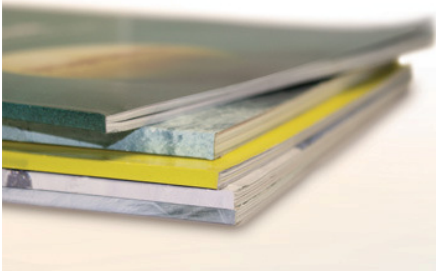


## Rescue Remedies for Trustees

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BY GILLIAN ROBINSON

**Trustees in Jersey do find from time to time, that mistakes have been made. These may be in the trust instruments themselves or in relation to particular transactions. Further, these errors often come to light some considerable time after they have been made.**

In such situations, the trustee may face an action for breach of trust, or the trustee's professional advisers, if any, may face a claim for negligence. However, such claims are relatively rare and this may be because there are a number of "self help" remedies available to a trustee. Which avenue the trustee pursues depends on the nature and consequence of the mistake and whether the trustee wants to maintain the structure or whether in fact it should never have been created.

Rectification can be a useful tool as it "... has the benefit of preserving that which a settlor intended to establish". Examples of where it has been successfully

used include where an instrument of appointment and retirement erroneously referred to the new trustee being appointed by the protector when in fact no protector had been appointed (**Re A** [2011 JRC 008]), and where the schedule in the trust instrument listing the beneficiaries had been left blank (**Re the Exeter Settlement** [2010 JLR 169]). In both those cases, the administration of the trust had continued with the trustee being oblivious for a number of years as to the defects.

The well established test for rectification as reiterated in **Re A** is as follows:

- "i. The court must be satisfied that as a result of a genuine mistake the trust deed does not carry out the true intentions of the parties;*
- ii. There must be full and frank disclosure;*
- iii. There should be no other practical remedy".*

If an order for rectification is made, it has a retrospective effect i.e. backdated to the date of the erroneous instrument, which is in effect re-written by virtue of the relevant court order.

By contrast, the remedy of “*mistake*” provides a rather different alternative in that if granted, the order can set aside the trust altogether. A recent example is the case of the **Lochmore Trust** [2010] JRC 068. In that case, shares in a company were transferred into the Lochmore Trust for tax reasons. Unfortunately, however, they were gifted to the trust rather than sold, which meant that the settlor was subject to an immediate charge to UK inheritance tax charge at 20% of the value of the shares. This was not the intended consequence at all, although it was not discovered for over six months after the transfer.

The court confirmed the rejection of the distinction between a mistake as to the “*effect*” of a transaction and a mistake as to the “*consequences*” of a transaction as formulated in the English case of **Gibson v. Mitchell** (1991) 1WLR 1304. Instead, the court said it had to ask itself the following questions:

- “**i.**     *Was there a mistake on the part of the settlor?*”
- ii.**     *Would the settlor not have entered into the transaction but for the mistake?*
- iii.**    *Was the mistake of serious a character as to render it unjust on the part of the donee*

*to retain the property?”*

The court decided that the test had been satisfied in that case – the trust was established by mistake and was thus invalid.

A third alternative for a trustee is to apply for relief pursuant to the principles established in the English case of **Hastings-Bass & Others v. Inland Revenue Commissioners** [1975] 1 Ch 25. This relief enables a particular transaction undertaken by a trustee to be set aside rather than the entirety of the trust.

An example is the case of **Re Seaton Trustees Limited** [2009] JRC 050 – a Jersey trustee sought to set aside two transactions withdrawing funds from an Isle of Man company, which had resulted in a far greater UK tax liability for the settlor than expected. In fact, there had been two alternative methods of withdrawing the funds one of which would have resulted in no tax liability.

The court stated that the test to be applied was:

- “**i.**     *What were the trustees under a duty to consider?*”
- ii.**     *Did they fail to consider it?*
- iii.**    *If so, what would they have done if they had considered it?”*

The court set aside the transaction, finding that the

trustee had been under a duty to consider the tax implications of the transfers, had failed to do so, but had it done so, would have chosen the tax efficient method. These principles established in **Hastings-Bass** and in relation to mistake have recently been extensively reviewed in the English Court of Appeal cases of **Pitt v. Holt** and **Futter v. Futter** [2011] EWCA CIV197. As a result, and subject to any appeal to the Supreme Court, the jurisdiction to correct errors is likely to be much restricted in England and Wales in the future.

However, in Jersey a “*self help*” remedy for a trustee (usually carried out at its own expense) is an

infinitely better solution for innocent errors than protracted litigation by those adversely affected against a trustee or its advisors, both in terms of cost and speed of result. It is hoped that notwithstanding the changes in the English position, these remedies will continue to be developed and refined by the Royal Court.

*Gillian Robinson appeared for the trustee in Re A.*

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