

Futter and another (appellants) v. The Commissioners for Her Majesty's Revenue and Customs
(respondent)

Pitt and another (appellants) v. The Commissioners for Her Majesty's Revenue and Customs
(respondent)
([2013] UKSC 26)

Indexed As: Futter et al. v. United Kingdom (Her Majesty's Revenue and Customs)

United Kingdom Supreme Court
London, England
Lord Neuberger, President, Lord Walker, Lady Hale, Lord Mance, Lord Clarke, Lord Sumption
and Lord Carnwath
May 9, 2013.

Summary:

Futter Case:

This case involved a private family trust. Futter made two settlements. Initially both settlements had non-resident trustees, but subsequently Futter and Cutbill, both United Kingdom residents, were appointed as trustees. Cutbill was a partner in the firm of solicitors acting for the trustees and gave tax advice respecting the settlements. Acting on that legal advice, Futter and Cutbill distributed capital from the trust funds in the exercise of a power of enlargement and the power of advancement. The legal advice overlooked certain capital gains consequences such that the trustees also overlooked the tax consequences in distributing the funds. The trustees applied to have the deed of enlargement and deeds of advancement declared void on the basis of the Hastings-Bass rule. Revenue and Customs resisted the application. The trial judge allowed the application, holding that the advancements were vitiated under the Hastings-Bass rule and should be set aside. Revenue and Customs appealed.

The England and Wales Court of Appeal (Civil Division), per Lloyd, L.J., in a decision with neutral citation [2011] EWCA Civ 197, allowed the appeal. The trustees' acts of enlargement and advancement were within their powers under the respective settlements, and could not be held to be void. The trustees took advice from appropriate solicitors as to the tax consequences of what they were thinking of doing, and acted in accordance with that advice. Therefore, they did not act in breach of trust in making the enlargement and the advancements even though, because the advice was wrong, they were mistaken as to the tax consequences. The enlargement and the advancements were therefore not voidable. Futter appealed.

The United Kingdom Supreme Court dismissed the appeal. The court generally agreed with the decision of Lloyd, L.J., as it related to the application of the Hastings-Bass rule.

Pitt Case:

Pitt became mentally incompetent because of head injuries sustained in a road traffic

accident. His wife was appointed as Pitt's receiver under the Mental Health Act. His claim for damages from the accident was compromised by a structured settlement of £1.2 m. Upon the advice of financial advisors, Pitt's wife established a trust under the authority of the Court of Protection. Some years later it was discovered that the financial advisors failed to address the issue of inheritance tax and, if that matter had been considered, the trust could have been set up in a more advantageous manner. Pitt died. His personal representatives, who were also two of the trustees, commenced proceedings to have the trust set aside either under the Hastings-Bass rule or on the ground of mistake. Revenue and Customs resisted the application. The trial judge allowed the application and set aside the trust on the basis of the Hastings-Bass rule, but would not have done so on the basis of mistake. Revenue and Customs appealed.

The England and Wales Court of Appeal (Civil Division), per Lloyd, L.J., in a decision with neutral citation [2011] EWCA Civ 197, allowed the appeal on the Hastings-Bass issue. What Pitt's wife did was within the terms of the power conferred on her by the Court of Protection. It was therefore not void. She owed her husband a fiduciary duty in respect of her exercise of the power conferred on her by the Court of Protection. However, having taken advice from a proper source as to the advantages and disadvantages of the various courses open to her, she was not in breach of fiduciary duty even though, because of the inadequacy of the advice given, she did not take into account the liability that would arise. Accordingly, what she did was not voidable as having been done in breach of fiduciary duty. The court refused to set aside the trust on the basis of mistake. Pitt appealed.

The United Kingdom Supreme Court dismissed the appeal in so far as it turned on the Hastings-Bass rule, generally agreeing with the decision of Lloyd, L.J., on that issue. The court, however, allowed the appeal on the mistake issue, and set aside the trust on that basis.

Mistake - Topic 201

Mistake of law - General - [See third **Mistake - Topic 603**].

Mistake - Topic 603

Mistake of fact - General - Mistake of fact - What constitutes - Pitt became mentally incompetent because of head injuries sustained in a road traffic accident and obtained a structured settlement of £1.2 m. - His wife was appointed as Pitt's receiver under the Mental Health Act - Upon the advice of financial advisors, Pitt's wife established a trust under the authority of the Court of Protection - Subsequently it was discovered that the financial advisors failed to address the issue of inheritance tax and the trust could have been set up in a more advantageous manner - Pitt died - His personal representatives, who were also two of the trustees, commenced proceedings to have the trust set aside on the ground of mistake - The United Kingdom Supreme Court set aside the trust on the ground of mistake - The court reviewed the law on what constituted a mistake and adopted a test focussed on the gravity of a mistake rather than on the type of mistake - See paragraphs 99 to 142.

Mistake - Topic 603

Mistake of fact - General - Mistake of fact - What constitutes - The United Kingdom

Supreme Court adopted a test for what constituted a mistake that focussed on the gravity of a mistake rather than on the type of mistake - The court stated that "the gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion ... The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus ... on the facts of the particular case ..." - See paragraph 126.

Mistake - Topic 603

Mistake of fact - General - Mistake of fact - What constitutes - The United Kingdom Supreme Court adopted a test for what constituted a mistake that focussed on the gravity of a mistake rather than on the type of mistake - The court, per Walker, J., stated that, inter alia, "... I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. If the Gibbon v Mitchell test is further widened in that way it is questionable whether it adds anything significant to the Ogilvie v Littleboy test. I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction" - See paragraph 122.

Trusts - Topic 4087

Administration - Powers of trustee - Setting aside discretionary decisions of trustees - Hastings-Bass rule - The Hastings-Bass rule concerned trustees who had made a decision without having properly considered relevant matters which they ought to have taken into consideration - The United Kingdom Supreme Court discussed the history and application of the rule in detail - The court concluded, inter alia, that "... for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene ... (apart from the special case of powers of maintenance of minor beneficiaries, where the court was in the past more interventionist ...) ... It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention" - See paragraph 73.

Trusts - Topic 4087

Administration - Powers of trustee - Setting aside discretionary decisions of trustees - Hastings-Bass rule - This case involved a private family trust involving two settlements - Initially both settlements had non-resident trustees, but subsequently two United

Kingdom residents were appointed as trustees - One of the resident trustees was a partner in the firm of solicitors acting for the trustees which gave tax advice respecting the settlements - Acting on that legal advice, the trustees advanced capital from the trust funds - The legal advice overlooked certain capital gains consequences such that the trustees also overlooked those in distributing the funds - The trustees applied to have the advancements declared void on the basis of the Hastings-Bass rule - The United Kingdom Supreme Court held that the advancements could not be voided under the Hastings-Bass rule where there was no breach of fiduciary duty - See paragraphs 47 to 52 and 58 to 98.

Trusts - Topic 4087

Administration - Powers of trustee - Setting aside discretionary decisions of trustees - Hastings-Bass rule - Pitt became mentally incompetent because of head injuries sustained in a road traffic accident and obtained a structured settlement of £1.2 m. - His wife was appointed as Pitt's receiver under the Mental Health Act - Upon the advice of financial advisors, Pitt's wife established a trust under the authority of the Court of Protection - Subsequently it was discovered that the financial advisors failed to address the issue of inheritance tax and the trust could have been set up in a more advantageous manner - Pitt died - His personal representatives, who were also two of the trustees, commenced proceedings to have the trust set aside under the Hastings-Bass rule - The United Kingdom Supreme Court held that the trust could not be set aside under the Hastings-Bass rule where there was no breach of fiduciary duty - See paragraphs 53 to 98.

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Agents:

[None disclosed.]

This appeal was heard on March 12, 13 and 14, 2013, before Lord Neuberger, President, Lord Walker, Lady Hale, Lord Mance, Lord Clarke, Lord Sumption and Lord Carnwath, of the United Kingdom Supreme Court. The following judgment was delivered by Lord Walker, for the court, on May 9, 2013.

Order accordingly.

Editor: Elizabeth M.A. Turgeon