

**"The Supreme Court decision in *Futter v HMRC/ Pitt v HMRC* was published yesterday (9 May 2013).**

I have been following the case closely to see what their Lordships would say about where the case now leaves the Hastings-Bass rule.

To recap, under the Hastings-Bass rule, the court will intervene and set aside a trustee exercise of power/discretion where the effect is otherwise than intended and the trustee would not have acted as he did had he fully considered the (often fiscal) implications (tantamount to a breach of fiduciary duty). The rule has allowed decisions based on erroneous tax advice to be set aside.

Well no more get out of jail free cards (at least in the UK) and a few more fearful tax advisers now that the buck stops with them.

Their Lordships upheld Lloyd LJs restatement of the rule in Hastings-Bass. As it happened Mrs Pitt was able to have her transfer set aside on the grounds of mistake (previously disallowed on the grounds that this was a mistake as to the consequences not as to the nature of the transaction) but hers were quite unique circumstances. Remember the facts of her case- Mr Pitt sustained serious head injuries in a road accident and the proceeds of his settlement were transferred into a discretionary trust without regard to the IHT charge. Lord Walker decided that her trust was "precisely the sort of trust which Parliament intended to grant relief" and in fact had a s89 trust been used such relief would have applied. The court had less sympathy with Futter whereby the trustees exercised a power of enlargement and advancement to try to wash out stockpiled gains using some allowable losses.

So in summary the 3 main points I take from the judgment are:

- Lord Walker stated (and the 6 other judges agreed) that the court will only intervene to rescind a flawed trustee decision if the trustee has breached his fiduciary duty in reaching that decision. If he has therefore taken adequate advice but that advice turns out to be wrong and this causes a disadvantage there will be no rescission (that is not to say that the decision is not voidable- it may be, and court still has discretion as to whether it might grant relief to the beneficiaries but it is for the beneficiaries to commence this action).
- Lord Walker notably widened the test for mistake. He said that the court will consider in the round whether there has been a mistake central to the transaction and look at the seriousness of the consequences of the mistake. The court will then make an evaluative judgment as to whether it would be unconscionable or unjust to leave the mistake uncorrected.
- Interestingly Walker mentioned that artificial tax avoidance structures would not merit the court's intervention using the flexible mistake jurisdiction due to the risk that a trustee takes in undertaking a planning scheme and he goes further to say that discretionary relief will be refused on policy grounds. Very interesting."

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