs to be assessed in terms of injustice or the 'unconscionableness' of leaving the transaction unwound, something that should be considered and assessed objectively.

In Guernsey, the doctrine of mistake continues to provide parties with an effective mechanism by which transactions may be set aside and the inadvertent consequences of that transaction rectified. However, parties must keep in mind that the position is different in Guernsey to other offshore jurisdictions, in that Guernsey appears to be fully in line with the approach in England. According to Lord Walker:

'[the] gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition'.

The injustice caused by leaving the transaction as is must also be considered objectively, 'but with an intense focus on the facts of a particular case'.

With the above in mind, it appears that before the Guernsey Court can (and/or will) set aside a transaction on the ground of mistake, it will need to consider, among other things:

- the seriousness of the mistake and whether it relates to some fact or law central to the transaction;
- the evidence and determine (objectively) whether it will be:
 - unconscionable to leave the transaction as is; and
 - in the interest of justice to remedy the mistake and rectify the consequences flowing from the mistake.

Limitations as to the relief granted: including consequential orders

Jersey

The Jersey Court considered the nature and extent of the relief it may grant in *BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others*,^[14] noting that art.47E provides a 'flexible framework'. The decision was summarised as follows in *Representation of L re M Trust*,^[15] at para.18:

'In particular, the Court of Appeal stated at paragraphs 93 to 95 that taking the natural meaning of the words which appear in Article 47E the court may follow one of three courses:

- (i) It may declare the transfer in question to be voided and of no effect from the time it took place;*
- (ii) It may declare the transfer to be voided from the time of its having taken place but nonetheless be deemed to have had such effect as the Court may determine; or*
- (iii) It may declare the transfer to be voided from a date subsequent to the time of its having taken place.'*

Each of arts.47E-47H of the Jersey Law provide that, upon making a declaration that a transfer or exercise of power is voidable, the court can declare the transfer or exercise 'has such effect as the court may determine'. Further, under art.47I(3) of the Jersey Law, the court has discretion to make such orders as it sees fit that are consequential upon the making of a declaration under arts.47E-47H, with the express limitation only being that an order cannot be made that would prejudice a bona fide purchaser of trust property without notice of the relevant matters. Those provisions have provided scope to applicants to seek broader orders than ones merely setting aside the transfer or exercise of power.

The following recent cases provide a helpful overview as to the boundaries within which the Jersey Court has, to date, considered itself bound when faced with applications for broader, creative or else consequential orders.

B Trust

In which the Jersey Court was prepared to declare that certain transfers into trust could be voided on the ground of mistake.[\[16\]](#) However, as merely voiding the transfers would mean that the assets would fall back into the settlor's estate, which would not be as tax efficient as he had intended, the settlor instead sought a declaration that the transfers should take effect as if they had been gifts to his wife. The Jersey Court declined to do so, noting as follows:

'[i]t was one thing to make orders as to the validity of transactions where those orders might have tax consequences, and it was quite another thing to select for one of the parties which order to make so as to achieve the best taxation outcome. That was no part of the business of the court. The court would not take a positive step to improve the taxation outcome for the representor as though that were the objective itself. It might be the representor's objective but it was not the objective of the court.'

Grundy Trust[\[17\]](#)

In this case, the former trustee had wholly excluded the settlor and his wife from the trust so that they could not benefit under the trust or be added back as beneficiaries (for tax reasons). The former trustee had not consulted the beneficiaries fully on this exercise of power and it subsequently came to light that less aggressive options could have been taken.

The Jersey Court was asked to consider exercising its powers to declare that the exclusion would have effect as if the former trustee had at that time exercised its powers in a more limited way, which would potentially have substantial IHT advantages, rather than simply setting aside the exclusion. The Jersey Court found that the former trustee had intended to exclude the wife and did so. However, it was found that that decision was flawed and, had the trustee acted in accordance with its duty, there could be no doubt that it would have only excluded the wife during the settlor's lifetime and not beyond, which the Court considered was the obvious course for the trustee to have taken. The Jersey Court found that to make an order having that effect would not be to 'substitute a different transaction for that which was undertaken', which is invariably an outcome the Jersey Court will not entertain, but fell 'squarely within the court's power to declare that the former trustee's exercise of its fiduciary power shall have such effect as the court may determine'.

Hawksford Trustees Limited v P[\[18\]](#)

This case concerned IHT consequences arising from a transaction structured, *inter alia*, by way of sale of shareholdings, as opposed to the making of gifts. The trustee sought to set aside two parts of a composite transaction rather than the whole transaction and, indeed, the advice received was that to set aside the whole transaction would serve to further increase the IHT liabilities of the trust.

The Jersey Court held that it did not have power under Jersey Law to reform a transfer, disposition or exercise so that it becomes a new and different one to the original transaction, which has been declared voidable. To set aside only part of the transaction while leaving other crucial aspects (the effect of which would be to declare that the transaction could take effect as a gift and not a sale), went beyond partial avoidance of the transaction taken as a whole: it was to recharacterise it into a different transaction entirely.

Representation of Crestbridge Trustees Limited re Avocado Trust[\[19\]](#)

In this case, a trustee had relied on erroneous advice regarding UK stamp duty and land tax that suggested that, by procuring an underlying company to hold assets in a nominee capacity (as part of a staged plan concerning the restructuring of a property holding structure), the trustee would not incur a stamp duty liability. Having found the test for mistake to have been met, the Jersey Court was willing to declare the exercise of powers by the trustee, by which it procured the company to hold trust property as nominee, to be void and of no effect. Further, it granted the application to make consequential orders setting aside as void and of no effect the nominee agreement between the company and the trustee and relevant declaration of bare trust by the company.

Representation of Altum Trustees Ltd (formerly LGL Trustees Ltd) and VG Trustees Ltd re Andha Trust[\[20\]](#)

This case concerned an application based on mistake and *Hastings-Bass* principles arising out of circumstances involving the potential tainting of the trust through value being added by a deemed-domicile settlor. Attempts to avoid such tainting through a loan agreement with the trustees of another trust failed, due to non-compliance with the terms of the loan agreement in respect of the timing of interest payments. The Jersey Court found that, although questionable (noting that there is

no authority regarding the reasonableness of a mistake for the first limb of the legal test for mistake, under art.47G of the Jersey Law), there was no actionable mistake for the purposes of the Jersey Law because the errors were, in fact, administrative in the trustee failing to comply with the terms of the agreement. On the alternative application for the setting aside of the exercise of the power (under art.47H), the Court also declined to grant relief as it did not consider the trustees to have taken account of irrelevant considerations in entering the loan agreement (the advice having been clear) or that the trustee would have entered the loan agreement on different terms.

The application had sought a declaration that included provision that the Jersey Court direct that the loan agreement should have effect *ab initio*, as if it had been executed on terms that were identical, save for the provision for the timing of interest payments. The Jersey Court reviewed the decisions in *Hawksford* and *Grundy*, particularly with regard to the ability of the Jersey Court to partially avoid the exercise of a power but not to bring about the exercise of a different power. The Jersey Court also confirmed that consequential orders may extend to the making of orders affecting a contract with a third party (following *Crestbridge*) and had the test for mistake been made out it would have granted relief.

In the matter of the Representation of RBC Trustees (Jersey) Limited[\[21\]](#)

This case concerned an application by the trustee seeking an order to set aside six distributions made from the trust to one beneficiary.[\[22\]](#) The Jersey Court held that it was quite clear that there was a mistake on the part of the trustee in making the distributions and that the three limbs of the test were clearly satisfied. However, the novel part of the application was in relation to the consequential orders the Court was invited to make as a result of its declaration. They were as follows:

‘a. the Representor can follow it into the hands of any such person unless that person is a bona fide purchaser for value without notice; and

b. the Representor can trace into the replacement asset the value applied in acquiring it and assert a lien over that asset for that value.

If and so far as any Relevant Distribution is not recovered in accordance with paragraph 2 above B is liable to pay its value to the Representor.'

Although the Jersey Court had no doubt that it had the power to grant the declaratory relief sought, it did not do so for the following reasons:

- The relief in question might have prejudiced the interests of the beneficiaries. Although the beneficiaries had written letters in support of the representation, the representation itself did not seek the orders in relation to following and tracing but rather just a general declaratory order that the distributions be set aside and of no effect.
- In this regard, the potential for the trustees to follow or trace the distributions into the hands of recipients was only limited to the extent that the recipients were bona fide purchasers for value without notice. The Jersey Court noted that it was possible other defences would be available to the beneficiaries, such as change of position and, without the beneficiaries convened, the Jersey Court had not been addressed in this regard.
- The order sought was not a 'usual' one, which would typically provide that the property subject to the transfer that was set aside would be held on bare trust by the recipient for the trustee. There were matters still to be considered between the trustee and the respective beneficiaries, which the Jersey Court did not consider should be 'pre-judged' by the making of consequential orders.

Guernsey

Although the Guernsey Court in the *St Anne's* decision made clear that the rules of *Hastings-Bass* applied in Guernsey, as described above, it noted some limitations in relation thereto. These limitations include the lack of any need to demonstrate a direct causal nexus between the underlying breach and damage to the trust property or to the interests of a beneficiary of the trust and the lack of a principle of unconscionability.

Notwithstanding the above, the court has a discretion to make such orders as it sees fit that are consequential upon the grant of an order. The sorts of cases that have been dealt with by the courts in Guernsey include those where there:

- were transactions of shares/assets into trust tax planning structures, which, contrary to the intention to secure tax advantages, actually had the effect of causing serious tax implications; and
- has been a disposal of assets into a trust structure when the settlor did not fully understand the effect and consequences of the disposition.

- the applicant must establish that there had been a relevant breach of duty by the trustee; and

It is not obvious in Guernsey how far the courts will go in setting aside transactions on the ground of mistake, whether the court would take into account the interests of third parties and whether the Court would be willing to try and sever the transaction to avoid fully setting aside the transaction (i.e., the Court would re-write the transaction).

In this regard, the following cases provide a helpful overview as to the boundaries of the Court's powers to grant such consequential relief.

HM Revenue and Customs v Gresh and RBC Trust Company (Guernsey) Limited[\[23\]](#)

In this case, the Guernsey Court permitted HMRC to join the *Hastings-Bass* application on the basis that any determination in relation to the transaction would affect whether the distribution was liable to UK income tax. The Guernsey Court found that HMRC had a direct interest in the validity of the distribution. On this basis, it was determined that it was just and convenient to join HMRC as a party to the *Hastings-Bass* application, as HMRC was entitled not to accept a Guernsey court's ruling unless it was made a party.

M v St. Anne's Trustees Limited[\[24\]](#)

The Guernsey Court confirmed that where the court's assistance is sought to avoid an act of a trustee that a beneficiary wished to have set aside, a two-stage approach should be followed:

- the applicant must establish that there had been a relevant breach of duty by the trustee; and
- the court must decide whether to set aside the act or disposition in question.

There was no rule or presumption that relief would always be granted if the first qualifying condition above were met.

It was also confirmed that the basic policy of the *Hastings-Bass* doctrine was to protect beneficiaries from aberrant conduct by trustees. It was intended to be used in extreme cases. In order to decide whether to exercise its discretion to set aside an act, disposition or transaction, the appropriate test for the court to apply when having regard to all the facts and circumstances, was whether the court considered it unconscionable (i.e., unjust or unfair) that the act, disposition or transaction should be

left to stand.

Conclusion

The introduction of the statutory regime in Jersey has evidently resulted in there being more applications, the majority of which have, to date, been successful in terms of seeking to set aside transfers, dispositions or the exercise of powers applying the different tests provided under the Jersey Law. The lack of any need to demonstrate breach coupled with the breadth of circumstances (in terms of effects and consequences) provides a broad basis for parties to work with in this area. Moreover, the courts have demonstrated a willingness to approach the discretion granted in a constructive manner (for example, to cater for partial avoidance), but there is a clear limit: the jurisdiction cannot be used to rewrite transactions or declare the exercise of a different power.

The approach in Guernsey is different to that in Jersey, with the Guernsey position following that of England. Although mistake continues to provide parties with a mechanism by which transactions, decisions or dispositions can be set aside, the Guernsey Court will necessarily examine the factual matrix carefully to determine the impact, serious and consequences of any transaction. The requirements as confirmed in the *St Anne's* decision will have to be established before the Guernsey Court exercises its discretion to avoid transactions and/or exercises of powers. The requirement that a breach of some kind be shown to have been committed remains a key differentiator.

Naturally, trustees and settlors alike will not wish to have to rely on the mistake / *Hastings-Bass* regimes, so the focus should remain on ensuring proper advice is taken (as well as seeking a second opinion, if in doubt) and for trustees to take care they have properly deliberated, so identifying what is relevant and what is irrelevant. However, if there is a need to seek the assistance of the court, the developing jurisprudence in the Guernsey and Jersey Courts, although different, does still offer hope that unforeseen consequences and effects (particularly as regards tax) can be reversed. If resort is to be had to the statutory provisions in Jersey or the customary and common law in Guernsey, it is clear that in either jurisdiction, the courts will require:

- a proper analysis of the factual position;
- that parties do not delay in bringing their applications; and
- that there is a realistic approach taken to the relief sought, at least for Jersey.

Although the courts can set aside history, they will not accept any attempts to re-write it.

ABSTRACT

- Although it has been a number of years since the law in England and Wales relating to *Hastings-Bass* and mistake was fundamentally reviewed by the UK Supreme Court in *Pitt v Holt*, Jersey has continued to see a regular flow of applications before its courts as a result of the introduction of statutory provisions in 2013 addressing both concepts.
- By contrast, neighbouring Guernsey did not legislate in this area and has followed the English and Welsh law approach. This article looks at recent decisions in this area from the Guernsey and Jersey courts to demonstrate the differences.
- In particular, in the case of Jersey, recent decisions have addressed the extent to which the courts will apply certain statutory provisions to make consequential orders or be more creative in the terms of declarations that are made to set aside exercises of fiduciaries' powers or transfers of assets to trusts (for example, to only partially set them aside). Applications for such orders or more expansive declarations does, however, inevitably come up against the clearly stated unwillingness of the court to rewrite transactions as opposed merely to setting them aside.

[\[1\]](#) [2013] UKSC 2

[\[2\]](#) For example, see the Jersey decisions in *In the Matter of the Onorati Settlement* [2013] JLR 324 at [44]; *In the matter of the E Settlement* [2018] JRC 143 at [21(iii)-22]; *A and B v C, D and E* [2019] JRC 111 at [23-28]

[\[3\]](#) For the remainder of this article, instances of 'England and Wales' and 'English and Welsh' will be abbreviated to 'England' and 'English', respectively.

[\[4\]](#) See, for example, *Representation of G and in the matter of the D Trust E Trust and the F Trust* [2016] JRC 166C

[\[5\]](#) See *Pitt v Holt* [2013] 2 AC 108 at [105] and [114] (UKSC)

[\[6\]](#) [2017] JRC 177

[\[7\]](#) [2018] JRC 159

[\[8\]](#) [2019] (1) JLR 175

[\[9\]](#) [2019] JRC 035

[\[10\]](#) [2021] JRC 166

[\[11\]](#) [2018] GLR 234

[\[12\]](#) At [22]

[\[13\]](#) At [52-53], [64], [70], [74-75]

[\[14\]](#) [2018] (2) JLR 175

[\[15\]](#) [2020] JRC 237

[\[16\]](#) [2019] JRC 035

[\[17\]](#) [2020] (1) JLR 153

[\[18\]](#) [2021] (2) JLR 20

[\[19\]](#) [2021] JRC 171

[\[20\]](#) [2023] JRC 080

[21] [2024] JRC 107

[\[22\]](#) [2024] JRC 107

[\[23\]](#) [2009] 140 GLR 239

[\[24\]](#) [2018] GLR 1

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