

## CASE NOTE

### *PITT V HOLT – FUTTER V FUTTER*

#### THE RULE IN *HASTINGS-BASS* & MISTAKE

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#### Introduction

It is not infrequently that the question is asked: can something trustees have done be undone? Until recently there has been confusion as to the applicable legal principles. The Court of Appeal in *Pitt v Holt* [2011] STC 809 has clarified the position, and the following is a summary of the Court's decision.

#### Facts

The case involved two related appeals, and in outline the facts were as follows.

In *Pitt v Holt* an individual, Mr. Pitt, was injured in a road traffic accident in 1990. His wife was appointed as his receiver by the Court of Protection. A personal injury claim was compromised by the payment of a lump sum and an annuity. With the benefit of professional advice, Mrs. Pitt decided to transfer both into a discretionary trust and this was done in 1994. In 2003 it was realised that the trust attracted IHT charges: the disadvantages could have been avoided had a s.89 IHTA 1984 disabled person's trust been used. In 2007 Mr. Pitt died. His personal representatives contended that the settlement was void, or alternatively voidable, and should be set aside. Reliance was placed on the Rule in *Hastings-Bass* and alternatively on the Court's equitable jurisdiction to set aside voluntary dispositions on the grounds of mistake.

In *Futter v Futter* assets were transferred from two trusts to beneficiaries. The trusts were offshore and had stockpiled capital gains. Inaccurate professional advice was obtained in relation to whether the trust's gains could be set against the losses of the beneficiaries. The trustees sought declarations that the transfers were void, or that they were voidable, and should be set aside. Reliance was placed on the Rule in *Hastings-Bass*.

#### Issue

The Court of Appeal considered in detail the scope of (a) the Rule in *Hastings-Bass*, and (b) the equitable jurisdiction to set aside transactions on the grounds of mistake. The decision runs to 239 paragraphs. The key principles identified by the Court are summarised below.

#### The Rule in *Hastings-Bass*

The rule is typically understood to mean the following. When trustees act under a discretion, in circumstances in which they are free to decide whether or not to exercise the discretion, and the effect of the exercise of the discretion is different from that which they intended, a court will interfere with their action if it is clear that they would not have acted as they did, had they taken into account considerations which they ought to and not taken into account irrelevant considerations.

The Court of Appeal held that it is necessary to distinguish between two categories of case.

The first concerns cases where the issue is whether the purported exercise of a discretionary power was within the scope of the power. If not then the exercise of the power is void and *vice*

*versa.* The following are examples of cases falling within this category:

1. There may be a procedural defect, e.g. use of the wrong type of document or failure to get a necessary consent.
2. There may be a substantive defect, e.g. an appointment to someone who is not within the class of objects.
3. Equally there may be a defect under the general law, e.g. an advancement might be invalid under the rule against perpetuities. In the latter case the impact will depend on the extent of the invalidity. If what remains of the advancement after the impact of the perpetuities rule cannot reasonably be regarded as being for the benefit of the advancee then it was not a valid advancement and the exercise of the power is void. By contrast, if it can be so regarded the exercise of the power was effective (to the extent permissible under the perpetuities rule).

The second category relates to cases where the exercise of a discretionary power is within the scope of the relevant power, but the trustees have breached their duties in respect of that exercise. In such a case the exercise (unless it is a fraud on the power) will not be void but simply voidable at the instance of a beneficiary who is adversely affected. In relation to this category various points were made by the Court of Appeal:

1. Trustees have various fiduciary duties including a duty to take into account all relevant matters and not to take into account irrelevant matters: therefore acts done in breach of this duty will be voidable.
2. In relation to the matters which trustees ought to take into account, it is not possible to lay down any clear rule – it will depend on the circumstances. However, there will be few instances when it would not be relevant for trustees of a private discretionary trust, with assets, trustees or beneficiaries in England or Wales, not to address tax consequences.
3. Where tax matters are relevant it is likely to be the duty of trustees, under their duty of skill and care, to take proper advice.
4. However if the trustees seek advice from apparently competent advisers, and follow that advice, then, in the absence of any other basis for challenge, the trustees are not in breach of their fiduciary duty to take into account relevant matters if that failure occurs because the advice was wrong: therefore in such circumstances the act will not be voidable.
5. A practical consequence is that if in the future it is desired to challenge an exercise of discretion by trustees on this basis, it will typically be necessary for beneficiaries to allege and prove a breach of fiduciary duties by the trustees. It will only rarely be appropriate for trustees to take the initiative: it might be necessary if, for example, the trustees need directions from the Court because a beneficiary alleges breach of duty but does not commence proceedings. Proceedings by a beneficiary will generally need to be brought under Part 7 of the Civil Procedure Rules since there is likely to be a substantial dispute of fact, and statements of case will be needed to set out the allegation of breach of trust and to answer that case.

As such, the outcome of the appeals was as follows.

In relation to *Pitt v Holt*, what Mrs. Pitt did was within the terms of the powers conferred on her by the Court of Protection, and therefore it was not void. She owed her husband a fiduciary duty in respect of her exercise of the power conferred on her by the Court of Protection. However,

having taken advice from a proper source as to the advantages and disadvantages of the various courses open to her, she was not in breach of fiduciary duty even though, because of the inadequacy of the advice given, she did not take into account the liability to IHT that would arise. Accordingly what she did was not voidable as having been done in breach of fiduciary duty.

In relation to *Futter v Futter* the trustees' acts were within their powers and therefore were not void. They took tax advice from appropriate solicitors, and acted in accordance with that advice. Therefore they did not act in breach of their duties even though, because the advice was wrong, they were mistaken as to the tax consequences. Therefore their acts were not voidable.

## **Mistake**

The Court stated that 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. The jurisdiction now in point was of the same type, and must not be confused with common law remedies for mistake.

It was held that the following requirements must be met for equity to set aside a voluntary disposition on the grounds of mistake. First, (leaving aside cases where there is an additional vitiating factor, such as misrepresentation or concealment in relation to the transaction) there must be a mistake by the donor, at the time of the disposition, as to the legal effect of the transaction or as to an existing fact which was basic to the transaction. Secondly, the mistake must be sufficiently serious that it would be unjust for the donee to retain the property.

In the first appeal, i.e. *Pitt v Holt*, mistake was relied on as an alternative ground. The Court held that the legal effects in this case were the creation of trusts, on particular terms, in relation to the lump sum and the annuity. For these purposes the tax liabilities were fiscal consequences not the legal effects of the transactions. Therefore the equitable jurisdiction did not apply.

## **Concluding Remarks**

The scope of the Rule in *Hastings-Bass* may be narrower than previously understood by some. In particular, the effect of relying on professional advice has been clarified by the Court of Appeal. The detail provided by the Court in relation to the applicable legal principles, in relation to both the Rule in *Hastings-Bass* and the equitable jurisdiction to set aside voluntary dispositions on the grounds of mistake, is to be welcomed in the interests of clarity.