

Remedies for Mistake under Jersey law

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Remedies for Mistake under Jersey law and the recent Royal Court decision *In the matter of the S Trust and the T Trust*

As a matter of Jersey law, the doctrine of mistake operates to permit a settlor who settles property on trust to apply to Court to set aside or unwind transactions, where (i) there was a mistake on the part of the settlor and (ii) the settlor would not have entered into the transaction "but for" such mistake and (iii) the mistake was of so serious a character as to render it unjust on the part of the donee to retain (as confirmed *In The matter of the Lochmore Trust [2010] JRC 068*). The doctrine also applies in respect of transfers, dispositions and appointments by a trustee.

Article 11 of the Trusts (Jersey) Law 1984 (the Law) provides that a trust is invalid to the extent that the Court declares that it was established, inter alia, by mistake. In addition, Trusts (Amendment No. 6) (Jersey) Law 2013 (**Amendment No. 6**) (which came into effect on 25 October 2013) introduced four statutory remedies under the Law to render a transfer or other disposition relating to trust property or exercise of power voidable on the grounds of mistake or under the "so called" Hastings-Bass principle. These remedies enable the Court to intervene when a settlor or trustee has entered into a transaction either by serious mistake (whether of law or fact) or having failed to take into account the relevant considerations (or having taken into account irrelevant considerations).

Crucially Amendment No 6 confirmed that fault on the part of the trustee is not a pre-requisite to invoke the remedy of Hastings-Bass as the statutory provisions codified the Jersey position prior to Amendment No. 6 and reflect the tests for mistake and Hastings-Bass as set out in decisions of the Royal Court prior to the decision of the Supreme Court in *Pitt v Holt and Futter v Futter [2013] UKSC*. This marks a divergence from the English law position but also provides certainty for settlors, beneficiaries and trustees and avoids the prospect of instigating litigation for professional negligence against advisors.

Amendment No. 6 only applies to Jersey trusts and the decision of whether to grant relief is at the discretion of the Royal Court. Helpfully, Amendment No. 6 permits the Royal Court to apply the new powers with retrospective effect.

The Royal Court recently considered both Article 11 and one of the new statutory remedies under Article 47E of the Law *In the matter of the S Trust and in the matter of the T Trust* [2015] JRC259. This concerned an application to the Court by the settlors of the S Trust and the settlors of the T Trust that transfers of money made them into the S Trust and the T Trust respectively be set aside on the grounds of mistake as to the tax consequences of the transfers. HMRC was notified of the representation and made written representations. The Trusts were established with the purpose of minimising inheritance tax and on the basis of advice received by Kevin Neal Associates Limited (KNAL). However, far from being an effective scheme for avoiding inheritance tax liabilities, the scheme proposed by KNAL was a fiscal disaster giving rise to substantial tax charges.

The Court considered that whether looking at the matter under Article 11 or under Article 47E of the Law, it does not matter whether the mistake was of fact, law, as to the effect or as to the consequences and that a mistake as to the tax consequences of a trust or a transfer to a trust is a mistake for these purposes.

Whilst HMRC sought to rely on certain passages in *Pitt v Holt* in order to persuade the Court not to set aside the transfers into trust, the Court noted that the Jersey courts were not bound by the Supreme Court and that the Jersey Court of Appeal and the Privy Council could be expected to have regard to the established Jersey line of authority and the Island's separate position.

Notwithstanding that the Court expressed its distaste at coming to the rescue of persons who have sought to avoid foreign tax, it nonetheless determined to exercise its discretion to set aside the transfers. The Court commented that the balance of equity was tipped “*by a small margin*” by the stress of litigation endured by the first and second representors and, in particular, the emotional stress that would be experienced by the representors if the orders were not made and the effect of such stress upon the children of the representors.

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Meet the Author



[Josephine Howe](#)

Partner

[Jersey](#)

E: josephine.howe@ogier.com

T: [+44 1534 514201](tel:+441534514201)

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