DEALING WITH MISTAKES OF TRUSTEES OR SETTLORS: THE OUTLOOK FROM THE OFFSHORE BENCH

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That the mistakes of trustees or settlors could be a proper subject for the intervention of the court has never been doubted and, as a general proposition of principle, still remains intact following the Supreme Court's decision in ***Futter v Pitt***[1] .

Indeed, one might think that the jurisdiction has been simplied and made more accessible, by the Supreme Court's determination that the "*true requirement for rescission on the ground of mistake is simply for there to be a causative mistake of sufficient gravity. 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. Consequencies (including tax consequencies) are relevant to the gravity of a mistake.*"[2] And further: "*a mistake must be distinguished from mere ignorance, inadvertence, and misprediction. 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*"[3].

I will return to consider the implications of this for future cases in the Cayman jurisdiction.

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[1] ***Futter and Another (Appellants) v. The Commissioners for Her Majesty's Revenue and Customs (Respondent)***; ***Pitt and Another (Appellants) v. The Commissioners for Her Majesty's Revenue and Customs (Respondent) [2013] UKSC 26***. (conjoined

[2] Per Lord Walker, at [122] and [132], respectively.

[3] At [104] and [105].

Much more controversial has been the response to the Supreme Court's restriction of the ambit of the different rule, the so-called rule in ***Hastings-Bass***.

In venturing to offer a response from any judicial perspective - let alone the perspective of an "offshore" jurist which is necessarily somewhat removed from the onshore socio-political context in which ***Futter and Pitt*** is decided – one is well advised to proceed with caution. The subject of judicial control of the exercise of fiduciary powers is a complex and at times even recondite area of the law. As Lord Walker himself prefaced his judgment given on behalf of the Supreme Court, "*these appeals raise important and difficult issues in the field of equity and trusts law*".

I proceed on the basis that although not directly binding on the Cayman Courts, the decision of ***Futter and Pitt*** will be of the most highly persuasive value. It would also be short-sighted to overlook the likelihood of the decision influencing the outcome of a final appeal from the Cayman Islands before the Privy Council as constituted by the same judges!

In this brief response, I think my first obligation therefore is to arrive at a sound understanding of the Supreme Court's decision and from there to consider its likely impact upon the Cayman jurisprudence in this difficult area of the law. This too, on the basis of the understanding, that no conclusive views can be expressed – few things can be more embarrassing for a judge than to have his public utterances come back to haunt him!

As a starting point it is important to remember that the existence of the court's discretionary judgment over trusts and trustees is as well established as the trust concept itself. Tracing the jurisdiction back at

least to the 17th Century, Lord Wilberforce, in M***cPhail v. Doulton***[4] cited the case of ***Moseley v Moseley***[5] as an early example "*from the time of equity's architect, where the court assumed power (if the executors did not act) to nominate (as beneficiary) from the sons of a named person as it should think fit and as most worthy and hopeful, the testator's intention being that the estate should not be divided (among different beneficiaries)*".

And Lord Eldon's statement declared more than 200 years ago in 1805 in ***Morice v. Bishop of Durham*** [6] still expresses authoritatively the nature of the overarching *supervisory role of the court :*

> *"As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that is can be under that control; so that the administration of it can be renewed by the court"*[7]

As it is essential that a trust must be enforceable before the courts, it is not surprising that there have been innumerable applications to the courts for orders for enforcement and for declarations as to construction of provisions.

But the framework for this practice has developed with the principle also firmly established that the courts will not interfere with the exercise of discretion vested in the trustee once it is exercised in good faith. Barring circumstances where the trustee surrenders the exercise of the discretion to the court[8], the trustee must exercise the discretion

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[4] ***McPhail and Others v. Doulton and Others [1971] A.C 424, at 451. C***.

[5] (1673) Fin. 53.

[6] (1805) 10 Ves Jun 522, 539, 32 ER 947, 954

[7] ***Morice v Bishop*** was cited with approval in all the judgments of their Lordships in McPhail v. Doulton (above).

[8] . For example, as contemplated by the ***Privy Council in Marley v. Mutual Sec. Bank and Trust Co Ltd [1991] 3 All E.R. 198, 201*** and considered by the Grand Court of the Cayman Islands in ***AL-Ibraheem v. Bank of Butterfield 2000 CILR 513*** and In ***Re Q Trusts 2001 CILR 481***

himself and the court will restrain its role to ensuring only that the trustee does fulfill his duties by the due exercise of the discretion.

The reason for this is plainly that the fiduciary obligations of the trustee are just as fundamental to the nature of the trust as is the supervisory role of the court.

Thus, the trustee will normally be required to and the court will normally allow the trustee to exercise the powers vested in him as their Lordships in ***McPhail v. Doulton*** declared:

> *"As to powers, although the trustees may and normally will, be under a fiduciary duty to consider whether or in what way they should exercise their power, the court will not normally compel its exercise. It will intervene if the trustees exceed their power, and possibly if they are proved to have exercised it capriciously. But, in the case of a trust power,[9] if the trustees do not exercise it, the court will do so in the manner best calculated to give effect to the settlor's or testator's intentions"*[10]

The importance of the separate and independent role of the trustee had long since been recognised and emphasised by the House of Lords in the 1877 case of ***Gisbourne v. Gisbourne***[11]. In that case, where the will trust gave the trustees an absolute discretion and "uncontrollable authority" over the application of the trust fund, it was held that the trustees were entitled to exercise an absolute discretion in the application of the fund as provided by the will and that, with their discretion and authority thus recognised by the court,

[9] There is no need to distinguish, for present purposes, a mere power from a trust power, the difficult issue that was central to the debate in the case.
[10] As taken from the headnote, [1971] A.C 424
[11] [1876-77] 2 A.C 300

it was inappropriate for the court nonetheless to declare , as proposed by the Court of Appeal below, that it approved of the manner in which the trustees proposed to exercise their discretion.

From this background, the natural tension between the essential supervisory role of the court on the one hand and the independent fiduciary role of the trustee on the other, will be readily apparent. It inevitably has led to need for the demarcation of boundaries even while the courts have been called upon over the ages to determine the validity of the decisions and actions (or inactions) of trustees.

The situations under which the courts have been called upon so to adjudicate are of course, far too numerous to be identified here. We have however, the benefit of the now famous four categories of such situations identified by Hart J. in ***Public Trustee v. Cooper***[12] and I think, as a matter of convenient reference, the kinds of cases with which we are concerned in this discussion would be those falling within Hart J.'s categories one and two:

> "The first category is where the issue is whether some proposed action is within the trustees' powers. That is ultimately a question of construction of the trust instruments or a statute or both… it is not always easy to distinguish that situation from the second situation that I am coming to…
>
> The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the

[12] [2001] 1 WLR 901, citing an earlier unreported judgment of Robert Walker J (as he then was) given in chambers.

> decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers…
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> The third category is a surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason; the most obvious good reason being either that the trustees are deadlocked (but honestly deadlocked, so that the question cannot be resolved by removing one trustee rather than another) or because the trustees are disabled as a result of conflict of interest….
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> The fourth category is where the trustees have actually taken action, and that action is attacked - [I would add "or is seen as capable of being attacked"] – as being outside their powers or an improper exercise of their powers…"

Many of the cases coming before the courts in these categories involved action or proposed courses of action that carried tax consequencies. In England and Wales, the taxation issue often arose from the construction of the trust instrument or a statute that governed dispositions under the settlement, such as the Inheritance Tax Act or, as in ***Futter and Pitt*** itself; the Taxation of Chargable Gains Act 1992; measures which simply do not exist in the Cayman Islands.

Re Hastings-Bass itself was such a case, one which could be described as coming within ***Public Trustee v. Cooper*** category 4 and one in which, as is often the case – and significant for purposes of our discussion here – the Inland Revenue Commissioners were contending parties (as indeed was the situation in the two cases identified by Lord Walker as being the most important precursors to

Hastings-Bass; viz: ***In Re Vestey's Settlement***[13] and ***In Re Abraham's Will Trust***[14]). It should be remembered that the relief sought by the trustees in Hastings-Bass was declaratory in nature. It was as to whether an advancement of interest by way of a sub-settlement was valid or invalid for want of certainty of object and for being in breach of the perpetuity rule. If invalid, the assets purportedly advanced would remain within the original settlement and so liable to inheritance tax when the benefit passed under the original settlement. The court held that the advancement was partially valid (that part that involved the resettlement of income for the benefit of the settlor's son) and so not liable to tax although the trustees had failed, by not properly identifying its objects, to resettle the capital of the original settlement. But as they had properly resettled the income, that aspect of the resettlement was severed from the bad and deemed to have been validly executed.

So properly understood, ***Re Hastings-Bass*** was really a case about severance.

No question arose requiring of the court a remedial order to remedy some action already purportedly taken by the trustees or which the trustees had failed to take. It was the more conventional question whether action already taken was valid.

Nonetheless, we saw the more general and far-reaching formulation emanating from the court and which came to be called the "Rule in Hastings-Bass", although it was not the *ratio decidendi* of the case – that which – as you have heard described by Justice Hayton – has been "*drastically restricted*" by the Supreme Court:

[13] [1951] Ch 209
[14] [1969] 1 Ch 463

> *" (1)Where, by the terms of a trust (as under s.32 of the 1925 Trustee Act), a trustee was given a discretion as to some matter under which he acted in good faith, the court should not interfere with his action, notwithstanding that it did not have the full effect which he intended, unless (i) what he had achieved was unauthorised by the power conferred on him or (ii) it was clear he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account"*[15].

As we have seen from the subsequent cases, (especially as reformulated per Warner J. in Mettoy ***Pensions Trustees Ltd v. Evans***[16], it has been in the application of this rule to the various circumstances presented by trustees, especially those words in the second division of the rule, that concern developed over whether the proper bounds between the supervisory role of the court and the independent fiduciary obligations of the trustee had become unacceptably blurred. Public policy concerns also arose over whether in the liberal application of the second division of the rule, *ex post facto* validation was being given to decisions of trustees only for the sake of avoiding unforeseen or unintended tax consequencies and in ways which were artificial and unfair to the public interest of the ordinary tax payer.

It was in this latter sense especially that, as Justice Hayton mentions, the rule ***in Hastings-Bass*** came to attract the rather uncomplimentary label as the trustee's "*get out of jail free card*" ; i.e: redemption by the

[15] AS TAKEN FROM THE HEADNOTE: [1974] 2 ALL E.R. 193, 194
[16] [1990] 1 W.L.R. 1587 (and as heavily criticized by Lord Walker in Futter and Pitt at [32])

court where otherwise the trustee would be faced with personal liability for failing to carry out his fiduciary obligations properly.

The Supreme Court's decision in ***Futter and Pitt*** restates the principle in fundamentally different ways even while seeking to ensure the flexibility of application of the rule. Passages from the judgment delivered by Lord Walker are illustrative:

> **From para 43**: " The rule in Hastings-Bass, properly understood, depends on breach of duty in the performance of something that is within the scope of the trustees' powers, not in the trustees doing something that they had no power to do at all". As also explained at paragraph 43, the rule applies to make a disposition voidable, rather than void.
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> **Para 63:** "Where trustees have been in breach of duty by exercising a discretion with inadequate deliberation, setting aside their decision may not be the only recourse open to the court".
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> **Para 73**: "For the rule [in ***Hastings-Bass***] to apply, the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. It is generally only a breach of duty on the part of trustees that entitles the court to intervene. It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable

trustees) only breach of duty justifies judicial intervention".

Para 91: "The rule is centered on the failure of trustees to perform their decision-making function. It is that which founds the court's jurisdiction to intervene if it thinks fit to do so".

Para 92: "As a matter of principle there must be a high degree of flexibility in the range of the court's possible responses…relief can be granted on terms…. To lay down a rigid rule would inhibit the court seeking the best practical solution in the application of the rule in Hastings-Bass in a variety of different factual situations".

And so it appears, that even while recognising that beneficiaries are peculiarly vulnerable in their relationships with trustees, courts are admonished to intervene for their protection by requiring only that trustees act in keeping within the terms of their trust, with integrity and responsibility. Beneficiaries of a discretionary trust have no entitlement to a particular outcome but they are entitled to proper conduct on the part of their trustees. As Legatt LJ had earlier succinctly stated the principle; a trustee's performance of his trusts "*is not to be judged so much by success as by absence of proven default*"[17].

A clear policy objective of the decision in ***Futter and Pitt*** is the restoration of certainty in the application of the law to the trust relationships, in particular as to the nature of the fiduciary duties of trustees. As Lord Walker said at para. 83: *" [This is] an area where the law has to balance the need to protect beneficiaries against*

[17] Nestle v. National Westminster Bank Plc [1993] 1 WLR 1260 (CA) 1284

aberrant conduct by trustees (the policy behind the rule in Hastings-Bass) with the competing interests of legal certainty, and of not imposing too stringent a test in judging trustees' decision-making".

But what then of the many cases which have been decided under the second division of the rule in Hastings-Bass, cases where trustees may have made decisions without having given proper consideration to relevant matters but who in doing so may not have acted in breach of duty because they relied reasonably on professional advice? And more specifically, what path shall be followed by the courts of the offshore jurisdictions where such cases have been decided under the erroneous ***Hastings-Bass*** principle?

Jersey has charted the path for its courts by the promulgation of the Trust (Amendment No. 6 (Jersey) Law which came into effect from 25 October, 2013 and which, at first sight, seems to provide a broad statutory definition of the concept of mistake; broad enough to encompass the kinds of circumstances under which not only the principle as restated by the Supreme Court but also as the old Hastings-Bass rule had come to be applied in actuality by the courts; as illustrated by cases decided not only in Jersey and elsewhere offshore, but also in England and Wales.

Some of these cases (such as ***Mettoy Pensions***[18]) have been concerned with the rules of occupational pension schemes and there have been several cases, as Lord Walker described them[19] "*which were concerned with family trusts, and in particular with tax-planning arrangements involving trusts, where the arrangements have for one reason or another proved unexpectedly*

[18] Above; also ***Edge v Pensions Ombudsman [1998] Ch. 512***; ***Gallaher Ltd. V Gallaher Pensions Ltd. [2005] EWHC 42 (Ch)***.
[19] At [2] of ***Futter v Pitt***

disadvantageous, and the court has been asked to restore the status quo ante under the Hastings-Bass rule"[20].

The Cayman Courts have dealt with such cases, applying the Hastings-Bass rule in circumstances which did not involve a clear breach of duty by a trustee[21].

I will mention the circumstances of those cases before going on to suggest what the path for the future might be in light of ***Futter and Pitt.***

In ***Barclays Private Bank v. Chamberlain*** (above), the Grand Court set aside *ab initio*, a transaction entered into by trustees of a BVI Trust who had not been advised about them and so had failed to take into account changes to relevant UK Capital Gains Tax legislation. The result of the transactions was that CGT became payable but which would otherwise not have been payable. The UK Inland Revenue Commissioners were given notice of the application but chose not to participate in the hearing before the Cayman Court. All indications were that they accepted the decision.

In ***A and others v. Rothschild Trust (Cayman) Limited***, the plaintiffs (the settlor and beneficiaries under the trusts) applied for orders declaring that the restatements of original settlements into subsequent settlements were invalid and void.

The first plaintiff, the primary beneficiary and settlor of the original trust settlements governed by Cayman law, contemplated that he would be spending periods of time in the United States and would

[20] EG: ***Breadner v. Granville-Grossman [2000] EWHC 224 (Ch); Green v. Cobham [2000] EWHC 1564 (Ch);Abacus Trust Co (Isle of Man) v. Barr [2003] EWHC 114 (Ch); Sief v. fox [2005] EWHC 1312 (Ch)***

[21] ***For the first time in Barclays Private Bank & Trust (Cayman) Limited v. Chamberlain*** Grand Ct., Cause No. 475 of 2004 unreported.; in ***A. v. Rothschild Trust Cayman Ltd 2004 -05 CILR 485*** and in ***Re Ta-Ming Wang Trust 2010 (1) CILR 541***. The "RULE" was also considered in ***In Re Q Trusts 2001 CILR 481*** where trustees applied for directions, seeking the court's approval of a resettlement of trust capital.

therefore become a U.S. resident for tax purposes. The concern arose that under U.S. law the assets of the trusts would be liable to tax as his income. According to legal advice, the original trusts could not be restructured, but had to be restated to avoid those consequencies. The defendant trustee accepted and acted upon that advice (by creating new trusts), but these actually gave rise to the very tax consequencies it was intended to avoid. In fact, only minor amendments to the original settlements would have been required. The plaintiffs (the settlor and other beneficiaries) sought to have the original settlements restored in order to make the necessary changes, and to avoid the otherwise potentially severe tax consequencies of the defendant trustee's reliance upon erroneous legal advice. The defendant trustee supported their application and submitted that (a) it had acted in error, in a manner which could not be described as being for the benefit of the beneficiaries, even though that was what had been intended; and (b) had it received the correct advice and had been aware of the true consequencies of the new trusts, it would not have concluded that they were for the benefit of the beneficiaries and would therefore not have created them.

These arguments were accepted and it was held, among other things, applying **Hastings-Bass**; that the fiduciary duty vested in the trustee, which governed the exercise of its fiduciary powers, required it to take into account all of the relevant but no irrelevant factors. The tax consequencies of the transactions were matters which it was under a duty to consider, and which it did in fact consider, but to which it failed to give proper consideration because its legal advisers gave incorrect advice. The trustee had therefore made and acted on decisions taken under a mistaken or seriously flawed understanding as to the nature of the benefit to be conferred as the consequence of its decision, and could not be said to have exercised its discretion

properly for the benefit of the beneficiaries. Having acted improperly, and given that its reliance on incorrect legal advice was fundamental to the erroneous exercise of its discretion, the declaratory order would set aside, *ab initio*, the new trusts.

Despite the finding that the trustee had failed to act for the benefit of its beneficiaries, noticeably absent was any finding that the trustee had acted in breach of duty, in the sense now apparently required by the restatement of the principle by the Supreme Court.

Nonetheless, a similar situation in the future may well arguably be covered by the doctrine of mistake as expounded by Lord Walker on behalf of the court; as in ***A v Rothschild*** there surely was a mistake as "to the legal character or nature of the transaction, or as to some matter of fact or law that was basic to the transaction"[22] and as *"consequencies*, (including tax consequencies) *are relevant to the gravity of the mistake*"[23]

In this case, however, there had already been a distribution of $500,000 made to a beneficiary under the new settlements and which therefore raised concerns about the appropriateness of setting aside the new settlements as being *void ab initio*. These were concerns of the kind that Sir Robert Walker (as he then was) had raised from as early as 2002 in his prescient lecture entitled "*The limits of the principle in Re Hastings-Bass*"[24]:

> *"Viewed simply as a case on severance of good from bad, Re Hastings-Bass is unsurprising and in line with principles of severance in other areas of the law. But the same approach has been adopted in situations in which*

[22] Futter and Pitt [122]
[23] OP. CIT, [132]
[24] Private Client Business [2002] 229-230; (2002) 13 King's Law Journal at 176

> *the vitiating factor was not the impersonal intervention of the rule against perpetuities, but human error; and in which its effect, if applicable, would be to nullify completely a decision taken, apparently in accordance with the right procedure, by an apparently reasonable and responsible body of trustees. The implications are potentially startling…"*

He went on to explain that great uncertainty could arise, if, for instance, appointments made by trustees were subsequently avoided, despite having been (to all outward appearance) arrived at and recorded in the correct manner. The matter might be raised many years afterwards, when the trust funds had been distributed (and tax paid) on the assumption that the appointment was valid[25].

In ***A. v. Rothschild Trust***, requiring the repayment of the distribution of $500,000 was an available option and was so ordered by the court to make the restoration of the original settlement possible.

The Grand Court noted that in an appropriate case, regard could be had to an impunged transaction as being voidable instead of void, and so to allow for the setting aside *pro tano,* of the transaction[26], subject to possible concerns over change of position by reliance on the transaction and that it should be within the Court's discretion to declare a trustee's exercise of fiduciary power to be void or voidable, depending on the nature of the circumstances[27].

[25] A stark example of the difficulties that can arise was the situation in Abacus Trust Co v. Barr (above), where an erroneous payment out of a large proportion of a trust fund was made but not discovered until 9 years later.
[26] As earlier proposed in Abacus Trust Co v. Barr (above) per Lightman J.
[27] At page 496 [37]

As noted above, that the application of the restated rule renders the transaction voidable is now accepted by the Supreme Court[28].

Hastings-bass was most recently applied by the Grand Court in ***Re Ta-Ming Wang Trust***[29].

Again, unintended tax consequencies arose because of the trustees' misunderstanding based on incorrect legal advice – here as to the date of expiry of a tax holiday – believing that the date was May 6th 2001 instead of the actual date, March 15th 2001. Acting on that erroneous advice and belief, the trustee procured, on April 25th 2001, a declaration of dividends by one of the underlying trust companies to be paid to and which it received into the assets of the trust. As the tax holiday had expired, and by then the settlor had acquired Canadian citizenship, the trust became liable to large amounts of Canadian tax. On the application of the beneficiaries of the trust and with the support of the trustee, the trustee's decision to procure the declaration of dividend, and to receive it into the trust; was declared *void ab initio*. The Canadian Revenue Authorities were given notice of the application before the Grand Court and did not oppose it. Among other things, the court held:

> *"The **Hastings-Bass** principle, which guided the Court's exercise of its statutory powers under the Trusts Law (2009 Revision), s.48[30], allowed the court to interfere with Trustees' exercise of discretion if it were clear that the effect of the exercise was different from that intended*

[28] See ***Fuller and Pitt*** [43]
[29] 2010 (1) CILR 541
[30] Which provides, in relevant part: "Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the court for an opinion, advice or direction on any question respecting the management or administration of the trust money… and the trustee or personal representative acting upon the opinion, advice or direction given by the court shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee or personal representative…"

> *because of a failure to take into account relevant considerations, or a taking into account of irrelevant ones. In making its decision, (the Trustee) took into account incorrect advice as to the expiry date of the Canadian tax holiday, with the consequence that a considerably larger amount of money was assessed for Canadian tax than would otherwise have been. Since (the Trustee) made an erroneous decision with detrimental consequencies for its trust, that decision was liable to be set aside".*

The reference in this case to section 48 of the Cayman Islands Trust Law is potentially quite significant because of the wide powers it gives to the court to make "(directions) on any question respecting the management or administration of the trust money..". Here, as the decision in question to direct the declaration of dividends and to receive them into the assets could be regarded as administrative rather than as dispositive in nature, the view was that the statutory power could be relied upon and that the ***Hastings-Bass*** principles (as developed in the case law up to then) could guide the application of the statutory power.

Thus, it would appear that this statutory power could in future, potentially arise for consideration where the decision in question is one that may be regarded as being administrative, rather than as dispositive powers – such as were the powers of advancement in ***Hastings-Bass*** itself and those powers of enlargement and advancement in the ***Futter*** appeal.

I think it safe to venture also that to the extent that the court may be called upon in the future to remedy trustee decisions which may properly be regarded as administrative in nature, the exercise of this statutory power as guided by reference to the rubric of the second

division of the old ***Hastings-Bass*** rule, would not be impermissible. And, as shown in ***Re Ta-Ming Trust***, such administrative decisions could carry tax implications of far-reaching consequencies for beneficiaries.

In summary then, one can, I think, safely venture that post ***Futter and Pitt,*** the courts of the Cayman Islands will not be unduly hamstrung in the relief to be granted from unintended and unforeseen tax consequencies arising from erroneous decisions of trustees.

Where such decisions are taken in breach of duty, they may well be caught by the rule in ***Hastings-Bass*** *a*s restated by the Supreme Court. Otherwise, they may arise for consideration as being the result of "mistake" as the doctrine is now also restated by the Supreme Court. From the point of view of the offshore bench, it is very significant that Lord Walker has recognised that a mistake in this sense can include consideration as to the gravity of the tax consequencies.

Nor am I, as an "offshore" judge, unduly alarmed about Lord Walker's admonitions to trustees and beneficiaries for the acceptance of risk that an artificial tax avoidance scheme might go wrong[31].

Surely "artificiality" in this sense – like beauty its antithesis – must be in the eyes of the beholder. Artificiality, as it so aptly described by Justice Hayton, is indeed an "accordion concept".

The perspective of the bench from a jurisdiction like the Cayman Islands is that from a place where there never has been direct income, capital gains or inheritance tax[32]. A jurisdiction which therefore has

[31] At [135].

[32] The historical result of the Taxation of the Colonies Act 1778, enacted by the British Parliament in the throes of the American Revolutionary War, and by which it promise never again to impose taxation without representation on its remaining colonies out of concern for the spread of rebellion.

never had the need in any sense "artificially" to structure its laws so as unfairly to arbitrage the tax laws of other jurisdictions. Accordingly, notions of the refusal of relief by the court, on "*grounds of public policy*" from the "*general recognition that artificial tax avoidance is a social evil*" must be considered in their proper context. In the socio-political context of the Cayman Islands, there can be no presumption that an arrangement, which is otherwise within the law not only of the Cayman Islands, but also of the relevant domiciliary jurisdiction, is to be deemed "artificial" simply because its primary aim is to mitigate the incidences of tax. In this regard, especially, I join forces with my colleague Kawaley CJ, with the sentiments expressed in his Paper for this Conference.

This is not to say that no tax arrangement could ever be impugned for reaching beyond the pale. Or that the court should be expected to grant relief simply because the impugned arrangement will carry unfavourable tax consequencies. No such notion could ever be consistent with the proper exercise of judicial discretion.

But even here, again, I am content to note the erudition of Lord Walker, having adopted the test from ***O'Gilvie v. Littleboy***[33] where he advised:

> *"The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequencies, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake*

[33] (1897) 13 TLR 399

uncorrected. The court may and must form a judgment about the justice of the case[34]*".*

I would venture that in the exercise of this wide discretion as to what may be unconscionable and while recognizing that "Leviathan can (indeed) take care of itself[35]"; the offshore courts, depending on the circumstances, may consider it appropriate to invite the views of the relevant onshore tax authority as to the consequencies of setting aside a transaction[36].

Rectification

As a distinct head of relief, rectification was also addressed by the Supreme Court in ***Futter and Pitt.***

Lord Walker described rectification as "*a closely guarded remedy, strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it*[37]*".*

The principle has been recognised and applied in the Cayman Islands by the Grand Court to rectify deeds of settlements precisely where well-established disparities between the words of the deeds and the intentions of the settlors and trustees were proven. In both cases the available evidence clearly showed that by virtue of drafting errors by the settlors' lawyers in England, the assets which were intended to be settled upon the trusts, were omitted from the schedule to the deeds in which the trust assets were required to be listed[38].

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[34] ***Futter and Pitt*** [128].
[35] As the Royal Court of Jersey aptly observed in ***Re R and the S Settlement*** [2011] JRC 117 at [39].
[36] As was done in Barclays v Chamberlain and ***Re Ta-Ming Trust*** (both above).
[37] At [131].
[38] ***Megerisi v Scotiabank Trust (Cayman) Ltd. 2004-05 CILR N. 27*** and ***Megerisi v Protec Trust Management and another – Cause FSD 79 of*** 2012 (ASCJ); 21.12.2012 (unreported).

The consequence of the omissions if not rectified, would have been that the assets would have been subject to inheritance tax in the United Kingdom where both settlors (brothers who had used the same lawyers) had become domiciled subsequent to the dates of the settlements.

Rectification was granted in each case on the incontrovertible basis, that their intentions were that the assets should have been settled upon the trusts before they became domiciled in the U.K.

19th November 2013