

Trust briefing: Setting aside transactions involving Jersey trusts

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In response to a fast-changing and unpredictable world, important decisions about how best to structure and shelter private wealth can sometimes be forced upon trustees and ultra-high-net-worth (UHNW) families unexpectedly.

Families and trustees may often feel compelled to react under acute time pressure and with limited information. The 2024 decision of the UK to abolish its 'non-dom' regime, for decades the cornerstone of UK/offshore wealth planning, has forced many wealthy families to consider relocating themselves and radically restructuring their assets in response.

It is not uncommon – particularly where rapid and radical changes interact with complex tax rules – that oversights and mistakes occur with unforeseen consequences. Fortunately, where transactions involve Jersey trusts, there are options available to trustees and UHNW families to set aside transactions, entered into on the basis of a mistake, misunderstanding or other serious error.

This article explores the options available, outlining the considerations, benefits and drawbacks of each.

Two typical routes to set aside transactions

There are typically two potential routes to set aside a transaction where there has been a mistake or other error in establishing a trust or during the course of its administration:

- **Mistake**, typically relevant when looking at how a trust has been established by a settlor but also relevant to trustees who make a mistake; and
- **The 'Hastings-Bass' rule**, typically involving the actions and decisions of trustees and power holders once a trust has been established, eg distributions, restructuring etc.

In Jersey, both have been placed on a statutory footing in Art 47A-J Trusts (Jersey) Law 1984. Similar mechanisms exist to set aside transactions involving trusts in Guernsey, BVI and Cayman.

Setting aside transactions subject to a mistake in Jersey

In Jersey, the general principle is that a transaction executed by a settlor or a trustee can be set aside on the basis of mistake if the relevant mistake is sufficiently material to the transaction that it impacts the fundamental validity of the transaction and it is reasonable for the transaction to be set aside.

This remedy can be of enormous assistance to settlors of Jersey trusts, to trustees and other fiduciaries as well as, potentially, beneficiaries.

Regulatory | Real estate | Private client and trusts | Insolvency and restructuring | Dispute resolution | Corporate | Banking and finance

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Jersey law takes a practical and flexible approach to the type of mistake that can vitiate transactions involving a trusts and trustees. While mistakes as to the tax effects or consequences of a transaction are common, there are other examples, including:

- any mistake as to any advantage to be gained by the transfer of property or from to a trust;
- any mistake as to the exercise of a particular power; and
- any mistake as to a fact existing or not existing at the time of (or before) the transfer disposition or the exercise of a power.

It is not a requirement to show that any person lacked care or was otherwise responsible for the mistake coming about in order to seek to have the transaction set aside. This can avoid lengthy and expensive arguments and potentially having to sue professional advisors.

The 'Hastings-Bass' rule in Jersey

The 'Hastings-Bass' rule gives The Royal Court of Jersey (the **Court**) discretion to set aside an exercise of power – and any resulting transaction involving a trust – if it is clear that the trustee would not have acted as they did if the trustee had either:

- failed to take into account relevant considerations which the trustee ought to have taken into account when exercising the power; or
- took into account considerations which should properly have been disregarded.

In Jersey, the 'Hastings-Bass' rule has been placed on a statutory footing to have the broadest possible application to a very wide number of circumstances affecting trustees.

The relevant considerations may be advice from a professional advisor which ought to have been followed or, equally, incorrect advice that should not have been followed. However, any material consideration that the trustee has not properly considered (or the inverse – an irrelevant consideration to which the trustee has given too great a weight) are capable of giving grounds to have a transaction set aside.

Examples of transactions that have been set aside include cases where:

- a trustee or settlor exercises a power over assets subject to a mistake such as misunderstanding of the tax implications of a transaction or failing to realise the impact of a particular decision on the trust's beneficiaries;
- a trustee exercised a power to transfer and restructure assets, for the purposes of trying to avoid reporting requirements under French tax and deferral of the potential tax liabilities which would otherwise have been incurred in relation to the assets of the trusts; and
- the trustee or settlor did not have the necessary knowledge to make an informed decision, and it is shown that the decision would have been different had the correct facts or legal understanding been in place.

These examples are touchstones of the overarching principle of ensuring that the trust is administered in accordance with its terms and the trustee's fiduciary duties. The Court's discretion to set aside reflects the overarching duty of trustees always to act and exercise their powers prudently in the best interests of the beneficiaries, and ensures that a mistake in the decision-making process does not negatively bind the trust to an outcome that would be detrimental to the beneficiaries.

Where there has been a mistake, the Court's general view is that a beneficiary's sole remedy should not be litigation against trustees and/or advisors, in circumstances where the beneficiary is not usually at fault and has already incurred loss by reason of an avoidable tax charge. Forcing a beneficiary to incur further expense in what may be uncertain litigation is unnecessary, undesirable and unjust.

The Court will not make an order to set aside a transaction which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which make the transfer of trust property or the exercise of power in relation to trust property voidable.

While applications are generally conducted in private (withholding the names of the affected beneficiaries), the Court will usually require, as part of such applications, that any relevant tax authority is put on notice of the application.

Who can apply to set aside transactions?

An application to set aside transactions on the basis of either mistake or the 'Hastings-Bass' rule can be made by:

- a settlor (or his personal representatives if deceased);
- a trustee;
- a beneficiary or an enforcer of a trust; or
- any other person with permission of the Court.

Practical considerations for trustees and settlors

Trustees and settlors should ensure that they fully understand the tax and legal implications of their decisions and that they have received proper advice (from relevant lawyers and tax professionals) to minimise the risk of a mistake or misunderstanding which might mean a transaction has to be set aside.

Where mistakes occur, the Court's ability to set aside transactions involving trusts, and its pragmatic approach to such questions is of considerable value to settlors, trustees and beneficiaries of Jersey trusts, allowing mistakes to be corrected without undue complexity or restriction.

Moreover, there are nuances to how these rules operate between Jersey and other offshore jurisdictions such as Guernsey, BVI and the Cayman Islands. These distinctions can be highly relevant where there are cross-jurisdictional interests, structures or assets.

How can Collas Crill help?

Collas Crill has decades of experience and in advising UHNW families and trustees about transactions and their assets. Our skilled litigation specialists have considerable experience guiding proceedings to a swift conclusion through the courts.

If a trust has been created or a transaction involving trust assets has taken place with unanticipated results, please contact our trust experts to discuss the specific circumstances and we will be pleased to advise you on your options.

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