Case Note

Recent trust cases of interest

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Abstract

Mark Studer of Wilberforce Chambers presents a round-up of recent trust cases of interest, featuring challenges to the appointment of trustees and protectors, the construction of appointment powers to add and/or exclude beneficiaries, the further development of the law of mistake—generally following *Pitt v Holt* and also where different offshore jurisdictions have now incorporated the rule in Hastings-Bass into their statute law—recent examples of the exercise of the Court's 'momentous decision' jurisdiction, and new cases in the variation of trusts, including an important decision as to the English Court's jurisdiction to vary trusts having a foreign proper law.

Appointments of trustees and protectors

(1) In ***Davidson v Seelig*** [2016] EWHC 549 (Ch) Henderson J decided, on an interlocutory application by the purported protector of two settlements for permission to re-amend his defence and bring a counterclaim in an action brought by the claimant beneficiaries challenging the validity of his appointment as protector, that, since the protector was alone in seeking the removal of the trustees, without the concurrence of the third defendant (the first protector of the settlements), he had no standing to seek that relief. The settlements had been established upon discretionary trusts in favour of a class of beneficiaries which included the settlors' children and remoter issue. The claimants were the settlors' children. By deeds of appointment made in 2003, the trustees established a protectorship regime. Under that regime, the protector was able to give or withhold consent to any exercise by the trustees of their powers of appointment, remove any trustee from office, and appoint new trustees and protectors. In 2004, the settlors appointed the third defendant as the first protector of each settlement. In 2013, the second defendant (the protector) was appointed to act jointly with the third defendant. Relations between the settlors and their children broke down. The claimants brought proceedings challenging the validity of the protectoral regime and seeking a declaration that the 2003 appointments were void. Alternatively, they sought a declaration that the protector's appointment was invalid or, in the further alternative, an order for his removal. Henderson J decided that it was implicit in Trustee Act 1925 section 41(1) that nobody other than a trustee or beneficiary had standing to seek the appointment of new trustees under that Act. Since the claimants and their adult children had made it clear that they had confidence in the trustees, it was fanciful to suppose that the court would be willing to remove them on the application of the protectors even if they were acting jointly. In any event, there was no evidence which might suggest that the trustees were guilty of misconduct such as to jeopardize the interests of possible future beneficiaries. Thus, the protector lacked standing to bring the relevant claims and his proposed counterclaim offered no reasonable prospect of success.

(2) Master Matthews in ***Barclay v Smith*** [2016] EWHC 210 (Ch) held that, although under Trustee

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Act 1925 section 41(1) the court had the power to appoint a new trustee or trustees when 'it [was] found inexpedient difficult or impracticable so to do without the assistance of the court', the Court also had the power under its inherent jurisdiction to appoint new trustees in any administration action, the advantage of the latter course being that it would not then have to consider the restriction imposed by the words 'inexpedient difficult or impracticable'. In the instant case, the claimants sought an order that they be reappointed as trustees of a cricket foundation. The president (C) of a cricket club had made a will whereby one-fifth of the residue of his estate, together with a cricket ground and a pecuniary legacy, was intended for the benefit of the club. C died in 2001. As the will was complex and confusing, the executor brought proceedings for the determination of issues of validity and construction. The cricket foundation was established as a trust by a court order in 2004. The trust deed, also made in that year, provided that the power to appoint a new trustee or trustees would be vested in the trustee or trustees for the time being. It also provided that trustees would be appointed for a period of five years. The first to fourth claimants, the second defendant and another individual, who retired in 2007, were the original trustees. The assets due to them under C's will were duly transferred to them. The fifth and sixth claimants were later appointed as additional trustees, in 2005 and 2006, respectively. The instant application had been brought because the five-year terms of the six claimants had expired and they had not been reappointed. Apart from the usual questions of internal administration that needed to be carried on, there was an urgency in establishing who the trustees were, because the process had been started of acquiring two properties as investments. All the claimants wished to be reappointed, or to continue, as trustees. The second defendant did not. The first defendant, a member of the club, had been put forward to represent the members generally. Both defendants supported the application. The evidence was to the effect that the finances and other affairs of the foundation were in good order, and there was nothing to suggest that any maladministration had taken place, or that any of the trustees were in any way unfit or unsuitable to be reappointed. In the circumstances, the Court would appoint the claimants for a further five-year term in substitution for themselves and the second defendant. That would be done under the court's inherent jurisdiction, making it unnecessary to consider whether it was 'inexpedient difficult or impracticable' to make the appointment without the assistance of the court. Had it been necessary, the Court would have held that it was indeed both inexpedient and impracticable, in the circumstances, to make the appointment out of court, and so the court could have made the order under section 41 also.

(3) The Royal Court of Jersey (Samedi Dvision, Sir Michael Birt, Commissioner) in ***Re the Antares & Other Trusts, WTHK Limited and Valentin NZ Limited v UBS Trustees (Jersey) Limited*** [2016] JRC099 held that, against the background of the very unusual facts of the case (involving the application of the Italian state tax amnesty programme), it was not irrational for the appointment of new trustees to be made by the protectors (following requests from the beneficiaries) in order to prevent a total loss of the trust assets as a result of instructions to effect a transfer of them to a new account in Italy, and to preserve the *status quo* and ensure that the trusts' assets stayed frozen in Switzerland pending the outcome of an investigation by the Milan State Attorney and any criminal proceedings which might result from it. The power of the protector of each trust to appoint new or additional trustees was a fiduciary power, and the duties of the holder of such a power when exercising the power to appoint a new trustee were: (i) to act in good faith and in the interests of the beneficiaries as a whole; (ii) to reach a decision open to a reasonable appointor; (iii) to take into account relevant matters and only those matters; and (iv) not to act for any ulterior purpose.

Powers to add beneficiaries

(4) The Royal Court of Jersey (Samedi Division, T J Le Cocq, Deputy Bailiff, and Jurats Olsen and Liston)

in ***Re the B Settlement, Re the Representation of C, D and E,*** and ***Re Articles 51 and 53 of the Trusts (Jersey) Law 1984*** [2016] JRC092 construed a power for trustees:

> . . . at any time during the Trust Period (but only during the lifetime of the Principal Beneficiary with the consent of the Principal Beneficiary) [to] add to the Beneficiaries such one or more objects or persons or classes of persons as the Trustees shall (subject to the application (if any) of the rule against perpetuities) determine and no Beneficiary may prevent the nomination of new beneficiaries under this Settlement.

It was held that, notwithstanding the death of the Principal Beneficiary, there continued to be a valid power to add beneficiaries. The clause gave a power which might be exercised 'at any time during the Trust Period' and it was clear that the settlement was highly likely to extend beyond the life of the Principal Beneficiary. There would have been no need or indeed point in making reference to the Trust Period in the relevant clause had it been intended to tie the power to appoint beneficiaries to the lifetime of the Principal Beneficiary. Furthermore, it was clear from a viewing of the form of the clause that the reference to the lifetime and consent of the Principal Beneficiary was a qualification in parenthesis and should be taken as a single qualification. In those circumstances, it became clear that that qualification subsisted only during the lifetime of the Principal Beneficiary and not at any other time. It was a qualification to the general power given to the Trustees and that qualification was time-limited; and once that time was over (ie when the Principal Beneficiary died), the qualification itself ceased and the power became unfettered.

Powers of appointment

(5) The Easter Caribbean Supreme Court, Court of Appeal (Pereira CJ, Baptiste and Michel JJA) held in ***Re the New Huerto Trust*** (2015) 18 ITELR 447 that a power of appointment conferred on discretionary trustees permitted them to exclude some beneficiaries prior to appointing to others. The relevant BVI discretionary settlement had two classes of beneficiary: the settlor (who alone comprised Class A) and his children and remoter issue (Class B). There was no power to add to the classes of beneficiary and no express power to remove any beneficiary from the class, nor was there any express power to vary or revoke any provision of the settlement. The trustee applied unilaterally to the Court for approval of a deed of appointment irrevocably excluding the settlor as a beneficiary of the trust. The deed also sought to release the trustee's power of revocation and to give it unlimited power to vary the terms of the trust in the future. The purpose of the exclusion was to prevent the trust assets being caught by a worldwide freezing order of the Family Division of the English High Court in divorce proceedings brought by the settlor's wife and presumably to prevent them being treated as a financial resource on the basis that he could no longer benefit from them. The power of appointment directed the trustees to:

> . . . stand possessed of the Trust Fund and the income thereof upon discretionary trusts for the benefit of the Beneficiaries or any one of more of them exclusive of the others in such shares and proportions and subject to such terms and limitations and with and subject to such provisions for maintenance, education or advancement or for accumulation of income during minority or for forfeiture in the event of bankruptcy or otherwise and such other conditions as the Trustees may from time [*sic*] appoint by Deed revocable or irrevocable executed before the Vesting Day.

A power of appointment conferred on discretionary trustees permitted them to exclude some beneficiaries prior to appointing to others

There was no express power in the trust deed to add or remove anyone from the class of Beneficiaries, to vary or revoke any of the provisions of the trust or to permit the trustee to appoint the trust fund onto new discretionary trusts. The trial judge had observed that the trustee could have excluded the settlor from benefit by making an irrevocable appointment of the whole of the trust fund in favour of the Class B beneficiaries, but it had no present wish to do that. He held, however, that the trustee could not exercise its power of appointment to vary the terms of the trust deed as it wished: in particular, the power could not be exercised so as to exclude a beneficiary from the class of Beneficiaries. It could only be exercised in favour of certain defined objects so as to create beneficial interests in one or more of those objects. On appeal, the Court of Appeal held that, given that the trustee could validly appoint property among two or more objects of the trust while excluding altogether one or more objects, there was no reason why the trustee could not, in advance of appointing any property to the objects of the trust, use the power of appointment to exclude one of them from benefitting under the trust. The necessity to do so had arisen only out of the desire of the trustee to protect the trust property from an adverse claim against it. Nor was there any reason based on principle why the trustee could not properly exercise the power of appointment under the trust deed to exclude the settlor from benefitting under the trust with the resultant increase in the assets available for distribution to the other nominated beneficiaries.

Mistake

(6) In ***Re F Trust, Re A Settlement*** [2015] SC (Bda) 77 Civ, (2015) 18 ITELR 459 Kawaley CJ in the Supreme Court of Bermuda exercised the statutory Bermudian jurisdiction in relation to the Rule in *Hastings-Bass* to set aside the appointment of a UK resident as a trustee of the F Trust by the other trustees in 2005 and of the same person as a trustee of the A Settlement by the settlor in 2008. The F Trust and the A Settlement were established in Bermuda. The settlor intended that there should be three trustees for each. No advice was taken as to the tax implications of appointing a UK resident as trustee. In 2005, public consultations were under way in the UK regarding proposed changes to capital gains tax and these came into force in 2007. The judge found it was clear that had tax advice been taken in 2005, the appointment in relation to the F Trust would not then have been made, notwithstanding that the UK capital gains tax consequences did not bite until 2007. In relation to the A Settlement appointment made in 2008 the adverse tax consequences were immediate. The trustees made voluntary disclosure to HMRC and then applied to the Court under section 47A of the (Bermuda) Trustee Act 1975 for an order declaring the appointments void *ab initio*. Section 47A empowered the Court to intervene in the flawed exercise of a fiduciary power, effectively introducing the rule in *Hastings-Bass* into Bermuda law. There was clear evidence of the failure to take into account the tax implications for the trusts of the appointment of a UK resident as trustee and it was clear that the power would have been exercised in a different manner had appropriate advice been received. The court, therefore, had jurisdiction to set the appointments aside. The discretion provided for in section 47A was not to be trammelled by the imposition of any particular test but should be applied on the facts of each case.

(7) Smellie CJ in the Grand Court of the Cayman Islands in ***Schroder Cayman Bank and Trust Co Ltd v Schroder Tust AG*** (2015) 18 ITELR 567 declared void purported appointments to benefit a class of beneficiaries under certain employee-financed retirement benefit schemes (EFRBSs) where the class of beneficiaries of the recipient EFRBSs was wider than under the donor (Cayman) trust. A UK company set up an irrevocable discretionary employee benefit trust in the Cayman Islands. The company was then warned of impending changes in UK tax law and took advice as to what steps to take. The solicitors consulted advised that the assets of the trust should be transferred to EFRBSs. The trustees had power to transfer funds to other trusts provided that all the beneficiaries of the recipient trust were beneficiaries of the Cayman trust. Documents could not be drawn up until shortly before the changes came into force as their details were unclear

until then. The deeds drawn up created EFBRSs in Jersey in favour of the members and their families and any other person dependent upon them. This last group did not appear in the Cayman trust. The recitals to the deeds, however, stated that the beneficiaries of the EFRBSs were also beneficiaries of the Cayman trust. These transfers were purportedly effected. It then became apparent that the advice the trustees had received was erroneous and that the funds in the EFRBSs were liable to IHT in the UK. The flaw in the EFRBS trust deeds was discovered and the trustees applied to the Court for a declaration that the deeds of appointment were void and of no effect, or alternatively setting them aside on grounds of mistake. The issue of forum and proper law arose as both Jersey and the Cayman Islands had enacted 'firewall' legislation which provided that their own law was to be applied and any foreign law to be disregarded. The Court held that, given the existence of conflicting rival 'firewall' provisions, neither of which provided for the situation, the correct approach was to fall back onto ordinary private international law principles. Since the dispositive transactions involved the exercise of discretionary powers by a Cayman resident trustee of a trust governed by Cayman law, the most closely connected system of law was clearly Cayman law. It would be absurd that the validity of such an exercise of powers should to be determined by Jersey law simply because the recipient of the assets appointed out from the Cayman trust happened to be a trustee of a trust governed by the laws of Jersey. The assets purportedly appointed were choses in action enforceable and therefore domiciled in the Cayman Islands and hence governed by Cayman law. The appointments purported to benefit a class of beneficiaries under the EFRBS that was wider than the class under the Cayman trust. The EFRBSs were, therefore, not 'qualifying settlements'. Since the EFRBSs were fully discretionary trusts, it could not be said what would have been the exact entitlements of any of the objects of the trusts of the EFRBSs. The appointments were, therefore, void and did not amount to an execution of the power at all. The reliance by the trustees on the erroneous advice and erroneous drafting from their lawyers, as to the effect of the appointments, in terms of both the issues of revocability and tax planning, led to false beliefs which had severe consequences for the trusts which were never intended. The appointments would never have been made but for those mistakes. Thus, the mistakes were of sufficient gravity as to engage the Court's jurisdiction to set them aside on the basis of mistake and it would be unconscionable and unjust to leave the mistakes uncorrected.

(8) In ***Gresh v RBC Trust Company (Guernsey) Ltd and HMRC*** Guernsey Judgment 6/2016 Sir Richard Collas, Bailiff declined to set aside a distribution to G on grounds of mistake. RBC was the sole trustee of a pension fund that had been established by a trust instrument on 27 February 1987. A sub-scheme was created in January 1993. G who was born on 1 December 1955 became a member of the sub-scheme. On 10 October 2006, HMRC informed G's English tax advisers that G's pension was not taxable under the special UK tax rules for benefits received under 'employer-financed retirement benefit schemes' and, therefore, assuming that the 'income' to which G was entitled under the sub-scheme represented 'payment of pension income', that would only be taxable in the UK if it were remitted to the UK. In November 2006, RBC decided to distribute to G all the funds held for G's benefit under the sub-scheme. A total of £1,462,280.51 was paid to G in the form of a lump sum in Jersey. In 2007, RBC realized that the distribution to G might not have amounted to a 'pension' since it did not involve any periodical payments over time and further that if it were legally effective, it would be treated as a lump sum and be subject to 40 per cent UK personal income tax under the rules for benefits received from employer-financed retirement benefit schemes. In April 2008, the distribution was expressed to be revoked and funds were provided to RBC on loan, which were used to fund a three-instalment pension for G from Freedom 2005 International Pension Plan ('FIPP'). RBC would then be repaid the loan it had obtained and used to fund G's FIPP pension from the amount returnable to

the sub-scheme under any order of the Guernsey Court declaring the distribution void, whether before or after 6 April 2008. RBC issued proceedings in August 2008 for an order under section 69 of the Trusts (Guernsey) Law 2007 and the rule in *Hastings-Bass* that the distribution be declared void *ab initio*. In March 2009, RBC withdrew its application and G issued proceedings for an order in the like terms to those originally sought by RBC. Subsequently the application was amended and in its amended form, G no longer relied upon *Hastings-Bass* principles, but instead sought to invoke the equitable jurisdiction of the Court to set aside a voluntary disposition on the ground of mistake, relying on the decision of the Supreme Court in *Pitt v Holt* [2013] UKSC 26. HMRC applied to be joined to G's application under rule 37 of the Royal Court Civil Rules 2007. The Deputy Bailiff held that HMRC satisfied none of the necessary requirements but this decision was reversed by the Guernsey Court of Appeal. HMRC was accordingly joined as a party to the proceedings. RBC adopted a neutral stance but in effect supported G. Prior to the hearing, the issues which were disputed between the parties were by consent identified as: (i) whether the correct test as set out in *Pitt v Holt* [2013] UKSC 26 required: (a) a causative mistake which it would be unconscionable in all the circumstances to be left uncorrected (as G contended); (b) a causative mistake which was of a sufficiently serious character as to render it unconscionable for the donee to retain the property given to him (as HMRC contended); (ii) whichever test applied, whether it was satisfied in the instant case; and (iii) whether it was open to G to bring the claim in the instant proceedings, or whether the claim gave rise to an equity that he was unable to assert as against himself. In the event, in submissions to the Court, G summarized the issue for decision as being limited to a choice between whether the agreed mistake was of sufficient gravity to justify it being set aside on the ground that it would be unconscionable or unjust to leave the mistake uncorrected or, that it would be unconscionable or unjust for G to retain the benefit of the transaction. HMRC submitted that the correct legal test in *Pitt v Holt* [2013] UKSC 26 required a causative mistake which it would be unconscionable in all the circumstances to be left uncorrected in the sense that it was a causative mistake of a sufficiently serious character as to render it unconscionable for the donee to retain the property given to him. The Court agreed that the decision in *Pitt v Holt* [2013] UKSC 26 was highly persuasive in Guernsey there was no reason why, under Guernsey law, the principles set out in the judgment in that case should not be applied. In the instant case, there was a distinct mistake, namely that G believed, and relied upon, the tax advice he had received and which turned out to be incorrect. His mistake was distinguishable from mere ignorance, inadvertence, or misprediction of some future event. The mistake was what caused G to make the request upon which RBC acted in making the distribution to him. The contentious issue was the injustice (or unfairness or unconscionableness) of leaving the disposition uncorrected. The Court accepted HMRC's submission that the test for equitable mistake was not altered by the Supreme Court and that what was required was to look at all the relevant circumstances or, as Lord Walker had said 'to look at the matter in the round', including the circumstances of the mistake and its consequences for the person who made the vitiated disposition in order to evaluate objectively 'the injustice (or unfairness or unconscionableness) of leaving the disposition uncorrected'. When considering the issue of unconscionability (or unfairness or injustice) it was necessary to look at the consequences of setting aside, or not setting aside, the disposition. The only person affected here was G, who would have a tax liability if the mistake was not corrected (and HMRC who would not be able to levy the tax if the disposition was set aside). By contrast, in other cases where the court had been persuaded to set aside dispositions, there had been other parties whose interests were affected. The unconscionableness (or injustice or unfairness) of leaving the mistake uncorrected had to be viewed objectively. In all the circumstances, the Court did not consider that it would be an appropriate exercise of the Court's jurisdiction to set aside the distribution.

The unconscionableness (or injustice or unfairness) of leaving the mistake uncorrected had to be viewed objectively

(9) Morgan J in ***Van der Merwe v Goldman*** [2016] EWHC 790 (Ch) set aside on grounds of mistake (i) a transfer of 24 March 2006 and (ii) a settlement and transfer of 27 March 2006. Until 24 March 2006 a husband and wife were the joint freehold owners of a house in Oxford, where they lived. At all material times up to March 2006, both of them were domiciled in South Africa. The effect of section 267(1)(b) of the Inheritance Tax Act 1984 was that, from 6 April 2006 both husband and wife would be treated for the purposes of the Act as domiciled in the UK because of their long residence in the UK. The husband wished to take steps to mitigate the consequences of his being treated for the purposes of IHTA as being domiciled in the UK. He sought and obtained advice as to what steps were open to him in this respect and was advised that his position would be improved if he placed the house in Oxford into an interest in possession settlement. The advice was sought by the husband alone and the advice did not directly address the wife's separate position nor the fact that the house was in joint names. The placing of the house into an interest in possession settlement would give the husband (or, more accurately, the trustees of the settlement) certain advantages: one such advantage would be that the trustees of the settlement could borrow money and secure the repayment of those monies against the house. The resulting charge of the house would reduce the value of the house under section 162(4) of IHTA. The money borrowed could be remitted outside the UK or invested outside the UK. The money or the investment outside the UK would be excluded property pursuant to section 48(3)(a) of IHTA if the settlor was not domiciled in the UK at the time the settlement was made; hence, the importance of creating the settlement before the husband became treated as domiciled in the UK on 6 April 2006, pursuant to section 267 of IHTA. In March 2006, the husband saw this as the principal advantage of creating an interest in possession settlement. As between husband and wife, it was the husband who took the initiative in taking advice on IHT in November 2005 and giving instructions to solicitors to draw up the appropriate legal documents. However, he fully explained his intentions and his reasons to the wife and she agreed that they would act together to give effect to his proposal. Neither of them was aware prior to 27 March 2006, nor indeed for many years later, of the budget announcement on 22 March 2006 to the effect that a settlement of this kind, created on or after 22 March 2006, would be a chargeable transfer for value. At the time of the transactions, they both believed that the husband would not become liable to pay tax. If he had been aware of the change announced in the budget on 22 March 2006, he would not have pursued the idea of a settlement after that date. If he had not pursued the idea of a settlement after that date then neither would his wife. The result would have been that the house would not have been transferred to H on 24 March 2006 and the settlement and the transfer of 27 March 2006 would not have taken place. The house would have remained in the joint names of both husband and wife as it did before 24 March 2006. By the proceedings, the husband alone sought an order setting aside the settlement and the transfer of 27 March 2006, on the basis that he was mistaken as to the tax consequences of creating that settlement. There was no pleaded claim by the husband and wife acting together, to set aside the transfer of 24 March 2006. HMRC had been joined as defendants and contended that the settlement and the transfer of 27 March 2006 were not transactions in favour of a volunteer, so that the court could not set aside the settlement and the transfer of 27 March 2006 unless they could be held to be void for mistake at common law, which was not suggested by the husband. This gave rise to a question as to whether the position would be different if the application before the court had been an application by the husband and wife acting together, to set aside the transfer of 24 March 2006 and the settlement and transfer of 27 March 2006. In turn, counsel for the husband and counsel for the wife indicated that they would wish the court to

consider the claim as involving a claim by the husband to set aside the settlement and the transfer of 27 March 2006, alternatively, a claim by the husband and wife acting together, to set aside the transfer of 24 March 2006 and the settlement and the transfer of 27 March 2006. HMRC did not oppose the request from the husband and wife that the case be considered in that way. The Court considered that there were two quite distinct sets of rules dealing with setting aside, or declaring to be void, transactions on the ground of mistake, one applying to contracts and the other to gifts. In contract cases there was no equitable jurisdiction allowing a court to order rescission of a contract for common mistake in circumstances that fell short of the circumstances in which the common law would hold the contract to be void. It was common ground that if the contract rules applied, the husband could not satisfy them. In cases concerning a gift made as the result of a mistake, the relevant legal principles were those restated in *Pitt v Holt* [2013] 2 AC 108, which applied even if the transaction was under seal. The difference between cases where the equitable rules applied and those where they did not turned on whether consideration had been given for the benefit conferred by the transaction. If the effect of rescission (or a declaration that a transaction was void) would deprive a party of a benefit for which he gave consideration, then the common law rules applied and there was no separate equitable jurisdiction to order rescission. Conversely, if the effect of rescission would deprive a party of a benefit for which he gave no consideration, then there was a separate equitable jurisdiction to order rescission, applying *Pitt v Holt*. In the instant case it was not necessary to find that there had been an informal contract between the husband and the wife, nor that the transfer of 24 March 2006 to the husband alone was by way of an outright gift: the wife did not intend to give the property to her husband beneficially for him to do with as he pleased; she transferred the property to him alone so that he could carry out their common intention to create the intended settlement. There was a principle of resulting trusts that, if a person transferred property to another to hold upon trusts that were to be declared in the future, a resulting trust would arise on the transfer and would subsist until the trusts had been effectively declared. In the circumstances, the husband and the wife had made a relevant mistake when they entered into the transfer of 24 March 2006 and the settlement and transfer of 27 March 2006; they were ignorant of the budget announcement on 22 March 2006 and that ignorance could not be regarded as 'mere ignorance' which would not give rise to a relevant mistake because the ignorance in the instant case led them to a false belief or assumption that the creation of the settlement did not involve a chargeable transfer so that no inheritance tax would be payable as a result; they would not have entered into the transactions of 24 and 27 March 2006 if they had not made the relevant mistake; their mistake was sufficiently grave to satisfy the relevant test and it was of so serious a character as to render it unjust on the part of a volunteer to resist rescission of the transactions. As a result, the husband and wife acting together were entitled to an order setting aside the transfer of 24 March 2006 and the settlement and transfer of 27 March 2006, on the grounds of mistake. The Court would also hold that the husband acting alone was entitled to an order setting aside the settlement and the transfer of 27 March 2006. The wife had said in her witness statement that if the settlement and transfer of 27 March 2006 were set aside, then the husband and the wife intended to transfer the property back into their joint names. In those circumstances, it was more appropriate for the Court to set aside all of the transactions of 24 and 27 March 2006.

(10) In ***Re the Z Trust, Representation of a First Purported Trustee*** [2016] JRC048 the Royal Court of Jersey (Samedi Dvision, JA Clyde-Smith, Commissioner and Jurats Ramsden and Morgan) set aside the appointment of UK-resident trustees pursuant to the statutory jurisdiction in relation to the Rule in *Hastings-Bass*. The trust was a discretionary trust governed by Jersey law. The principal asset was a shareholding in a foreign-registered company which had previously owned two properties in England, a leasehold flat and a freehold property. The original

beneficiaries were the settlor and her children (including B) and remoter issue. The settlor purported to exercise a power of appointment conferred on her under the trust deed on 'the Appointment Day' to appoint B and R1 as trustees in place of R2. At that time, B and R1 were both resident in the UK and worked for a firm of solicitors in London. On the same day, R2 purported to appoint a purported director as the company's director, president, treasurer, and secretary and to transfer the company's shares to a purported nominee, which in turn purportedly held the company's shares on bare trust for B and R1 as purported trustees. At the settlor's instigation, B and R1 executed a deed of addition and a deed of exclusion on by which, respectively, two of her children were revocably excluded and the settlor's spouse (H) was added as a beneficiary. The settlor died less than a year after the Appointment Day. Shortly after the settlor's death, her two children who had been revocably excluded challenged the validity of the appointment of B and R1 as purported trustees on the basis of her lack of physical and mental capacity. Approximately two years after the Appointment Day the company sold the flat for approximately of the value of the trust fund. It retained ownership of the freehold property which was thought to be worth approximately of the value of the trust fund and was occupied by H. The two revocably excluded children neither acted upon nor withdrew their challenge, and as a consequence B brought a representation seeking directions as to the validity of the appointment of B and R1 as trustees. During the course of 2015, the Court approved an agreement between the convened parties, B, R1, and R2 surrendering their discretion to the Court, by which all of the claims the two revocably excluded children (and their issue) had in relation to the trust were settled and under which they, their children and remoter issue were irrevocably excluded as beneficiaries of the trust. It was also a term of that agreement that B would apply to the Court to set aside the appointment of B and R1 as trustees because of the adverse tax consequences to the trust of that appointment. It was agreed that B, R1, and R2 would play a neutral role in that application. HMRC had been notified of the application but had not sought leave to participate. The settlor had been a member of a significant Middle Eastern family. She married H before the trust was established, but because they were not from the same country, the marriage was not approved by her family. As a consequence, they experienced a number of difficulties with the authorities in her home country. She was stopped from accessing her assets in her home country. Two of her children (namely those who were later revocably excluded) benefited from these assets and declined to transfer them to her. In consequence, she had a very strained relationship with the two children who were later revocably excluded. The settlor and H had one son, B, and some five years after establishing the trust, they moved permanently to the UK, which was when their home, and the freehold property was acquired by the company. The settlor and H were clients of the firm of English solicitors and consulted R1 (who worked at the firm) in relation to their wills and the trust. At that time the settlor was very ill and had suffered a stroke. Although she spoke some English, it was not her first language and H would act as an intermediary, sometimes explaining R1's advice to the settlor. She had a number of concerns at that time in relation to the trust: (i) R2, who administered the trust from Jersey, was threatening (in her view) to sell the flat for a figure of less than of the eventual sale price, something she and the family were strongly opposed to and which they thought was a serious undervalue; (ii) one of the settlor's children (who would later be revocably excluded) ('A') had contacted R2 directly about the trust, which as a beneficiary she was entitled to do. However, this caused the settlor much distress: she felt this interference in the affairs of the trust was disrespectful on the part of A; (iii) the settlor was very concerned that persons connected with her wider family in her home country would be able to take the assets of the trust because the trustee was based in Jersey; (iv) the settlor wanted to ensure that B's future was safeguarded and felt this was best done through having UK trustees. She and H suggested that this be done by B and R1 taking over as trustees on the basis that this would secure the trust assets and, because she had been living in the UK for some years, she was prepared to pay a reasonable amount of English tax. The English solicitors prepared a 'tax note', the purpose of which was to highlight some of the tax implications of moving the trust and the company onshore, which was sent to S some five months before the Appointment Day. H recalled reading the tax note to the settlor and trying to explain it to her as best he could, but as neither of them were English speakers, they did not understand all the technicalities. No further advice was obtained as recommended and, therefore, no calculations were ever undertaken to identify the extent of the tax consequences. In these circumstances, on the Appointment Day the settlor exercised her power to appoint B and R1 as trustees of the trust and R2 resigned. Before resigning, R2 sought and obtained confirmation from the solicitors that the settlor had received tax advice on the implications of bringing the trust and the company onshore. Also on the Appointment Day, and consequent thereto, employees of R2 retired as directors and officers of the company and a UK resident company was appointed in their place. Thus, both the trust and the company were moved onshore. The consequences of the move gave rise to English tax liabilities approaching 40 per cent of the value of the trust assets, creating substantial tax liabilities at the level of both the company and the trust. In the circumstances, B applied to have set aside the appointment made by the settlor of B and R1 as trustees of the trust, as a consequence of which the trust became resident in the UK for tax purposes. The settlor's exercise of the power to appoint B and R1 as a trustees could be impugned on a number of grounds: (i) the settlor did not seek or obtain any advice on the fiduciary nature of the power she was exercising, which, *inter alia*, required her to consider the interests of all the beneficiaries. She was focused almost exclusively on the interests of B; (ii) she failed to obtain the further detailed advice on the tax consequences of the move onshore that the English solicitors recommended in their tax note and so had no idea of the actual tax implications; (iii) her fear that her wider family would be able to take the trust assets if held through Jersey trustees was irrational. There was no evidence from R2 of any attempt by her wider family to do so and the wider family had no *locus* within the trust. It was equally irrational to move the trust onshore in order to protect the trust assets from her wider family, when such a move would have made no difference—any person's entitlement to benefit from or claim assets forming part of the trust property would still be determined by reference to the same yardstick—one of Jersey law. The same could be said of A's ability as a beneficiary to obtain information about the trust assets. Changing the trustee made no difference whatsoever to A's rights in that respect; (iv) it was equally irrational for the settlor to think that moving the trust onshore improved the safeguards for B. It made no difference to his rights whatsoever. What it did do was nearly halve the value of the trust assets that would otherwise have been available to him and his children. The Court would therefore, in exercise of its inherent jurisdiction, as supplemented by Article 51 of the Trusts (Jersey) Law 1984, set aside the appointment of B and R1 as trustees, on the grounds that the power of appointment of trustees was not exercised in the interests of all of the beneficiaries, it failed to take into account the serious tax consequences and it was irrational. In relation to the company, that was a wholly owned and controlled company through which the assets of the trust were held. The resignation of R2's officers as directors of the company, the appointment of the purported director as sole director and officer, and the transfer of the shares to the purported nominee were all undertaken for the sole purpose of giving effect to the settlor's exercise of the power of appointment, and pursuant to the obligation of R2 under the deed of appointment and retirement to vest the trust fund in B and R1 and to execute all documents necessary for that. There was a 'sufficient link' between (i) the settlor's exercise of the power of appointment and R2's subsequent retirement as trustee of the trust; (ii) the transfer of the company's shares to the purported nominee consequent upon that appointment and retirement of trustees; and (iii) the resignation of

R2's officers as directors of the company and the appointment of the purported director in that capacity. R2's officers would not have appointed the purported director as director of the company and themselves resigned as directors of the company if S had not exercised the power of appointment, in just the same way as R2 would not have purported to retire as trustee and transferred the company shares to the purported nominee as nominee for its successors in the absence of the exercise of the power of appointment. The Court would, therefore, treat these steps as one related transaction, so that having set aside the settlor's exercise of the power of appointment, with the effect that R2's retirement as trustee was invalid and ineffective, then, pursuant to Article 47I(3) of the Trusts (Jersey) Law 1984, the transfer of the company's shares and the resignation of R2's officers as directors and officers of the company and the appointment of the purported director as director and officer of the company should also be set aside as a necessary consequence.

(11) Master Matthews in ***Bainbridge v Bainbridge*** [2016] EWHC 898 (Ch) rescinded two transfers of land on the grounds of mistake. The claimants, who were father and son, had farmed together in partnership. They were concerned about possible claims to the partnership land from other members of the family. They claimed that their solicitors advised them to create a discretionary trust of the land, and advised them that there would be no capital gains tax chargeable on the transfer of the land into that trust, but this was incorrect. The trust was created and the land was transferred to the trustees. At a hearing in September 2015 a judge granted the relief sought in relation to part of the land and gave the claimants permission to re-amend the claim form to allow them to make similar claims to set aside two further transfers of land, which related to parcels that had later been sold by the trustees, the proceeds being used to acquire new land. The claimants accepted that the purchasers of the land disposed of were good faith purchasers and that there was no prospect of the court's making an order rescinding the purchases by those third parties, but they submitted that the new land substantially represented the land sold, and that the court should make an order 'restoring' the new land to the claimants' beneficial ownership. In a case where third party rights could not be disturbed, there was no reason not to apply the tracing process to exchange products of the transferred property in order to find other assets to which to make a claim instead. It was not only in cases of fraudulent misrepresentation that the idea of a 'proprietary base by avoidance' and the tracing process could be prayed in aid. The principle was wide enough to cover other vitiating factors too, including mistake. It was open to the claimants to make a claim to the new land: the court would make an appropriate declaration giving effect to the rescission of the transfers of the land sold.

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(12) In ***Girls' Day School Trust v GDST Pension Trustees*** [2016] EWHC 1254 (Ch) Norris J ordered the rectification of a definitive deed for a new occupational defined benefit pension scheme where the version adopted had been an unamended draft. The Judge noted that the Court could dispose of an application without a hearing if that would save time and expense and a hearing was not necessary. Rectification of a pension scheme would ordinarily require a hearing because it was often not an efficient use of court time for a judge to consider complex material unassisted by oral representations, and because it was important that ordinary scheme members should not be left with any sense that there had been some deal done in a dark corner. For the future, any party seeking to rectify a mistake in the expression of a pension scheme by obtaining a summary judgment order without a hearing had to understand that it was likely that the court would insist that after judgment all evidence be open to inspection. If that was not acceptable, the summary judgment application had

to be listed for a public hearing, with permission to vacate if no scheme member gave notice of intention to attend.

'Momentous decision' jurisdiction

(13) In ***Re the A Trust, A v R1, R2, R3, R4 and R5*** (Guernsey case 25/2016) John Russell Finch, Judge of the Royal Court of Guernsey held that trustees of a trust having a Bahamian proper law might effect a distribution of trust assets (having an approximate value of US$12.8 million) in accordance with the provisions of a schedule to the trust deed and the settlors' letter of wishes. The Courts of Guernsey would apply English principles of the conflicts of laws in relation to the admission of evidence of a foreign law, so that foreign law had to be pleaded and proved by expert evidence, the burden of proving it lying on the party who based his claim or defence on it; and if no evidence or insufficient evidence was adduced, then a Guernsey Court should apply the law of Guernsey. In the instant case the claimant had not put in any expert evidence on Bahamian law and Guernsey law was accordingly applicable. In relation to trustees' invocation of the 'momentous decision' jurisdiction, the Court had to satisfy itself that: (i) the trustee's decision had been formed in good faith; (ii) the decision was one which a reasonable trustee properly instructed could have reached; and (iii) the decision had not been vitiated by any actual or potential conflict of interest. In addition, the Court must not act as a rubber stamp and had to be satisfied as to the rationality of the decision. In the instant case, the trustee had considered the relevant points and done its best to address them. There was a rational decision-making process and an explanation for the decision made. The claimant had not engaged with the trustee in any meaningful way whatsoever. His case boiled down to a wistful hope that something more could be conjured-up for him than the 4.5 per cent of the assets he was going to get. A trustee was not to be penalized for following a letter of wishes, in the absence of some tangible reason otherwise.

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(14) On the application of the Charity Commission, Snowden J in ***Re The Cup Trust sub nom Charity Commission for England and Wales v Mountstar (ptc) Ltd*** [2016] EWHC 876 (Ch) blessed the decision of interim managers of a charity known as 'The Cup Trust' not to appeal against the rejection by HMRC of a claim to higher rate tax relief on what were portrayed as charitable donations to the trust. The trust had made claims totalling £46 million for gift aid on the 'donations' from taxpayers, but the claims had been rejected by HMRC on the basis that they failed to satisfy the requirements of the Income Tax Act 2007 Section 416. The interim managers had sought advice from counsel who considered that the prospects of success for the trust's appeal were negligible. The first defendant argued that the appeal should not be discontinued. Its director offered to personally fund the pursuit of the claims on the condition that the first defendant could choose counsel to represent the trust. The Court considered that there was a real question over whether it should 'bless' what were essentially business decisions, but there were plainly exceptional circumstances in the instant case that justified the Charity Commission having referred the matter to the court. The facts were highly unusual in the context of a charity and the potential amounts at stake were large. Moreover, controversy surrounded the trust and there had been a challenge to the appointment of the interim managers. In light of those factors, the commission was justified in seeking an independent review of the decision that its appointees wished to take. Even having regard to the very large amount of the gift aid claims, the interim managers were not obliged to accept funding and pursue an appeal against HMRC on the terms offered by the first defendant. The decision not to accept such funding and to discontinue the gift aid claims was within the range of decisions to which rational charity trustees could properly come.

Variation of trusts

(15) Norris J in ***Collins v Collins*** [2016] EWHC 1423 (Ch) varied the trusts of an insurance policy declared by a husband following his divorce in order to procure that the interest of the youngest child of the marriage should vest at 18, which was undoubtedly for her benefit in that it secured for her an absolute interest in a fund in which she currently had only a terminable interest in the income. That was a clear financial advantage, and there was no evidence to suggest that she would deal imprudently with her share. The arrangement was amended following the Court's indication during the course of the hearing that it could not approve the variation as originally drafted. Insufficient consideration had been given to the tax consequences of the original proposals.

(16) In ***TM v AH*** [2016] EWHC 572 (Fam) Moor J ordered the joinder of the trustees of two foreign trusts to financial proceedings between a husband and wife. The husband was the settlor of the trusts, which were established in Switzerland and the British Virgin Islands, respectively. The wife had applied to the Court to vary the trusts on the basis that they were nuptial settlements. The current beneficiary of the trusts was one of the parties' adult children, and it was intended that their other children would become beneficiaries once they became adults. The trustees had not submitted to the jurisdiction of the English court. Although elsewhere courts had taken the view that once trustees had been served matters could be determined without the need for them to be parties, they should usually joined be where an application was made to vary their trusts. It was a tenet of the right to a fair trial under ECHR Article 6 that trustees should be joined before a court varied the trusts of which they were the trustees. It was hard to see how a court could make such an order without them being parties to that litigation, let alone say that a variation was binding on them.

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(17) In the first case heard under section 4 of the Bermudian Perpetuities and Accumulations Act 2009 as amended by the Perpetuities and Accumulations Amendment Act 2015, the Supreme Court of Bermuda (Kawaley CJ) in ***Re the C Trust*** (2015: 473) varied a Bermudian trust so as to disapply the rule against perpetuities and any other similar rule of law that might limit or restrict the time under which property might be held subject to any trust should apply to the trust or its property; and extended the duration of the trust to 17 December 3002. The Court accepted the submission that the legislative history of the section showed that the main purpose of the provision was to create a more simplified means of extending trust periods than was available under the pre-existing law. The main rationale for extending the duration of the trust case was the size of the trust (its assets were said to be worth in the region of $2 billion) together with the desire to have regard to wishes of the settlor: she wanted the trust to be dynastic in duration and to ensure that succeeding generations of beneficiaries would never be 'spoiled' by suddenly coming into great personal wealth. This was neither irrational nor in any way objectionable.

*The Supreme Court of Bermuda in **Re the C Trust** extended the duration of the trust to 17 December 3002*

(18) In ***C v C*** [2015] EWHC 2699 (Ch), [2016] WTLR 223 Judge Hodge QC considered the jurisdiction of the Court to vary trusts having a foreign proper law. There were four family settlements and a beneficiary applied to the court for the approval, on behalf of minor beneficiaries and all unborn and unascertained persons who might become beneficially interested, the variation of the trusts of all of them and the compromise of an issue as to the validity of the two most recent of them. The first two settlements were made in 1932 and 1950 by the first respondent's late father, while the third and fourth were made by the first respondent in 1996. The 1950 settlement was governed by the law of Kenya. The other three settlements were governed by English law. The applicant

and the first and second respondents, who were husband and wife, were beneficiaries of all four settlements. The first respondent's minor sons were also beneficiaries of the 1932 settlement and his nephew was a beneficiary of the 1950 and 1996 settlements. The applicable law regarding the 1950 settlement was the law of Kenya which, under the Hague Convention on the Law Applicable to Trusts and their Recognition 1986 Article 8(h), was to govern the variation of a trust. Nevertheless, a court still retained the power under the 1958 Act to vary a trust governed by foreign law, subject to two limitations, namely that: (i) the court should be cautious in assuming jurisdiction where there were substantial foreign elements in the case; and (ii) the Court should apply the substantive law of the country governing the trust identified by reference to Article 6 or 7 of the Convention. It should not exercise the jurisdiction under the 1958 Act to make a variation if the applicable law did not permit variation. In the instant case, the Kenyan Trustee Act 1929 referred to 'the court' having power to effect a variation: that meant the High Court of Kenya. If the English court decided on that ground that it could not exercise the foreign power, it would be applying only a truncated form of foreign law, and not the whole of it, as the Convention prescribed. Since a Kenyan court would have power to vary the trusts of the 1950 settlement under its legislation, the English court similarly had jurisdiction under the 1958 Act. It was, therefore, appropriate to exercise that jurisdiction in the instant case. The variation of the trusts created by the 1950 settlement was intimately associated with the variation application in relation to the other three settlements, which were all governed by English law, and it would be wholly unreasonable and disproportionate to require a separate application to be made to the Kenyan courts.

(19) Warren J in ***A v B*** [2016] EWHC 340 (Ch) varied the trusts made under a will and a settlement where the core beneficiaries of the trusts were members of the same family, including their spouses and children, but there was a wide remoter class of potential beneficiaries, including unborn and unascertained persons and charitable entities, who were not represented before the court and were not parties to the proceedings. The main purpose of the proposed variation was to extend the perpetuity period to 2141. The trustees proposed a method of eliminating the need for the involvement of the wider class by executing deeds releasing their powers, but only to the extent that it deprived the members of the wider class, who were not members of the narrower class, of any right which they might otherwise have had to challenge the arrangement. In practical terms, the result of the release was that it removed such persons as potential beneficiaries for the instant before the arrangement took effect, so that their consent and the court's approval were not required, and reinstated them immediately after the arrangement took effect according to the terms of the varied trusts. There was no doubt that a power of appointment could be released, and if the persons entitled in default of the exercise of the power agreed a variation of the trusts, it would not be necessary to release the power altogether. It could be released to the extent necessary to allow the variation to take effect. There was no fraud on the power and it was in any event arguable that the arrangement benefited the wider class as it preserved valuable assets for the future in the remote circumstance of their ever benefiting. It did not matter whether the arrangement was seen as a partial or total release, subject to reinstatement of modified powers of appointment. It was perfectly proper for the trustees to effect the partial releases.

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