Futter v The Commissioners for Her Majesty's Revenue and Customs,
Pitt v The Commissioners for Her Majesty's Revenue and Customs
[2013] UKSC 26

Summary

This case concerned two cases:

Futter: There was a distribution of capital from a settlement set up by Futter to Futter and his children. In making the distribution – on the advice of solicitors – the trustees of the settlement overlooked the fact that that the way they made it resulted in Futter and his children incurring a liability to pay capital gains tax. The trustees sought to have the distribution set aside under the rule in *Re Hastings-Bass*. The Court of Appeal rejected the application on the basis that the trustees had acted within their powers in distributing the money, and they had not acted in breach of their duties as trustees, as they had acted on apparently competent advice from their solicitors.

Pitt: Pitt was seriously injured in an accident and obtained £1.2m in damages for his injuries. This money was used to set up a discretionary trust called the Derek Pitt Special Needs Trust (the 'SNT'). At the time the trust was set up, it could have been structured in a way that would have avoided inheritance tax being payable on the monies in the trust fund when Pitt died. But this was not done – the firm of financial advisers who advised setting up the discretionary trust did not mention the need to avoid paying inheritance tax. When Pitt died, and it was discovered that inheritance tax would be payable on the monies left in the SNT, the trustees of the SNT sought to have the trust set aside on the basis (a) that the rule in *Re Hastings-Bass* applied; and (b) that the SNT had been created by mistake, and as such its creation could be rescinded in equity. The Court of Appeal rejected both arguments: (a) the rule in *Re Hastings-Bass* did not apply as no breach of duty had been committed by the trustees setting up the SNT, as they were acting on professional advice; (b) a gift made by mistake could only be rescinded in equity if the mistake that resulted in the gift being made was 'of so serious a character as to render it unjust on the part of the done to retain the property given to him' (*Ogilvie* v *Littleboy* (1897) 13 TLR 399, 400 (per Lindley LJ)), and a mistake as to the tax implications of setting up the SNT in the way it was set up did not count.

The UKSC held that: (1) the dispositions in *Futter* and *Pitt* could not be set aside under the rule in *Re Hastings-Bass*; and (2) the disposition in *Pitt could* be set aside under the equitable jurisdiction to rescind gifts made by mistake. Lord Walker gave the only judgment, with which the other six members of the Court agreed.

The rule in Re Hastings-Bass

Lord Walker distinguished (at [62]) three different situations where a disposition of trust assets might be set aside:

(1) where the trustees had no power to dispose of the assets in the way they did ('excessive execution');

(2) where the trustees acted fraudulently in disposing of the assets in the way they did ('fraudulent appointment'); and

(3) where the trustees acted within their powers, and did not act fraudulently, in disposing of the assets in the way they did, but they acted as they did without sufficient deliberation ('inadequate deliberation').

He held that the dispositions in (1) and (2) would be void (though he was more doubtful about whether this was the case in (2)) as a matter of the general law. In situation (3), the disposition of trust assets might be voidable (not void: [93]) if the rule in *Re Hastings-Bass* applies. So the rule in *Re Hastings-Bass* is only really concerned with determining whether a disposition in an 'inadequate deliberation' case can be, and will be, set aside.

Lord Walker agreed (at [73]) with the Court of Appeal that a disposition of trust assets could only be set aside under *Re Hastings-Bass* in an 'inadequate deliberation' case if 'inadequate deliberation on the part of the trustees [was] sufficiently serious as to amount to a breach of...duty. Breach of duty is essential...because it is only a breach of duty on the part of the trustees that entitles the courts to intervene... It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would...have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of...duty justifies judicial intervention.'

(A note on language: in the above quote, Lord Walker actually talks about a 'breach of *fiduciary* duty' (emphasis added). I think the reason for this is that – as Lord Walker notes at [10] – the rule in *Re Hastings-Bass* can apply to non-trustees acting in a fiduciary capacity. So Lord Walker didn't want to talk about a 'breach of trust' and used the term 'breach of fiduciary duty' instead. When we talk about a breach of fiduciary duty, we are normally referring to some kind of self-seeking or profit-making behaviour. That is definitely *not* what Lord Walker is talking about here.)

But Lord Walker's judgment seems to indicate that establishing a breach of duty in an 'inadequate deliberation' case is *necessary* but *not sufficient* to have a disposition of trust assets set aside under *Re Hastings-Bass*. Lord Walker thought (at [92]) that 'there must be a high degree of flexibility in the range of the court's possible responses' to an 'inadequate deliberation' case where the trustees committed a breach of duty in their deliberations (or lack of them). In some cases, the court will only want to set aside the disposition of trust assets if it can be shown that (1) the trustees *would have* made a different disposition had they not committed their breach of duty. In other cases, the courts will think it appropriate to set aside the disposition if it can be shown that (2) the trustees *might have* made a different disposition had they not committed their breach of duty. Lord Walker did not want to lay down a 'rigid rule' as to whether (1) or (2) had to be shown in an 'inadequate deliberation' case – that 'would inhibit the court in seeking the best practical solution in the application of the *Hastings-Bass* rule in a variety of different factual situations' ([92]).

Even if he were inclined to do so, Lord Walker did not need to go into any more detail on these issues as the lack of any breach of duty in both *Futter* and *Pitt* meant that the rule in *Re Hastings-Bass* could not be relied on to set aside the dispositions in those cases. That was sufficient to dispose of the appeal in *Futter*, but the question of whether the disposition in *Pitt* could be rescinded in equity on the basis that it had been made under a mistake still had to be dealt with.

Rescission for mistake

Lord Walker held (at [122]) that a gift could be set aside in equity if it was affected by a 'causative mistake of sufficient gravity'. Each of these terms needs to be explained:

(1) *Causative*. This is relatively straightforward: a mistake will be causative of a gift if it would not have been made but for the mistake.

(2) *Mistake*. Lord Walker held (at [104]) that 'a mistake must be distinguished from mere ignorance or inadvertence, and also from what scholars in the field of unjust enrichment refer to as misprediction'. The first distinction is the most difficult. (On the second distinction, Lord Walker observed at [109] that 'A misprediction relates to some possible future event, whereas a legally significant mistake normally relates to some past or present matter of fact or law.) Lord Walker said at [105] that 'Forgetfulness, inadvertence or ignorance is not, as such a mistake, but can lead to a false belief or assumption which the law will recognise as a mistake.' Lord Walker endorses (at [108]) the distinction drawn in the current edition of *Goff & Jones on the Law of Restitution* between 'incorrect conscious beliefs, incorrect tacit assumptions, and true cases of mere causative ignorance ("causative" in the sense that but for his ignorance the person would not have acted as he did)' and held that 'mere ignorance, even if causative, is insufficient, but...the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.' The distinction between 'incorrect conscious beliefs' (will count as a mistake), and 'incorrect tacit assumptions' (will also count), and 'mere causative ignorance' (will not count) is very difficult to draw, but the following illustration may help:

Bob gives his girlfriend *Audrey* a present on March 8th, thinking that March 8th is her birthday, when in fact her birthday is on May 8th. Here *Bob*'s gift has been made as a result of a mistaken conscious belief, that it is *Audrey*'s birthday.

Bob gives his girlfriend *Audrey* a birthday present, unaware that she is cheating on him with his best friend. Here *Bob* has given *Audrey* a gift because he is tacitly assuming that all is well in their relationship, and that she is not cheating on him.

Bob gives his girlfriend *Audrey* a birthday present, unaware that she has joined the British National Party, a choice of political affiliation that would have so disgusted *Bob* if he knew about it that he would have dumped her and not given her a present. This is (probably) a case of mere causative ignorance. Had Bob known of Audrey's choice of political party, he would not have given her the present. But he didn't know, so he gave her the present. There is no conscious mistaken belief here – he wasn't giving her the present in the positive belief that she was a member of the Labour Party, for example. And there is (probably) no tacit assumption here – *Bob* may well have given no thought ever to the issue of what political party *Audrey* belongs to, if any.

(3) *Sufficient gravity*. But not every mistaken conscious belief/tacit assumption will entitle someone who has made a gift as a result of that mistake to rescind it in equity. Lord Walker rephrased (at [124]-[126]) the test in *Ogilvie* v *Littleboy* quoted above, and held that the mistake has to be of sufficient gravity as to make it unjust, or unfair, or unconscionable to leave the gift uncorrected. In determining this, 'the gravity of the mistake must be assessed

by a close examination of the facts...including the circumstances of the mistake and the consequences for the person who made the...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' ([126]). Lord Walker also said that 'as additional guidance to judges in finding and evaluating the facts of any particular case' the requirement that a mistake be of sufficient gravity as to render it unjust/unfair/unconscionable to leave it uncorrected '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' ([122]). But Lord Walker was unwilling to set down 'an elaborate set of rules' on what would and would not count as a mistake of 'sufficient gravity': 'The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected' ([128]).

Lord Walker went on to find (at [142]) that the disposition in *Pitt* could be set aside on the basis that it had been made as a result of a 'sufficiently grave' mistake. There would have been nothing wrong or abusive in setting up the SNT in such a way that it was exempt from inheritance tax, and setting aside the SNT would not prejudice the interests of any third parties (with the Inland Revenue not being treated as a third party for this purpose).

Comments

The fact that there was only one judgment in this case may have been designed to promote a degree of certainty over what the case actually said. But the reality is that Lord Walker's decision leaves all the areas of law on which it touches in a deplorably uncertain state. We now have confirmation that a disposition of trust assets can only be set aside under *Re Hastings-Bass* in an 'inadequate deliberation' case where the trustees committed a breach of duty in disposing of those assets; but Lord Walker's judgment also makes it clear that there will be situations where the courts should refuse to set aside a disposition under *Re Hastings-Bass* even if there was a breach of duty – but refuses to say what those situations will be. Similarly with the law on when a gift can be rescinded as having been made as a result of a mistake: we are given very little guidance on (1) when a claimant who has made a gift in ignorance of certain facts can argue that the gift was made as a result of a mistaken conscious belief or tacit assumption, and (2) when a mistaken conscious belief or tacit assumption will count as 'sufficiently grave' as to undermine the gift. (Peter Birks, in particular, would have been furious at the suggestion that the mistake will only be 'sufficiently grave' if it means that it would be unconscionable/unfair not to correct the gift.) On page 66 of Andy Burrows' *Restatement of the Law of Restitution*, he sets out a number of examples of C making a gift to D: (1) where D is engaged to C's daughter, and D is – unknown to C – a violent thug; (2) where C mistakenly believes D is poor when he is rich; (3) where C gratuitously increases the monthly contractual payments that he makes to D, unaware that D is an enemy of a close relative of C's; (4) where C pays D money thinking that he is richer than he is; (5) where C makes a donation to a charity D because he wrongly thinks that some local worthies have donated money too; (6) where C makes a donation to a charity D, unaware that D opposes a cause that C supports. Lord Walker says (at [126]) that 'it is impossible...to give more than the most tentative answer to [what the law would say in these situations]: we simply do not know enough about the facts.' We simply cannot afford to run a legal system in which

resolution of these cases depends on each of them being litigated and their individual merits considered in exhaustive detail. It is deeply regrettable that the UKSC seems incapable of realising this.