IN THE MATTER OF THE A TRUST

B v. C, D and E

ROYAL COURT (Clyde-Smith, Commr. and Jurats Le Breton and Le Cornu): December 16th, 2009

Trusts—creation—intention of donor—mistake—voluntary disposition into trust (forming entire trust fund) set aside for mistake of fact or law by settlor/donor if so serious that unjust for donee to retain property—court to be satisfied settlor/donor would not have entered transaction "but for" mistake—disposition set aside if mistaken belief would avoid substantial UK inheritance tax—transaction voidable not void ab initio

The representor applied to set aside a trust.

The representor was born in Kenya and moved to England in 1967. In divorce proceedings in 2005, she was awarded inter alia certain shares which were subsequently sold for approximately £5.39m. On the advice of an English accountant, an offshore trust was established by the first respondent ("the trustee") of which the representor and the second and third respondents were the beneficiaries. The proceeds of the sale of the shares were transferred to the trustee and constituted the only property of the trust. The representor believed, on advice, that she had non-domiciled status and was therefore not liable to UK tax. She subsequently discovered that, although she had successfully avoided UK income and capital gains tax, she did not have non-domiciled status for inheritance tax purposes and had incurred an immediate liability of between £1m. and £1.2m., which might require her to sell her home and would potentially double if she died within seven years of the disposition.

The representor applied under art. 11(2) of the Trusts (Jersey) Law 1984 for a declaration that the trust was invalid on the ground of mistake insofar as it concerned the disposition of the share proceeds. As those proceeds represented the entire trust property, she therefore sought an order that the trust was invalid in its entirety. She submitted that the proceeds would not have been paid into the trust if she had been aware of the resulting inheritance tax liability. She also submitted that the trust was void ab initio, rather than merely voidable (to avoid tax reporting obligations under English law).

She sought a further declaration that the trustee could retain all remuneration received and recover any expenses incurred in connection with the trust as if it were valid. The other beneficiaries consented to the relief sought.

Held, granting the application:

The representor's disposition into the trust (and, as a consequence, the trust itself) would be set aside under the Trusts (Jersey) Law 1984, art. 11(2)(b)(i) on the ground of her mistake as to the resulting liability to inheritance tax. A voluntary disposition by a donor or settlor could be set aside on the ground of mistake if the donor or settlor had been under a mistake (whether of fact or of law) that was so serious as to render it unjust on the part of the donee to retain the property given to him. In applying that test, the court had to be satisfied that the donor or settlor would not have entered into the transaction "but for" the mistake. In the present case, the representor's disposition of £5.39m. into the trust would be set aside because (i) there had clearly been a mistake as to her domiciled status for inheritance tax purposes; (ii) that mistake had been serious, in that it had given rise to an immediate liability to inheritance tax of between £1m. and £1.2m., which was a material proportion of her wealth; (iii) there was no doubt that she would not have entered into the transaction "but for" the mistake, indeed it was inconceivable that anyone in her position would have voluntarily agreed to a disposition with such a result; and (iv) given the unforeseen and serious consequences for the representor, it was unjust for the trustee to retain the money (and neither the trustee nor the beneficiaries would be adversely affected if the relief were granted). Given the equitable nature of the jurisdiction to set aside the transaction for mistake, the transaction was voidable, rather than void ab initio (paras. 41–47; para. 76; para. 82).

Cases cited:

(1) Abacus Trust Co. (IoM) v. Barr, [2003] Ch. 409; [2003] 2 W.L.R. 1362; [2003] 1 All E.R. 763; [2003] W.T.L.R. 149; [2003] EWHC 114 (Ch), followed.

(2) Abrahams' Will Trusts, In re, [1969] 1 Ch. 463; [1967] 3 W.L.R. 1198; [1967] 2 All E.R. 1175, referred to.

(3) Anker-Petersen v. Christensen, [2002] W.T.L.R. 313, referred to.

(4) Betsam Trust, In re, Manx Ch. D., June 5th, 2008, unreported, applied.
(5) Clarkson v. Barclays Private Bank & Trust (IoM) Ltd., 2005–06 MLR 493; [2007] W.T.L.R. 1703, applied.
(6) Cloutte v. Storey, [1911] 1 Ch. 18, referred to.
(7) DSL Remuneration Trust, In re, [2007] JRC 251; Royal Ct., December 20th, 2007, unreported, considered.
(8) Donaldson v. Smith, [2007] 1 P. & C.R. DG2; [2007] W.T.L.R. 421, referred to.
(9) Gibbon v. Mitchell, [1990] 1 W.L.R. 1304; [1990] 3 All E.R. 338, not followed.
(10) Green GLG Trust, In re, 2002 JLR 571, distinguished.
(11) Griffiths, In re; Ogden v. RHS Griffiths 2003 Settlement Trustees, [2009] Ch. 162; [2009] 2 W.L.R. 394; [2008] 2 All E.R. 655; [2008] STC 776; [2009] BTC 8027; [2008] W.T.L.R. 685; [2008] EWHC 118 (Ch), applied.
(12) Hastings-Bass, In re, [1975] Ch. 25; [1974] 2 W.L.R. 904; [1974] 2 All E.R. 193, distinguished.
(13) Hood of Avalon (Lady) v. Mackinnon, [1909] 1 Ch. 476; (1909), 78 L.J. Ch. 300; 100 L.T. 330, considered.
(14) JP v. Atlas Trust Co. (Jersey) Ltd., [2008] JRC 159; Royal Ct., September 22nd, 2008, unreported, dicta of Birt, Deputy Bailiff considered.
(15) Kleinwort Benson Ltd. v. Lincoln C.C., [1999] 2 A.C. 349; [1998] 3 W.L.R. 1095; [1998] 4 All E.R. 513; [1999] LGR 1, referred to.
(16) Ogilvie v. Littleboy (1897), 13 T.L.R. 399; on appeal, sub nom. Ogilvie v. Allen (1899), 15 T.L.R. 294, applied.
(17) R Remuneration Trust, In re, 2009 JLR N [40], considered.
(18) Sieff v. Fox, [2005] 1 W.L.R. 3811; [2005] 3 All E.R. 693; [2005] EWHC 1312 (Ch), considered.
(19) Sinclair v. Moss, [2006] VSC 130, distinguished.
(20) Turner v. Turner, [1984] Ch. 100; [1983] 3 W.L.R. 896; [1983] 2 All E.R. 745, referred to.
Legislation construed:
Trusts (Jersey) Law 1984 (Revised Edition, ch.13.875, 2007 ed.), art. 11(2): The relevant terms of this paragraph are set out at para. 23.
Texts cited:
Lewin on Trusts, 18th ed., para. 29–249, at 1081–1082 (2008).
Underhill & Hayton, Law of Trusts & Trustees, 17th ed., para. 61.22, at 856–860 (2006).
D.R. Wilson for the representor;
N.G.A. Pearmain for the first respondent;
The second and third respondents did not appear and were not represented.
1 CLYDE-SMITH, COMMISSIONER: The representor, Mrs. B, applies under art. 11(2) of the Trusts (Jersey) Law 1984 for a declaration that the A Trust ("the trust") established by the first respondent ("C") by declaration dated August 11th, 2005 was established by mistake and is by reason of that mistake invalid in its entirety.
Background
2 Mrs. B was born in 1957 in Kenya to parents of Indian origin. Her parents moved with her to England in 1967, where she still resides. On August 26th, 1984, she was married to Mr. F and they have one child, E, who was born on October 4th, 1988.
3 On November 4th, 2004, her marriage to Mr. F was dissolved. The subsequent ancillary relief proceedings were protracted. It is not necessary to recite the history of those proceedings, save to say that in her judgment on November 8th, 2005, Bracewell, J. found that Mr. F had not been frank in his disclosure. In particular, he had failed to reveal that he had transferred shares in the family business established by him and his brothers to a Cayman Island trust of which Barclays Bank was trustee. His English solicitors confirmed that, for the purposes of the ancillary proceedings, it was under his complete control and that his ability to deal with the assets in the trust was unaffected by its existence. He was able to deal with moneys as he wished had they been in a bank account in his sole name onshore.

4 Mrs. B was paid a lump sum of £3.14m. and it was proposed that she should also receive the transfer of 150,000 shares in the family business. Mrs. B had been assisted in those proceedings by a chartered accountant, Mr. G of H, practising from offices in London. Mr. G advised that she should have her non-domiciled status confirmed and, subject to that, the shares should be placed in an offshore trust. We were shown a note on the UK tax implications prepared by Mr. G which critically, as will become clear later, focuses on capital gains tax. That confirmation was obtained on July 4th, 2005.

5 On July 19th, 2005, Mr. G telephoned Mr. I of C informing him that he was acting as tax adviser to Mrs. B and requesting a draft discretionary trust deed. Mr. I's file note does not indicate that there was any discussion as to the terms of the trust, either in terms of what was required or what was the effect. His recollection was that Mr. G seemed to know exactly what the circumstances of Mrs. B required.

6 On July 25th, 2005, Mr. I sent two emails to Mr. G, the first providing him with more information about C and its scale of charges and the second providing C's standard questionnaire form and its standard deed.

7 The documentation available shows that, on July 22nd, 2005, Mr. G sent the questionnaire form to Mrs. B for completion, together with the sample declaration of trust, but with no other explanation or advice.

8 On August 10th, 2005, the questionnaire form, which had been completed in most part by Mr. G, was returned to Mr. I duly signed by Mrs. B, together with the verification of identity documents. The same day, Mr. I spoke to Mr. G, who asked him to produce a final draft of the trust deed which was sent to him for review on August 11th, 2005 prior to execution. Very shortly thereafter, Mr. G asked that Mr. I proceed with execution and the declaration of trust was executed on August 11th, 2005.

9 The declaration of trust was in C's standard form and was declared by C. Mrs. B was not a party to it. The initial property was stated as being £5,000 and the beneficiaries as being Mrs. B, E (the third respondent) and D (the second respondent). Mrs. B was also appointed protector, with certain powers of veto and the power to appoint and remove trustees. Contrary to the terms of the preamble to the trust, C was not in fact in receipt of the initial property as at August 11th, 2005.

10 In the meantime, the 150,000 shares due to be transferred to Mrs. B were sold by the Cayman Island trustee and, following further manoeuvres on the part of F, the proceeds of that sale, amounting to £5,390,097.78 were held by the Cayman trustees' Cayman Island lawyers, J, pending instructions as to where the same should be paid.

11 Instructions were given by Mrs. B's English divorce lawyers for this sum to be paid directly to C and, on November 18th, 2005, Mr. I emailed Mr. G confirming that the same had been received for value on that day. Nothing was said in that email about the same being added to the trust.

12 On the same day, C signed an instrument of addition, under which it formally accepted the sum of £5,385,097.78 as an addition to the trust fund. The balance of £5,000 out of the sums received constituted the initial property. Mrs. B was not a party to this instrument.

13 On December 14th, 2005, Mr. G was appointed by C as the financial and taxation adviser to the trust. Mrs. B acknowledged that appointment by countersigning the letter of appointment.

14 On February 10th, 2006, Mrs. B entered into a "Service Agreement for Trust Administration" with C for the provision of trustee and trust services.

15 The trust proceeded to make a number of investments including, through corporate vehicles, the acquisition of two residential properties in Ascot and London. It also made loans to Mrs. B and E; the loan to Mrs. B being to enable her to acquire her English residence in her own name.

16 Concerns in relation to some of the investments made on the advice of Mr. G arose in 2007, and in 2008 Mrs. B instructed new accountants, namely K, to advise. Their advice came as a shock to her.

17 She had intended moving into the Ascot property, as she was encountering problems with her own home, but was advised that she would have to pay market rent, failing which the tax benefit of having the offshore trust would be defeated. The same applied to the London property.

18 She then had the terms of the declaration of trust explained to her for the first time by an English lawyer and accountant and discovered that C were not, as she had previously thought, managers of her assets. They were owned by the trustee, which had discretionary powers over their disposal.

19 Of more immediate significance was K's advice that, whilst she had non-domiciled status for income and capital gains tax purposes, she did not have that status for inheritance tax purposes ("IHT"). For IHT, the relevant test was whether she had been resident in the United Kingdom for 17 out of the preceding 20 years. She had been resident in the United Kingdom for the 38 years leading up to 2005, and was therefore deemed UK domiciled for IHT. This rendered her entire worldwide estate subject to IHT with the consequence that the disposition of £5,390,097.78 into the trust was immediately chargeable to IHT at lifetime rates. The lifetime rates at the date of transfer were:

(i) £263,000 at 0% (the nil rate band);

(ii) the balance chargeable at 20%; and

(iii) a further 20% becoming payable should Mrs. B die within seven years of the disposition (i.e. before November 18th, 2012).

These rates gave rise to a liability of £1,280,275 payable in the first half of 2006 (had she been aware of the liability and the need to account). Her liability to IHT in this amount has since been confirmed by junior tax counsel, Leon Sartin. She is liable and has no right of indemnity against the trustee. There was an argument that C would be able to treat the disposition as a gross receipt and the trust be liable instead of Mrs. B for the net sum of £1,024,220. In any event, the overall effect was that a liability of between £1m. and £1.2m. became payable immediately, potentially doubling if she were to die before 2012. The fact that she believed herself non-domiciled on advice for IHT purposes at the time of the disposition, and that she would not have settled the trust if she had known of the liability, does not change the position.

20 Mrs. B is pursuing a claim against Mr. G for negligence arising out of this and other advice. A letter before action was sent to his lawyers on May 26th, 2009 but there has been no substantive reply setting out his recollection of these events.

Jurisdiction

21 The trust is governed by Jersey law and the court therefore has jurisdiction by virtue of art. 5 of the Trusts Law. The court and the parties have proceeded on the basis that the disposition of the funds into the trust by Mrs. B is similarly governed by Jersey law, being the jurisdiction with which the transaction has its closest and most real connection.

Mistake

22 Mrs. B seeks to have the trust set aside on the ground that it was established by mistake in two respects:

(i) that she was non-domiciled for IHT purposes and therefore that no charge would arise on the disposition into the trust; and

(ii) as to the legal effect of the terms of the trust into which the disposition was made.

23 The starting point is art. 11(2) of the Trusts Law, which provides as follows:

"Subject to Article 12, a trust shall be invalid

. . .

(b) to the extent that the court declares that—

(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty . . ."

24 Mrs. B does not seek to set aside the trust itself, as this was declared by C. There is no evidence before the court that C was under any mistake when executing the deed. Rather, Mrs. B seeks an order that the trust be declared invalid to the extent and insofar as it relates to Mrs. B's voluntary disposition into the trust on November 18th, 2005. As this represents all of the property settled into the trust, Mrs. B seeks an order that the trust is invalid in its entirety. She accepts that C should retain remuneration received and recover any expenses incurred in the administration of the trust as if the same were valid and effective, and seeks a declaration to that effect. Thus, C would not be adversely affected by the orders sought.

25 The traditional test for mistake is that set out by Millett, J. in Gibbon v. Mitchell (9), where he summarizes the position as follows ([1990] 1 W.L.R. at 1309):

"In my judgment, these cases show that, wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the

disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."

26 In Sieff v. Fox (18), Lloyd, L.J. carried out an extensive review of the English law of mistake and referred to a late 19th century authority not apparently cited in later cases and, in particular, in Gibbon v. Mitchell.

27 In Ogilvie v. Littleboy (16) in the Court of Appeal, and reported as Ogilvie v. Allen in the House of Lords, the plaintiff, a widow, had executed deeds founding two charities and devoting to them a considerable part of the large fortune which she had inherited from her husband, but later brought proceedings to set the deeds aside asserting that she had not been fully and properly advised and had not fairly understood the nature and effect of the documents. The action was dismissed by Byrne, J. and appeals were dismissed by the Court of Appeal and the House of Lords. In the Court of Appeal, Lindley, L.J. said (13 T.L.R. at 400):

"Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor. It has been contended that even where all those elements are absent the burden in equity is on the donee to prove that the donor knew what he was doing and was under no mistake as to the effect of any legal instrument which he may have signed. Passages were cited from judgments of Lord Romilly and Vice-Chancellor Stuart in support of this contention; but their observations must be understood as having reference to the cases before them, and are far too wide if meant to express a general principle of equity applicable to gifts unaccompanied by any of those circumstances of suspicion to which we have alluded. This was pointed out by Lord Justice Kay in Henry v. Armstrong (18 Ch. D. 668). In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him."

28 In Ogilvie v. Allen, Lord Halsbury, L.C. agreed with the judgment of Lindley, L.J., as also did Lord Macnaghten. That case, therefore, sets out a broad principle of injustice as the test for setting aside a voluntary disposition.

29 Lloyd, L.J. referred to Lady Hood of Avalon v. Mackinnon (13), in which the plaintiff, a widow, had a power of appointment in favour of her two daughters. She exercised that power in favour of the younger daughter on her getting married. She wanted to ensure equality between the two daughters. She therefore exercised the power to the same extent in favour of her elder daughter. She had, however, entirely forgotten that, years before, she and her husband had already exercised the power in favour of the elder daughter. The result of the three exercises of the power was to produce inequality and to dispose of more than the amount of the fund available. Eve, J. held that the last appointment had been made under a serious mistake as to the facts, namely as to the existing position as regards interests under the trusts by virtue of the exercise of the power of appointment, and that it ought to be set aside. Lloyd, L.J. commented that although Eve, J. did not refer to the formula used by Lindley, L.J. in Ogilvie v. Littleboy (16), he would not have had any difficulty in finding that the circumstances were such that it would be unjust for the donee to retain the benefit of the appointment.

30 Lloyd, L.J. summarized the position as follows ([2005] 1 W.L.R. 3811, at para. 106):

"Clearly there is a jurisdiction in equity to set aside a voluntary disposition for mistake (as there is also to rectify such an instrument to accord with the donor's true intentions: In re Butlin's Settlement Trusts [1976] Ch. 251). The mistake must be as to the effect of the disposition. The discrepancy may arise from a legal defect in the disposition itself (as in Gibbon v. Mitchell [1990] 1 W.L.R. 1304) or from a mistake of fact as to the position under the relevant trusts (as in Lady Hood of Avalon v. Mackinnon [1909] 1 Ch. 476) or as to the effect of the disposition in the hands of the donee: Ellis v. Ellis 26 TLR 166. It may arise from a misunderstanding of the nature of the trusts which would affect the property after the disposition, due to a failure on the part of the advisers to explain the position

properly: Anker-Petersen v. Christensen [2002] W.T.L.R. 313. According to Gibbon v. Mitchell [1990] 1 W.L.R. 1304 the mistake must be as to the effect of the disposition, and a mistake as to its consequences is not sufficient. If that is the correct test, David, J.'s comment that the fiscal consequences of the transaction are not relevant is probably right, and a misunderstanding as to those would not justify setting the disposition aside. According to Ogilvie v. Littleboy 13 T.L.R. 399 the test is more general, namely whether the donor or settlor 'was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.' That formula might allow fiscal consequences to be taken into account, if they were sufficiently serious. There is no case concerning a disposal by an individual of his or her own property which has turned on the relevance, or otherwise, of tax consequences. In Gibbon v. Mitchell [1990] 1 W.L.R. 1304 the mistake as to the legal effect of the deed did mean that it had different tax consequences, but this would not have sufficed for Millett, J. to have set it aside in the absence of the mistake as to legal effect."

31 In JP v. Atlas Trust Co. (Jersey) Ltd. (14), the court set aside a disposition into a trust on the ground of mistake, applying the narrower test in Gibbon v. Mitchell (9), but Birt, Deputy Bailiff commented on the possible application of the wider test as follows ([2008] JRC 159, at paras. 20–21):

"20 Lloyd, L.J. did not need to resolve which was the correct test or whether there was in fact a difference between them, although he pointed out that there was no decided case where a disposal by an individual of his own property had been set aside on the basis of a mistake as to tax consequences. He accepted that, if the test were limited in the way described by Millett, J., there was a difference in approach between those cases where there was a disposal by an individual of his own property and those where there was an appointment by trustees (where the Hastings-Bass principle allows a mistake as to the fiscal consequences of a decision as a ground for setting aside that decision). He considered that such a difference was justifiable.

21 For the reasons set out below, we also do not need to resolve whether the test for setting aside a voluntary transaction on the ground of mistake is limited to where the mistake is as to the effect of the disposition (as stated by Millett, J. in Gibbon v. Mitchell) or whether the test is more general, namely whether the donor or settlor was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him. We simply record that the matter remains open for decision in a future case where the point arises directly."

32 The point arises in this case because, certainly in so far as mistake as to her domiciled status is concerned, it was not a mistake by Mrs. B as to the effect of the disposition into the trust. She gave instructions through her English lawyers for the sums involved to be sent to C for the purpose and with the intention of the same being added to the trust. That was the precise effect of the disposition. It is as to its fiscal consequences that the mistake arises. It was a mistake of law in that, unbeknown to her, she was in fact deemed domiciled for IHT purposes giving rise to an immediate and substantial charge to IHT.

33 In Sieff v. Fox (18), Lloyd, L.J. did not need to determine the point as the case involved a Hastings-Bass application made by a trustee (In re Hastings-Bass (12)), rather than an application by an individual to set aside a voluntary disposition. For trustee decisions, unknown tax consequences remain relevant but it was left open as to whether they might be relevant to a mistaken disposition by an individual. Interestingly, in Sieff v. Fox, in addition to the mistake by the trustees, there was a mistake by an individual, Lord Howland, who held a power of veto over the exercise by the trustees of certain powers ([2005] 1 W.L.R. 3811, at para. 116):

"It is a case of a highly material mistake resulting, on the part of the person whose consent is required, from inadequate information and misunderstanding, as in AMP (UK) plc v. Barker [2001] PLR 77. I need not, and do not, decide anything as regards the relevance or otherwise of tax consequences to dispositions by individuals of their own property, because Lord Howland was not disposing of his own property when he consented to the making of the 2001 appointment.

Directly, he was doing the opposite, since by the appointment the property would become his, rather than cease to be his. But it seems to me that his mistakes as to the tax consequences, both as regards capital gains tax following from the appointment, and as regards inheritance tax because of the reservation of benefit, and his ignorance of the implications of clause 47(c) of the 1987 settlement, are

sufficient to vitiate the giving of Lord Howland's consent, and the same is no doubt true of that of the Marquess of Tavistock."

34 Clarkson v. Barclays Private Bank & Trust (IoM) Ltd. (5), a Manx case, was decided shortly after Sieff v. Fox. The plaintiff set up a trust to protect his assets from income tax and death duties. He transferred two sums to the trust in 1987. However, HMRC deemed him to be domiciled at that time in the United Kingdom, meaning that an inheritance tax liability arose on the transfers, as well as a 10-year charge and a charge when the plaintiff died. The plaintiff did not seek to challenge the relevant trust. Rather, it was his case that the payments to the trust were recoverable on the ground of common law restitution. Deemster Kerruish was satisfied that the payments were indeed recoverable on that ground. He did, however, deal with the alternative submission by the plaintiff that the court should exercise its equitable jurisdiction to relieve it, as the party making the payments, from the consequences arising therefrom. He analysed the cases of Ogilvie (16), Gibbon (9) and Sieff before concluding (2005–06 MLR 493, at para. 29):

"I accept that there is no rational basis for restricting recovery to where there has been a mistake as to the operative effect of a transaction. Ogilvie . . . is authority for a wider test based upon the mistake being so serious as to render it unjust for the donee to retain the property irrespective of the precise nature of the mistake. Both AMP (UK) plc v. Barker . . . and what Lloyd, L.J. said in Sieff v. Fox . . . lend support to a test based on the seriousness of the mistake. By way of analogy with the approach of the courts to a common law claim in restitution, the best measure as to whether the mistake was so serious as to render it unjust for the volunteer donee to retain the moneys is if the payment would not have been made 'but for' the mistake. In other words the mistake was the cause of the payment."

35 The court was therefore able to grant relief to the plaintiff on the alternative ground applying the Ogilvie test. The court found that the plaintiff would not have made the initial payments if he had not mistakenly believed that in doing so he was securing a tax advantage and it followed that the payments were recoverable.

36 In In re Griffiths (11), an individual transferred shares into a short-term discretionary trust with reverter to settlor in April 2003. In February 2004, he then transferred his reversionary interest in the shares, all in accordance with tax advice. The settlor however was then diagnosed with lung cancer and died shortly after the diagnosis. All the transfers were therefore chargeable transfers for inheritance tax. It was found as a fact that the settlor was healthy in April 2003 but was terminally ill (unknown to him) in February 2004 at the time of the second disposition. Lewison, J. said that the mistake as to the settlor's state of health for the February 2004 transaction was a mistake not to effect but of fact. When considering whether this caused the case to fall outside the Gibbon v. Mitchell test, Lewison, J. said ([2009] Ch. 162, at para. 24):

"I do not read the formulation by Millett, J. as limiting the overall scope of the equitable jurisdiction to relieve against the consequences of a mistake. He said that a voluntary deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. He did not say that a voluntary deed will only be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. The formula of principle by Lindley, L.J. [i.e. that in Ogilvie v. Littleboy as relied upon in Clarkson] and approved by the House of Lords is not so limited."

Lewison, J. commented on the Gibbon v. Mitchell test (ibid., at para. 23):

"His Lordship's distinction between the effect of the transaction and its consequences or advantages has proved a difficult one to grasp. Davis, J. in Anker-Petersen v. Christensen [2002] W.T.L.R. 313, Lloyd, L.J. in Sieff v. Fox [2005] 1 W.L.R. 3811 and Mann, J. in Wolff v. Wolff [2004] STC 1633 have all expressed that difficulty."

He then continued (ibid., at para. 25):

"It is plain in my judgment that a mistake of fact is capable of bringing the equitable jurisdiction into play. All that is required is a mistake of a sufficiently serious nature. In my judgment a mistake about an existing or pre-existing fact if sufficiently serious is enough to bring the jurisdiction into play. If and to the extent that Millett, J. intended to restrict the scope of the equitable jurisdiction to a mistake about the effect of a transaction, I respectfully disagree."

37 The Ogilvie test was therefore applied by the High Court as being the correct test. Lewison, J. also decided that the operative mistake must be a mistake which existed at the time when the transaction was entered into; mere falsification of expectations entertained at the date of the transaction was not enough. Thus, there was no mistake in relation to the April 2003 disposition and this stood. The court, preferring a higher test than the "might have" test in Hastings-Bass, was satisfied that the settlor would not have acted as he did in February 2004 had he known the state of his health. This was his mistake. The court found that it was unjust for the donees to retain the gift in circumstances which imposed upon the donor an unintended liability to a very substantial amount of inheritance tax. The court therefore exercised its discretion and set aside the February 2004 transfer of the reversionary interest in the shares.

38 A second Manx case, In re Betsam Trust (4), was decided on June 5th, 2008. The petitioners bought a redemption bond and assigned this to trustees. Their financial adviser had not appreciated (and therefore not advised) that an immediate IHT charge applied to the petitioners as a result of the disposition into the trust. Deputy Deemster Corlett referred to the relevant authorities stating that, had the law remained as it was in 2005, he might have been unwilling to grant the relief sought by the current petitioners, bearing in mind that the petitioners could not have been mistaken as to the legal nature of the transaction they were entering into.

39 However, relying upon the authorities of Clarkson (5) and In re Griffiths (11), he accepted that the law had moved on. He concluded by finding that—

"in light of these observations of Lewison, J. [in In re Griffiths], those of David, J. in Anker-Petersen, Mann, J. at paragraph 25 of Wolff v. Wolff, [2004] EWHC 2110 (Ch) and also of Deemster Kerruish in Clarkson, I am satisfied that the test set out in Gibbon v. Mitchell requiring the court to distinguish between the effect of a transaction and its consequences or advantages is one which poses a real difficulty in cases such as this and may be said in the light of experience to be unworkable. Accordingly, I agree with Mr. Bridson that the court does have a broad equitable jurisdiction to set aside a voluntary transaction on the ground of mistake, a jurisdiction established by Ogilvie v. Littleboy, a decision which it appears was not brought to the attention of the court in some subsequent cases on the basis that it does not appear to have been reported in the established Law Reports at the time."

After distinguishing the case of Griffiths, he went on to say:

"The facts and relief sought in the cases of Clarkson and Ogden are markedly different to those I have to consider. In Clarkson the relief sought was different to that sought by these petitioners. In Ogden the mistake was clearly one of fact rather than of law. However, I consider that taking the two cases together and applying the principle of unconscionability (which after all is the basis of other equitable doctrines), I am satisfied that the court does have jurisdiction to grant the relief sought by the petitioners and that this would be a proper case to set aside the trust."

40 Deputy Deemster Corlett made reference to the debate referred to by Lewison, J., stating that the question he must ask was not that posed by Millett, J. in Gibbon v. Mitchell (9) relating to effects or advantages, but is instead "whether the mistake as to the taxation consequences is sufficiently serious to enable relief to be granted in accordance with the Ogilvie v. Allen/Littleboy formula . . ." He also decided that the trust would not have been created at the time it was but for the mistaken belief of the petitioners and their advisers that no tax consequences would flow therefrom.

41 We accept Mr. Wilson's submission that English law has moved from the position in 2005 in Sieff v. Fox (18). The above quoted authorities demonstrate that the wider test in Ogilvie v. Littleboy (confirmed in the House of Lords in Ogilvie v. Allen) (16) has been applied in preference to the narrower test proposed by Millett, J. in Gibbon v. Mitchell. Taking account of the comments of Lewison, J. in In re Griffiths (11) and David, J. in Anker-Petersen v. Christensen (3), one reason that such a test should be preferred is the difficulty in distinguishing between the "effects" and the "consequences" of a transaction. The Isle of Man authorities have gone further in finding a fiscal mistake as to consequences sufficient to set aside a transaction. All authorities are agreed that the "but for" test (a higher test than that imposed upon trustees in Hastings-Bass applications) is to be applied and met in respect of setting aside a transaction by an individual.

42 We further accept Mr. Wilson's submission that there is no good reason to restrict the court's jurisdiction under art. 11(2) of the Trusts Law to the narrow Gibbon v. Mitchell test, especially in the face of the wider formulation by the Court of Appeal and approved by the House of Lords not subsequently cited in related cases including Gibbon v. Mitchell (9).

43 We therefore conclude that under Jersey law the test when considering an application to set aside a voluntary disposition on the ground of mistake by an individual is that set out in Ogilvie v. Littleboy (13 T.L.R. at 400), as confirmed in Ogilvie v. Allen (16), namely whether the donor or settlor "was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him." In applying the test, the court must be satisfied that the donor or settlor would not have entered into the transaction "but for" the mistake.

44 This case involves a mistake of law as opposed to fact. In Clarkson (5) (see para. 34) and In re Betsam Trust (4) (see para. 39), the Isle of Man courts could see no reason to distinguish between the two kinds of mistake, citing Gibbon v. Mitchell ([1990] 1 W.L.R. at 1309) where Millett, J. was content it mattered not whether the mistake was one of law or of fact, and the House of Lords decision in Kleinwort Benson Ltd. v. Lincoln C.C. (15) which abolished the rule that payments under a mistake of law were not recoverable. In our view, the Jersey court can grant relief whether the error is one of law or one of fact.

45 The court had no difficulty in applying this broader test to the facts of this case. Mrs. B's evidence was clear. She had understood that she was non-domiciled and that a successful application had been made to establish her as such. She had not appreciated that there was any distinction between income tax and capital gains tax, on the one hand, and IHT on the other. If she had known at the time of making the dispositions into the trust that such a large charge to IHT would arise, she would not have made those dispositions.

46 Applying the Ogilvie test:

(i) First, it is clear that there was a mistake. It was a mistake of law as to her domiciled status for IHT purposes.

(ii) Secondly, it was a serious mistake in that it gave rise to an immediate charge to IHT of between £1m. and £1.2m., some 20% of the sum involved and a sum which represented a material proportion of her wealth.

(iii) Thirdly, there was no doubt that she would not have made the disposition "but for" the mistake. Indeed, in our view, it is inconceivable that anyone in her position would have voluntarily agreed to a disposition with such immediate consequences.

(iv) Finally, we turn to whether it is unjust of the trust to retain the sums donated. The liability is that of Mrs. B, payable out of her own funds. Her current financial position is such that she may well have to sell her own home in order to pay it. In our view, it cannot be just for a donee to retain a gift when such unforeseen and serious consequences fall on the donor as a result of that gift. The other beneficiaries (the second and third respondents) have both agreed to the gift being set aside and to the declaration protecting the position of C being granted. Thus, neither C nor the beneficiaries would be adversely affected by the dispositions being set aside.

47 There is one payment by Mrs. B to C attributed by C as to £5,000 for the initial property and the balance for the instrument of addition. We therefore set aside the disposition of the total sum paid over, namely £5,390,097.78. We will hear counsel as to the precise form of the order to be made.

Mistake as to the legal effect of the dispositions of funds into the trust

48 If the court did not accept the wider Ogilvie test, then Mr. Wilson made the alternative submission that the narrower Gibbon v. Mitchell test was met, in that Mrs. B was mistaken as to the legal effect of the dispositions of funds into the trust.

49 In her affidavit, Mrs. B explained that she had very little involvement in the formation of the trust and never had its terms explained to her. She believed that she would be putting her money somewhere safe and tax-efficient and, although she understood that it was not a bank, she did believe that the assets would remain hers and that she would be able to spend them as she chose. This was very important to her, as she had just emerged from a 20-year marriage and the assets in question had been extremely hard won and at the cost of a great deal of distress to her and her immediate family. She

operated under the mistaken belief that C were essentially managers and the reason that an offshore jurisdiction was necessary was for tax reasons. Her understanding of trusts generally was very limited and influenced by her experience in her divorce proceedings, in which it had been confirmed that the trust established in the Cayman Islands by her husband was under his control.

50 A further factor is that, during the course of the proceedings, Mrs. B, who had suffered from depression and illness, had become very dependent on Mr. G. She had little grasp of financial matters and confessed that she simply went along with what he told her and she believed that he would look after her and her financial affairs.

51 The documentation available shows that Mrs. B—

(i) was not a party to the trust;

(ii) was not a party to the instrument of addition;

(iii) appears simply to have been sent a copy of C's draft standard deed without any explanation or advice; and

(iv) received no advice from C in their meetings following the execution of the instrument of addition as to the terms of the trust.

There was no evidence to show that she was sent the final version of the trust deed or of the instrument of addition.

52 Thus, whilst Mrs. B accepts that through her London divorce lawyers she gave instructions for the funds to be paid to C and added to the trust, there is nothing to show that she understood the terms of the trust.

53 In view of the claims she is pursuing against Mr. G, we did not have the benefit of his evidence to assist us on these matters. We were conscious that, if he contested her assertions in respect of her understanding of the trust, there was scope for cross-examination arising out of:

(i) His letters to her over the material period showing that they met on a regular basis; his letters constituting bullet point summaries of the discussions held at those meetings. Although it is true that none of the letters confirms that he did take her through and explain the terms of the trust, he might well say that he had done so. She clearly had input into the identity of the beneficiaries, which was changed from the draft to the final version.

(ii) Mr. I explained to us that he had assumed Mrs. B had been advised on the terms of the trust and his file note of their first meeting in Jersey on November 30th, 2005, after the instrument of addition had been executed, is consistent with that belief. For example, one of his notes reads as follows:

"Mrs. B is very keen for G to grow the trust. In fact she has a target of making it worth £8m. She appears to accept that this will have to be done within the ideology of a trustee, although I believe will take some more convincing."

(iii) She was involved in discussions on the letter of wishes, the use of that term implying lack of control on her part. The letter she did sign was a short-term expedient drafted by Mr. G in the following terms:

"Please treat this as my letter of wishes in respect of the distribution of the trust assets on my demise.

Until further advised, I would expect the trustees to deal with my assets in line with the distribution of assets in my latest UK will, which is proven for probate."

She says she understood the letter of wishes to be connected with her will as some sort of variation of it and has only recently been advised that it is in fact a document relating to the trust. It does not contain the reservation usually seen in letters of wishes, making it clear that it does not detract from the powers and discretions of the trustee.

(iv) The service agreement she signed on February 10th (albeit after the event) contained an agreement on her part that she will not enter and will not permit or cause others to enter into any contract on behalf of the trust independently of the trustee and that where a company is established and owned by the trustee, all or any rights arising to the client under the agreement will be vested in and exercisable by the trustee.

(v) The appointment of Mr. G as a tax and investment adviser to the trust (as opposed to her) and references in his letters to her to C having to consent to investment proposals.

(vi) Reference in a draft affidavit prepared by her divorce lawyers in which she records her wish to reserve the right to allege that the Cayman trust established by her husband was a sham. It is not known whether that affidavit was ever finalized or used but it would indicate that she must have received some advice on the nature of trusts.

54 However, we have to decide the matter on the evidence before us, which is the evidence of Mrs. B and Mr. I and the available documentation. On the balance of probabilities, we concluded that Mrs. B had not been advised of and did not understand the terms of the trust and was mistaken as to its effect. For that reason, we also set aside the disposition of the full sum of £5,390,097.78.

Further submissions—void/voidability

55 Following the issuing of this judgment in draft and in response to our invitation to be heard on the precise form of the order, Mr. Wilson sought orders in this form:

(i) an order that the two dispositions to the A Trust in the total sum of £5,390,097.78 paid on November 18th, 2005 at the request of the representor into a bank account in the name of C in respect of the A Trust were made by the mistake of Mrs. B and are, by reason of the representor's mistake, invalid and void ab initio;

(ii) a declaration pursuant to art. 11(2)(b)(i) of the Trusts (Jersey) Law 1984 (as amended) that the trust was established by mistake and is, by reason of this mistake, wholly invalid and void ab initio; and

(iii) an order that, notwithstanding the declaration of the court above, C may retain all remuneration and reasonable expenses spent on the administration of the trust as if the same were valid and effective and accordingly an order that C need not account for any moneys in respect thereof to any person who may be beneficially entitled to the assets of the trust, including Mrs. B.

56 The court had no difficulty with the third proposed order in favour of C or, because the dispositions it is setting aside represent all the property settled into the trust, with declaring the trust to be invalid but it received further written submissions on the issue as to whether the transactions are void ab initio ("void") or voidable.

57 The issue is of importance to Mrs. B in her dealings with the Inland Revenue. A disposition which is void is of no legal effect and cannot therefore give rise to IHT. The same follows for a disposition which is voidable and is set aside. The IHT treatment is therefore the same whether the dispositions are void from the outset or voidable and subsequently declared void.

58 The concern arises in relation to the reporting obligations. If the dispositions are declared void, there would be no reporting obligation because there would have been no transfer of value. If, on the other hand, the dispositions are found to be voidable and subsequently declared void, this would imply that a reporting obligation had occurred. A tax liability would thus have arisen, but as the dispositions were subsequently declared void, a claim for repayment would have to be made under s.150 of the Inheritance Tax Act 1984. We accepted these concerns, which relate to matters of English law, as expressed and without inquiry.

59 Mr. Wilson submitted that the court should declare the dispositions and the trust void. Mr. Pearmain's understandable concern was with protecting the position of C and he was neutral on the void/voidable issue.

He did draw our attention to the passages from Underhill referred to below and questioned whether reliance should be placed on the cases decided under the Hastings-Bass principle. Mr. Wilson, on the other hand, argued that it was helpful to consider the void/voidable issue in the context of Hastings-Bass applications and we take his submissions in that respect first.

60 In Abacus Trust Co. (IoM) v. Barr (1), Lightman, J. held that the trustee's exercise of an overriding power of appointment was voidable rather than void ([2003] Ch. 409, at para. 33):

"A successful challenge made to a decision under the rule should in principle result in the decision being held voidable and not void. This accords with the ordinary principles of equity that, leaving aside the separate and distinct self-dealing rule, a decision challenged on grounds of breach of fiduciary duty is voidable and not void."

61 The issue was of "critical significance" to Lightman, J. (ibid., at para. 28):

"… [F]or the lapse of ten years since the appointment, the signal failure by the settlor, indeed his deliberate decision not to take any legal advice or any effective action until 2001, his acquiescence until

then in the appointment having full legal effect and in particular the payment to the sons as fully entitled thereto of some £400,000 from the settlement must have the greatest significance if the settlement is voidable, but none at all if it is void."

62 Lightman, J. compared the position in trust proceedings with public law proceedings, stating (ibid., at para. 30) that—

"by contrast with the position in public law proceedings in trust proceedings the legal classifications of void and voidable must be respected and there is no such strict time limit, and the court only has a discretion and can only have regard to the lapse of time between the act under challenge and the challenge when the challenged act is voidable and not void."

63 Having expressed the view that this was a desirable outcome, Lightman, J. dismissed as "problematic" (ibid., at para. 31) the decision of the Court of Appeal in Cloutte v. Storey (6) that an appointment taking effect in equity which is a fraud on the power is void. While recognizing (ibid., at para. 32) that there were cases, such as Turner v. Turner (20), in which what may appear to have been a decision of trustees may on examination prove to have been no decision at all, that could not in Lightman, J.'s view be said of trustees who have exercised their discretion but in doing so have failed to take into account a relevant consideration or have taken into account an irrelevant consideration.

64 Lightman, J. referred to the fact that for a decision to be void under the common law doctrine of non est factum the transaction must be essentially different in substance or in kind from the transaction intended (ibid., at para. 32): "As Sir Robert Walker suggests . . . a like requirement as to the essential nature of a transaction is surely called for before the equivalent rule can render a decision in equity no decision at all."

65 Lightman, J. therefore came to the conclusion that the appointment was voidable and not void, although this was on the basis that the application of the Hastings-Bass doctrine should be regarded as depending upon a breach of duty by the trustees.

66 In Sieff v. Fox (18), Lloyd, L.J. considered Lightman, J.'s conclusion that the defect makes the appointment voidable rather than void as "attractive" ([2005] 1 W.L.R. 3811, at para. 79) because the consequences of the appointment being void may be dramatic and potentially unfair for trustees and for beneficiaries. Also, if the breaches of duty are voidable, such an application may be defeated on discretionary and equitable grounds which would not be available if the disposition was void, such as affirmation or laches.

67 Despite this, Lloyd, L.J. considered it "to be questionable whether the application of the doctrine should be regarded as depending on a breach of duty, and whether its consequences should be aligned with those of a breach of trust" (ibid., at para. 80).

68 He went on to state (ibid., at para. 81):

"Taking together, first, the fact that only if the exercise was void could the Inland Revenue have succeeded in having the advancement set side In re Abrahams' Will Trusts [1969] 1 Ch. 463 (and, at first instance, in the Hastings-Bass case [1975] Ch. 25 itself) and, secondly, the difficulty of showing that in either of those cases there was any breach of the trustees' duty, it seems to me that Lightman, J.'s conclusion that the appointment was voidable is open to doubt, as also is his introduction of a factor, not previously mentioned in the cases, that the trustees or their advisers or agents must have been at fault in some way for the principle to apply. I respectfully agree with him that the application of the principle is of potentially worrying breadth if it cannot be confined or controlled by reference to equitable principles, and that it would be more satisfactory if substantial delay in raising the point, with knowledge of the problem (as in the case before him), could be treated as relevant to the grant or withholding of relief. Mr. Taube submitted that, because the remedy lay in equity, and the grant of a declaration is discretionary, matters affecting the conscience of the parties, including laches or acquiescence, could be taken into account by the court in deciding what, if any, relief to grant, even if, on the true analysis, an appointment which is vitiated by the Hastings-Bass principle is void, not merely voidable."

69 However, Lloyd, L.J. said that he did not need to decide between void and voidable in order to decide Sieff v. Fox (18) (ibid., at para. 32). It seemed to Lloyd, L.J. that on authority the main ways open to the court to control the application of the Hastings-Bass principle are (ibid., at paras. 82–83)—

"82 … (a) to insist on a stringent application of the tests as they have been laid down, (b) to take a reasonable and not over-exigent view of what it is that the trustees ought to have taken into account, and (c) to adopt a critical approach to contentions that the trustees would have acted differently if they had realised the true position, perhaps especially so in cases (unlike the present) where it is in the interests of all who are before the court that the appointment should be set aside …

83 The position would also be more flexible if equitable considerations can be taken into account in deciding whether or not to grant any and if so what relief."

70 In Sinclair v. Moss (19), the Supreme Court of Victoria considered the void/voidable point in the context of a Hastings-Bass application. This was decided shortly after Sieff v. Fox. The Australian court considered Lloyd, L.J.'s conclusion alongside that of Lightman, J. in Abacus v. Barr (1). Byrne, J. noted the difficulties which troubled the English court in Abacus v. Barr ([2006] VSC 130, at paras. 82–84) but in reliance upon Lloyd, L.J.'s conclusion in Sieff v. Fox considered that his duty as a judge at first instance was to treat the determinations as void. As against that, Mr. Pearmain drew our attention to Donaldson v. Smith (8), in which David Donaldson, Q.C., sitting as a Deputy High Court Judge, said that if he had been required to decide between void and voidable in the context of a power under an instrument, judicial comity, if not stare decisis, would have compelled him to follow the decision of Lightman, J. in Abacus v. Barr, unless he considered he was plainly wrong; a view taken neither by him nor by Lloyd, L.J. in Sieff v. Fox.

71 Setting aside a voluntary disposition on the ground of mistake involves an exercise of discretion by the court and Mr. Wilson submitted that the concerns expressed by Lightman, J. and identified by Lloyd, L.J. may be considered in the round in the court's exercise of that discretion, as part of its equitable consideration as to whether any relief should be given. Thus, the test can be applied consistently but allow the court to find that, although there is a relevant mistake, no relief will be granted. In this situation, notwithstanding the relevant mistake, the transaction will still be valid simply because the remedy is equitable. Part of the exercise of this discretion will be to consider the position of third parties and, for example, the beneficiaries of the trust.

72 Both Underhill & Hayton, Law of Trusts & Trustees, 17th ed., para. 61.22, at 856–860 (2006) and Lewin on Trusts, 18th ed., para. 29–249, at 1081–1082 (2008) lend support to the proposition that, as assumed in earlier cases (see In re Abrahams' Will Trusts (2)), where the exercise of a fiduciary power is open to challenge on the Hastings-Bass principle the exercise was void. In the case of In re Green GLG Trust (10), the court, applying the Hastings-Bass principle, declared appointments made by the trustee void, but without citing any argument that might have been heard on the point. However, Underhill, para. 61.22, at 859 makes clear the distinction between mistakes by individuals with their own property and mistakes by trustees exercising fiduciary powers:

"However, Sieff v. Fox brought up the distinction between mistakes made by individual donors or appointors and mistakes made by trustees of fiduciary powers. Where an appointor with a personal power executes a deed drafted by his lawyer intended to exercise the power in a limited way, but the deed in fact goes further than the appointor's intentions or the draftsman's instructions, it is voidable at the instance of the appointor. Similarly, where such an appointor exercised the power forgetting that she had already provided for the appointee earlier, and the result was the opposite of what she intended. But these cases dealt with appointors owing no fiduciary duty to the objects, and not with trustees, and in any event in none of them was there any argument as to voidness or voidability. For an individual to make a mistake of this kind is not in principle the same as a trustee failing to take into account all and only relevant considerations: an individual is not obliged to take account of all relevant considerations and is free to take account of irrelevant considerations. Thus, a condition for the effective exercise of a personal power of appointment is not taking account of all and only relevant considerations. However, it is submitted that such conduct is requisite for the exercise of a fiduciary power of appointment or advancement, and if not present the exercise will be void in the absence of a contrary intent in the trust instrument."

73 Mrs. B was an individual dealing with her own property and in our view it is more helpful to look at authorities dealing with voluntary dispositions by individuals. In Griffiths (11) (see para. 36 above), Lewison, J. considered whether the assignments made by an individual, which were set aside in the

exercise of the court's equitable jurisdiction, were void or merely voidable ([2009] Ch. 162, at paras. 31–34):

"31 . . . I need also to consider whether the satisfaction of these conditions means that the assignment of that interest is void or merely voidable. It makes a difference in this case because the executors have paid inheritance tax on a provisional basis. If the assignment is void they are entitled to interest on the overpaid tax as from the date on which they made the payments (section 235 of the Inheritance Tax Act 1984), whereas if it is voidable then interest is only payable from the date when a claim to repayment is made (section 150 and section 236(3) of the 1984 Act). This equitable jurisdiction has always been described as a jurisdiction to relieve against the consequence of a mistake or as a jurisdiction to set aside unilateral transactions entered into under a mistake. This description of the jurisdiction suggests strongly that unless and until the transaction is set aside (or relief is given) it did have some legal effect. In other words the transaction is voidable rather than void ab initio. In this respect the position differs from the effect of mistake at common law on what appears to be a contract. But that is not surprising since the equitable jurisdiction is wider than the common law principle. In Abacus Trust Co (Isle of Man) v. Barr [2003] Ch. 409, Lightman, J. considered the question whether an exercise of discretion by trustees, which was vitiated by the principle in In re Hastings-Bass, decd [1975] Ch. 25, was void or voidable. He described resolution of that issue as of 'critical significance' in the case before him. He decided that the exercise was voidable rather than void. The question was discussed by Lloyd, L.J. in Sieff v. Fox [2005] 1 W.L.R. 3811, but as he recognised, nothing turned on the distinction in that case. He said that Lightman, J.'s view was 'open to doubt' although he also expressed the view that to hold that an appointment was voidable rather than void was attractive. He was of course discussing the Hastings-Bass principle rather than the wider equitable jurisdiction to relieve against the consequences of a mistake.

32 In Barrow v. Isaacs & Son, [1891] 1 Q.B. 417 the tenant of a warehouse in the City of London sublet it. The head lease contained a covenant against subletting without the landlord's consent such consent not to be unreasonably withheld. However, the tenant forgot to ask the landlord for consent and the landlord claimed to forfeit the lease. The majority judgment of the Court of Appeal was delivered by Kay, L.J. He held that forgetting to ask for consent could properly be described as making a mistake. It was this part of the judgment that Eve, J. relied on in Lady Hood of Avalon v. Mackinnon, [1909] 1 Ch. 476. However, although a relevant mistake was made, the court nevertheless refused relief. In describing the issues Kay, L.J. said, at p. 425:

'But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise, or mistake. At present the only one of these we have to deal with is mistake; and the questions are, (1) whether the facts I have described amount to mistake: and, if so, (2) whether in its discretion the court will relieve.'

33 Having held that there was a relevant mistake Kay, L.J. went on to say, at p. 426:

'It is an entirely different question whether on the ground of such a mistake equity, in the exercise of its discretionary jurisdiction, would relieve a man from a forfeiture incurred by his own gross carelessness.'

34 Relief was refused. If the exercise of the jurisdiction is discretionary (as Kay, L.J. undoubtedly said it was) it must follow that if as a matter of discretion relief is refused the impugned transaction will stand. If it stands it will have the effect it purports to have. I do not see how such a result is possible unless the impugned transaction is voidable rather than void ab initio."

74 Mr. Wilson submits that Lewison, J.'s conclusion is wrong. It was, he says, a decision based in part on Abacus v. Barr (1) whose conclusions in this respect were doubted in Sieff v. Fox (18). However, whilst Lewison, J. drew some support from the former case, he took into account the doubts expressed in the latter. Furthermore, he expressly acknowledged that both were cases concerned with the Hastings-Bass principle and not with the wider equitable jurisdiction to relieve against the consequences of a mistake.

75 This case is not concerned with the Hastings-Bass principle but with a voluntary disposition by Mrs. B of her own property. We find Lewison, J.'s reasoning persuasive. It has been followed in In re Betsam Trust (4) and should, in our view, be followed in this jurisdiction.

76 The issue is whether, in the light of the donor's serious mistake, it is just for the donee to retain the property given to him. That exercise by its very language presupposes that the original disposition had some legal effect. The voluntary disposition stands unless and until it is set aside for mistake; it is voidable, not void.

77 Mr. Wilson submitted that a declaration that the dispositions and trust were void is consistent with the statutory wording of art. 11(2) of the Trusts Law (set out in para. 23 above). The words "shall be invalid" suggested a mandatory requirement following a declaration by the court. The need for the court to consider that the trust was "established" by reason of one of the vitiating factors suggested, he argued, that the trust is rendered void because it never existed at all.

78 In our view, it simply does not follow that because the court is considering whether the trust was established by (in this case) mistake it never existed at all, as opposed to it existing until the court decides otherwise. The statutory provision does not, we think, inform the void/voidable debate.

79 Mr. Wilson placed some reliance on the case of In re R Remuneration Trust (17), a case where, applying English law, gifts into a trust were set aside by the court on the ground of mistake. There the court concluded that a mistake had been made before going on to consider whether to exercise its discretion. In doing so, it took into account the effect on the beneficiaries and third parties and observed ([2009] JRC 164A, at para. 37) that if the gifts were set aside, the donor would have a theoretical claim against the trustee for moneys distributed to the beneficiaries and the trustee may in turn have a claim against the beneficiaries, subject to a change of position defence. The court took a similar approach in In re DSL Remuneration Trust (7), also involving English law. The fact that the court considered the position of third parties in this way lent support to the view, Mr. Wilson argues, that the transactions in question are rendered void as opposed to voidable.

80 We do not think these cases lend any particular support to that argument. This is a discretionary remedy and in exercising that discretion the court must consider the effect on the donee and third parties, irrespective of whether the transaction is void or voidable. In our view, the potential for claims against beneficiaries exists whether the dispositions and trust are void or voidable.

81 The court asked to be addressed on the Jersey customary law and, in particular, on "erreur" in the Jersey law of obligations. However, we accept Mr. Wilson's submissions that this would be of limited assistance. He drew our attention to the warning given by Birt, Deputy Bailiff in JP v. Atlas Trust Co. (Jersey) Ltd. (14) ([2008] JRC 159, at para. 22):

"'Erreur' may be relevant when considering a contract governed by Jersey law but it cannot possibly, in our judgment, have any relevance in a case governed by equitable principles. The concept should be confined to matters governed by the law of contract. It would be quite wrong in principle and highly undesirable to muddy the waters by importing into cases concerning equitable principles a concept derived from a jurisdiction which does not recognise or apply such principles."

82 We conclude therefore that the dispositions made by Mrs. B which we are setting aside for mistake and (as a consequence) the trust are voidable as opposed to void.

Order accordingly.