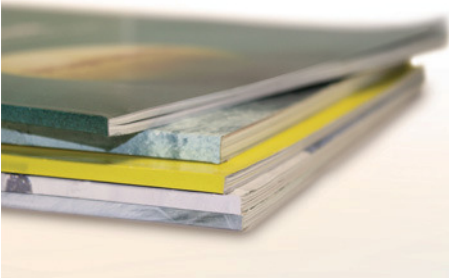


# “It Was a Mistake!” Setting Aside Jersey Trusts on the Grounds of Mistake

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## Introduction

There is, of course, an ever-increasing overlap between the worlds of law and accountancy. Forensic accountants are, for example, invaluable in complex fraud and assets tracing cases, and the tax treatment and ramifications of various legal agreements and transfers can often be highly significant.

Arguably, nowhere are the fiscal ramifications more relevant in the context of applications to the court than in the area of transfers into trusts or transactions made by trustees, where there can on occasion be a failure to give proper regard to the potential fiscal consequences.

## Hastings-Bass

As regards transactions by trustees, relief may be given under the Hastings-Bass principle. It has been established in various English and Jersey cases (**eg Re Seaton Trustees Limited** [2009]). Where the effect of the exercise of a trustee's discretion is different from that which they intended (for example, if unappreciated tax consequences follow) the court will interfere with the trustees' action if it is clear that they might not have so acted had they been aware of the unintended consequences.

## Mistake

The court has similar, but not identical, powers to set aside transfers into trust by an individual (or setting aside the trust itself) where it can be shown that the trust was established by reason of a mistake on the part of the transferor.

The classic formulation as to the grounds of setting aside a trust and the grounds of mistake was set out in the English case of **Gibbon v. Mitchell** [1991] where it was stated that:-

*“The (Trust) deed will be set aside if the court is satisfied that the (transferor) did not intend the transaction to have the effect it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it”.*

Great difficulties have been encountered by the courts since the **Gibbon** case in seeking to distinguish between the “effect” and “consequences of a transaction”. There had been until recently, for example, no decided cases where disposal by an individual of his property

(into a trust) had been set aside on the basis of a mistake as to the tax consequences (as it was said that was not a mistake as to the effect of the transaction). Consequently there was a difference in approach between cases where there was a disposal by an individual of his own property, and those where there was a transfer by trustees (where the Hastings-Bass principle did allow a mistake as to the tax consequences of a decision as a ground for setting aside that decision).

Matters have, however, very recently moved on and there has now been a definitive analysis of the position in Jersey as a result of the decision in **Re A Trust** in December last year.

The facts in **Re A** can be briefly stated. The settlor in question transferred monies into trust in circumstances where although she had received certain tax advice she had not been made aware that the transfer might have inheritance tax consequences. In the event the transfer gave rise to potential tax liability of approximately £1.3 million. On that basis she sought an order that the trust be declared invalid to the extent it comprised the sums she had transferred into the trust by reason of her mistaken belief as to the tax consequences.

The court referred to the judicial debate which had commenced in the English case of **Seiff v. Fox** [2005] where it was suggested that the relevant test may be more general, namely whether the donee 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 indicated that such a formula might allow a mistake as to fiscal consequences to be taken into account if it were sufficiently serious. Importantly, the court in **Seiff** did not have to determine which was the appropriate test.

The Jersey courts had since **Seiff** twice debated which was the appropriate test (**JP v. Atlas Trust Company** [2008], and **Re Remuneration Trust** [2009]) but in neither case did the courts have to determine which was the appropriate test.

The issue, however, did directly arise for the first time in **Re A**. The court had regard to a rather unfortunate

English case (**Ogden v. Trustees of the RHS Griffiths Settlement** [2008]) where the relevant mistake was not directly as to the tax consequences but was a mistake as to the settlor’s state of health when he made certain transactions. At the time he made the transactions the settlor had been suffering (unknown to him) from terminal lung cancer. The settlor died shortly afterwards by reason of that illness and the transfers thus became chargeable transfers for inheritance tax purposes. On the unusual facts of that case the court concluded that all that was required was a mistake of fact *“of a sufficiently serious nature”* in order to set aside the transaction. It was not necessary in the court’s view to seek to draw the difficult distinction between the effect of a transaction and its consequences or advantages.

The court in **Re A** further had regard to recent Isle of Man authorities (**Clarkson v. Barclays Private Bank Isle of Man Limited** [2007] and **Re The Betsam Trust** [2008]), where the mistake had been as to the taxation consequences. It then concluded that under Jersey law the test in relation to an application to set aside a disposition on the grounds of mistake by an individual, was whether the donor 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, and that such a mistake could relate to a mistake as to the taxation consequences, if those consequences were sufficiently serious.

A necessary element of the principle is the *“but for”* test (in other words the court must be satisfied that the donor would not have entered into the transaction *“but for”* the mistake). It is to be noted in passing that this is a higher test than that under Hastings-Bass where all that is required is that the trustees *“might have”* acted differently if they had been aware of the correct state of affairs.

The mistake in **Re A** was one of law as opposed to fact whereas in **Ogden** it was clearly a mistake of fact. The court in **Re A** however, concluded that as a matter of Jersey law the Jersey courts could grant relief in this area regardless of whether the mistake was one of law or fact.

## Conclusion

The case of **Re A** is of some considerable significance. It has greatly widened the test in this area and has, whilst noting that the law in England had moved on, further developed the law so as to make it clear that the wider test applies whether or not the mistake is one of law or of fact. The case is also of interest in relation to the weight the Royal Court gave to Isle of

Man decisions and is the latest example of a Jersey court trawling its net widely for guidance from offshore authorities before definitively stating and developing the law in a particular area.

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