

## The doctrine of mistake and the rule in Hastings-Bass: statutory remedies in Jersey law

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### 1. Introduction

The Trusts (Amendment No. 6) (Jersey) Law 2013 (**Amendment No. 6**) came into effect on 25 October 2013. The amendment enshrined the existing Jersey law relating to the rule in Hastings-Bass and the doctrine of mistake into statute.

The rule in Hastings-Bass gives the Court discretion to set aside an exercise of power if the trustee failed to take into account relevant considerations which the trustee ought to have taken into account when exercising the power, or took into account considerations which should properly have been disregarded. The doctrine of mistake operates on a not dissimilar basis to permit a settlor who settles property on trust to apply to Court to set aside or unwind transactions. A summary of the current law in Jersey with respect to the application of the Hastings-Bass principle is set out in our briefing on *In the Matter of the Onorati Settlement*.

### 2. Amendment No. 6

The effect of Amendment No. 6 was to insert four separate remedies into the existing Trusts (Jersey) Law 1984 to render a transfer or other disposition relating to trust property or exercise of power voidable on the grounds of mistake or under the rule in Hastings-Bass.

### 3. Retrospective Effect

Crucially, Amendment No. 6 permits the Royal Court to apply the new powers (as summarised below) with retrospective effect to cases where the transfer of trust property, or the exercise of any power in relation to the trust, occurred either before or after Amendment No. 6 came into

force.

## **4. Power to set aside a transfer or disposition of property by the Settlor on the ground of mistake**

Article 47 E sets out the grounds on which the Royal Court may declare a transfer or other disposition of trust property to be voidable on the ground of mistake. The Royal Court has power to intervene where a settlor or person exercising a power made a mistake in relation to the transfer or other disposition and would not have made that transfer or disposition but for that mistake. The mistake can be one of fact or law but it must be of so serious a character as to render it just for the Court to exercise its power to set aside the transaction.

## **5. Power to set aside an exercise of fiduciary power under the rule in Hastings-Bass**

Article 47F confers power on the Royal Court to set aside a transaction where the person exercising the power to make the transfer or disposition of trust property on behalf of the settlor (i) failed to take in account any relevant considerations or took into account irrelevant considerations and (ii) it is clear that he or she would not have effected the transfer had he or she not failed to take into account relevant considerations or had taken into account irrelevant considerations. The relevant considerations may be advice from a professional adviser which ought to have been followed or equally, incorrect advice that should not have been followed. This remedy applies to a person who exercises a power to transfer or make other dispositions of property to a trust on behalf of the settlor and who owes a fiduciary duty to the settlor.

## **6. Power to set aside an exercise of power in relation to a transfer or disposition of property on the ground of mistake**

Article 47G provides a remedy where a person exercising a power made a mistake in relation to the exercise of that power. In such a case, the Royal Court may declare the transaction voidable with no effect or of such effect as the Court may determine on the grounds that the person made a mistake in the exercise of his or her power and would not have exercised the power (or would not have exercised the power in the way it was exercised) but for that mistake. As before, the mistake must be of so serious a character as to render it just for the Court to intervene.

## **7. Power to set aside an exercise of power or discretion under the rule in Hastings-Bass**

Where property has passed into trust and a trustee exercises its fiduciary powers or any person (acting other than in the capacity of trustee) exercises a power in relation to the trust or trust property, Article 47H permits the Royal Court to set aside the exercise of that power on the grounds that (i) the trustee or person failed to take in account any relevant considerations or took into account irrelevant considerations and (ii) it is clear that he or she would not have exercised the power had he or she not failed to take into account relevant considerations or had taken into account irrelevant considerations.

## **8. Applications and Orders of the Court**

Applications to the Royal Court under Article 47E(2) or 47F(2) can be made by any settlor or any of his or her personal representatives or successors in title.

Applications under Article 47G(2) or 47H(2) can be made by:

- (a) the trustee who exercised the power concerned or the person exercising the power;
- (b) any other trustee;
- (c) a beneficiary or enforcer;
- (d) the Attorney General in relation to a trust containing charitable trusts, powers or provisions;
- or
- (e) any other person with leave of the court.

It is important to note that Amendment No. 6 only applies to Jersey trusts and the decision of whether to grant relief is at the discretion of the Royal Court. The Court will not make an order which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which make the transfer of trust property or the exercise of power in relation to trust property voidable.

## **9. Comment**

The key benefit of enshrining these principles in Jersey law is to provide greater certainty for settlors and beneficiaries in that if a transaction is entered into, and the results have adverse consequences for the trust fund, an application can be made to the Royal Court on a statutory basis to set aside the transaction. Amendment No.6 also helps in avoiding the uncertainty and costs of litigation for beneficiaries against professional advisers who may have provided incorrect advice and such advice has been acted upon.

However, as the new statutory tests do not expressly overrule the body of case law previously applied by the Royal Court, it is likely that the common law will continue to develop (independently of the statutory test) and be available as a remedy.

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