# Competition in the Global Law Market: Offshore Development of the Statutory "Rule in Hastings-Bass"

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## Abstract

This Article examines the competitive dynamics in the global law market through the lens of the statutory evolution of the Rule in Hastings-Bass across various International Financial Centers (IFCs). Following the UK Supreme Court's 2013 decision in Pitt v Holt and Futter v Futter, which significantly restricted the judiciary's ability to void trustee decisions under the Rule, seven IFCs (Jersey, Bermuda, The Bahamas, the Dubai International Financial Center, the Cayman Islands, and the British Virgin Islands) enacted statutes to preserve and clarify the Rule within their jurisdictions. These legislative actions highlight the strategic adaptations by IFCs to enhance their legal frameworks and maintain a competitive edge in providing sophisticated trust services. By codifying the Rule, these jurisdictions have addressed key criticisms of the common law version, ensuring greater certainty, flexibility, and protection for trust beneficiaries. The Article argues that this evolution exemplifies the positive role of

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jurisdictional competition in improving legal services and facilitating international financial transactions, thereby contributing to the global economy.

## Introduction

Between 2013 and 2023, seven small international financial centers (IFCs) with trust laws built on English trust law rejected, through statutes, the UK Supreme Court's 2013 judgment in *Pitt v Commissioners* and *Futter v Commissioners.*[1] That judgment had dramatically restricted the English courts' previous equitable power to undo transactions by trustees where the trustees had considered things they should not have or failed to consider things they should have ("the Rule in *Hastings-Bass*", hereafter "the Rule").[2] Many in the IFCs believed their courts would follow the UK Supreme Court's lead.[3] This would have dramatically reduced the ability of IFC judges to fix problems that arose through trustees' erroneous beliefs about the consequences of their actions. For example, under the pre-*Pitt/Futter* Rule, an English court was able to void a transaction where the retirement of a single trustee from his law practice changed the trusts' tax status and produced a capital gains tax liability of over £35m, a significant loss to the beneficiaries.[4] After *Pitt/Futter,* such relief would no longer be available unless there had been a breach of fiduciary duty by the trustee.[5] More than a detail of trust law,[6] the IFCs' actions illustrate how these jurisdictions are innovating in law to outcompete larger jurisdictions in the global law market through enhancing the capacity of their judiciaries.[7] Not just a divergence of legal rules among common law jurisdictions, the evolution of

1. Futter v. Comm'rs for HM Revenue and Customs [2013] UKSC 26.

2. Hastings-Bass v. Inland Revenue Comm'rs (*In re* Hastings-Bass (Deceased)) [1975] Ch 25, 41; [1974] STC 211.

3. *See* Clifford Chance, *Trustees' taxing mistakes—offshore perspectives on the Supreme Court's decision in* Pitt v HMRC (June 2013), https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/06/trustees-taxing-mistakes-offshore-perspectives-on-the-supreme-courts-decision-in-pitt-v-hmrc-14-june-2013.pdf.

4. Green v. Cobham [2002] STC 820.

5. Futter v. Comm'rs [2013] UKSC 26, ¶73.

6. MICHAEL J. ASHDOWN, TRUSTEE DECISION MAKING: THE RULE IN *RE HASTINGS-BASS* 4 (2015) [hereinafter ASHDOWN, TRUSTEE DECISION MAKING] ("It would be profoundly misguided, although perhaps tempting, to characterize [the Rule] as an interesting but essentially obscure field of scholarly enquiry.").

7. *See* Andrew P. Morriss, *IFCs: Providing the Rule of Law*, IFC REV. (Apr. 2, 2020) [hereinafter Morriss, *IFCs: Providing the Rule of Law*], https://www.ifcreview.com/articles/2020/april/ifcs-providing-the-rule-of-law/.

*Hastings-Bass* powers across the global law market illustrates how IFCs protect a crucial competitive edge they have developed in their judiciaries.[8]

In the global law market, jurisdictions compete for transactions that bring them revenue and business to their lawyers, accountants, and other professionals, which in turn generates more revenue for the jurisdictions.[9] The law market requires three components to function. First, it needs an area of law where differences matter to those planning to use the law to accomplish their goals. That is, a jurisdiction's law must be capable of being perceived as "better" by those who will choose the jurisdiction under whose law a transaction is organized.[10] Second, there must a group within the jurisdiction able to successfully lobby for adoption of the "better" law.[11] Third, other jurisdictions must recognize the application of the law of the jurisdiction with the "better" law.[12]

All of these are present with respect to trust law. IFCs have been explicitly competing by varying trust law provisions since the 1960s.[13] IFC trust law professionals form cohesive groups with a shared interest in seeing their jurisdiction succeed by innovating, and the small size of IFCs makes collaboration and coordinating easy.[14] The shared legal heritage in trust law across IFCs and with larger jurisdictions has made their trust laws familiar and compatible with larger jurisdictions'.[15] Further, the creation and adoption of the Hague

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8. Andrew P. Morriss, *Long-term Trends in Trust Law Favour IFCs*, IFC REV. (Apr. 30, 2024) [hereinafter Morriss, *Long-term Trends in Trust Law Favour IFCs*], https://www.ifcreview.com/articles/2024/april/long-term-trends-in-trust-law-favour-ifcs/.

9. Erin A. O'Hara & Larry E. Ribstein, THE LAW MARKET 3, 13 (2009).

10. *Id.* at 68–73.

11. *Id.* at 73–77.

12. *Id.* at 6–7, 77–78 (explaining why courts enforce choice of law clauses).

13. Andrew P. Morriss, *Cultivating Trust Law: Four Phases of Offshore Trust Law's Development,* OXFORD HANDBOOK OF COMPARATIVE TRUST LAW (Richard Nolan et al. eds.) (forthcoming 2025) [hereinafter Morriss, *Cultivating Trust Law*]. *See also* Donovan Waters, *The Hague Trusts Convention twenty years on,* in COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW 96 (Michele Graziadei et al. eds., 2005) ("The innovative offshore jurisdictions have amended and reworked their various pieces of trust legislation with a frequency that continues to astound those accustomed to pleading with their respective mainland jurisdictions to update the local trust legislation.").

14. Andrew P. Morriss & Charlotte Ku, *IFCs' "Secret Sauce": A Commitment to an Effective Legal Infrastructure,* IFC REVIEW (Jan. 12, 2022) [hereinafter Morriss & Ku, *IFCs' "Secret Sauce"*], https://www.ifcreview.com/articles/2022/january/ifcs-secret-sauce-a-commitment-to-an-effective-legal-infrastructure/ ("[t]he smaller communities in IFCs enable speedier and more responsive methods of governance.").

15. Morriss, *Long-term Trends in Trust Law Favour IFCs*, *supra* note 8.

Convention on the Law Applicable to Trusts and on their Recognition[16] has both formalized the recognition of offshore trusts in a number of jurisdictions and prompted changed attitudes towards trusts.[17]

A positive interpretation of this competition is that it incentivizes the adoption of laws that offer advantages over other jurisdictions' laws, the creation of efficient, high-quality courts, and the establishment of clusters of relevant professionals.[18] Critics of jurisdictional competition argue that it leads to a "race to the bottom," in which jurisdictions lower standards to attract business and undermine other jurisdictions' efforts to adopt welfare-increasing regulatory and tax measures.[19] These critics see IFCs' role as imposing costs on other jurisdictions and rarely concede that there are any benefits from the existence of IFCs.[20]

IFCs' adoptions of statutory versions of the Rule in *Hastings-Bass* provide a test of those competing explanations, which I argue in this Article supports a positive view of the role of regulatory competition internationally. By preserving IFCs' ability to provide their judiciaries an enhanced role in the administration of their increasingly sophisticated trust laws, the adoption of statutory *Hastings-Bass* provisions provides them with a competitive advantage in providing trust law to clients from around the world.[21] In particular, the statutory *Hastings-Bass* provisions enable trusts created under these IFCs' laws to avoid costly litigation over decisions that later prove problematic, making trusts in these jurisdictions more protective of beneficiaries.

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16. Hague Conference on Private International Law, Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, https://assets.hcch.net/docs/8618ed48-e52f-4d5c-93c1-56d58a610cf5.pdf.

17. Waters, *supra* note 13, at 96 ("Counting the number of ratifications of a Hague Convention is one way in which to judge success. Another perhaps is to judge how far the Convention has changed attitudes and focused thinking about trusts.").

18. Andrew P. Morriss & Charlotte Ku, *IFCs: Pioneers in Transmission of Legal Innovation,* IFC REV. (Jan. 14, 2021) https://www.ifcreview.com/articles/2021/january/ifcs-pioneers-in-transmission-of-legal-innovation/.

19. *See, e.g.*, Esme Berkhout, *Tax Battles: The dangerous global race to the bottom on corporate tax,* OXFAM 4 (Dec. 12, 2016), https://policy-practice.oxfam.org/resources/tax-battles-the-dangerous-global-race-to-the-bottom-on-corporate-tax-620159/ ("Corporate tax havens are causing the loss of huge amounts of valuable tax revenue and their use is becoming standard business practice for many companies.").

20. *See, e.g.*, *id.* at 6 ("Ultimately, the evidence shows that the only beneficiaries of this destructive race to the bottom are corporations and their wealthy shareholders and owners.").

21. *See* Clifford Chance, *supra* note 3.

Part I sets the stage with a discussion of the role of international financial centers (IFCs) in the world economy. Contrary to the impression created by popular media accounts of nefarious doings in "tax havens" and "secrecy jurisdictions," IFCs often play an important role in the global economy.[22] In particular, they provide legal systems with the ability to effectively "export" the rule of law in particular classes of transactions.[23] Given the general shortage of the rule of law globally, encouraging jurisdictions able to export it to do so is a benefit.[24] Part II applies this explanation to the judicial creation and development of the Rule, England's judicial abandonment of it, and IFCs' adoption of their statutory versions. I argue that the role of British tax authorities in the rule's evolution in England is crucial to understanding its birth, evolution, and eventual demise both there and offshore, while IFCs' pursuit of a competitive advantage that enhances the suitability of their trusts and entities for both commercial and individual use led to those jurisdictions' decisions to clarify and preserve the Rule. Part III examines the divergence of IFC trust law from English law and makes the case that this is a positive development for both trust law in particular and jurisdictional competition generally. Rather than evidence of a race to the bottom, the IFC statutes reflect these jurisdictions playing to their strengths as exporters of the rule of law.

## I. TWO VIEWS OF THE ROLE OF IFCS IN JURISDICTIONAL COMPETITION

A positive view (and mine) of jurisdictional competition involving IFCs is that IFCs provide legal services and rules unavailable or difficult to use in other jurisdictions.[25] These can facilitate international investment flows and enable individuals and organizations to accomplish goals that would otherwise be costlier or impossible to accomplish.[26] However, for many countries where the rule of law is flawed, having access to a jurisdiction where investments can be legally located, that provides superior rule of law

22. *See* Morriss, *IFCs: Providing the Rule of Law*, *supra* note 7.; Richard Gordon & Andrew P. Morriss, *Moving Money: International Financial Flows, Taxes, and Money Laundering,* 37 HASTINGS INT'L & COMPAR. L. REV. 1, 10–16 (2014).

23. *See* Morriss & Ku, *IFCs' "Secret Sauce"*, *supra* note 14; Gordon & Morriss, *supra* note 22, at 16–21.

24. *See* Gordon & Morriss, *supra* note 22, at 118 ("The rule of law is all too scarce in today's world and jurisdictions that specialize in providing it to others provide a valuable service that needs to be recognized.").

25. Gordon & Morriss, *supra* note 22, at 118–120.

26. *Id.* at 112.

services to govern the relationships among the investors, can be an important part of facilitating such investments.[27]

IFCs provide these rule of law services through the combination of legal systems (courts, statutes, bodies of precedent, treaties, intergovernmental agreements, legislatures, and executive agencies) and networks of professionals (including accountants, bankers, financial advisors, insurance managers, and lawyers) familiar with their legal systems.[28] By locating transactions and entities in an IFC, parties from outside the IFC can access the legal system and network of the IFC.[29] For example, for many years the Netherlands Antilles provided U.S. businesses with access to the Eurodollar market (thereby lowering their borrowing costs) through a combination of its tax treaty network and a ring-fenced income tax regime.[30] By borrowing Eurodollars and lending them on to its U.S. parent, the Antillean entity created a conduit for investment to flow into the United States at a cost below that of domestic investment, fueling economic growth within the United States as well as enabling U.S. firms to invest abroad without relying on U.S. source funds.[31] This was made possible by the Netherlands Antilles providing a low-tax entity which enabled such transactions. Similarly, the Cayman Islands provide a specialized regulatory regime for captive insurance solutions that has facilitated U.S. health care systems lowering their medical malpractice costs.[32] Many of the owners of Cayman-based medical malpractice captive insurers are U.S.-based non-profit health care providers.[33] These U.S. entities are neither avoiding nor evading U.S. taxes because they are non-profit entities. Their use of Cayman-based structures thus reflects advantages of the Caymanian regulatory and legal systems for this specific purpose.[34] The result of the availability of Cayman captive structures is reduced medical malpractice costs and greater risk control for U.S. health care

27. *See generally* Morriss, *IFCs: Providing the Rule of Law*, *supra* note 7.

28. *See generally* Morriss & Ku, *IFCs' "Secret Sauce"*, *supra* note 14.

29. *See generally* Morriss, *IFCs: Providing the Rule of Law*, *supra* note 7.

30. Craig M. Boise & Andrew P. Morriss, *Change, Dependency, and Regime Plasticity in Offshore Financial Intermediation: The Saga of the Netherlands Antilles,* 45 TEX. INT'L L.J. 377, 405 (2009).

31. *Id*. at 407–09.

32. *See* Tony Freyer & Andrew P. Morriss, *Creating Cayman as an Offshore Financial Center: Structure and Strategy since 1960*, 45 ARIZ. STATE L.J. 1297, 1343 (2013).

33. Monique Jackson, *Healthcare Captives: A Retrospective*, CAPTIVE INT'L (Jan. 1, 1970),
https://www.captiveinternational.com/healthcare-captives-a-retrospective.

34. *Id.*

providers.[35]

More generally, when two or more individuals or entities wish to organize a transaction, there is a need for law governing that transaction. Sometimes, parties to the transaction need an entity (partnership, corporation, LLC, foundation, etc.) or relationship (trust) to govern their continuing transactions.[36] The needs range from being able to execute on agreed plans to solving problems that arise due to unforeseen circumstances.[37] A transactional legal framework must therefore address disagreements over provisions explicitly agreed *ex ante* and problems due to incompleteness in the governing agreements creating the entity or relationship that arise *ex post*.[38] Courts play a crucial role in resolving these problems both in general and with respect to trust law in particular. Trusts in IFCs frequently play a role in pensions, structuring family wealth, and a variety of business purposes ranging from asset securitization to project finance.

In creating a trust, the settlor turns over legal ownership of assets to the trustee, who then has a fiduciary obligation to use those assets in the interests of the beneficiary or, in the case of a purpose trust, to advance the purpose. The judiciary plays a crucial role in the administration of trusts that goes well beyond presiding over litigation. In particular, courts can be called upon to "bless" momentous trustee decisions, to remove existing and appoint new trustees and protectors, and much else.[39] Courts also issue judgments that provide a crucial part of the legal framework governing trusts. Over the past three decades, leading IFCs have developed sophisticated judiciaries, whose judges play a crucial role in developing trust law, not just for the IFC on whose courts they sit, but for trust law generally.[40] Not only are these courts staffed by judges with considerable experience, their judiciaries often have experience in multiple jurisdictions.[41] Unsurprisingly, these courts have

35. *Id.*

36. Andrew P. Morriss & Charlotte Ku, *English Company Law: Legal Architecture for a Global Law Market,* 31 IND. J. GLOB. LEG. STUD. 61, 90–96 (2024).

37. *Id.* at 94–95.

38. *Id.*

39. *See* Alan Binnington, *From Bishops to Blessings: Momentous Decisions by Trustees*, 3 JERSEY & GUERNSEY L. REV. 320 (2019) (blessings); Trustee Act 1925 § 36 (court power to remove and appoint trustee in English law); *In the Matter of the Piedmont Trust & Riviera Trust* [2021] JRC 248 (court's power to appoint a protector in Jersey).

40. Morriss, *Cultivating Trust Law*, *supra* note 13.

41. *Id.*

produced many landmark decisions in trust law.[42] Many still use the Privy Council as their court of last resort, making a highly respected court that lacks even a hint of local bias a guarantor of quality. As is described below, the Rule in *Hastings-Bass* builds on this strength by enhancing the equitable powers of the courts to fix problems in trust administration.

Critics of IFCs, including non-governmental organizations such as the Tax Justice Network ("TJN"), Christian Aid, and Oxfam, developed country governmental alliances like the Organization for Economic Cooperation and Development ("OECD"), and governments that dislike having competition on tax rates like France's and Germany's, portray the law market in unidimensional terms: jurisdictions vary only in the strictness of their regulation and tax systems, and "more" regulation and/or higher tax rates are always better.[43] In this view, competition from IFCs provides only "harmful tax competition," opportunities for corruption, or similar social ills.[44] For example, a 2017 TJN report, *Trusts: Weapons of Mass Injustice?*, argued that "tax havens are engaged in a race to the bottom to offer ever more devious and illegitimate forms of trust law allowing multiple subterfuges to defeat the laws of other jurisdictions."[45]

In earlier work, Richard Gordon and I labeled these critics' view a "Control First" approach, suggesting that the first priority for those holding it was preventing "bad" transactions (generally defining as "bad" those transactions that reduce tax revenues in some jurisdiction or enable ownership of assets to be non-public).[46] We contrasted this with what we termed an "Efficient Enterprises" view of the law market, in which the first goal was facilitating private transactions to create new wealth.[47] That includes legal and regulatory measures that screen out bad actors while adding net value (i.e. pass a cost-benefit test). It also includes measures that reduce the transaction costs of engaging in wealth-creating activities. Such regulations include not

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42. *Id.*

43. Gordon & Morriss, *supra* note 22, at 5–7.

44. *See generally* OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998), https://www.oecd.org/en/publications/1998/04/harmful-tax-competition_g1ghgc60.html. *See also* Andrew P. Morriss & Lotta Moberg, *Cartelizing Taxes: Understanding the OECD's Campaign against "Harmful Tax Competition"*, 4 COLUM. J. TAX L. 1, 39–56 (2012).

45. Andres Knobel, *Trusts: Weapons of Mass Injustice?*, TAX JUST. NETWORK 2 (Feb. 13, 2017), https://www.taxjustice.net/wp-content/uploads/2017/02/Trusts-Weapons-of-Mass-Injustice-Final-12-FEB-2017.pdf.

46. Gordon & Morriss, *supra* note 22, at 5–7.

47. *Id.* at 4–5.

only prohibitions (as many anti-corruption measures are structured) but also facilitating rules (as with statutes that lower transactions costs for creating and operating entities).

The debate over IFC's role today is conducted almost entirely around two areas of policy. First, Control First proponents argue that competition over nominal income tax rates has only negative consequences.[48] These IFC critics rarely look beyond nominal rates, suggesting an incomplete view of tax competition.[49] Second, more recent IFC critics have focused on the idea of a public register of beneficial ownership as a critical component in good governance.[50] Law market competition that enables less than full public disclosure of beneficial ownership is considered unacceptable by critics because they believe that such disclosure is essential to combating tax avoidance, corruption, and money laundering of criminal proceeds.[51] This ignores many IFCs' heavy investments in regulating who is allowed to participate in their financial sector, an approach to regulation which is an alternative to the type of regulation that Control First proponents prefer.[52] As a result, IFCs are less likely to accept that there are net benefits of measures like public beneficial ownership registries than their Control First critics are.[53] In addition, Control First arguments in favor of such measures rarely acknowledge the downsides to public registers, such as exposing people included in them to risks of kidnapping and robbery.[54]

In trust law, I have argued elsewhere that IFCs which compete for trust business have developed a sophisticated trust law regime that now surpasses regimes provided in England or other onshore trust

48. *Id.* at 52–53.

49. *Id.*

50. *Id.* at 39.

51. *See Id.* at 50–66.

52. Charlotte Ku & Andrew P. Morriss, *IFC Regulatory Innovation: Vital to the Maintenance of a Healthy Global Financial Ecosystem,* IFC Review (Jan. 12, 2022), https://www.ifcreview.com/articles/2022/january/ifc-regulatory-innovation-vital-to-the-maintenance-of-a-healthy-global-financial-ecosystem/. *See also* Andrew P. Morriss & Roger E. Meiners, *Regulating Entities, Not Activities: Reforming the Environmental Permit Raj,* CASE W. RSRV. U. L. REV. (forthcoming 2024) (describing IFC regulations of entities as a model for regulatory reform).

53. *See, e.g.*, Julian Morris, *When It Comes to Money Laundering, Cayman is not the Problem,* IFC REVIEW (May 31, 2022), https://www.ifcreview.com/articles/2022/may/when-it-comes-to-money-laundering-cayman-is-not-the-problem/.

54. Devon Pendleton, *Family Offices Say Disclosure Plan Invites Theft, Kidnapping*, BLOOMBERG (Feb. 9, 2022), https://www.bloomberg.com/news/articles/2022-02-09/family-offices-say-disclosure-plan-invites-theft-kidnapping.

jurisdictions.[55] Starting with Jersey's 1984 adoption of a comprehensive substantive trust statute and continuing through the development of such additional innovations as non-charitable purpose trusts, private trust companies, and comprehensive regulation of trust service providers, IFCs have moved beyond the minor tweaks to English law (such as extension of perpetuities and accumulations periods) they made in the 1970s into the development of a body of international trust law that goes well beyond what is possible under traditional English trust law.[56]

Underpinning all of these changes is a growing reliance on IFCs' judiciaries, staffed by judges with international reputations before whom it is not uncommon for top English practitioners to appear (as well as leading practitioners from IFC-based firms).[57] This can be seen in the growing proportion of citations to IFC precedents in treatises discussing IFC trust law rather than the previous dominance of citations to English case law.[58] It can also be seen in the growth of areas of trust law (such as protectors, non-charitable purpose trusts) for which there are few or no English precedents as these innovations are largely unknown to English trust law.[59] This evolution of trust law beyond its English origins and the presence of additional competitive dimensions in the law market beyond nominal tax rates and the degree of public disclosure of beneficial ownership of assets makes the history of the Rule in *Hastings-Bass* a useful means of exploring a different competitive dynamic. Examining it broadens the debate over IFCs beyond the simplistic "low tax/secrecy" approach to include an understanding of how small jurisdiction legal systems can add value in the global economy. To understand that debate, we must first

55. Morriss, *Cultivating Trust Law*, *supra* note 13; Andrew P. Morriss & Charlotte Ku, *The Evolution of Offshore Trust Law* (Tex. A&M U. Sch. L., Legal Stud. Rsch. Paper Series, Rsch. Paper No. 21–07) [hereinafter Morriss & Ku, *The Evolution of Offshore Trust Law*].

56. Morriss, *Cultivating Trust Law*, *supra* note 13, at 19–20; Morriss, *Evolution, supra* note 55; MARK HUBBARD, PROTECTORS OF TRUSTS 214 (2013) ("The development of the offshore trust industry and the enthusiastic adoption of it in relevant jurisdictions has caused rapid and extensive changes to the private domestic trust model as it existed in England in the late 1970s (and as it largely exists today) and as it also exists in many relevant jurisdictions in relation to domestic trusts.").

57. Morriss, *Cultivating Trust Law*, *supra* note 13, at 18–19; Morriss & Ku, *The Evolution of Offshore Trust Law*, *supra* note 55.

58. Morriss, *Cultivating Trust Law*, *supra* note 13, at 12–14; Morriss & Ku, *The Evolution of Offshore Trust Law*, *supra* note 55.

59. Morriss, *Cultivating Trust Law*, *supra* note 13, at 11–17; Morriss & Ku, *The Evolution of Offshore Trust Law*, *supra* note 55; HUBBARD, *supra* note 56, at 216 ("In these international trust statutes, relevant jurisdictions have deliberately departed from (or at least pressed at the boundaries of) the domestic trust model familiar in England, and indeed in many of the same jurisdictions.").

understand the Rule's evolution in England.

## II. THE RULE IN HASTINGS-BASS

In 1975, an English court first recognized what eventually became known as the Rule in *Hastings-Bass*, which the author of the authoritative treatise on it termed "one of the great enigmas in the recent history of the English law of trusts."[60] The Rule enabled courts to declare prior acts by trustees void or voidable (later courts and commentators disagreed on this point) to cure problems created by failing to consider what the decision maker was under a duty to consider or by considering things that the decision maker was under a duty not to consider. Making a large error in evaluating (or just not considering) the tax consequences of an action thereby harming the beneficiaries by reducing the trust's assets (often by millions) was one category of problem that the Rule was invoked to cure. To its critics, the Rule became a "get out of jail free" card for negligent trustees involved in aggressive tax avoidance.[61] To its defenders, the Rule protected trust beneficiaries from the consequences of mistakes by trustees and their advisors.[62]

In 2013, after a number of first-instance court and court of appeal judgments had applied and developed the Rule, the UK Supreme Court abandoned the Rule as it was then understood.[63] That same year Jersey codified the Rule in statutory form and Bermuda followed suit in 2014. Over the next decade, they were followed by The Bahamas, the British Virgin Islands, the Cayman Islands, the Dubai International Financial Centre, and the Isle of Man. These seven jurisdictions seizing the opportunity to differentiate their trust laws from the United Kingdom's is an example of the law market in action, providing insight into how international jurisdictional competition operates.

The evolution of the Rule in *Hastings-Bass* provides an

60. Hastings-Bass v. Inland Revenue Comm'rs (*In re* Hastings-Bass (Deceased)) [1975] Ch 25; ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 1.

61. *See, e.g.*, Miguel Colebrook, *'Get Out of Jail Free' Card: The Courts' Offer of Assistance to Errant Trustees*, 25 DENNING L.J. 211 (2013).

62. *See, e.g.*, Michael J. Ashdown, *In Defence of the Rule in* Re Hastings Bass, 16 TRS. & TRS. 826, 848 (2010) [hereinafter Ashdown, *In Defence of the Rule in* Re Hastings-Bass] (noting that "the function of the rule is to protect the beneficiaries' entitlement to proper performance by trustees of their duty to consider").

63. Pitt v. Holt [2011] EWCA (Civ) 197; Futter v. Futter [2010] EWHC (Ch) 449. *See* Mike Truman, *So long, Billy Bass*, TAXATION 9 (2011) ("the scope of the rule as it now stands is considerably reduced"). Note that the English Court of Appeal "does not have the power to overturn its own judgments" and so *Pitt/Futter* had to "overturn the rule in *Hastings-Bass* without actually overturning the judgment in it." *Id.*

opportunity to test the framework set out in Part I in two ways. First, we can compare the English and offshore trust law jurisdictions' approaches to the Rule to see if the pattern of its adoption fits either the positive or the negative versions of the law market story. The jurisdictions considered here that take a common law approach to trusts include:

- the Crown Dependencies of the Bailiwick of Guernsey, the Isle of Man, and the States of Jersey;
- the British Overseas Territories of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, and Gibraltar;
- the independent nations of The Bahamas, the Cook Islands (which is in free association with New Zealand), and St. Kitts & Nevis; and
- the special economic zone of the Dubai International Financial Centre.[64]

The Rule's development in England launched it into common law trust jurisprudence; England's effective abandonment of the Rule provides a second pivot point on which to compare the jurisdictions that followed English precedent and those that did not. Second, we can also compare the roles the Rule plays in English and IFC jurisprudence, shedding light on whether the Rule represents a transactions-costs-reducing rule or a race to the bottom.

Why these jurisdictions? I focus primarily on jurisdictions using the Privy Council as the court of final appeal (all but the DIFC) and which either have significant offshore-focused trust industries or have made efforts to develop one. The overlap between the Privy Council and the UK Supreme Court is significant because it is frequently cited as a reason IFC courts which use the Privy Council as a court of last resort would be likely to follow the UK Supreme Court's approach. Table 1 lists the jurisdictions.

64. *See* Alejandro Carballo, *The Law of the Dubai International Financial Centre: Common Law Oasis or Mirage within the UAE?*, 21 ARAB L.Q. 91, 99 (2007)(technically, England and Wales. I will refer to the jurisdiction as simply "England" in the interests of space. Scotland's legal system has a different basis from England and Wales and so the Rule was never necessarily part of Scottish law).

Table 1 - Jurisdictions Examined

| **Jurisdiction** | **Adoption of Statutory *Hastings-Bass*** | **Status** |
|---|---|---|
| Anguilla | -- | Overseas Territory |
| Bahamas | 2016 | Independent |
| Bermuda | 2014 | Overseas Territory |
| British Virgin Islands | 2021 | Overseas Territory |
| Cayman Islands | 2020 | Overseas Territory |
| Cook Islands | -- | Free Association with New Zealand |
| Dubai IFC | 2017 | Special Zone |
| Gibraltar | -- | Overseas Territory |
| Guernsey | -- | Crown Dependency |
| Isle of Man | 2023 | Crown Dependency |
| Jersey | 2013 | Crown Dependency |
| St. Kitts & Nevis | -- | Independent |

These include all three Crown Dependencies, five of the fifteen Overseas Territories, two independent countries, one country in free association with New Zealand, and one special zone. Both independent countries and the country in free association retain the Privy Council as their final courts of appeal. The special zone courts of the Dubai IFC follow a common law approach to the law for cases arising under their Financial Centre's laws, and look to English precedent; its judiciary also includes judges from common law jurisdictions, including many trained in Britain.[65] Although none of

65. DIFC Law No. 3 of 2004, Articles 8 and 9 (listing "the laws of England and Wales" as a source of law in the DIFC). *See also* David Russell & Gabor Bognar, *The application of English law in the financial free zones of the United Arab Emirates*, 23 TRS. & TRS. 480, 486 (2017) (describing how English law is used); Carballo, *supra* note 64, at 99 (explaining the adoption of English common law "as the law of international commercial transactions (thus making foreign investors more confident and comfortable) and the discretion it allows the judges (helping to develop the flexible *corpus iure* required for the fast-developing and increasingly complex international practice"); JAYANTH K. KRISHNAN, THE STORY OF THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS: A RETROSPECTIVE 27 (2018). Further, the DIFC's adoption of "the common law of trusts and principles of equity" to supplement its statute, is "presumably wide enough to enable the DIFC court to apply the principles developed by the English court in the exercise of its inherent supervisory jurisdiction over trusts, at least to the extent that they are consistent with the provisions of the Trust Law". Andrew de la Rosa, *The Dubai International Financial Centre Trust Law*, 14 TRS. & TRS. 481 (2008). In addition, many of the personnel involved in establishing the DIFC courts were British legal professionals or people trained in British law schools. *Id.* at 14–15, 18–19, 27–35; Andrew Bodnar & Martin Kenney, *Jurisdiction and the Dubai Courts:*

these jurisdictions would have been *required* to follow a UK Supreme Court decision, it was thought unlikely in the aftermath of *Pitt/Futter* that their courts would diverge from the UK's retreat from the Rule given their frequent reliance on English precedents as persuasive and the respect with which the UK Supreme Court's decision was treated.[66] Given that the UK's retrenchment of the Rule made it possible, and even likely, that the same would happen in their courts, these are the jurisdictions most likely to consider adopting a statute to enable diverging from the UK Supreme Court precedent if the trust law sector believed preserving the Rule would give their jurisdiction an advantage.

None of the remaining Overseas Territories that have offshore sectors have made similar regular investments in statutory additions to their trust laws.[67] Similarly, most of the independent countries that have attempted to develop offshore trust sectors but which do not use the Privy Council are excluded.[68] The civil law jurisdictions that have introduced trusts via statute are excluded as the role of the judiciary, and so the utility of the Rule, is quite different in civilian legal systems.[69]

## III. THE RISE, ENGLISH FALL, AND OFFSHORE STATUTORY RESURRECTION OF THE RULE IN *HASTINGS-BASS*

We now turn to the evolution of the Rule. Close attention to its

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*Self-Immolation or Order Out of (Potential) Chaos?*, 19 BUS. L. INT'L 125, 127 (2018) ('where the DIFC laws, rules, and judgments are silent, it applies English and other common law.").

66. *See The Judicial Committee*, JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, https://jcpc.uk/ (last visited Mar. 11, 2025).

67. These are Antigua & Barbuda, Grenada, and St. Vincent and the Grenadines. Those without offshore sectors are the British Antarctic Territory, British Indian Ocean Territory, Falkland Islands, Montserrat, Pitcairn Islands, Saint Helena, and South Georgia. Note that Montserrat once had an offshore sector but is no longer a significant financial services jurisdiction. *See* Int'l Monetary Fund, *Review of Financial Sector Regulation and Supervision—Montserrat* (Oct. 2003), https://www.imf.org/external/pubs/ft/scr/2003/cr03371.pdf.

68. Barbados, Belize, Brunei Darussalam, Dominica, Liberia, Malta, Mauritius, Niue, Singapore, St. Lucia, and Tuvalu. Nauru's financial sector collapsed in 2004 and so it is also excluded. Anne Davies & Ben Doherty, *Corruption, incompetence and a musical: Nauru's cursed history*, THE GUARDIAN (Sept. 3, 2018), https://www.theguardian.com/world/2018/sep/04/corruption-incompetence-and-a-musical-naurus-riches-to-rags-tale.

69. The civil law jurisdictions that have introduced trusts via statute include Lichtenstein in *Law of 8 November 2013 concerning Professional Trustees and Fiduciaries (Trustee Act)* 173.520 (2013), Panama in *Law 21, Gaceta Oficial* (May 12, 2017), and San Marino in *Law No. 42 of March 2010*.

doctrinal evolution is necessary for two reasons. First, the courts' discussion of the Rule provides insights into the reasons for its adoption and its abandonment which enables us to evaluate its appropriateness to the IFCs' trust industries. Second, the process of adoption in offshore jurisdictions reveals information about how the judiciary and legislatures in those jurisdictions act in furthering their interests as IFCs.

### A. CREATION AND DEVELOPMENT OF THE RULE

The Rule is generally attributed to a 1975 English Court of Appeal judgment, *Hastings-Bass.*[70] In this section I trace its origins and development through English judgments, largely from first-instance courts.

#### 1. Hastings-Bass

*Hastings-Bass* concerned British tax authorities' efforts to collect estate duty on a transfer between two trusts. In 1957, trustees of one trust transferred £50,000 to another trust for the benefit of the son and future descendants of the beneficiary of the original trust, to avoid estate duty. [71] They succeeded in creating a life interest in the son but ultimately failed with respect to the future interests, which were to follow the life estate, because they were ultimately held void on perpetuities grounds based on a 1962 House of Lords decision (and so which the trustees could not have anticipated in 1957).[72] Ironically, given its subsequent history in reducing tax bills, the idea that courts had the power to undo trustee actions was asserted by the tax authorities. It was the Inland Revenue that argued that the trustees' original action (the creation of all of the various interests) should be held void due to the trustees' lack of consideration of a relevant matter (the perpetuities issue).[73] Under the tax authorities' argument, the life interest would also be void and so estate duty owed.[74] The Court of

70. Colebrook, *supra* note 61, at 212 (noting the dicta from the case that became known as the rule).

71. This summary draws from Hastings-Bass v. Inland Revenue Comm'rs [1975] Ch 25 and ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 1.

72. The 1962 decision is Re Pilkington's Will Trusts [1964] AC 612. Since it is irrelevant to the Rule just why they were void, I will not explore the nuances of the Rule Against Perpetuities.

73. *Id*.

74. *Id.* As a third-party to the transaction, HMRC's only ability to undo the life interest was to have the entire discretionary action of the trustees voided.

Appeal rejected this argument, finding that the trustees' purpose in benefiting the life interest holder was accomplished despite the failure of the subsequent interests.[75] However, while he rejected the Inland Revenue's proposed rule's application, Lord Justice Buckley agreed that the courts had the power to reform the trustees' actions in such circumstances, noting that where:

> a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action, notwithstanding that it does not have the full effect which he intended unless 1) what he has achieved is unauthorized by the power conferred on him or 2), it is clear that he would not have acted as he did a) had he not taken into account the considerations which he should not have taken into account or b) had he not failed to take into account considerations which he ought to have taking into account.[76]

Neither a clear nor a concise statement of what became the Rule and *dicta* rather than the *ratio decidendi* of the judgment, Buckley's statement is unremarkable in two respects. First, it drew little attention in English legal commentary at the time, suggesting it was not seen as introducing something particularly new or interesting into English trust law. Second, although the judgment in *Hastings-Bass* did not discuss the issue in these terms, the idea of such a power in the courts fits easily into the historic conception of the courts' supervisory powers over trusts. As Daniel Clarry's comprehensive survey of courts' supervisory jurisdiction over trusts notes, "[t]he coherent principle that justifies and unifies the constituent aspects of the supervisory jurisdiction over trust administration is that the Court acts to facilitate the performance of trusts and thereby reasonably ensure their due administration."[77] This jurisdiction "is attached to each and every trust to ensure due performance from cradle to grave in the life of a trust."[78] Given the expansiveness of this jurisdiction – allowing courts to "bless" actions of trustees, remove trustees, vary trust provisions, and so on[79] – it is unsurprising that it extends to undoing actions that caused problems, subject to the caveat that such

75. *Hastings-Bass*, [1975] Ch 25, 32.

76. *Id.* at 41.

77. Daniel Clarry, THE SUPERVISORY JURISDICTION OVER TRUST ADMINISTRATION 3 (2018).

78. Clarry, *supra* note 77, at 10.

79. *Id.* at 103–04.

undoing would not disadvantage innocent third parties.[80]

Importantly, Clarry observes that the modern view of the variation power:

> [I]s associated with the introduction of taxation statutes, especially those statutes that create new nodes in a person's life when taxes will be levied—such as inheritance tax on the value of a person's assets after death. As trusts are typically performed over a period of time, often even intergenerationally, without advance notice of new taxes being levied, changes to tax legislation place trustees in a difficult situation in performing trusts in the best interests of the beneficiaries, thereby precipitating proposed variations to minimize consequent tax liabilities and to preserve the value of the trust estate.[81]

Thus, I contend that the best way to read *Hastings-Bass* is as a decision by an English court that its supervisory jurisdiction over trusts extended to coping with the complications which arose from the significant expansion of British taxation in the 1960s and 1970s in ways that complicated trustees' tasks and required them to consider entirely new types of taxes that had not been previously levied.[82]

British taxation underwent dramatic changes in this period. Martin Daunton's history of UK taxation from 1914 to 1979 describes the changes instituted by Labour governments thus: "after 1964, the dam broke and officials were unable to direct the flow of new ideas. Instead of a consensus emerging on the basis of technical advice, the result was complexity and even incoherence by the late 1970s."[83]

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80. *See* Abacus Trust Co. v. Barr [2003] EWHC 114. In this case, the trustee misunderstood instructions and appointed 60% of the trust assets to the settlor's two adult sons rather than 40%. Although the mistake was discovered earlier, it took almost a decade before the settlor opted for the trustee to challenge the appointment under the Rule. The sons argued that the voiding of the appointment would leave them not with the 40% their father intended but with nothing, which the court noted that, as "a 'penalty' for the error for which the sons had no responsibility would appear draconian." *Id.* ¶15. The court held the appointment voidable rather than void, and expressed the hope that a resolution could be reached among the parties. *Id.* ¶34.

81. Clarry, *supra* note 77, at 185.

82. Clarry devotes considerable attention to the Rule in *Hastings-Bass* in his monograph, and concludes with a defense of the Rule, suggesting that any problems with its application could have been better dealt with "by the incremental development of the jurisprudence on voidability, especially discretionary factors that may inform whether and to what extent a particular decision should be set aside, leaving it to Parliament to address artificial schemes by the general anti-avoidance rule." *Id.* at 256.

83. MARTIN DAUNTON, JUST TAXES: THE POLITICS OF TAXATION IN BRITAIN, 1914–1979,

Major changes introduced in the 1960s and 1970s included introductions of capital gains tax and capital transfer tax (an innovation aimed in part at the use of trusts),[84] substitution of corporation tax for profits tax, major reforms of death duties, dramatic increases in the progressivity of income tax with the top marginal rate reaching 98%,[85] and an investment surcharge on passive income. In addition, Labour regularly talked of imposing a wealth tax, with a 1974 government Green Paper stating, "[t]he government is committed to the use the taxation system to promote greater social and economic equality. This requires redistribution of wealth as well as income. Thorough-going reforms are needed in the taxation of capital."[86] Unsurprisingly, efforts to avoid these unprecedented levels of taxation, including the use of trusts, expanded significantly.[87]

Indirect support for this interpretation comes from a comment by Lord Walker of Gestingthorpe, the author of the judgment in *Pitt/Futter,* in response to the observation that before his elevation "at the bar he was the most adept of tax planners in the context of trust rearrangements." [88] Walker defended his change in views in a 2015 lecture in Hong Kong, where he said that when he practiced:

> [T]ax avoidance had not lost all touch with reality, and tax rates were almost confiscatory: the top rate of tax on unearned income was 93 per cent, and on earned income 83 per cent, and the top rate of death duties was 80 per cent. Now that these rates have halved, highly artificial, pre-packaged tax-avoidance schemes, sold for large fees to those who can afford them, are not good for society. They are unfair to workers whose tax is deducted at source.[89]

At least for Lord Walker, whose views turned out to be crucial to

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at 280 (2002).

84. Ronald Maudsley, *The British Capital Transfer Tax*, 13 SAN DIEGO L. REV. 779, 783–84 (1976).

85. RICHARD WHITING, THE LABOUR PARTY AND TAXATION: PARTY IDENTITY AND POLITICAL PURPOSE IN TWENTIETH-CENTURY BRITAIN 233 (2000).

86. *Id.* at 237, 189 ("The widespread interest in the wealth tax from 1963 was one of the most obvious indications of the powerful impetus towards tax reform in the early 1960s."); *see also* DAUNTON, *supra* note 83, at 290–338.

87. WHITING, *supra* note 85, at 241.

88. Frank Hinks, *Setting aside trust transactions under the rule in* Hastings-Bass *or on the basis of equitable mistake–a case study of* Futter v. HMRC *and* Pitt v HMRC [2013] UKSC 26, 20 (1&2) TRS. & TRS. 79, 85 (2014). Lord Walker was also counsel for the pension trust seeking in Mettoy Pension Trustees v. Evans [1990] 1 WLR 1587.

89. Robert Walker, *55 Years in the Law*, 45 H.K. L.J. 417, 423 (2015).

the Rule's fate in England, there was a significant difference between tax planning to help clients avoid such marginal tax rates and the lower ones applicable in the 2010s. Similarly, Ashdown notes the importance of tax issues in the academic criticism of the Rule.[90]

2. Mettoy Pension Trustees v. Evans

After appearing as an initial recognition of the courts' power to undo transactions, the Rule then appears to have lain relatively dormant[91] until the 1990 judgment in *Mettoy Pension Trustees v. Evans*[92] transformed *Hastings-Bass's* string of convoluted double negatives into a positive statement of when a court would interfere:

> [W]here a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account.[93]

Under *Mettoy,* the Rule became "a forensic analysis of the thought-processes of the fiduciary whose actions were being challenged."[94]

Such a "forensic analysis" of trustees' thought-processes is inevitably fact- and context-dependent, making the Rule's application dependent on the ability of the judges applying it to separate cases

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90. ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 144.

91. Radley-Gardner states "[w]hile Hastings-Bass was occasionally cited in argument and referred to in judgments, the supposed rule . . . was not applied or considered until the decision in *Mettoy*," and cites just one other example of *Hastings-Bass*' citation in a judgment, Turner v. Turner [1984] Ch. 100. Oliver Radley-Gardner, *The Law of Unintended Consequences: The Rule in* Hastings-Bass *Reconsidered*, FALCON CHAMBERS 6 (Aug. 5, 2016), http://www.falcon-chambers.com/publications/articles/the-law-of-unintended-consequences.

92. *Mettoy*, [1990] 1 WLR 1587.

93. *Id.* at 1621.

94. Radley-Gardner, *supra* note 80, at 6. Just as in *Hastings-Bass,* however, the court in *Mettoy* declined to exercise the power it announced it had under the restated Rule. In *Mettoy*, trustees of a now-insolvent employer's pension trust sought to undo granting an employer the power of augmentation for employee pensions if the fund were in surplus on winding up. *Mettoy*, [1990] 1 WLR 1587, 1611. The trustees argued they would not have executed the document in question had they known this action vested this power in the employer rather than in the trustees. *Id.* at 1621–22. Justice Warner rejected this claim, finding the employer held the granted power in a fiduciary capacity and thus that he was unsatisfied that the trustees would have acted differently had they realized what they were doing. *Id.* at 1629–30.

where equity counseled in favor of its application and those where it did not. I think this is a point which cannot be overstressed in understanding the Rule's application in practice. Without a judiciary experienced enough in sophisticated trust matters to be able to separate meritorious cases from unmeritorious ones, the Rule did threaten to become simply a means by which trustees would get a do-over for decisions that turned out badly. With an appropriate judiciary, however, it is a powerful tool for protecting beneficiaries in appropriate circumstances.

Doctrinally, *Mettoy's* removal of the negatives from *Hastings-Bass's* formulation shifted the focus from the effect of the trustees' action to the trustees' consideration of the relevant factors. Indeed, *Mettoy's* reformulation of the Rule was "an evolutionary leap" that recognized "an actual duty to interfere with decisions that, but for some relevant omission, should have been made differently." [95] This proved useful in two additional pension trust decisions, including some discussion of the Rule by the Court of Appeal in 1991.[96]

3. Green v Cobham

The first reported use of the Rule outside the pension trust context occured in the 2002 English judgment *Green v Cobham.*[97] The case involved a BVI trust ("the Will Trust") and subsequent settlements made for the benefit of several generations of an English family.[98] The Will Trust held shares in an investment company, which in turn owned companies founded by the testator whose will had

95. *Id.* at 2, 6. (summarizing *Mettoy's* impact, the Rule "moved from an objective assessment of outcomes to a subjective analysis of reasons"). In one of the many interesting intersections of players in the development of the Rule, counsel for the trustees in this case included Robert Walker (as he then was). Sir Robert Walker, *When Will The Court Grant Relief for Trustees' Mistakes?* Pitt v Holt *and* Futter v Futter, 44 H.K. L.J. 759, 760 (2014).

96. Stannard v. Fisons Pension Trust Limited [1991] Pensions L. Rep. 225, 233. *See also* AMP (UK) PLC v. Barker [2000] 3 ITELR 414; JONATHAN GARTON, MOFFAT'S TRUSTS LAW: TEXT AND MATERIALS 537 (6th ed. 2015). (arguing these decisions reflected "a perception of the special nature of the right of pension scheme members to hold trustees to account" and so led to courts having "a willingness to review trustees' decisions more extensively than had been thought to be the case in a family trust context").

97. Green v. Cobham [2002] STC 820. *See also* Robert Pearce, *Revisiting Trustees' Decisions: Is* Pitt v Holt *the Final Word on the Rule in* Re Hastings-Bass?, 26 DENNING L.J. 170, 171 (2014) ("*Snell on Equity* did not contain any substantial discussion of *Re Hastings-Bass* until a supplement issued between the 30th and 31st editions in 2000 and 2005, and other textbooks show a similar pattern.").

98. *Green*, [2002] STC 820.

established the trust.[99] (This was a common structure in offshore trusts at the time.)[100] The investment company had accumulated substantial retained profits, which the trustees wished to distribute to trust beneficiaries (the six grandchildren of the testator, three of whom were minors) "in a tax-efficient way." The trustees were not engaged in what could today be termed "aggressive tax avoidance," but merely seeking to pass assets to their beneficiaries in the manner which involved the least liability for tax.[101]

The Will Trust itself had BVI-resident trustees, and, therefore, was not liable for U.K. tax under British law.[102] The trustees' challenge was to get the maximum retained profits, net of taxes, to the UK-tax-resident grandchildren. As part of its plan to distribute the investment company's retained earnings, the Will Trust made two settlements in November 1990 into accumulation and maintenance trusts on behalf of the three minor grandchildren.[103] (The older grandchildren did not require a trust for their distributions and so we need not consider them further.) The first trust, which covered two of the minor grandchildren, had as trustees their father (tax-resident in the UK) and two accountants (legally treated as non-resident for tax purposes under UK law).[104] The second trust, which covered the remaining minor grandchild, Camilla, had as trustees her parents (both tax-residents in the UK), an additional UK tax-resident individual, and a solicitor (who, like the accountants, was legally non-resident).[105]

Why did British tax law make the distinction with respect to tax residency? The treatment of physically-resident-in-Britain professionals serving as trustees as non-tax-resident in Britain is a

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99. *Id.*

100. *See* David Kilshaw & Robert A Clifford, *Sheltering Income and Gains Overseas for UK Domiciled Individuals: Problems and Solutions*, *in* 2 TOLLEY'S INTERNATIONAL TAX PLANNING 26, 65–68 (Malcom J Finney & John C Dixon eds., 1993) ("Until relatively recently, it was customary for assets held overseas to be owned by an overseas company and for the shares in that company in turn to be held by the trustees of an overseas settlement.").

101. The testator's creation of the BVI *trust* might be seen as a more active step toward tax avoidance, but the use of an offshore trust by someone not tax resident in Britain rather than an English trust is better characterized as common sense. By the time of this case, British tax law had largely eliminated the tax advantages of English trusts in estate planning. *See, e.g.*, Tim Bennett, *Asset Protection and Offshore Creditor Protection Trusts*, *in* TOLLEY'S INTERNATIONAL TAX PLANNING 2-09 (Malcolm J Finney & John Dixon eds., 3d ed. 1996) ("In the United Kingdom, changes introduced in the 1991 Budget have severely curtailed the use of offshore trusts for capital gains tax planning purposes").

102. *Green*, [2002] STC 820.

103. *Id.*

104. *Id.*

105. *Id.*

provision of British tax law designed to encourage the use of British professionals as trustees of foreign trusts. This benefitted the British professionals who earned fees, the British economy (from their spending), and the British Exchequer (from their income and other tax payments).[106]

Because the two new trusts were created by the Will Trust, British tax law at the time treated the combination of the Will Trust and the two 1990 settlements as a "composite settlement."[107] For the composite settlement to be considered non-tax-resident, a majority of the combined trustees of all three trusts had to be non-resident.[108] If they were not, then the capital gains tax would apply to the entire portfolio of all the trusts.[109] In November 1990, when the two new trusts were created, the total set of trustees were:

- The three trustees of the two grandchildren's trust (1 UK tax-resident, 2 non-tax-residents);
- The four trustees of Camilla's trust (3 UK tax-residents, 1 non-tax-resident); and
- The Will Trust's trustees (3 non-tax-residents).

This gave the composite settlement a total of 4 UK-resident and 6 non-resident trustees, thus meeting the requirement for exemption from capital gains tax that a majority of the trustees be non-resident.[110] So far, so good.

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106. Milton Grundy, THE WORLD OF INTERNATIONAL TAX PLANNING 29 (1984). ("There is a long tradition of major institutions in the United Kingdom accepting trust business from overseas clients, and no doubt this qualification was introduced for the express purpose of enabling that business to continue, and it seems clear that the use of U.K. trust corporations or other 'professional' trustees by settlors ordinarily resident and domiciled abroad, far from taking advantage of any anomaly in the law, is in precise conformity with Government policy in this regard.")

107. *Green*, [2002] STC 820.

108. *Id.*

109. Capital Gains Tax Act 1979, c. 14, § 52 (UK). Section 52 (1) of the Capital Gains Tax Act 1979 quoted in *Green* provided "the trustees of the settlement shall for the purposes of this Act be treated as being a single and continuing body of persons (distinct from the person who may from time to time be the trustees), and that body shall be treated as being resident and ordinarily resident in the United Kingdom unless the general administration of the trusts is ordinarily carried on outside the United Kingdom and the trustees or a majority of them for the time being are not resident or not ordinarily resident in the United Kingdom." *Green*, [2002] STC 820.

110. The trustees ignored this because they viewed the UK settlements as separate from the BVI trust. *Green*, [2002] STC 820. The trustees argued "no consideration at all" was given to the consequences of the appointments of UK-resident trustees for the

Unfortunately for the beneficiaries and the trustees, one of the trustees of Camilla's trust (the UK solicitor) retired from practice at the end of 1990 but remained a trustee.[111] His retirement changed his status from non-UK-resident to UK-resident.[112] This change of status of a single trustee altered the balance of the composite settlement's combined trustees from 6-4 non-resident/resident to 5-5.[113] The even split meant that the composite settlement was no longer non-resident and UK capital gains tax now became due on all three trusts. The consequences were substantial: the capital gains bill had reached £37m by the time of the judgment.[114] There remains little doubt that, had the trustees realized the capital gains consequences of their action, they would not have proceeded, at least without addressing the residency split.[115] The court therefore held the trustees' 1990

settlements would affect the offshore trust or result in capital gains tax for it, as they regarded the offshore trust as separate from the UK settlements. *Id.* Nor did their counsel advise them that they should consider such consequences. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Green*, [2002] STC 820. Although counsel for Camilla, one of the beneficiaries whose settlement would be voided if the Rule in *Hastings-Bass* were applied, supported the trustees' legal position, he "very properly and helpfully" undertook "to play the role of devil's advocate in putting forward such arguments as are, or may be, available in opposition to the relief sought." In this role, he argued that, even if the trustees had known of the capital gains consequences, they might have made the same decisions despite those consequences. There were four arguments why the trustees might have acted as they did despite the tax consequences of the appointment. First, at the time they made the settlements, they were concerned with avoiding a different tax provision and to do so required the distributions. The court rejected this, finding the consequences of the other provision "paled into insignificance" compared to the "dire capital gains tax consequences" of the trustee appointment. Second, in 1990 some form of trust would have been needed for one of the beneficiaries who was at that time a minor, thus necessitating the UK settlement. The court found there were alternative arrangements that would not have had the dire tax consequences. Third, the "dire capital gains tax consequences" were due to the later retirement of the non-resident trustee and his replacement with a resident trustee, not the distributions. The court found that "the damage was done as soon as the 1990 Deed was executed in the sense that, at that point, the status of the Will Trust as an offshore trust became, if the 1990 Deed was effective, determinable by reference to the resident or non-resident status not only of the trustees of the Will Trust but also of the Trustees of the 1990 Deed." Moreover, the court rejected the idea that applying "a causative analysis to the sequence of events which followed the relevant disposition" was required by the Rule. Finally, a finding that the trustees were UK resident was "not catastrophic" in 1990 when the Deed was executed as it was the Finance Act 1991 which introduced the provision that made the consequences so dire. The court rejected this argument, finding that the imminence of 1991 change "was a matter of general speculation at the time of the 1990 Deed and that there would have at least been consequences with respect to 1990/91 capital gains even under the tax law then in effect. The court rejected this argument, finding this is a clear case for the application of the Hastings-

action to be void.[116]

The decision in *Green* demonstrates the utility of the *Hastings-Bass* rule as well as marking a milestone, with the court applying the Rule for the first time in a published judgment to alter a decision of trustees to avoid the consequences of an error.[117] Absent the Rule's application, the beneficiaries of the trust would have suffered a substantial loss with no remedy other than a possible claim against the Will Trust trustees for breach of fiduciary duty in making the settlements as they did, a difficult case to make given the complexity and in flux nature of the relevant tax provisions at the time the settlements were made.[118]

4. Sieff v. Fox

The next stage in the evolution of the Rule came in the 2005 case of *Sieff v. Fox*, in which Lord Justice Lloyd (who later wrote the Court of Appeal judgment in *Pitt* and *Futter*—the British legal community involved with the Rule is remarkably small) restated the Rule as:

> Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.[119]

Like *Green, Sieff* involved a complicated series of family trusts,

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Bass principle. In my judgment there is no real room for doubt on the evidence that had the then trustees of the Will Trust had regard to the possible capital gains tax consequences of the proposed appointment in favour of Camilla, they would not - and I stress would not - have gone ahead with it. What other course they might have taken is, I accept, not entirely clear. However, what is entirely clear, in my judgment, is that had the trustees directed their minds, as they should have done, to considerations of capital gains tax, they would not under any circumstances have made an appointment which gave rise to any significant risk that the Will Trust might thereafter become a United Kingdom resident trust for capital gains tax purposes. *Id.*

116. *Id.*

117. *See* ASHDOWN, TRUSTEE DECISION MAKING, supra note 6, at 4 n. 36.

118. *Green*, [2002] STC 820. Suits against trustees also face a hurdle in that many trusts include liability exemption clauses for the trustees. *See* LAW COMMISSION, TRUSTEE EXEMPTION CLAUSES § 2.1 (LAW COM No. 301, 2006).

119. Sieff v. Fox [2005] EWHC (Ch) 1312, ¶ 119.

whose purposes included avoiding application of inheritance tax that would have resulted in their loss of the family estate.[120] Abstracting from the lengthy series of acts aimed at allowing one generation of an aristocratic family to take over, from the prior generation, the occupancy of the family's home and make use of chattels held by a trust, the heart of the case involved decisions by two sets of trustees in 2001 that had inheritance and capital gains tax consequences that the trustees' advisors mistakenly failed to identify (one judge suggested the capital gains tax due to the error that was due on the chattels alone was £1,000,000).[121]

Lord Justice Lloyd found that these were consequences the trustees were under a duty to consider, and which they did consider, albeit in light of erroneous advice.[122] If they had received correct advice, he found that they would not have made the 2001 decisions (an obvious point given the scale of the tax liability) and, as a consequence, the effect of their exercise of their discretion was different from what they intended.[123] He therefore set aside the 2001 actions.[124] The judgment in *Sieff* rejected the requirement of a breach of duty imposed by a prior judgment.[125] To prevent overbroad application of the Rule, he suggested that the courts must "insist on stringent application of the tests," take a reasonable and not overly demanding view of what the trustees needed to take into account, and have a critical approach to the argument that the trustees would have acted differently had they realized the true position.[126] *Sieff's* formulation of the Rule highlighted the crucial role of the judiciary.

With its restatement in *Sieff*, the Rule was fully developed in English jurisprudence. Post-*Sieff,* courts of the first instance continued to apply the Rule, and its contours remained essentially the same until the Court of Appeal's judgments in 2010 in *Futter v Futter* and *Pitt v Holt*.[127] However, even before *Sieff*, there was some disquiet about the Rule in legal journals.[128] After *Sieff*, a growing chorus of English

120. *Id*. ¶¶ 6, 14–20.

121. *Id*. ¶¶ 21–27. *See also* Lionel Smith, *Can I Change My Mind? Undoing Trustee Decisions*, 27 ESTS. TRS. & PENSIONS J. 284, 284 (2008).

122. *Sieff*, [2005] EWHC (Ch) 1312 ¶¶ 90, 111.

123. *Id*. ¶¶ 93, 114.

124. *Id*. ¶ 120.

125. *Id*. ¶¶ 66, 81 (discussing Abacus Trust Company (Isle of Man) Ltd. v NSPCC [2001] WTLR 953).

126. *Id*. ¶ 82.

127. *See* Walker, *supra* note 95, at 764.

128. *Sieff*, [2005] EWHC (Ch) 1312, ¶ 57 ("Some disquiet has been expressed both judicially . . . and extra-judicially (see Sir Robert Walker (as he then was), The Limits of the Principle in *Re Hastings-Bass* [2002] Private Client Business 226, and see also

commentary questioned both the basis for and application of the Rule.[129] Nonetheless, other common law jurisdictions also began to recognize the Rule, as described in the next section.

5. The Rise of the Rule in England

Five things are notable from this brief survey of the Rule's development to its English apogee. First, the UK tax authorities appear in this account just once: in *Hastings-Bass*, where they advocated for the original formulation of the Rule to enable it to collect inheritance tax on the funds in the trust by voiding the tax-avoiding creation of a life interest in William Hastings-Bass.[130] After that, HMRC repeatedly declined repeated invitations from English courts to make an appearance in the cases involving tax issues.[131] Not until 2006 did HMRC set out its views on the Rule's development, commenting in a bulletin in response to Lloyd's suggestion in *Sieff* that its views would be useful.[132] Moreover, it was not until *Futter* and *Pitt* that HMRC took up the invitation to appear in court.[133] It thus seems reasonable to conclude that until it issued *Tax Bulletin* No. 83 in 2006, HMRC did not see the Rule as a significant impediment to collection of revenue or even shared Lord Walker's distinction between marginal rates in the 80s and 90s and the rates applicable post-2000.[134]

Second, despite its origins in a 1975 judgment,[135] the Rule does not appear to have been a significant part of English trust jurisprudence until the 1990s in the pension trust context[136] and the 2000s in the family trust context.[137] This can be seen both in the absence of published judgments pre-*Mettoy* (involving pension trusts) and pre-*Green* (involving family trusts) and in the absence of significant legal commentary on the Rule prior to the early 2000s.

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Underhill & Hayton, Law of Trusts and Trustees, 16th edition, 694-9) as to the ease with which the principle may allow the court to set aside what appear to be valid exercises of a trustee's discretion.").

129. Tang Hang Wu, *Rationalising Re* Hastings-Bass*: A Duty to Act on Proper Bases*, 21 TR. L. INT'L 62, 64–65 (2007); Keith M. Gordon & Joseph H. Howard, *Taking the Bait?*, TAXATION, June 3, 2010, at 11–12.

130. Hastings-Bass v. Inland Revenue Comm'rs [1975] Ch 25.

131. Walker, *supra* note 95, at 762 ("until *Pitt v Holt* and *Futter v Futter*, the Revenue consistently declined to participate, even when invited to do so.").

132. HMRC AND THE HASTINGS-BASS PRINCIPLE, TAX BULLETIN NO. 83 2, 4 (2006).

133. Walker, *supra* note 95, at 762.

134. *See* ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 144.

135. *Hastings-Bass*, [1975] Ch 25.

136. *See* Mettoy Pension Trustees v. Evans [1990] 1 WLR 1587.

137. *See* Green v. Cobham [2002] STC 820.

*Green* is significant in first attempting to comprehensively address the Rule's implications in family trust cases but the Rule's contours continued to be unclear at least through *Sieff v Fox*. The accomplishments of Justice Parker in *Green* and Lord Justice Lloyd in *Sieff* in delineating the Rule's contours are particularly impressive since they managed to do so without the benefit of vigorous argumentation on opposing sides of the issues as all the parties in *Green* and *Sieff* favored the application of the Rule (the role of providing counter arguments, as well as arguments in favor of its application, fell to counsel for the party seeking the application of the Rule).[138] As it would continue to do until *Pitt/Futter,* HMRC declined to participate.[139]

Third, Lord Justice Lloyd's judgment in *Sieff* put the Rule on firm jurisprudential footing. Not only did he comprehensively restate the Rule in a clear manner, he indicated the areas where future development might be expected and highlighted the need for judicial discretion in applying the Rule to avoid overbreadth.[140] In doing so, however, his prodding of HMRC appears to have prompted a shift in the agency's approach.[141] Soon after the opinion in *Sieff*, HMRC issued *Tax Bulletin* No. 83, which set out seven points to give an indication of its "present thinking on some of the main questions which arise."[142] As discussed below, the appearance of HMRC in disputes under the Rule was an important factor in the Rule's ultimate limitation in England. Notably, HMRC's decision to begin to advocate against the Rule came after a substantial shift in discourse about tax avoidance strategies, as Control First advocates in governments, the OECD, and among NGOs sought to limit "harmful tax competition."[143]

Fourth, there is no evidence from any of the published judgments of the use of the Rule as a means of reducing the cost of aggressive tax avoidance. One of the critiques of the Rule was that it could provide a means for such efforts.[144] For example, the distinguished judge Lord Neuberger suggested extra-judicially that the Rule was "a magical morning-after pill" as it would allow the following:

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138. *See id.*; Sieff v. Fox [2005] EWHC (Ch) 1312.

139. *See Green*, [2002] STC 820; *Sieff*, [2005] EWHC (Ch) 1312.

140. *Sieff*, [2005] EWHC (Ch) 1312.

141. *See* Richard Nolan & Adam Cloherty, *Taxing Times for* Re Hastings-Bass, 126 L.Q. REV. 513, 516 (2010) ("The Revenue has recently been much more assertive both onshore and offshore.").

142. HMRC AND THE HASTINGS-BASS PRINCIPLE, *supra* note 132, at 3.

143. Gordon & Morriss, *supra* note 22, at 540–66; *see also* Morriss & Moberg, *supra* note 44, at 39–56.

144. *See* Lord Neuberger of Abbotsbury, *Aspects of the Law of Mistake:* Re Hastings-Bass, 15 TRS. & TRS. 189, 193 (2009).

> Say that trustees are told that a particular action has a 10 per cent chance of saving tax, and a 90 per cent chance of increasing tax liability, and they take the action in the belief that, if it does not work, they can unscramble it by relying on the principle. If they go ahead, the principle seems to result in heads the trust wins, tails the Revenue loses.[145]

He went on to conclude:

> [T]rustees should not seek tax advice about a power they are proposing to exercise in the hope of achieving a tax benefit. This is because such advice will either be a waste of money or it will be positively disadvantageous. They should exercise the power without advice. If it works and tax is avoided, they did not need the advice, and they have saved money by not getting it. If the hoped for result does not transpire, then the trustees can invoke the principle to undo it, and they will have taken no advice which may show that they could not have believed that the exercise of the power would avoid tax.[146]

Although Lord Neuberger dismissed Lord Justice Lloyd's suggestion in *Sieff* that judges' exercise of their discretion could prevent overbroad application of the Rule,[147] the evidence described in this Article from published judgments is that judges in England and IFCs have been able to do just that. Not every application for relief succeeds and there are no reports of cases where trustees simply do not seek tax advice in an effort to roll the dice on aggressive tax planning. In particular, I am not aware of even a single case where a trustee behaved as Lord Neuberger suggested they might.[148] Similarly, Michael Ashdown's analysis of the Rule pre-UK Supreme Court judgment but post-Court of Appeals judgment suggested that the Rule potentially allowed "settlors and beneficiaries to shift much of the risk" of trustee mismanagement to "innocent third parties."[149] I

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145. *Id.*

146. *Id.* Similar critiques are made by other scholars. *See* ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 145; Anthony Molloy, Hastings-Bass*: The True and the Spurious,* 14 TRS. & TRS. 26, 30–31 (2008).

147. Neuberger, *supra* note 144, at 198.

148. *See id.* at 193.

149. Michael Ashdown, The Rule in Re Hastings-Bass, at 117 (2013) (Ph.D. thesis, Oxford University) (Oxford University Research Archive). Ashdown makes a similar critique in his later treatise on the Rule, arguing the Supreme Court's judgment "made collusive action by trustees and beneficiaries to eliminate the unwanted consequences of the trustees' actions much less appealing." ASHDOWN, TRUSTEE DECISION MAKING,

have seen no evidence of any such case.

Finally, two key weaknesses in the English Rule emerged from the cases leading up to *Sieff*. The first weakness was what some took to be an apparently limitless scope for the Rule's application. Indeed, even after *Sieff's* comprehensive restatement of the Rule,[150] it remained unclear exactly how courts were to apply the Rule.[151] The second weakness was the disagreement over whether the Rule's application rendered an action void or voidable.[152] Lord Justice Lloyd had avoided the issue in *Sieff* as unnecessary to his decision;[153] Justice Lightman determined it voidable "with little citation of previous authority" in *Abacus Trust Company (Isle of Man) v Barr*;[154] Justice Parker had voided the trustees' action in *Green* but had not explicitly addressed the issue of whether it might be merely voidable.[155] No definitive answer to this question had yet emerged from the case law and the lack of clarity on the point was a doctrinal weakness.

### B. THE SPREAD OF THE RULE BEYOND BRITAIN

We have both direct and indirect evidence that the Rule applied in the IFC trust jurisdictions pre-*Pitt/Futter.*

#### 1. General Reception Offshore

Because all the jurisdictions examined here built their trust law on English trust law foundations, the Rule was generally considered to be part of their law. In addition to jurisdictions where the courts recognized the application of the Rule before *Pitt/Futter*, there are three IFCs where articles in *Trusts & Trustees* between 2000 and 2010 argued that the Rule would apply in jurisdictions considered in this

*supra* note 6, at 136. Trustees and beneficiaries share an interest in correcting trustee mistakes, but this hardly seems, to me, to make application to a court under the Rule "collusive."

150. *See* Sieff v. Fox [2005] EWHC (Ch) 1312.

151. *See, e.g.*, Ashdown, *In Defence of the Rule in* Re Hastings-Bass, *supra* note 62, at 848.

152. *Id.*

153. *Sieff*, [2005] EWHC (Ch) 1312 ¶ 82.

154. Matthew Conaglen, *Judicial Review of Trustees' Discretionary Decisions*, 63 CAMBRIDGE L.J. 283, 284–85 (2004).

155. Green v. Cobham [2002] STC 820.

Article: BVI,[156] Guernsey,[157] and Isle of Man.[158] The prestige of *Trusts & Trustees* and the caliber of the authors appearing in it suggest that the consensus of the professional trust law communities in those jurisdictions believed their courts would apply the Rule.[159]

In addition, the editors of *Trusts & Trustees* surveyed leading trust practitioners in many jurisdictions for the 2010 *The World Trust Survey*.[160] Among the questions they asked was: "If a trustee fails to take a relevant matter into account in administering the trust can an appeal be made to the court to put matters right, such as under the *Hastings-Bass* doctrine in England?"[161] With responses stating the law as of July 1, 2009, and so pre-*Pitt*/*Futter* but post-*Sieff*, correspondents in four jurisdictions unambiguously stated that the doctrine was part of their law (the Cayman Islands, the Isle of Man, Jersey, and New Zealand)[162] and one referenced a general adoption of English law within the period of the *Hastings-Bass* decision (Singapore). Correspondents in eight others (The Bahamas, Barbados, Bermuda, BVI, Gibraltar, Guernsey, Ireland, and St. Lucia) reported it would probably be available because their jurisdiction generally followed English law. Correspondents in four reported that it was not likely (Anguilla, Antigua and Barbuda, Australia, and Malta), while those in two were unsure (the Cook Islands and Seychelles). Based on this world-wide survey, it appears that while the doctrine was not in

156. *See* Robert Macro & Sonya Parry, *World Survey 2007: British Virgin Islands*, 13 TRS. & TRS. 316, 319 (2007).

157. Marcus Leese, *World Survey 2007: Guernsey*, 13 TRS. & TRS. 384, 387 (2007).

158. Ben Hughes & Robert Colquitt, *World Survey 2005: Isle of Man*, 11 TRS. & TRS. 97, 100 (2005); Ben Hughes et al., *World Survey 2007: Isle of Man*, 13 TRS. & TRS. 396, 400 (2007); Donal Quinn, *In Focus: Isle of Man*, 14 TRS. & TRS. 501, 509 (2008).

159. The rule was also recognized in Canada, where the courts followed the pre-*Futter Hastings-Bass* jurisprudence, although it was cited only for challenges by others to trustees' authority and not to overturn discretionary actions. John O'Sullivan, *Jurisdiction to Review Trustee Discretion—Case Comment on Two UK Appeals—Pitt v. Holt, Futter v. Futter*, 31 ESTS. TRS. & PENSIONS J. 1, 5 (2011). "Fixing" tax consequences there is done under rectification, as in Juliar v. Canada (Attorney General) (2000), 50 O.R. 3d 728 (Can.). Smith expressed skepticism that *Juliar* was likely to last, arguing it went beyond traditional notions of rectification. Smith, *supra* note 121, at 290 ("My own view is that the decision in *Juliar* is likely to be overruled, and that it would be dangerous to rely upon it"). Perhaps any route to revisiting trustee decisions is likely to stretch the boundaries of traditional legal doctrine. These rectification cases' fact patterns "are indistinguishable from *Sieff*, *Futter* and *Pitt* in that they all involve deliberate, documented transactions that contain an error resulting in financial repercussions, which are contrary to the specific and continuing intentions of the parties from the outset of the transaction." O'Sullivan, *supra* note 159, at 7.

160. THE WORLD TRUST SURVEY (Charles Gothard & Sanjvee Shah eds., 2010).

161. *Id.* at xx.

162. Frustratingly, the Isle of Man response did not cite a case to support the claim and I have found none from pre-2010 to support it.

heavy use internationally, it was widely recognized in common-law trust jurisdictions (13 out of 18).[163] Where IFC jurisdictions did explicitly address the Rule, they did so in thorough opinions that carefully applied it to matters similar to those in which it was applied in England.

2. Jersey

Jersey's Royal Court first addressed the Rule in a December 2002 judgment, *In re Green GLG Trust*.[164] Jersey has a substantial trust industry as well as a statutory trusts law (The Trusts (Jersey) Law 1984), which it adopted in part to give the industry a firm footing.[165] The case involved a trust explicitly governed by Jersey law, which held shares in four investment companies for the benefit of the settlor (a UK resident) and his family.[166] Between September 2000 and April 2001, the trustee made four appointments of capital in favor of the settlor, the original source of funds for which was a loan from the settlor's employer (Lehman Brothers), the proceeds of which the settlor had put into the trust.[167]

In March 2000, the UK Chancellor announced an initiative to counter "flip-flop" tax shelters;[168] the restrictions on such shelters came into force in July 2000 but with effect from the March announcement.[169] The legislation did more than ban flip-flops, however, as it also provided that "any unrealized capital gains in the trust assets will be treated as realized. By virtue of other provisions of

163. South Africa is not a common law jurisdiction and the South African correspondent reported that it was not recognized there. THE WORLD TRUST SURVEY, *supra* note 160.

164. In the matter of the Green GLG Tr. [2002] JLR 571 (Jersey).

165. Giles Corbin et al., *Jersey*, 13 TRS. & TRS. 414, 415 (2007) ("high volume of trusts administered in Jersey"); Morriss, *Cultivating*, *supra* note 13, at 11–12 (Jersey's adoption of statute).

166. In the matter of the Green GLG Tr. [2002] JLR 571, ¶¶ 2–3, 6.

167. *Id.* ¶ 8.

168. The Chancellor described these as

"This is a device for extracting gains from a trust tax-free or with a significant tax saving. At its simplest, the trustees of a trust in which a UK resident settlor has an interest (so that the settlor is charged in respect of trust gains) borrow money on the security of assets in the trust and advance the money to another trust. The settlor then severs his interest in the first trust. In the following tax year, the trustees sell the assets and use the proceeds to repay the debt. The settlor receives his money from the second trust. If successful, the outcome of the device is that, in the case of an offshore trust, no tax is paid by the settlor."

*Id.* ¶ 9.

169. Finance Act 2000, § 92, sch. 25–26 (Eng.).

the TCGA such gains can be attributed to the settlor, even if no payment has been made to him."[170] This included circumstances where the trustee had outstanding borrowing, the proceeds of which had not been used "for normal trust purposes;" in these circumstances "there will be a deemed disposal of the trust fund at market value followed by an immediate re-acquisition." [171] Because the Green GLG Trust had outstanding borrowings from Lehmann Brothers at the time of the four payments to the settlor, this provision applied even though the Green GLG transactions were not flip-flops.[172]

When the trustees learned of the problem in 2002 (while completing a routine questionnaire from HMRC), they sought relief in the Royal Court.[173] In support of their claim for relief under the Rule, the trustees argued that they had relied on UK tax counsel (who had been retained by the New York lawyer who had also hired them), that the UK tax counsel had been copied on email correspondence in 2000–2002 and so was aware of the proposed transactions and did not object, and that they therefore believed the payments would not have adverse consequences under UK tax law.[174] Similarly, the trust's protector, who was the U.S. attorney who had retained both the trustees and the UK tax counsel, stated that he had relied on UK tax counsel and was unaware of the changes in 2000 in UK tax law.[175] The court held that if the trustees and protector had been aware of those changes, they would not have made or allowed the payments.[176]

After reviewing the English decisions in *Hastings-Bass, Mettoy*, *Green* (including an affidavit from the trust's solicitor in that case providing further details of the case), and *Abacus Trust (Isle of Man) Ltd. v NSPCC,* Deputy Bailiff Michael Birt concluded that the Rule was "but a manifestation of the general principle that a trustee must act in good faith, responsibly and reasonably."[177] After discussing several opinions exploring that duty, he described the Rule as "entirely

170. In the matter of the Green GLG Tr. [2002] JLR 571, ¶ 11.

171. *Id.*

172. *Id.* ¶ 12.

173. *Id.* ¶¶ 13–16.

174. *Id.* ¶ 14.

175. *Id.* ¶ 15. Protectors are largely an offshore innovation. *See* Anton Duckworth, *Trust Law in the New Millennium: Part I - Retrospective*, TRS. & TRS. 12, 13 (2000); (protector is an idea that was "not one with which English law was familiar"). Their role is distinct from that of trustees but varies considerably from trust to trust and jurisdiction to jurisdiction. Hubbard, *supra* note 56, at 13 ("A protector can be clearly distinguished from a trustee both in equity and by reference to statutory provisions in relevant jurisdictions. The basis in principle of the distinction is that a trustee holds trust assets but a protector does not.").

176. In the matter of the Green GLG Tr. [2002] JLR 571, ¶ 17.

177. *Id.* ¶ 25.

consistent with precedent and principle."[178] As the Trusts (Jersey) Law 1984 "draws substantially on general principles of English trust law," Birt found "nothing in the decisions we described which is inconsistent with Jersey law," allowing it to hold that the Rule was "equally a principle of Jersey law."[179] He also noted that he was "not attracted" to the alternative of the settling of such disputes through litigation between the trustees, the beneficiaries, and the advisors.[180] Without resolving the void/voidable issue, Birt held the four appointments void *ab initio*.[181] The importance of the decision is that the Jersey court gave the Rule a firmer jurisprudential footing than just *Hastings-Bass* by connecting it to broader general trust principles.[182]

3. The Cayman Islands

The second offshore court to apply the principle was the Cayman Islands Grand Court, where Chief Justice Sir Anthony Smellie recognized the Rule under Cayman law in *A and Ors v. Rothschild Trust Cayman Limited*, a 2005 judgment.[183] In that case, in anticipation of the primary beneficiary and settlor of several Cayman trusts spending more time in the U.S. and so becoming resident in the U.S. for tax purposes, the trustee had sought legal advice on how to avoid the trusts' assets being treated as the settlor/beneficiary's assets for U.S. tax purposes (the court described this as leading to "severe" consequences).[184] During 2001, the trustee took steps under the advice it had received.[185] As the Chief Justice noted, the advice "turned out to be incorrect and the tax consequences of the 2001 transactions themselves turned out to be the very consequences which they were intended to avoid."[186]

The trustee sought relief under the Rule. After reviewing at some

178. *Id.* ¶ 276.

179. *Id.*

180. *Id.* ¶ 29.

181. *Id.* ¶ 30.

182. In 2006, the Jersey Royal Court decided *RAS I Trust*, in which applied the law of the Cook Islands and determined that that jurisdiction would also adopt the Rule, based on English, Australian, Jersey, and New Zealand precedents applying the Rule. In the Matter of the Representation of Mr. Steven Bruce Friedman and Asiatrust Ltd. as Trs. of the RAS I Tr. (2006) (Jersey) (unreported).

183. A and Ors v. Rothschild Trust Cayman Ltd. [2005] CILR 485, ¶ 43.

184. *Id.* ¶¶ 2–3.

185. *Id.* ¶ 3.

186. *Id.* The correct advice would have been that only some minor amendments to the original settlements were required. *Id.* ¶ 4.

length the English decisions in *Hastings-Bass*, *Mettoy*, *Green*, *Abacus Trust Co. (Isle of Man) v. Barr*, and *Abacus Trust Co. (Isle of Man) v. NSPCC*, as well as several pension trust cases and an unreported 2004 Cayman opinion applying the Rule in the context of BVI law,[187] the Chief Justice found the facts satisfied the *Sieff* formulation of the Rule, which he termed "the most conservative reformulation emerging from the subsequent cases."[188] He also pointed to the court's "wide statutory jurisdiction" under Cayman's Trusts Law (2001 Revision) §48 that authorized it to give "'direction on any question respecting the management or administration' of a trust fund or assets,'"[189] powers which he described as "convergent with the evolving *Hastings-Bass* principle."[190] Applying these powers, he voided the 2001 transactions. The judgment makes explicit the connection to the court's broad supervisory powers over trusts.

In 2010, the Cayman court again applied the Rule in a case involving confusion over the date by which a transaction between a company and a trust and the migration of the trust to Canada had to be accomplished to take advantage of a tax holiday and so avoid Canadian tax on gains accumulated in a Cayman trust.[191] In brief, those involved believed they had until May 6, 2001 to act free of tax but Canadian tax authorities determined that the deadline was actually March 15, 2001.[192] The trustee and the company directors both sought relief under the Rule from the effect of various acts taken after March 15 but before May 6, 2001.[193] Justice Levers concluded that the case fell "well within" the *Sieff* formulation of the Rule with respect to the trustee but not with respect to the directors.[194] Although the Court found the Rule could apply to directors acting as fiduciaries, it declined to apply it in the case before it because there was "no evidence of what, if any, advice the directors considered and therefore no evidence to assure me that . . . [the directors] so acted on the erroneous advice or belief that their decision would have had the desired benefit of achieving the objectives of the Trust."[195] Indeed, the Grand Court found that as the directors were nominee directors and

187. Barclays Priv. Bank & Tr. (Cayman) Ltd. v. Chamberlain [2004] 9 ITELR 302 (Cayman Is.).

188. A and Ors v. Rothschild Tr. Cayman Ltd. [2005] CILR 485, ¶ 40–41.

189. *Id.* ¶ 42.

190. *Id.* ¶ 43. The Chief Justice's observation is what made me recognize the connection to the broader supervisory power.

191. Re Ta-Ming Wang Tr. [2010] CILR 541.

192. *Id.* ¶ 7.

193. *Id.* ¶ 8–9.

194. *Id.* ¶ 16–17.

195. *Id.* ¶ 22.

so acted merely on the instructions from their principal, it would be a "contradiction in terms" to set aside their actions based on *Hastings-Bass*, which requires "the decision in question is that of the fiduciary decision-maker and of no one else."[196]

4. British Virgin Islands

A judge in the Cayman Grand Court, Justice Levers, recognized the Rule under BVI law in an unreported 2004 decision.[197] In that case, a UK tax resident settlor had created a BVI trust in 1994 to defer capital gains tax on the underlying investments.[198] In 2000 the trustee took actions pursuant to an accounting firm's erroneous advice which triggered new provisions of UK tax legislation and made UK capital gains tax applicable. The court determined that BVI law would recognized the Rule, discussed the English cases of *Hastings-Bass, Mettoy, Abacus Trust Co (Isle of Man) Ltd v. Barr,* and *Burrell v. Burrell,* and held that the facts fell within the Rule because, as an account of the decision termed it, "the whole purpose of the investment" was "to defer capital gains tax and the change of the UK tax legislation was plainly a relevant consideration that the trustees did not consider."[199] Even if a breach of fiduciary duty was necessary, the court found it would have been present because the party did not obtain up-to-date tax advice before making the investment.[200] Although not a judgment of a BVI court, this judgment is strong evidence that the Rule applied there.

5. Guernsey

In 2009, HMRC made its first attempt at an appearance in a case involving the Rule since *Hastings-Bass* itself, seeking leave to appear in the first application to a Guernsey court to apply the Rule there.[201]

196. *Id.* ¶ 23.

197. *See* Barclays Priv. Bank & Tr. (Cayman) Ltd. v. Chamberlain [2004] 9 ITELR 302 (Cayman Is.). *See also* John Goldsworth, Hastings-Bass *Considered in Cayman Islands Court,* 13 TRS. & TRS. 221 (2007) (describing that case).

198. *See Barclays*, [2004] 9 ITELR 302, 303.

199. *See id.* at 306.

200. *Id.*

201. Gresh v. RBC Tr. Co. (Guernsey) Ltd. & HMRC [2009] RCG 25, ¶ 1 (Jersey)*; Application of the Rule in* Hastings-Bass *in Guernsey*, CAREY OLSEN (Sept. 3, 2015), https://www.careyolsen.com/briefings/application-of-the-rule-in-hastings-bass-in-guernsey (noting that *Gresh* was first application under *Hastings-Bass* in Guernsey and that merits proceeding had been held over after the joinder issue was resolved). After the UK Supreme Court decision in *Pitt/Futter*, the case proceeded on equitable mistake

This was also its first attempted intervention after *Tax Bulletin* No. 83's announcement that it would seek to participate in at least some *Hastings-Bass* cases in the future.[202] *Gresh v. RBC Tr. Co. (Guernsey) Ltd* involved the beneficiary of a pension scheme who received a distribution based on mistaken tax advice with the result that the distribution created a tax liability for the beneficiary. HMRC responded to the customary notification of a *Hastings-Bass* application by seeking to join as a party. Before the court resolved whether to allow the participation, the trustee withdrew its application and the beneficiary brought his own application. HMRC then sought to intervene in the beneficiary's application. The Royal Court of Guernsey refused leave.[203] HMRC appealed to the Court of Appeal of Guernsey, which allowed the appeal, finding that HMRC was not seeking extraterritorial enforcement of UK revenue laws but to only participate where there was a common interest in the validity of the distributions from the pension scheme, and that it was just and convenient to have HMRC's experience and presence in the case.[204] The substantive hearing was held over and no final decision appears to have been issued and so no formal consideration of the Rule's role in Guernsey's jurisprudence appeared prior to *Pitt* and *Futter*. This may be because the trustee made Mr. Gresh whole for the UK tax liability resulting from the distribution. Nonetheless, the case is some evidence that the Rule was seen as part of Guernsey law.

6. Summary

The offshore jurisdictions' recognition of the Rule suggests two important points to consider in evaluating the Rule's role. First, the close examination of the English jurisprudence by the IFC courts to consider the question indicates those courts gave the Rule's merits and jurisprudential basis serious examination. Neither *Green GLG* (Jersey) nor *Rothschild* (Cayman) simply imported the Rule; each gave

grounds and relief was eventually denied by the Guernsey Royal Court. *Your Guide to the Doctrine of Mistake in Guernsey,* COLLAS CRILL (Jan. 15, 2025), https://www.collascrill.com/articles/the-doctrine-of-mistake-in-guernsey/.

202. Edward Hewitt, HMRC v Re Hastings-Bass*: The Battle Begins*, 16 TRS. & TRS. 548, 553 (2010).

203. Gresh v. RBC Tr. Co. (Guernsey) Ltd. & HMRC [2009] RCG 25 (Jersey).

204. Simon Davies & Jonathon Ellis, *HMRC Wades in Offshore:* Gresh v RBC Trust Company (Guernsey) Ltd & HM Revenue and Customs, *Court of Appeal of Guernsey, 16 September 2009*, 16 TRS. & TRS. 331, 334 (2010). There is a long-standing private international law rule that one country will not enforce the revenue laws of another. *See* Christopher Sly & Marcus Parker, *Payment by Trustees of Foreign Taxes,* THE INTERNATIONAL TRUST (David Hayton, ed.) (3rd ed.) 541 (2011).

the questions of whether or not to recognize the Rule and how the Rule would operate careful consideration. Second, even in jurisdictions where courts did address the Rule, there were few published judgments applying it prior to *Pitt/Futter,* and most of the IFCs had not considered the issue at all. These points undercut the narrative that the Rule served as a common means of saving failed aggressive tax avoidance schemes, or at least that there were many such schemes in need of saving. Certainly, the Rule's existence was widely known to anyone reading law journals. *Trusts & Trustees* included over 75 articles mentioning it between 2000 and 2010 (inclusive).[205] If the Rule really was primarily a "get out of jail free card" for sloppy trustees pushing the boundaries of anti-social tax avoidance, it appears either remarkably ineffective at accomplishing that end or that there were not many sloppy trustees engaged in aggressive tax avoidance who were in need of playing the *Hastings-Bass* card.

### C. THE (ENGLISH) FALL OF THE RULE

In 2006, in response to Lord Justice Lloyd's invitation in *Sieff,* and because of its concern that "the principle as currently formulated is too wide in its scope," HMRC began giving "active consideration to participating in future cases where large amounts of tax are at stake and/or where it is felt we could make a useful contribution to the elucidation and development of the principle."[206] In a published memorandum, the agency set out seven points, contending that the Rule should:

1. be discretionary not mandatory;

2. make actions voidable rather than void;

3. "as far as possible be assimilated" into broader categories of law, including mistake and the general law governing impugning of the exercise of discretion by a trustee;

4. be applied under a test that asked if the trustee "would" rather than "might" have acted differently if the correct

205. Based on a search of the *Trusts & Trustees* library for journal articles appearing between January 2000 and December 2010 for the term "Hastings-Bass."

206. HMRC AND THE HASTINGS-BASS PRINCIPLE, *supra* note 132, at 3.

considerations had been taken into account;

5. not apply where a trustee sought advice as to tax but the advice turns out to be wrong (as in *Sieff*);

6. not apply where a trustee makes an error in carrying out the tax advice it received (as in *Abacus v NSPCC*); and

7. not require a breach of duty by the trustee or the trustee's agent or advisors.[207]

All but the last point reflected HMRC's rejection of the Rule as formulated in *Sieff*: If a court adopted all seven, the Rule would no longer apply to broad swaths of trustee decisions (those where the trustee had sought tax advice that turned out to be wrong or improperly executed), might vanish entirely into other doctrines, and, where it still applied, would be the weakest possible form (discretionary in application and remedy, which a high bar "would test").

1. Courts of First Instance

In 2010, HMRC intervened—for the first time in England since it brought the original suit in *Hastings-Bass*—in two cases involving the Rule.[208] Its strategy appears to have been a full-frontal assault.[209] In the High Court, both cases appeared to the first instance judges as

207. *Id.* at 3–4.

208. Julian Harris, *Hastings-Bass Rule Restated by Court of Appeal*, Busy PRAC. (2011); Pitt v. Holt [2011] EWCA 197 (Civ), ¶ 1. *See also* ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 7 (noting importance of HMRC involvement and that it was HMRC which sought and received permission to appeal the first instance judgments.)

209. Pitt v. Holt [2010] EWHC 45 (Ch), ¶ 18 ("Several cases since *Mettoy* have considered and applied the rule . . . . I shall have to address these cases later in this judgment because there is no doubt that they are inconsistent with the argument of HMRC before me. Indeed, Miss Harman accepts that this is so. Her case is quite simply that they were wrongly decided."); *id.* ¶ 40 ("I now turn to Miss Harman's fundamental attack on the rule in *Hastings-Bass* as it has been developed in the cases."); Futter v. Futter [2010] EWHC 449 (Ch), ¶ 19 ("Ms Harman submits that the 'Rule in Hastings-Bass' has been carried to almost absurd lengths and that it is important to have firmly in mind Lloyd LJ's guidance as to the means to keep the Rule within reasonable bounds."). *See also* Joel Nitikman, *The U.K. Supreme Court Has the Most Recent (but Likely Not the Last) Word on the Rule in* Hastings-Bass *and the Doctrine of Recission for Mistake—Case Comment:* Futter v HMRC *and* Pitt v HMRC, 33 ESTS. TRS. & PENSIONS J. 1, 2 (2013) (describing HMRC argument in first instance in *Futter* as "HMRC argued that the Rule in *Hastings-Bass* did not apply and in fact that there was no such 'Rule'.").

appropriate opportunities for the application of the Rule.[210] While both expressed some skepticism about the merits of the Rule,[211] they saw themselves constrained by prior judgments.[212] As Ashdown notes, "[a]t first instance both *Pitt v. Hold* and *Futter v. Futter* were decided on the basis of law which seemed then to be well settled and entirely orthodox."[213]

*Futter v. Futter* presented a straightforward fact pattern: trustees of a family trust had made distributions from capital gains because the trustees believed that the gains could be offset against losses in the recipients' personal portfolios.[214] Unfortunately, the trustees' solicitors had not taken into account a tax law provision that specifically barred such setoffs, so the distributions incurred a substantial tax liability.[215] The trustees successfully invoked *Hastings-Bass* in the High Court, which ruled that the trustees would not have acted as they did if they had realized the gains could not be offset, as minimizing the tax payable on the distributed funds was a priority.[216]

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210. *Pitt*, [2010] EWHC 45 (Ch), ¶ 44 ("Applying the threefold test suggested by Warner J in *Mettoy* and the principles summarized by Lloyd LJ in *Sieff*, I consider that the present [case] is a clear cut case on the facts for application of the rule in *Hastings-Bass*."); *Futter*, [2010] EWHC 449 (Ch), ¶¶ 26–30 (rejecting HMRC arguments). Lloyd LJ, who provided the main opinion in the Court of Appeal, similarly observed that *Futter* "was entirely orthodox in terms of the Hastings-Bass rule" and *Pitt* was "a straightforward case under the Hastings-Bass rule." Pitt v. Holt, [2011] EWCA 197 (Civ), ¶¶ 135, 160.

211. *Pitt*, [2010] EWHC 45 (Ch), ¶ 41 ("It may well be that the time is ripe for the Court of Appeal to consider the Rule in *Hastings-Bass*."); *Futter*, [2010] EWHC 449 (Ch), ¶ 2 ("This is another application by trustees who wish to assert that they have acted in an untrustee-like fashion and so have failed properly to exercise a power vested in them. The trustees wish to take advantage of this failure to perform their duties in order to enable the beneficiaries to avoid paying the tax liability consequent upon the trustees' decision. Put like that (and I am conscious that this is not the only way in which the situation can be described) the possibility is raised that the development of the Rule may have been diverted from its true course.").

212. *Pitt*, [2010] EWHC 45 (Ch), ¶ 42 ("It is, of course, technically correct, as [HMRC counsel] Miss Harman reminded me, that these first instance decisions are not binding on me. Nevertheless, I would be most reluctant to depart from such a consistent line of authority unless perhaps I were persuaded that some critical error had been made and thereafter overlooked. Miss Harman did not suggest that this was the case."); *Futter*, [2010] EWHC 449 (Ch), ¶ 3 ("This is not an occasion for a judge at first instance to indulge in reconsideration of the Rule (itself developed at first instance). My task is to decide the case before me in accordance with the established rules of precedent. Where a decision at first instance has itself been considered by a second judge at first instance, I do not regard myself as free to depart from the second decision (unless persuaded that some binding or persuasive authority has been overlooked . . . .").

213. ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 7.

214. *Futter*, [2010] EWHC 449 (Ch), ¶¶ 13–17.

215. *Id.* ¶ 17.

216. *Id.* ¶ 30.

*Pitt v. Holt* had similarly clear facts: a wife—who had been appointed as receiver for her husband after he became incapable of managing his own affairs due to injuries in an accident—put compensation that her husband had received into a discretionary settlement with the family as beneficiaries.[217] She did not consider the inheritance tax consequences and so there was substantial liability for inheritance tax when her husband died.[218] The High Court set aside the settlement, eliminating the inheritance tax liability under *Hastings-Bass*.[219] Neither case presented particular difficulty under the *Sieff* formulation of the Rule: *Futter* looked similar to *Green* on its face and *Pitt* presented a particularly appealing set of facts for the application of the Rule (albeit requiring the court to extend the principle to cover the wife's role as receiver).[220]

2. The Court of Appeal

HMRC was granted leave to appeal in both cases; a contemporary account described the agency as "very keen to take the case all the way so as to get definitive answers" on the questions about the rule's applicability[221] and the agency's goal was to narrow the scope of the rule.[222] The Court of Appeal heard the two appeals together, and the appeals court panel included Lord Justice Lloyd, the judge who had decided *Sieff* (in his last sitting as a first instance court judge prior to his elevation). As in the first instance courts, HMRC made a frontal assault on the Rule.[223]

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217. *Pitt*, [2010] EWHC 45 (Ch), ¶ 8.

218. *Id.* ¶¶ 10–11.

219. *Id.* ¶ 48.

220. Hinks, *supra* note 88, at 81 (expressing surprise that the Revenue chose *Pitt* as a test case, since "the facts were likely to make a court sympathetic to the plight of the taxpayer.").

221. Gordon, *supra* note 129, at 13.

222. *Id.*

223. *Pitt*, [2011] EWCA 197 (Civ), ¶ 23 ("In each case HMRC appeal, contending that, on a correct view, the Hastings-Bass rule does not justify a conclusion that the relevant disposition was void or even voidable. It is not suggested that either judge was wrong, being bound, in effect, to follow the line of decisions that had developed since *Mettoy*. However, it is contended that, looking at the matter in terms of (a) the ratio of *Re Hastings-Bass* itself and (b) relevant principles of trust law, it is wrong to treat the acts of either Mrs Pitt or the trustees of the Futter settlements as vitiated by the fact that the fiscal consequences of what was done were different from what was expected. The argument on this point requires the court to go back both to *Re Hastings-Bass* itself and to first principles."). Lloyd LJ noted that the court was "favoured (if that is the right word) with authorities . . . spread over (in the end) nine binders", including "a small selection from the very many published articles and lectures about the Hastings-Bass rule." *Id.*

HMRC's tactic worked. Lord Justice Lloyd "comprehensively restated" the Rule and the other two members of the panel offered only brief interventions.[224] He found the *Hastings-Bass ratio decidendi* not to be the formulation quoted earlier but a much narrower one, significantly reformulating the source of the Rule and a court's power under it. He went on to say that *Mettoy's* positive reformulation of the Rule was also problematic: "The principle on the basis of which the judge decided this aspect of the case cannot, in my judgment, be found in the decision in *Hastings-Bass* itself."[225] As a result, Lord Justice Lloyd concluded that *Hastings-Bass* could not provide the "true principle" behind what had come to be known as the Rule and he rejected both *Mettoy* and the post-*Mettoy* case law as "not a correct statement of the law."[226] He determined that trustees' acts would "be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and to the court's discretion." Turning to the role of tax impacts, he found that while "[f]iscal considerations will often be among the relevant matters which ought to be taken into account[,]" they would not serve as the basis for voiding the action "[i]f the trustees seek advice (in general or in specific terms) from apparently competent advisers as to the implications of the course they are considering taking, and follow the advice so obtained."[227]

Unsurprisingly, applying this narrow reading of *Hastings-Bass* led him to reverse the lower courts' application of the broader Rule in both cases. In *Futter*, he found that "the trustees acted entirely properly" in relying on the tax solicitors.[228] "They did not overlook the need to think about CGT [capital gains tax]. They were given advice on the right point. The problem was that the advice was wrong."[229] There was thus no breach of fiduciary duty by the trustees and so no opportunity to void the action.[230] Similarly, in *Pitt* he concluded that "Mrs. Pitt fulfilled any duty of skill and care she was under by looking for advice to her solicitors acting in the litigation, either to advise her or to see she got whatever advice she needed from another source . . . In those circumstances, I cannot accept that, in entering into the two

224. Harris, *supra* note 208208; *Pitt*, [2011] EWCA 197 (Civ).
225. *Pitt*, [2011] EWCA 197 (Civ), ¶ 72.
226. *Id.* ¶¶ 95, 131.
227. *Id.* ¶ 127.
228. Futter v. Futter [2010] EWHC 449 (Ch), ¶ 138.
229. *Id.*
230. *Pitt*, [2011] EWCA 197 (Civ), ¶ 144. Lord Justice Lloyd also considered whether one trustee being a partner in the same firm that provided the advice through a junior made a difference. He concluded it did not. *Id.* ¶¶ 140–43.

deeds . . . Mrs Pitt can be said to have been acting in breach of her fiduciary duties owed to Mr Pitt."[231]

3. The UK Supreme Court

The Futters and Mrs. Pitt appealed to the UK Supreme Court, which accepted the cases. That court's unanimous judgment, given by Lord Walker (in his last judgment on the court),[232] agreed with Lloyd's analysis of the Rule but disagreed about Mrs. Pitt's claim for relief based on mistake.[233] Lord Walker's key gloss on the Court of Appeal's reasoning was to highlight the distinction between "an error by trustees in going beyond the scope of a power," which he labeled with "the traditional term 'excessive execution[,]'" and "an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power," which he labeled "inadequate deliberation."[234] In cases of inadequate deliberation, Lord

231. *Pitt*, [2011] EWCA 197 (Civ), ¶ 163. He also rejected the alternative claim of mistake in *Pitt,* finding that while "Mrs Pitt is entitled to feel that she has been badly let down by the advice that she was given, and the failure of her advisors to address the question of [IHT], especially as the liability could have been avoided so easily," her remedy (and the Futters') "lies not in the realms of equity but by way of a claim for damages for professional negligence." *Id*. ¶ 220.

232. Walker*, supra* note 89, at 418.

233. Futter v. Commissioners [2013] UKSC 26, ¶ 5. Lord Walker "provisionally" concluded that "the true requirement" for rescission on grounds of mistake "is simply for there to be a causative mistake of sufficient gravity" and 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." *Id.* ¶ 122. A "close examination of the facts"—the test requires "an intense focus . . . on the facts of the particular case"—is necessary to determine whether or not the mistake is sufficient to support relief. *Id.* [126]. Mrs. Pitt qualified for relief because she could have complied with the provision of the tax code designed for her exact circumstances "without any artificiality or abuse of the statutory relief" and the loss of the benefit of the tax provision "was certainly a serious matter for Mrs. Pitt." *Id.* ¶¶ 133–34. Possibly Lord Walker's view, expressed in a later lecture, that Mrs. Pitt received "lamentably incompetent" financial advice combined with the failure of the Court of Protection ("whose sole function is to protect the interests of mentally incompetent people") to flag the issue, played a role in the mistake judgment. Walker, *supra* note 95, at 763. Although no mistake claim was timely made in *Futter*, Lord Walker speculated that the court might have refused to aid "in extricating claimants from a tax-avoidance scheme which had gone wrong," as Futter's plan, while "by no means at the extreme of artificiality," was still "hardly an exercise in good citizenship." Futter v. Commissioners [2013] UKSC 26, ¶ 135. As a result, he noted that "[i]n some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy." *Id.* ¶ 135.

234. *Id.* ¶ 60. *Hastings-Bass* itself was a case of excessive execution, while *Mettoy* was brought as a case of inadequate deliberation, although the *Mettoy* court held the

Walker agreed with the appellate court that the inadequacy of deliberation

> 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 trustees that entitles the court 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, 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.[235]

Although the Supreme Court did not entirely discard the Rule in *Hastings-Bass*, the post-*Pitt/Futter* version of the Rule bears little resemblance to the Rule as it existed at the time *Mettoy* was decided. Further, the Court of Appeal's decision in *Pitt/Futter* newly required a breach of a fiduciary duty before it could be invoked. As Ashdown observes, "[a]rguably the most practically important aspect of the Supreme Court's decision in *Pitt v Holt* is Lord Walker's treatment of reliance by trustees on professional advisers . . . .In broad terms, a trustee who takes and acts on apparently trustworthy professional advice does not commit a breach of duty, even if the advice turns out to be wrong."[236] Under the new rule, most of the applications of the Rule described earlier would have resulted in the courts refusing to apply the Rule. A second change is that post-*Pitt/Futter*, the requirement that a trustee have breached a duty makes it less likely that the trustee would seek relief under the rump Rule.[237]

4. Why Did the Rule Fall in England?

The Rule's fall in England provides four points for our assessment of the role of IFCs. First, HMRC's involvement was critical. Between *Mettoy* and *Sieff*, HMRC declined repeated invitations from the courts to participate in cases where parties invoked the Rule.[238] Once it

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deliberation adequate on the facts and so the Rule did not apply. Mettoy Pension Trustees v. Evans [1990] 1 WLR 1587, 1629–30 (Eng.).

235. Futter v. Commissioners [2013] UKSC 26, ¶ 73.

236. ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 135.

237. *Id.* at 153.

238. Hewitt, *supra* note 202, at 550 ("Although a practice has developed to notify HMRC of an intended *Re Hastings-Bass* application and to invite them to join as a party

returned to the issue for the first time since *Hastings-Bass* itself (where, ironically, its position had been in support of voiding a trustee's actions), HMRC launched a direct assault on the substance of the Rule.

Second, by the mid-2000s, the English courts were receptive to HMRC's assault.[239] Before *Futter,* multiple judges made extra-judicial critiques of the Rule[240] and even some judges applying it had suggested that the higher courts needed to reexamine it.[241] The author of the Supreme Court's judgment had criticized the Rule in print prior to his appointment to that court (but while he was on the Court of

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and take an active role in the proceedings, such invitations have generally been declined."). HMRC's absence was regularly commented on in the literature. *See* Lord Neuberger of Abbotsbury, *Aspects of the Law of Mistake: Re Hastings-Bass*, 15 TRS. & TRS. 189, 198 (2009); Tony Molloy, *What Really* is *the rule in* Hastings-Bass?, 15 TRS. & TRS. 200, 200 (2009) ("[I]n practically every relevant case" on the Rule, "*all sides* have asked the court to 'apply' a particular, convenient, view of the 'principle,' without vigorous contestation of the correctness of that view . . . ."); Charles Mitchell, *Reining in the Rule in* Re Hastings-Bass, 122 L.Q. REV. 35, 36 (2006) ("[T]he result of this standoffishness has been that significant cases have been decided in the past few years without the benefit of counter-argument from a party with a real financial interest in opposing the application . . . ."). Even post-*Futter* this criticism continued. *See* Hinks, *supra* note 88, at 81 ("The rule in *Hastings-Bass* was developed in cases where trustees and beneficiaries had a common interest in avoiding the unintended tax. The Revenue was not joined as a party and in so far as contrary arguments were put to the court normally they were put in a soft form by someone having no real interest in seeing them succeed."); Walker, *supra* note 95, at 762 ("[P]roceedings [without HMRC] tended to be, I will not say collusive, but non-contentious.").

239. *See* Pearce, *supra* note 97, at 195 ("The solidarity of the judiciary in the higher courts in seeking to constrain the rule in *Re Hastings-Bass* was striking.").

240. Sir Gavin Lightman, *Guest editorial on Hastings-Bass*, 15 TRS. & TRS. 184, 185 (2009) (Offering the arguments of a judge who ruled in *Abacus Trust Co. (Isle of Man) v. Barr* for a "reconsideration by an appellate court" and for courts to "sweep aside" the Rule); Neuberger, *supra* note 238238, at 192 ("It appears that Doctor Equity can administer a magical morning-after pill to trustees suffering from post-transaction remorse, but not to anyone else" and rule is "a sort of get-out-of-gaol-free card"); Sir Robert Walker, *The Limits of the Principle in* Re Hastings-Bass*,* 13 KING'S L.J. 173, 183 (2002) [hereinafter Walker, *The Limits of the Principle*] (arguing that "The unrestrained extension of the *Hastings-Bass* principle could lead to trustees being treated as a new class of incapacitated persons, like children or feeble-minded adults. No one could ever be sure that they had taken proper advice . . . or that they meant what they said.").

241. *See, e.g.*, Futter v Futter [2010] EWHC 449 (Ch) ¶ 2 ("This is another application by trustees who wish to assert that they have acted in an untrustee-like fashion and so have failed properly to exercise a power vested in them. The trustees wish to take advantage of this failure in order to enable the beneficiaries to avoid paying the tax liability consequent upon the trustees' decision. Put like that (and I am conscious that that is not the only way in which the situation may be described) the possibility is raised that the development of the Rule may have been diverted from its true course. Such a suggestion is canvassed in an article by Lord Walker . . . [and] in a lecture by Lord Neuberger . . . .").

Appeal).[242] And in the appellate judgment in *Futter* itself, Lord Justice Longmore's remarks labelled *Hastings-Bass* an example of the law "taking a seriously wrong turn."[243] Both the Court of Appeal and Supreme Court marshaled critiques of the Rule's doctrinal roots.[244] However, as Pearce noted, it "was not a foregone conclusion" that the Rule had developed beyond the "bounds justified by authority," pointing to the Jersey Royal Court's decision in *In the Matter of the Green GLG Trust,* which found the Rule to be "entirely consistent with precedent and principle."[245] Lord Walker's opinion was a masterful piece of judicial work, in part because the issue was not an open-and-shut one doctrinally and so it required a lengthy analysis to get where he wanted to go in the judgment.

One source of the judiciary's hostility to the Rule appears to be related to a sense that it facilitated unseemly (at best) tax avoidance.[246] Another source may have been the posture of *Hastings-*

242. Walker, *The Limits of the Principle*, *supra* note 240, at 173 n.*, 183–85.

243. Pitt v. Holt [2011] EWCA 197 (Civ), ¶ 227.

244. *See id.* ¶¶ 63–95; Futter v. Commissioners [2013] UKSC 26, ¶¶ 9–94 (examining underlying issues of the Rule).

245. Pearce, *supra* note 97, at 192; In the matter of the Green GLG Tr. [2002] JLR 571, ¶ 27.

246. Will Twidale, *Setting aside voluntary dispositions: where are we now?*, 22 TRS. & TRS. 302, 307 (2016) ("People were said to be 'engaging in speculative tax schemes in the knowledge that the schemes could be later set aside if they failed.' This was a practice which, among others, Lord Neuberger and Lord Walker were understandably keen to stamp out and by their judgment in *Pitt* and *Futter* they have stamped it out."); Walker, *supra* note 95, at 764 ("[T]he so-called *Hastings-Bass* rule was coming to be seen as a sort of 'Get out of jail free' card for failed tax-avoidance schemes."); Pearce, *supra* note 97, at 174 ("These remarks about tax avoidance are revealing . . . .What is more important is that the Court has signaled a reluctance to assist in the implementation of these schemes . . . .Lord Walker's remarks may have been intended to, and are likely to have, the effect of discouraging applications to escape from tax avoidance schemes, which have gone wrong.").

Walker, while a Court of Appeal judge, had commented in 2002 that the "tax-avoidance maneuvers which went wrong" in *Green v Cobham* and *Abacus Trust Company (Isle of Man) v NSPCC* "threatened those involved with the disaster of having to pay the same amount of tax as the rest of us." Walker, *The Limits of the Principle*, *supra* note 240, at 177–78. As noted earlier, the error as to the residency of the trustee in *Green* threatened application of capital gains tax to £37 million, which seems likely to be more than virtually all of "the rest of us" regularly pay in tax. Moreover, *Green* was the first decision to apply *Hastings-Bass* outside the pension trust context since *Hastings-Bass* itself, at which point it would have been hard to see the Rule as a major threat to public finances. Walker seemed to think that the substantial capital gains tax that would have been due in *Green* was not a major loss to the recipients of the funds, somewhat snarkily noting in his 2002 commentary that "I must resist the temptation to ask where, on a scale of one to ten, you would place the catastrophe of participating in accrued gains of £35m, even after capital gains tax." *Id.* at 178.

*Abacus Trust Company v NSPCC* involved a potential tax liability of £1.2 million on a base of what appears to me from the opinion to have been £2.7 million in 2001 as the

*Bass* cases, where all parties agreed to the application of the Rule and testimony by the trustees admitting "untrustee-like" conduct was not subject to cross-examination. Finally, it may be related to the academic criticism of the Rule in UK law journals. Whatever the source, by the time the Court of Appeal got *Pitt* and *Futter,* the English courts were clearly primed to be sympathetic to HMRC's attack on the Rule. Indeed, the uniting of both the Court of Appeal panel and the Supreme Court behind single opinions suggests that the judges wanted to send a strong signal.[247] Notably the judgments came after more than a decade of attacks on tax avoidance generally[248] sto restrict the tax advantages of trusts.[249]

Third, despite the full-on assault by HMRC and the sympathetic reception it received, neither Lord Justice Lloyd (arguably the UK judge who had thought the most deeply about the doctrine, given his opinions in both *Sieff* and *Pitt*) nor Lord Walker completely eliminated the Rule. While it is only a pale shadow of its former self, a rump Rule remains in place where trustees breach fiduciary obligations in cases of inadequate deliberation or go beyond the scope of their powers in cases of excessive execution. As we will see below, this may be important in those IFCs which have not adopted statutory versions of the Rule, since it leaves space for their courts in some instances to offer relief that is at least facially consistent with the post-*Pitt/Futter* version of the Rule.

Finally, despite Lord Walker's evisceration of the Rule, his grant of relief to Mrs. Pitt on grounds of mistake with a relatively low threshold led to "the foreseeable untoward effect of shifting reliance

result of the mistaken execution of documents on April 3, 1998 rather than on April 6, 1998. Abacus Trust Co. (Isle of Man) v. NSPCC [2001] EWHC B2 (Ch), ¶¶ 2, 10. In neither case could the steps taken to reduce tax liability be fairly characterized as pushing the boundaries of tax law. Indeed, in both cases the structures were fully compliant with UK tax law except for the mistakes made by the trustees as to trustee residence (*Green*) and the date of execution of documents (*Abacus*). Whatever the case for increasing tax on relatively wealthy individuals, it hardly seems a demand of natural justice for such tax liabilities to turn on such minor details.

247. Pearce, *supra* note 97, at 195–96 ("The Supreme Court bench of seven judges was unanimous, with only a single judgment. Before this, the Court of Appeal had been unanimous, with no indication of any difference of opinion between the Court's members. Lloyd LJ referred to critical lectures by Lord Walker in 2002 and by Lord Neuberger in 2009 and in the Judicial Studies Board Annual Lecture, given shortly after the Court of Appeal delivered its decision, Lord Neuberger (who was later appointed president of the Supreme Court and was a member of the bench for the appeal), repeated his criticism, described the judgment of Lloyd LJ as 'magisterial', and said that the development was based upon 'a cornerstone placed on sand.'").

248. *See* Morriss & Moberg, *supra* note 44, at 33–56 (discussing efforts to combat tax avoidance and evolving tax policies through the 1980s and 90s).

249. *See supra* notes 71–75, 169 and accompanying text.

from the *rule in Hastings-Bass* to mistake."[250] Colebrook argues that mistake doctrine's reliance on "amorphous terms" such as "*justice* and/or *unconscionability*" provided mere "fig leaves for boundless discretion" that would not produce consistent decisions.[251] This reasoning suggests the Rule may be mostly gone. However, post-*Futter,* this reasoning suggests that the impact of *Futter* on the law of mistake may now be a more significant tool for fixing problems with fiduciaries' decisions.[252] This suggests that the source of the Court of Appeals' and Supreme Court's unease with the Rule was not the idea of altering trustee decisions retroactively but rather the impact on tax law of doing so to the detriment of the UK Exchequer.

## IV. IFC RESPONSES TO *FUTTER*

Both the Court of Appeal and UK Supreme Court decisions caused significant discussion and initial reaction to the UK Supreme Court decision suggested *Pitt/Futter* could be influential even in IFC courts. For example, Jersey's Deputy Bailiff William Bailhache indicated in *Re B* that the Royal Court would be inclined to follow *Futter*, although he found it was not necessary to decide the question in the case at hand because the facts did not qualify for relief even under the more expansive version.[253] This position was reinforced in *In the matter of the Onorati Settlement,* where Bailiff Sir Michael Birt noted that "the position remains open, although any party wishing to submit that Jersey law should continue to plough its own furrow will have to explain why the closely reasoned judgments of Lord Walker and Lloyd LJ should not be applied."[254] As the two senior members of the judiciary had offered such dicta, it seems likely that Jersey would have opted to follow *Futter* absent statutory intervention.[255] Many thus believed that the most likely judicial response in the IFC jurisdiction courts would be to follow *Pitt/Futter*, perhaps in recognition of the widespread approval in the English legal literature of both the Court of Appeal and Supreme Court decisions, the overlap with the Judicial Committee of the Privy Council, respect for Lord Walker and Lord

250. Colebrook, *supra* note 61, at 221.

251. *Id.* at 221. *See also* Pearce, *supra* note 97, at 174 (criticizing "the emphasis on ascertaining what is unjust, unfair or unconscionable in all the circumstances" as providing "only very limited guidance").

252. *See* Clarry, *supra* note 77, at 253–55 (discussing the role of the duty of care in *Futter* and the likely impacts on trust administration).

253. *See* In the matter of B Life Interest Settlement [2013] JLR 1; Pearce, *supra* note 97, at 200–01.

254. In the Matter of the Onorati Settlement [2013] JRC 182, ¶ 17 (Jersey).

255. *See* Clifford Chance, *supra* note 3.

Justice Lloyd, or general norms of the common law.[256]

More skeptically, in the Isle of Man First Deemster David Doyle in *AB v. CD* noted that while pre-*Pitt* Manx law had been the same as England's (and thus included the Rule), he had doubts as to whether *Pitt* would be persuasive under Manx law as he found the decision to have been "largely driven by English public policy and revenue considerations" and to "not reflect the modern offshore trust world which the Isle of Man inhabits."[257] In a somewhat similar vein, Cayman Grand Court Chief Justice Anthony Smellie (the author of *Rothschild* opinion first applying *Hastings-Bass* in Cayman) wrote in a 2014 article that *Pitt/Futter* were "although not directly binding on the Cayman Courts," they would be "of the most highly persuasive value,"[258] but there was also an important difference between the English and Caymanian legal contexts. Smellie noted that "Surely 'artificiality' in this sense—like beauty its antithesis—must be in the eyes of the beholder."[259] He continued:

> The perspective of the bench from a jurisdiction like the Cayman Islands is that from a place where there has never been direct income, capital gains or inheritance tax. A jurisdiction which therefore has never had the need in any sense 'artificially' to structure its laws so as unfairly to arbitrage the tax laws of other jurisdictions. Accordingly, notions of the refusal of relief by the court, on '*grounds of public policy*' from the '*general recognition that artificial tax avoidance is a social evil*' must be considered in their proper context. In the socio-political context of the Cayman Islands, there can be no presumption that an arrangement, which is otherwise within the law not only of the Cayman Islands but

256. *See, e.g.*, Ashley Fife, *Bermuda's Statutory Hastings Bass—If I Could Turn Back Time . . .* , IFC REV. (Aug. 1, 2015) ("Is the remedy of Re Hastings Bass as it was prior to Pitt and Hold and Futter and Futter available in, for example, The Bahamas, the BVI, Isle of Man, Guernsey, Cayman Islands and other Overseas Dependencies and Crown Dependencies other than Bermuda and Jersey? It now appears it may not be, if the case makes it [sic] way to the UK Privy Council or if those offshore jurisdictions follow Pitt v Holt and Futter v Futter which, it appears they may be bound to do without having the benefit of statutory provisions in place to in effect preserve the previous application of the rule.").

257. AB v. CD [2016] CHP 16/0007 ¶¶ 39–41 (Isle of Man).

258. Anthony Smellie, *Dealing with Mistakes of Trustees or Settlors: The Outlook from the Offshore Bench*, 20 TRS. & TRS. 1101, 1102 (2014) (noting further, "It would also be short-sighted to overlook the likelihood of the decision influencing the outcome of a final appeal from the Cayman Islands before the Privy Council as constituted by the same judges!").

259. *Id.* at 1109.

> also of the relevant domicilary jurisdiction, is to be deemed 'artificial' simply because its primary aim is to mitigate the incidences of tax.[260]

This recognition that the interests to be weighed in judicial consideration might be different in IFCs than in Britain is also discussed below with respect to Guernsey. In addition, a June 2013 "briefing note" from law firm Clifford Chance surveyed leading practitioners in six IFCs (Bermuda, BVI, Cayman, Guernsey, Isle of Man, and Jersey); while all concluded that their jurisdictions were likely to follow the UK Supreme Court's decision, several speculated that their courts might factor in different considerations from the UK courts in applying the Rule.[261]

To forestall their courts following *Pitt/Futter* in eviscerating the Rule, seven of the twelve IFC jurisdictions we are examining took statutory action, however, and we now turn to those measures. At the least, it is certainly true that "without statutory intervention, setting aside a fiduciary's exercise of a power would likely be more time consuming and expensive with uncertain outcomes."[262]

### A. JERSEY

Jersey began considering a statutory version of the Rule in 2011 in a meeting of the Trusts Law Working Group, which was made up of "leading members of industry, members of the Economic Development Department, and Jersey Finance Limited."[263] Once the group decided to proceed, it worked with the Society of Trust and Estate Practitioners (STEP) to engage "the services of a leading English barrister to provide an opinion on amending the law."[264] That opinion formed the basis for instructions from the Economic Development Department to the law draftsmen, with the resulting drafts reviewed by both the working group and external counsel.[265] Jersey Finance, which represents the financial services industry generally, "carried out a targeted marketing campaign on

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260. *Id.* note 258, at 1109.

261. Clifford Chance, *supra* note 3.

262. Ashley Fife & Vanessa Lovell Schrum, *Trusts and Charities Act Amendments Providing a Positive Impact*, IFC REV. (Feb. 1, 2015), https://www.ifcreview.com/articles/2015/february/trusts-and-charities-act-amendments-providing-a-positive-impact/.

263. States of Jersey, Official Report 76 (July 16, 2013).

264. *Id.*

265. *Id.*

intermediaries who advise clients on their jurisdiction to establish trust structures in" and got "a significant interest" in the proposed amendment.[266]

The Trusts (Amendment No. 6) (Jersey) Law passed the States Assembly on July 16, 2013 and received the Royal Assent in the Privy Council on October 9, 2013. Discussion in the Assembly was mostly limited to a statement of support from the Minister for Economic Development (Sen. A.J.H. MacLean) describing the Amendment as providing "certainty for the Island's trust clients and protect the interests of beneficiaries of Jersey trusts," and arguing that the proposal "will strengthen the offering Jersey has in the international private client marketplace and will assist in retaining our position as the leading offshore trust jurisdiction in the world."[267] Minister MacLean predicted that the amendment would both "encourage a number of existing trusts to alter the governing law of their trusts and establish themselves under the Jersey law" and "assist intermediaries in recommending Jersey to become the most prominent jurisdiction for new trusts to be established here." [268] Commenting on the draft legislation, the international law firm Clifford Chance noted that "on a case-by-case basis trustees will need to consider migrating a trust to Jersey to remedy a problematic transaction and a failure to do so could itself expose trustees to unwelcome litigation risk."[269]

The statutory rule set out clear rules for cases of both mistake and the traditional *Hastings-Bass* circumstances. Article 47B provided a broad definition of mistake as including a mistake as to "the effect of," "any consequences of," or "any of the advantages to be gained by, a transfer or other disposition of property to a trust, or the exercise of a power over and in relation to a trust or trust property."[270] In addition, it included "a mistake as to a fact existing either before or at the time of, a transfer or other disposition or property to a trust, or the exercise of a power over or in relation to a trust or trust property"[271] and "a mistake of law including a law of a foreign

266. *Id.*

267. *Id.* at 75. The only question came from Senator S.C. Ferguson, who asked why it took from 1975 (the year of the *Hastings-Bass* decision) until 2013 to pass such a law, commenting, "I know Jersey works slowly but this is rather slower than usual" and suggesting that lawyers might have been unwilling to see litigation over mistakes eliminated as a reason for the delay; Senator Maclean responded that the Rule had previously been established in Jersey through precedents. *Id.* at 76.

268. *Id.* at 76.

269. Clifford Chance, *supra* note 3, at 7.

270. Draft Trusts (Amendment No. 6) 2013 (Jersey) Law 201, Art. 47B(2)(a).

271. *Id.* art. 47B(2)(b).

jurisdiction."[272] The statute's drafters also specifically excluded the Jersey customary law concept of *erreur* from application to the meaning of misstate under the statute.[273]

Article 47D gave the statute retroactive effect.[274] Article 47I(3) allowed courts to "make such order as it thinks fit" subject only to a restriction on prejudice to "any bona fide purchaser for value of any trust property without notice of the matters which render the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, voidable."[275] Article 47E empowered courts to set aside a transfer or disposition of property to a trust due to mistake; Article 47F empowered courts to set aside a transfer or disposition of property to a trust exercised by fiduciary power; Article 47G empowered courts to set aside the exercise of powers in relation to a trust or trust property due to mistake; and Article 47H empowered courts to set aside the fiduciary powers of non-trustees in relation to a trust or trust property.[276] Each of these provisions authorized a broad group of persons (defined for Article 47E and Article 47F as settlors and defined for Article 47G and 47H as trustees, beneficiaries, enforcers, the Attorney General for charitable trusts, and "any other person with leave of court").[277]

The provisions governing putting property in a trust (Article 47E) made actions voidable if the relevant person "(a) made a mistake in relation to the transfer or other disposition of property to a trust; and (b) would not have made that transfer or other disposition but for that mistake, and the mistake is of so serious a character as to render it just for the court to make a declaration under this Article."[278] Similarly, the provisions governing setting aside actions due to failure to take into account "any relevant considerations" or taking into account "irrelevant considerations" required that the person exercising the power "would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations or that taking into account of irrelevant considerations."[279] Those provisions also explicitly disclaimed need for there to have been "any lack of care or other fault on the part of the [trustee or] person exercising a power,

272. *Id.* art. 47B(2)(c).
273. *Id.* art. 47C.
274. *Id.* Art. 47D.
275. *Id.* Art. 47I(3)–(4).
276. *Id.* Art. 47(E)–(H).
277. *Id.* Art. 47I(1)–(2).
278. *Id.* art. 47E(3).
279. *Id.* arts. 47F(3), 47H(3).

or on the part of any person giving advice in relation to the exercise of the power."[280]

Finally, courts were given broad discretion in shaping remedies, making acts subject to the law voidable and allowing the court to give the acts "such effect as the court may determine" or make the act be "of no effect from the time of its exercise."[281]

The Jersey rule is a clear translation of *Sieff v. Fox's* statement of the Rule into statutory language, and also provided greater clarity on scope and the irrelevance of fault. It thus resolved a number of issues the English version of the Rule had left unclear. First, it settled the void/voidable debate by making acts voidable and giving courts broad discretion in crafting remedies, while explicitly protecting bona fide purchasers for value who did not know of the problems. Second, it settled the "would/might" debate by opting for the more stringent "would" standard, albeit softened a bit by the broad phrasing of "any relevant considerations." Third, it clarified the differences between *Hastings-Bass* and mistake fact patterns.

### B. BERMUDA

While Bermuda's courts had not addressed the Rule prior to *Pitt* and *Futter*, the jurisdiction was the second to adopt a statutory version of the Rule to displace the UK Supreme Court decision from its jurisprudence with the Trustee Amendment Act 2014.[282] The Act added a new section 47A to Bermuda's Trustee Act 1975.[283] This new section allowed the court to set aside a power in whole or in part upon an application submitted by (1) persons holding fiduciary powers, (2) any trustee, (3) any person beneficially interested in a trust, (4) the Attorney General for charitable trusts, and (5) any other person by leave of the court.[284] The statute authorized the court in the exercise of its discretion to impose such conditions, and condition relief upon setting aside the exercise of the power, as it saw fit.[285] To succeed, the applicant must show that the person holding the power "did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the

280. *Id.* arts. 47F(4), 47H(4).

281. *Id.* arts. 47E(2), 47F(2), 47G(2), 47H(2).

282. Trustee Amendment Act 2014 (Berm.)., http://parliament.bm/admin/uploads/bill/f5994227c6ffdaa16ca52a8edb15a722.pdf.

283. *Id.*

284. *Id.* art. 47A(1), (5).

285. *Id.* art. 47A(1).

power, or took into account one or more considerations that were irrelevant to the exercise of the power" and that, but for the failure to take into account a relevant consideration or for taking into account an irrelevant one, the person holding the power would not have exercised the power at all, would have exercised it on a different occasion, or would have exercised it in a different manner.[286] No breach of duty is required.[287]

As with Jersey's statute, Bermuda framed its statute to resolve the key open questions in the judicially created rule, making actions voidable rather than void, giving courts discretion in fashioning remedies,[288] and requiring the higher "would" test rather than "might."[289] Like Jersey, Bermuda also protected bona fide purchasers for value who did not have notice of the problems.[290] It explicitly applies retroactively.[291] Unlike Jersey's statute, Bermuda's version applies to non-trustee fiduciaries[292] and to fiduciaries' dealings with third parties, something not covered by the former English Rule.[293] Both were a significant broadening of the Rule.

It did not take long for the new statute to be put to use. *In the Matter of the F Trust and In the Matter of the A Settlement*, the Bermuda Supreme Court was asked to set aside the appointments of a new trustee to two trusts with a combined value estimated at more than $50 million.[294] UK tax advice was not sought, which proved to be a costly mistake because the new trustee's British residence subjected the trusts to UK capital gains tax (CGT) due to changes to the law pending when the trustee was appointed to one trust and in force when he was appointed to the second.[295] After disclosing the situation to UK tax authorities and paying the tax owed, the trustees sought to void the appointment of the British resident trustee to remove the trusts from UK tax in the future.[296] (As had been its practice in the UK pre-*Pitt/Futter*, HMRC declined to appear despite being invited to do so.[297]) The court determined that the appointment of a trustee was the

286. *Id.* art. 47A(2).
287. *See Id.* art. 47A(8).
288. *See id.* art. 47A(1).
289. *See id.* art. 47A(2) ("would" test).
290. *Id.* art. 47A(6).
291. *Id.* art. 47A(7).
292. *See* Fife, *supra* note 256; *see* Trustee Amendment Act 2014, art. 47A(8).
293. *See* Fife, *supra* note 256; *see* Trustee Amendment Act 2014, art. 47A(5) (referring to "the person who holds the power").
294. *In re* F Trust, [2015] SC (Bda) 77 Civ ¶ 5.
295. *Id.* ¶¶ 5–7, 11.
296. *Id.* ¶ 8.
297. *Id.* ¶¶ 9–10.

exercise of a fiduciary power, as the statute required, and that the trustees had failed to take into account "financially significant factual and legal considerations which were relevant to the exercise of the power, namely the tax implications of D1's UK residence for the Trusts."[298] The court noted the similarity between the case before it and both the pre-*Pitt/Futter* English decision in *Green v Cobham* and the Jersey judgment *In the Matter of the Green GLG Trust*.[299]

One commentator called the amendment "an important addition to Bermuda's already very attractive regime for restructuring trusts" and a "flexible remedy to resolve potential disastrous unanticipated consequences of decisions."[300] This is reinforced by Justice Ian Kawaley's conclusion in *F Trust* that it was not necessary to set out an *ad hoc* test for the exercise of the Court's discretion, instead relying on counsel's "practical and principled proposition" that

> the application of the discretion provided for in section 47A should not be trammelled by the imposition of any particular 'test' but rather should be applied on the facts of each particular case. The circumstances in which the Court will consider it appropriate to intervene to correct a flawed exercise of a power could be varied and numerous and specific limits on the Court's jurisdiction by the articulation of any test could create injustice if it prevented intervention in unforeseen circumstances.[301]

### C. THE BAHAMAS

The trust industry recommended through its Trust Working Group with the Financial Services Board that The Bahamas adopt a statutory *Hastings-Bass* provision, and it did so in 2016.[302] One rationale was based on a fear that the UK Supreme Court decision in

298. *Id.* ¶ 22.

299. *Id.* ¶¶ 24–25.

300. Fife, *supra* note 256.

301. *In re* F Trust, [2015] SC (Bda) 77 Civ, ¶ 26.

302. Natario McKenzie, *Bahamas Strengthens Trust Regulatory Regime*, THE TRIBUNE (Dec. 13, 2016), http://m.tribune242.com/news/2016/dec/13/bahamas-strengthens-trust-regulatory-regime/ ("Industry professionals highly recommended the preservation of this rule by the insertion of the principle into legislation. What we are seeking is to protect the principle of that rule and put it into the [] legislation."); Bah. Fin. Serv. Bd., *Amendment Acts to Strengthen Trust Regulatory Regime* (Dec. 12, 2016),
https://bfsb-bahamas.com/blog/2016/12/amendment-acts-to-strengthen-trust-regulatory-regime/.

*Pitt/Futter* "would be considered highly persuasive to the courts in The Bahamas."[303] The Minister of Financial Services, Hope Strachan, stated that "[t]he Bahamas is currently at a disadvantage for not having the rule included."[304] In its "Objects and Reasons" section, the legislation quoted *Hastings-Bass's* formulation of the Rule, which it described as one that "clarifies the extent to which the court can control the exercise of trustees' powers."[305]

The Bahamas' legislative approach was simpler than either Jersey or Bermuda's. The amendment simply added a new section entitled "Power of court" that provided that a court could "declare the exercise of a fiduciary power void or voidable and make such determination as it deems fit" upon a determination that "a person with the fiduciary power" had taken "irrelevant considerations" into account or failed to take into account "relevant considerations" and would either not have exercised the power or would have exercised it "on a different occasion, or in a different manner, to that in which it was exercised."[306]

The Bahamian legislation went beyond the English common law rule in its expansion of who can seek relief under it and in not requiring a breach of trust of fault by the person exercising the power.[307] It authorized a broadly defined class of people who could seek such relief, including trustees, protectors, and anyone exercising the power, "authorized applicants" as defined in the Purpose Trust Act, the Attorney General if there is no authorized applicant, or "any person with leave of the court."[308] It requires that the exercise of the power not prejudice a *bona fide* purchaser for value of any trust property who was unaware of "the matters which allow the court to set aside" the exercise of the power.[309] One commentator suggested that the elimination of the requirement of a breach of duty was "a very significant development" and that the "added flexibility" this produced "makes Bahamian trusts much more protected in the event of decisions giving rise to any adverse fiscal consequences" that arise

303. Shivron Gay, *The Bahamas: Hastings Bass & Firewall Protection—Recent Developments in Bahamian Trust Law*, IFC REV. (Sept. 29, 2021), https://www.ifcreview.com/articles/2021/september/the-bahamas-hastings-bass-firewall-protection-recent-developments-in-bahamian-trust-law/.

304. Natario, *supra* note 302.

305. Trustee Act, 1998 (Ch. 176) (Bah.) (amended 2016) § 5.

306. *Id.* § 4(b).

307. Kamala Richardson, *The Bahamas Codifies the Rule in Re Hastings-Bass*, LEXOLOGY (Apr. 5, 2018), https://www.lexology.com/library/detail.aspx?g=e5b02ff8-a723-4a04-82d0-9d44ebbabc5c; Gay, *supra* note 303. Trustee (Amendment) § 4(b).

308. Trustee (Amendment) § 4(b).

309. *Id.*

from the trustees' actions.[310] He further described the legislation as showing "a bold willingness to address instances where the common law has taken a left turn" and keeping Bahamian law "on the cutting edge."[311]

### D. DUBAI IFC

In 2017, the Dubai International Financial Centre (DIFC) began a consultation process on revising its trust law, and it adopted a revised Trust Law in 2018 (replacing the 2005 Trust Law).[312] Noting that in England the law concerning dealing with trustee mistakes (a category in which it included the Rule) "has become extremely complex and controversial," the consultation noted that the Rule had been "seriously undermined" by Lord Walker's judgment in *Pitt/Futter*.[313] Explicitly noting Jersey's statute – which it described as "restoring *Hastings-Bass's* potency" and as having "confirmed the Royal Court's ability to provide discretionary relief where the beneficiaries find themselves materially prejudiced by a trustee's decision" – it modeled the DIFC provisions on Jersey's.[314]

The 2018 statute included a *Hastings-Bass* provision, providing that courts could, on the application of a trustee, beneficiary, protector, enforcer, settlor, settlor's heirs, the DIFC with respect to charitable trusts, and any other person given leave of the court, "make such order as it thinks fit", to set aside the action of a trustee or other person exercising a power, who owes a fiduciary duty to the beneficiary respecting the power, over or in relation to a trust or trust property.[315] The court's authority extends to where the person exercising the power has failed to take into account relevant considerations or taken into account irrelevant ones.[316] There is an exception such that the court cannot act so as to prejudice good faith purchasers for value of trust property who lacked notice of the matters which would render the exercise of the power voidable.[317] No violation of a duty is required.[318]

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310. Gay, *supra* note 303.
311. *Id.*
312. DIFC Authority, *Consultation Paper No.* 4, at 3 (2017); Trust Law, 2018 (DIFC Law No. 4 of 2018) (U.A.E.) § 1.
313. DIFC Authority, *Consultation Paper No. 4*, *supra* note 312, at 9.
314. *Id.*
315. DIFC Law No. 4§§ 27(1), (2), 28(3).
316. *Id.* § 27(3).
317. *Id.* § 28(4).
318. *Id.* § 27(4).

### E. CAYMAN ISLANDS

Post-*Pitt/Futter*, "the possibility of the Cayman Court following" those decisions "had been a matter of some concern."[319] However, it was not until 2019 that the Cayman Islands adopted a statutory version of the Rule "to preserve the flexibility" of the Rule prior to "the constraining effect of *Pitt v Holt*."[320] The Cayman statute is "materially very similar" to the Bermuda statute.[321] The statutory authority allowed courts to set aside the exercise of a power (in whole or in part) unconditionally or conditioned as the court determined.[322] Courts can exercise this discretionary authority where the person holding the power "did not take into account one or more considerations (whether of fact, law or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power" and, as a result, would not have exercised it or would have exercised it differently or at a different time.[323] The interests of bona

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319. *The Trusts (Amendment) Law, 2019 will come into force in the Cayman Islands on 14 June 2019*, WALKERS ADVISORY (June 14 2019), https://www.walkersglobal.com/images/Publications/Advisory/2019/Amendments_to_the_Trusts_Law_-_June_14_2019_v2.pdf. *See also Changing with the Times: The Cayman Islands' Trusts Law gets a Revamp*, CONYERS (May 2019), https://www.conyers.com/publications/view/changing-with-the-times-the-cayman-islands-trusts-law-gets-a-revamp/ (noting that *Pitt v. Futter* "had found some favour in the Cayman Islands").

320. Trusts Law (Cayman Is.) (current version at Law 4 of 2019) art. 64A (1); *Correcting Trustee Mistakes: Hastings-Bass in the Cayman Islands*, MOURANT (Nov. 27, 2023), https://www.mourant.com/news-and-views/updates/updates-2023/correcting-trustee-mistakes--hastings-bass-in-the-cayman-islands.aspx. *See, e.g.*, *Make no mistake—Unwinding Trustee Errors in the Cayman Islands*, CAREY OLSEN (Mar. 2024), https://www.careyolsen.com/sites/default/files/2024-03/CO_CAY_TPW_Make-no-mistake_Unwinding-trustee-errors-in-the-Cayman-Islands_03-2024.pdf (describing the statute as reinstating the original rule, suggesting that between *Pitt v. Futter* and the statute *Pitt v. Futter* governed). *But see Enhancing Cayman's trusts law*, CAREY OLSEN (May 21, 2019), https://www.careyolsen.com/sites/default/files/2023-09/CO_CAY_TPW_Enhancing%20Cayman%27s%20Trusts%20Law.pdf (referring merely to the statute "confirm[ing] the Rule. This may only reflect stylistic preferences rather than a substantive commentary).

321. Charles Moore, Jessica Williams, Paul Madden & Paula Kay, *The Rule in Hastings-Bass under Cayman Islands' Statute*, HARNEYS (Sept. 14, 2023), https://www.harneys.com/our-blogs/offshore-litigation/the-rule-in-hastings-bass-under-cayman-islands-statute/.

322. Trusts Act, 1964 (Cap. 175) (Cayman Is.) (current version at Law 56 of 2020) art. 64A(1).

323. *Id.* art. 64A(2).

fide purchasers for value of any trust property who did not have notice of "the matters which allow the Court to set aside the exercise of a power" are authorized.[324] No breach of fiduciary duty is required to invoke the statutory remedy.[325] The statutory remedy was to void the flawed exercise of a fiduciary power rather than to make it merely voidable.[326] Like Bermuda, the Cayman statute allows relief to be sought by a beneficiary, enforcer, holder of a fiduciary power, the Attorney-General, or (with leave of the Court) "any other person" as well as the trustee.[327] It also applies to any holder of a "fiduciary power" (defined as a power which the holder must exercise for the benefit of someone other than the holder), not just trustees.[328]

An unreported decision in 2022 allowed relief under the new statute where a trustee had erroneously believed it was making a distribution from capital when in fact it was making a distribution from income, which had adverse UK income tax consequences.[329] The first published judgment under the statute came in 2023.[330] In it, Justice Kawaley (who had moved from the Bermuda court to the Cayman court) found the statutory jurisdiction to be analogous to the original equitable doctrine and that pre-*Pitt/Futter* case law to remain a valuable source for applying it.[331] He also suggested there was likely a requirement of good faith in relation to the transaction in question, such that there could not have been a deliberate pursuit of a course of conduct to gain an impermissible tax advantage or "procure any other improper benefit", although the "starting assumption" should be that the applicant acted in good faith.[332]

### F. BRITISH VIRGIN ISLANDS

Although there are indications that the issue of a statutory *Hastings-Bass* rule was raised as early as 2014,[333] it was not until 2021

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324. *Id.* art. 64A(6).
325. *Id.* art. 64A(4).
326. *Id.* art. 64A(3).
327. *Id.* art. 64A(5)(d).
328. *Id.* art. 64A(7).
329. *See* Moore et al., *supra* note 321.
330. *In re* Settlements made by Declarations of Trust dated 9 May 2013 [2023] IKJ 228 (Cayman Is.).
331. *Id.* ¶ 16.
332. *Id.* ¶ 23.
333. Will Burnell, *Hastings-Bass and Mistake: Should the BVI Follow Jersey's Example?*, MONDAQ (Aug. 25, 2014), https://www.mondaq.com/trusts/335290/hastings-bass-and-mistake-should-the-bvi-follow-jerseys-example (arguing the "commercial upsides" of a statute were

when, based on recommendations from the Trust and Succession Law Review Committee of the BVI Branch of the Society of Trust and Estate Practitioners, BVI adopted a statutory *Hastings-Bass* provision.[334] Trustee (Amendment) Act 2021 and Probates (Resealing) Act 2021. The statute provided for a broad class of potential applicants, did not require breach of trust or fiduciary duty to invoke the power, and broadly defined fiduciary power so as "to include most dispositive, administrative or investment powers."[335]

### G. ISLE OF MAN

Although *Hastings-Bass* legislation was initially expected in 2014,[336] the Isle of Man did not create a statutory version of the Rule until 2023.[337] The process began with a package of proposed amendments from the Society of Trust and Estate Practitioners in 2015 presented to the Regulatory and Legislative Innovation Working Group, which ultimately led to a draft bill in 2022 which was "prepared taking into account extensive input from private sector stakeholders" that was then subject to a brief public consultation begun in April 2022, with a final draft bill issued just four weeks later.[338] The proposed statutory Rule received overwhelming support in the public consultation (13 of 14 comments supported it); the consultation led to only a minor clarifying change.[339]

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"clear").

334. O'Neal Webster, *Additional Amendments to BVI's Trustee Act Including Re-Introduction of the 'Old Rule in Hastings-Bass'*, O'NEAL WEBSTER (Mar. 16, 2021), https://onealwebster.com/additional-amendments-to-the-bvis-trustee-act-including-re-introduction-of-the-old-rule-in-hastings-bass/ (stating that a *Hastings-Bass* application was possible "only" if there was a breach of fiduciary duty or breach of trust); Trustee Act 1961 (Cap. 303) (Virgin Is.) (current version at No.12 of 2021). BVI practitioner commentary shows disagreement on the question of whether *Pitt/Futter* was in force in BVI prior to the 2021 statute. Walkers suggested that the statute put to rest "[a]ny concern that the BVI Courts might follow the Supreme Court's lead." *Major Amendments to BVI's Trust Laws*, WALKERS (July 15, 2021), https://www.walkersglobal.com/images/Publications/Advisory/2021/BVI/Major_Amendments_to_BVIs_Trusts_Laws.pdf

335. *Major Amendments to BVI's Trust Laws*, *supra* note 334.

336. *See* Tom Maher, *Isle of Man: Stability and Security in Challenging Times,* IFC REV. (Aug. 1, 2014), https://www.ifcreview.com/articles/2014/august/isle-of-man-stability-and-security-in-challenging-times/ ("In light of the 2013 English Supreme Court decision in Pitt v Holt, the Island is expected to introduce a statutory Hastings-Bass rule during 2014.").

337. Trusts and Trustees Act 2023 (Act No. 2023/0326) (Isle of Man).

338. YN TASHTEY, THE TRUSTS AND TRUSTEES BILL 2022 CONSULTATION RESPONSE DOCUMENT ¶ 1.6 (2022). The proposed bill included topics other than the Rule.

339. *Id.* ¶ 4.4.

The consultation document introduced the bill by describing the Isle of Man's trust law as having diverged from England's less than the Channel Islands' and that of "other International Finance Centres further afield," which it described as giving those jurisdictions the benefit of "regular and proactive developments" in trust legislation.[340] Conceding that "the persuasive application of England's voluminous and well-respected precedent has been of benefit to Manx practitioners," it went on to note "a growing consensus that the Island's trust legislation needs updating to provide a landscape which is clearer, more competitive and more reflective of common practice in the sector."[341]

The statutory power applies to "the exercise of a power by a trustee over or in respect of a trust or any transaction affecting or concerning trust property."[342] The courts are empowered to make any transfer or other disposition "voidable and has such effect as the court may determine" or "void from the time of its exercise."[343] As with the earlier statutes, the court may make such orders where the trustee has failed to take into account relevant considerations or has taken into account irrelevant considerations.[344] No finding of fault on the part of the trustee or any other person giving advice about the exercise of the power is required.[345] Trustees, beneficiaries, protectors, and, with leave of the court, any other person can apply to the court for relief.[346] The act applies to trusts created before its passage as well as those created afterwards.[347]

### H. EVOLUTION OF THE STATUTORY RULE

The Clifford Chance briefing note cited above speculated whether other IFCs would "allow Jersey to offer this difference [its statutory *Hastings-Bass* remedy] for long remains to be seen."[348] They did not. All seven versions of the statutory Rule share important elements. All define the conditions where the Rule applies in similar, often identical, terms; all give the courts broad discretion in shaping a remedy; and all dispense with the requirement of a breach of trust or a duty. The

340. *Id.* ¶ 1.3
341. *Id.* ¶ 1.4.
342. Trusts and Trustees Act 2023 (Act No. 2023/0326) (Isle of Man) art. 55A (1).
343. *Id.* art. 55A (2).
344. *See Id.* art. 55A (3).
345. *Id.* art. 55A (4).
346. *Id.* art. 55A (1), (6).
347. *Id.* art. 55A (7).
348. Clifford Chance, *supra* note 3, at 7.

differences are primarily connected with subsidiary matters. Starting with Bermuda, all but the Isle of Man specifically protect bona fide purchasers for value of trust property who were unaware of the conditions that led to the Rule being invoked. [349] Again, starting with Bermuda, there is increasing specificity in the list of who can seek relief, expanding on Jersey's initial list of trustees, beneficiaries, and persons exercising powers to include the attorney general (for purpose trusts), protectors, successors in title, and other persons (with leave of court). [350] Three (Jersey, DIFC, and Isle of Man) explicitly preserve the power to setting aside the transfer of property to a trust.[351] Broadly speaking, the evolution of the statutory Rules is toward greater detail but without any fundamental differences in the expression of the key powers granted to the courts.

One key player in the development of the statutory versions of the Rule by IFCs appears to be STEP. Not only do several of the accounts of the drafting of the statutes above reference a role for STEP but various accounts of the reaction to the UK Court of Appeals judgment in *Pitt/Futter* mention STEP as being focused on the issue. For example, a blog post from Mauritius on 18 March 2011 noted that STEP had "recently alerted members to the worrying implications" of the Court of Appeals' judgment[352] and STEP's chair delivered a lecture on "The Rule in Hastings-Bass" on April 2, 2012 in Australia.[353] It seems likely that the organization played an important role in sharing technical information on developing statutory versions of the Rule for use by members in IFCs to use in seeking changes.

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349. Trustee Amendment Act, 2014 (Berm.) art. 47A (6); Trustee Act, 1996 (Ch. 176) (Bah.) (amended 2016) art. 91C (5); Trust Law, 2018 (DIFC Law No. 4 of 2018) (U.A.E.) § 28(2); Trusts Law (Cayman Is.) (current version at Law 4 of 2019) art. 64A (5); Trustee Act, 1961 (Cap. 303) (Virgin Is.) (current version at No.12 of 2021) § 59A (5).

350. Trustee Amendment Act, 2014 (Berm.) art. 47A (6); Trustee Act, 1996 (Ch. 176) (Bah.) (amended 2016) art. 91C (5); Trust Law, 2018 (DIFC Law No. 4 of 2018) (U.A.E.) § 28(2); Trusts Law (Cayman Is.) (current version at Law 4 of 2019) art. 64A (5); Trustee Act, 1961 (Cap. 303) (Virgin Is.) (current version at No.12 of 2021) § 59A (5); Trusts and Trustees Act 2023 (Act No. 2023/0326) (Isle of Man) art. 55A (6).

351. Draft Trusts (Amendment No. 6) (Law 201), 2013 (Jersey) art. 47E ; Trust Law, 2018 (DIFC Law No. 4 of 2018) (U.A.E.) § 29; Trusts and Trustees Act 2023 (Act No. 2023/0326) (Isle of Man) art. 55A (6).

352. *STEP says Hastings Bass judgement severely restricts taxpayers ability to rectify inaccurate advice*, AMAR (Mar. 18, 2011), https://amarbheenick.blogspot.com/2011/03/step-says-hastings-bass-judgement.html.

353. *The Rule in Hastings Bass (Advertisement)*, N.S.W. BAR ASS'N (Apr. 2, 2012), https://nswbar.asn.au/the-bar-association/publications/inbrief/view/af77f7e6a3215c1d05301740287c05d6.

## I. THE NON-ADOPTERS

Five of the twelve offshore jurisdictions considered here (Anguilla, the Cook Islands, Gibraltar, Guernsey, and St. Kitts & Nevis) have not adopted statutory versions of the Rule, although one (Guernsey) was reported earlier to be in consultations over whether to do so.[354] The failures of Anguilla, the Cook Islands, Gibraltar, and St. Kitts & Nevis to adopt statutory versions of *Hastings-Bass* are not surprising.[355] The trust sectors in all four are focused heavily on asset protection trusts (APTs).[356] Three of the four (all but the Cook Islands) do not appear to invest in regular amendments to their trust laws;[357] while all compete for multiple lines of IFC business, non-APT trusts are not their primary products as jurisdictions.[358]

Asset protection trusts' primary benefit is placing assets out of reach of potential creditors, rather than executing the types of

354. Christian Hay, *The Time Has Come for Guernsey to Codify Its 'Get Out of Jail Free' Card . . .* , COLLASCRILL (Mar. 19, 2018), https://www.collascrill.com/articles/the-time-has-come-for-guernsey-to-codify-its-get-out-of-jail-free-card/.

355. Note that St. Kitts & Nevis is a federation and both subsidiary jurisdictions have their own laws aimed at the financial sector.

356. *See, e.g.*, *Offshore Trust Services,* FIRST ANGUILLA TRUST CO., https://www.firstanguilla.com/offshore-trust-services/; *Gibraltar Trusts & Fiduciary Services*, HASSANS, https://www.gibraltarlaw.com/expertise/trusts/trust-fiduciary-services/; *A Complete Guide to Nevis Asset Protection Trusts*, DOMINION (Apr. 3, 2024) https://www.dominion.com/asset-protection/nevis-asset-protection-trust.

357. Trusts Act, 2014 (R.S.A., Ch. T70) (Anguilla); International Trusts Act 1984 (Cook Islands) (amended 2021); Trusts Act, 1996 (Ch. 5.19) (St. Kitts & Nevis) (amended 2020); Nevis International Exempt Trust and Ordinance, 1989 (Ch. 7.03 (N)) (St. Kitts & Nevis) (amended 2017); Trustees Act (Act. No. 1895-18) (Gib.). Gibraltar relies heavily on case law for its trust law, with some targeted statutes covering topics like purpose trusts, with its primary trusts statute originating in 1895. (Based on my review of Gibraltar legislation. The 1895 Trustee Act has been amended or supplemented with regulations just 15 times in the past 130 years, with just six of those dating after 1983.) The Cook Islands created the APT and have focused their trust business on that. Gideon Rothschild, *Establishing and Drafting Offshore Asset Protection Trusts*, *in* ASSET PROTECTION STRATEGIES: PLANNING WITH DOMESTIC AND OFFSHORE ENTITIES (Alexander A. Bove, Jr. ed., 2002).

358. That does not mean that these jurisdictions do not innovate. For example, all have been pioneers in importing the civil law foundation and Anguilla and Gibraltar are both active in developing digital asset legislation. Henry Wiggin, *The Anguilla Foundation Act*, 13 TRS. & TRS. 158 (2007); Richard Pease, *St Kitts: It Looks Like a Company and Works Like a Trust—A Case Study from St. Kitts*, 17 TRS. & TRS. 616 (2011); Jan Dash & Leonora L. Walwyn, *The Multiform Foundations Ordinance of Nevis*, 16 TRS. & TRS. 503 (2010); Adrian Pilcher, *Gibraltar Foundations, DLT, and ICOs*, 24 TRS. & TRS. 565 (2018); *Anguilla: The Crypto Regulation Haven for Utility Token Offerings and Exchanges*, KELMAN LAW (Aug. 17, 2020), https://kelman.law/anguilla-utility-token-regulation/. The Cook Islands recently introduced a new Relationship Property Trust statute. *See* International Relationship Property Trusts Act 2021 (No.14) (Cook Islands).

complex or commercial transactions or pension fund structures more common in other IFCs (and where the "undo" button provided by statutory *Hastings-Bass* provisions are more likely to be needed). As a result, it is not surprising that these jurisdictions have not made the same type of investments in statutory innovations outside of their core businesses. Moreover, *Hastings-Bass* powers might even undermine the asset protection products in these jurisdictions if a settlor/beneficiary in an onshore jurisdiction sought to invoke them as part of an effort to purge him- or herself from contempt charges in an onshore court looking to recapture assets from the offshore trust. For these four jurisdictions, therefore, the lack of a post-*Pitt/Futter* statute is unsurprising.

This leaves us with the puzzle of Guernsey, which has an active trusts sector and has invested heavily in developing its trust law. Like its close neighbor Jersey, Guernsey has a substantive Trust Law that it regularly amends, and like the other jurisdictions that adopted a statutory *Hastings Bass* rule, it has a well-regarded judiciary capable of applying a discretionary rule. However, in several cases Guernsey courts considering requests to apply the Rule post-*Pitt/Futter* have suggested (without deciding) that Guernsey would likely follow *Pitt/Futter* in narrowing the doctrine's reach.[359]

Guernsey's failure to adopt statutory *Hastings-Bass* legislation is puzzling, all the more because a 2020 commentary by a Guernsey advocate suggested that Guernsey was likely to follow *Pitt/Futter* in restricting the doctrine, despite its courts having been previously "sympathetic to such claims".[360] Similarly, a 2018 commentary on recent Guernsey *Hastings-Bass* decisions titled "*The time has come for Guernsey to codify its 'get out of jail free' card . . .* " mentioned that "Practitioners in Guernsey have made appropriate representations to the relevant States Committee with a view to enacting legislation following the wider test similar to that already brought in by other

359. M v. St. Anne's Trs., Judgment [2018] Royal Court of Guernsey (Jan. 12, 2018), ("I can see no reason not to accept the appropriateness of the revised approach in Pitt v Holt. The legal rationale for limiting the legal availability of the Hastings Bass jurisdiction is the same for Guernsey law as for English law. It would therefore not be right, in my judgment . . . to follow the course which has been trailed in the Isle of Man"); *In re* the Aylesford/Achilles Trusts [2018] Royal Court of Guernsey ("Unless and until legislation is enacted in this jurisdiction, I continue to hold that Guernsey law should follow Pitt v Holt and I respectfully decline to follow the robust view expressed by Deemster Doyle in the Isle of Man"); HCS Trs. Ltd. v. Camperio Legal and Fiduciary Servs. Plc [2015] Royal Ct. of Guernsey (June 30, 2015) (unreported).

360. Raymond K. Ashton, *Guernsey: Bright Prospects for the Future?*, IFC REV. (Dec. 10, 2020),
https://www.ifcreview.com/articles/2020/december/guernsey-bright-prospects-for-the-future/.

offshore jurisdictions" and concluded that "We expect the Hastings Bass regime in Guernsey to be subject to further change in the near future."[361] It thus appears that Guernsey's trust sector sought a *Hastings Bass* statute but did not succeed.

One explanation might be the Guernsey courts having previously held that public policy did not require Guernsey courts to protect foreign tax revenue, which might enable a court to address trustee errors under either *Pitt/Futter's* expansion of mistake or within the shrunken version of *Hastings-Bass* those opinions had left in place.[362] For example, the Guernsey Court of Appeal in *M v. St. Anne's Trustees* allowed the voiding of a transaction under the post-*Pitt/Futter* version of the Rule in a case where a trustee's failure to take tax advice led the beneficiary of a pension trust to repay a loan in a manner that incurred a £1.8m tax charge when he could have done so in an alternative way that would have avoided the charge.[363] As with the UK Supreme Court's approach, it required breach of a fiduciary duty to invoke the rule. Commentary on the judgment suggested that the Court of Appeal

> departed from the strict requirement set out in Pitt v Holt for there to be a breach of fiduciary duty, finding that a breach of a duty, whether fiduciary or not, will suffice as long as it is of sufficient seriousness for the Court to exercise its discretion. Whilst the Court of Appeal considered that the scope of the

361. Hay, *supra* note 354.

362. Ashton, *supra* note 360. *See also* Mathew Newman, *Two Islands, Two Courts, Two Laws – and Two Different Approaches to Hastings-Bass*, OGIER (May 14, 2018), https://www.ogier.com/news-and-insights/insights/two-islands-two-courts-two-laws-and-two-different-approaches-to-hastings-bass/ ("In the event that the appeal in *M* is successful, it might not be considered necessary to enact legislation equivalent to that in Jersey. However, if unsuccessful, there may well be pressure from the trust and legal profession for the position to be enshrined in statute, to ensure there is no mistaking what the law in Guernsey is."). Ashton does note that the Guernsey-UK double tax agreement does require Guernsey to assist the UK in revenue claims. *Id. In re* estate of Mr. A. Gamble Deceased [2003], Judgment 30/2003, Royal Court of Guernsey. The Royal Court used rectification (in place of, and without mentioning, *Hastings-Bass*) to alter a will where a mistake in tax advice as to the creation of a trust had led to a tax liability of at least £100,000. In doing so, the court commented on its broad powers under the Trusts (Guernsey) Law, 1989 which law is of great importance to people from outside this island who come to make use of the local financial services industry and put assets here for reasons of security and prudent financial planning. This Court has imperceptibly perhaps accepted that along with the trusts regime incorporated into our law by the Law of 1989 there is a power for this Court to rectify trust instruments in the same way as courts in other jurisdictions where there is an established law of trusts have power to do so. *Id.* ¶ 3.

363. M v. St. Anne's Trs., Judgment, [2018] Royal Court of Guernsey (Jan. 12, 2018), ¶¶ 7–16, 81.

> rule in Hastings Bass applies in Guernsey to 'like effect' as in England, the door remains open to further adaptation of the rule by the Guernsey courts.[364]

The Court of Appeal also overruled a first instance judgment that had added a requirement to the *Pitt/Futter* formulation that it must be unconscionable to leave the situation unresolved.[365] (The Deputy Bailiff had taken note in her judgment that Guernsey had not rejected *Pitt/Futter's* modification of the Rule and applied the same "legal rationale" for limiting the availability of relief under the Rule as in English law.)[366]

Perhaps, as a Guernsey lawyer concluded, the result of *St Anne's Trustees* is that "[b]eneficiaries of Guernsey Trusts can . . . take comfort that in appropriate circumstances where a trustee has erred, transactions can still be set aside without the need to demonstrate 'unconscionability'."[367] The judgment also demonstrated that "relief in the form of Hastings-Bass is available and the court is willing to assist those who have a tax issue (or who have suffered some other unintended consequence of a trustee's action)" and that the process of seeking *Hastings-Bass* relief in Guernsey "now has a degree of predictability following the Court of Appeal's judgment."[368] In doing

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364. Karen Le Cras, Elaine Gray, & Julia Schaefer, *Court of Appeal Delivers Landmark Judgment in M v St Anne's Trustees Limited Clarifying the Application of Hastings-Bass Relief in Guernsey Law*, LEXOLOGY (July 3, 2018), https://www.lexology.com/library/detail.aspx?g=7a5bb6a9-4da3-4256-a756-affdbfff4808.

365. M v. St. Anne's Trs., Judgment, [2018] Royal Court of Guernsey (Jan. 12, 2018), ¶¶ 165–67. *See also* Jennifer Seaman, *Guernsey's Recent Controversial Decision on the So-called 'Rule in Hastings-Bass': M v. St. Anne's Trust Limited*, 24 TRS. & TRS. 444, 449 (2018).

366. M v. St. Anne's Trs., Judgment, [2018] Royal Court of Guernsey (Jan. 12, 2018). Indeed, she also noted that Guernsey should guard against allowing "the same breadth of availability to be reintroduced by the back door, by being over-astute to discern the (now necessary) breach of duty on the part of the trustees, by applying an over-exacting standard of conduct so as to enable the jurisdiction to be invoked." *Id.* ¶ 50.

367. *Hastings Bass in Guernsey—M v St Anne's Trustee's [sic] Limited (Guernsey Court of Appeal)*, WALKERS ADVISORY (August 2018), https://www.walkersglobal.com/images/Publications/Advisory/2018/08.28.2018_Walkers_-_Guernsey_-_Hastings_Bass_-_Aug2018.pdf.

368. Christopher Edwards et al., *Some Mistakes* Are *Meant to Be Fixed: A Return to a Measure of Predictability in Guernsey* Hastings-Bass *Orders*, MOURANT UPDATE (July 2018), https://www.mourant.com/file-library/2018---media/2018---updates/some-mistakes-are-meant-to-be-fixed-a-return-to-a-measure-of-predictability-in-guernsey-hastings-bass-orders.pdf. *See also* Anthony WIlliams, *Guernsey Court of Appeal Hands Down Landmark Hastings Bass Relief Judgment*, APPLEBY(June 20, 2018), https://www.applebyglobal.com/news/guernsey-court-of-appeal-hands-down-landmark-hastings-bass-relief-judgment/ (stressing predictability point).

so, it did not provide "any overriding test for the exercise of discretion under the Hastings-Bass principle," commenting that "we do not think this would be a practicable or indeed desirable exercise" because "[i]nevitably, the exercise of discretion is likely to be fact specific."[369] Further, Guernsey courts have been willing to use the law of mistake to address problems which might previously have been addressed under *Hastings Bass*.[370]

## V. EFFICIENT ENTERPRISE LAW MARKET OR RACE-TO-THE-BOTTOM?

Evaluating the Rule's role in a legal system requires some sense of the policy issues at stake. Critics of the English court-derived Rule attacked it for:

- incoherence[371] and uncertainty;[372]
- discouraging trustees from seeking professional advice;[373]
- being "far laxer" than the law of mistake;[374]
- encouraging abuse by intentionally reckless

369. M v. St. Anne's Trs., Judgment, [2018] Royal Court of Guernsey (Jan. 12, 2018), ¶ 82.

370. *See, e.g.*, Whittaker v Concept Fiduciaries Ltd., Judgment, [2017] Royal Court of Guernsey 15/2017; *In re* B Tr. [2017] Royal Court of Guernsey (unreported).

371. Lightman, *supra* note 240, at 185 ("no satisfactory or convincing exposition of the law 'according to *Hastings-Bass'* has yet emerged"); Neuberger, *supra* note 238, at 194 ("the circumstances in which it applies are unclear" and "the results of its application are unclear"); Tony Molloy, *What Really* Is *the Rule in* Hastings-Bass?, 15 TRS. & TRS. 200, 218 (2009) ("a line of 'authority' based on hopes, wishes, and spurious reasoning rather than on principle"); Colebrook, *supra* note 61, at 211 ("Notwithstanding the ability of courts to state the rule in *Hastings-Bass* clearly, its scope remained uncertain and varied from case to case.").

372. Colebrook criticized the pre-*Futter* Rule for having "three crucial uncertainties" that "invariably made it difficult for the court to apply the rule in *Re Hastings-Bass* consistently": (1) "did the rule apply solely to dispositive powers?" (2) "should the rule be governed by the requirements for rescission?" and (3) "did the application of the rule result in the transaction being void or voidable?" Colebrook, *supra* note 6161, at 21415. Kerry offered similar criticisms. Simon Kerry, *Control of Trustee Discretion: The Rule in* Re Hastings-Bass, U. COLL. LONDON J.L. & JURIS. 46, 48–50 (2012).

373. Neuberger, *supra* note 238, at 193.

374. *Id.* at 197.

trustees;[375]

- unfairly providing greater remedies for trustees than for non-trustees;[376]
- being overbroad; [377] and
- giving an advantage to "persons who conduct their affairs through trusts" over those who do not.[378]

The statutory versions of the Rule resolved many of the pre-*Futter* criticisms of the Rule. In general, all of the statutes clarify the void/voidness, would/might, and scope questions.[379] Indeed, in 2007, Hagen called for a statutory version of the Rule that provided discretionary rather than mandatory relief and which rendered transactions voidable rather than void and the IFC statutes all take this approach.[380]

The main issue not addressed by converting the Rule to well-drafted statutory form is the response to the question of why trustees should receive more protection than individuals do with respect to their own property.[381] Some defenders of the Rule argue that it is

375. Steven Kempster, *Mistakes and Trusts: When and How Can the Slate Be Wiped Clean?*, 15 TRS. & TRS. 651, 660–61 (2009).

376. Kempster, *supra* note 375, at 660.

377. For example, Justice Park in *Breadner v. Granville-Grossman* argued that, "It cannot be right that whenever trustees do something that they later regret and think that they ought not to have done, they can say that they never did it in the first place." Breadner v. Granville-Grossman [2001] Ch 523, 543 (Eng.). Similarly, a leading UK trusts text, *Underhill and Hayton*, commented that "[o]ne's instinctive reaction is that the *Hastings-Bass* principle is too wide—too good to be true—and that trustees, unlike others, can use it whenever it suits them to wriggle out of the reckless or negligent decisions which turn out to have unfortunate consequences." SINEAD AGNEW ET AL., UNDERHILL AND Hayton: LAW RELATING TO TRUSTS AND TRUSTEES § 57.24 (David Hayton et al. eds., 18th ed. 2010).

378. Hinks, *supra* note 88, at 81.

379. *See supra* Part IV.

380. Dakis Hagen, *The Unruly Rule in* Re Hastings-Bass*: Are the Limits Still Unclear?*, 13 TRS. & TRS. 238, 241 (2007).

381. Smith summarized the criticisms based on controlling the application of the Rule as

> Why should trustees be allowed to undo transactions that others, dealing with their own property, cannot undo? Why should they be allowed to avoid in this way the consequences of their own carelessness, or that of their advisors? Will commercial parties become unwilling to deal with trustees, knowing that the transaction is liable to be set aside if the trustees had poor advice?

Smith, *supra* note 121, at 300. *See also* Kerry, *supra* note 372, at 52; Monica Bhandari,

needed as "part of a category of privileges available to [trustees] which rebalances the otherwise onerous nature of their office . . . ."[382] For example, one argues that "[t]he duty of a trustee is a heavy burden" and "[a]pplication of the rule has allowed the trustees to avoid personal liability to compensate the trust fund for any losses."[383] Other defenders' response was that it is not for trustees' benefit that the power exists, but for the benefit of the beneficiaries, and that the answer to the question was that it was because trustees were not acting on their own property.[384]

These responses point in the direction of what I think is the most important purpose of the Rule. Defenders of the Rule note that direct actions against trustees or their advisors face significant difficulties and so the Rule provides relief for beneficiaries without those difficulties.[385] Indeed, one critic of *Pitt/Futter* noted that *Pitt/Futter*'s restriction of the Rule to where the trustees have sought professional advice "potentially leaves beneficiaries without any means of redress if they incur tax liabilities that were not foreseen because of the negligence of the professional advisors."[386] This is so because beneficiaries have no direct cause of action against an advisor to a trustee,[387] identifying potential beneficiaries to serve as plaintiffs can be difficult,[388] finding the right defendant can be challenging,[389] and

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*Tax Advantages for Bungling Trustees*, 7 J. TAX RSCH. 54, 62 (2009).

382. Hagen, *supra* note 380, at 241.

383. Judith Bray, *Sink or Swim? The Future for the Rule in* Re Hastings-Bass, 18 TRS. & TRS. 96, 112 (2012).

384. UNDERHILL AND HAYTON, *supra* note 377, at 915. *See also* Edward Hewitt, *The End of* Re Hastings-Bass, 17 TRS. & TRS. 704, 711 (2011) (discussing how the Rule benefits beneficiaries).

385. Bray, *supra* note 383, at 114; Twidale, *supra* note 246, at 308. *See also* Mitchell, *supra* note 238, at 36.

386. Twidale, *supra* note 246, at 303. Note that the advisors who provide bad advice suffer reputational consequences of the poor quality of their advice becoming known through the application.

387. Hewitt, *supra* note 384, at 710 ("Where professional advisers have been retained by trustees to advise them in relation to the tax consequences of a prospective exercise of a discretionary power, it seems that the advisers' duty of care will generally be owed only to the trustees, and not to any of the beneficiaries personally."); *see also* Pearce, *supra* note 97, at 198 ("Where trustees seek professional advice, the primary duty to provide competent advice is owed to the trustees. However, the liability to the trustees may be meaningless, for if the trustees are not in breach of trust because they have sought and followed professional advice, the trustees will bear no loss for which they can seek to be indemnified.").

388. Pearce, *supra* note 97, at 198 ("It may be hard to identify who are appropriate claimants, particularly in the case of discretionary trusts, those where there are unborn beneficiaries, or where there is a power to add beneficiaries.").

389. *Id.* ("Where more than one adviser has been consulted it may not be obvious who is responsible.").

trustees themselves are often protected by exoneration clauses in the trust deed (as were the trustees in *Futter*).[390] As Hewitt put it, "the beneficiaries will see the value of their trust fund diminish without being able to do much about it."[391] Another benefit of the Rule is that it incentivizes trustees to explain their decisions, which the law generally does not require.

The Rule is also useful because of the complexity of the areas of law in which it is primarily invoked, pensions and tax. One of the more neutral formulations of the policy question raised by the Rule in *Hastings-Bass* was by Davies and Virgo, who posed the question as "Trustees often seek to make appointments to beneficiaries in a tax-efficient manner, and seek professional advice in order to do so. Unfortunately for all concerned, sometimes that advice is erroneous. Should the courts then be able to grant equitable relief and unwind the dispositions made?"[392] One reason this might be is that the type of tax error seen in *Sieff* "is not unusual" because "[t]axation law is pretty complicated."[393] Even Lord Walker, the author of the Supreme Court opinion, conceded in a lecture in 2014 that

> Trustees, whether of pension trusts or of family trusts, have to take decisions in an environment of ever-increasing complexity. Trust law has indeed become a bit easier to cope with as a result of the reform of the rule against perpetuities, but tax law never gets any easier. Nor does the regulatory regime affecting pension trusts. The range of investment opportunities open to trustees is wider, and correspondingly more perilous, than in earlier times. For all these reasons trustees need skilled professional advice from lawyers, accountants, investment advisers, estate agents and so on. And sometimes, unfortunately but inevitably, professional advisors fail in the performance of their duties of care.[394]

Given the difficulties in protecting beneficiaries against bad advice given to trustees, the Rule serves a useful purpose.

Rather than a rule for saving tax avoiders from their advisors'

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390. Twidale, *supra* note 246, at 303–04. *See also* Hewitt, *supra* note 384, at 710 ("[I]t should not be forgotten that many modern trust instruments contain widely-drafted exemption clauses and may even include no-contest clauses, both of which have been recognized as valid and enforceable in principle.").

391. Hewitt, *supra* note 384, at 711.

392. Paul S. Davies & Graham Virgo, *Relieving Trustees' Mistakes*, 21 RESTITUTION L. REV. 74, 74 (2013).

393. Smith, *supra* note 121, at 285.

394. Walker, *supra* note 95, at 762.

negligently bad advice or special treatment for those holding their property through trusts, I contend that the Rule is a component of a broader set of legal institutions that facilitates trust arrangements.[395] Such arrangements often seek to reduce the total tax burden of those benefiting from them, but they also include a wide range of other benefits, including providing professional management of complex investment portfolios for the benefit of future generations, allowing people to structure who will inherit their property and under what conditions and serving the business uses of trusts.

IFCs offer advantages for these types of trusts. For example, one of a small number of judges, who are carefully selected for their expertise and experience in complex legal matters, will hear any legal dispute that arises in the Jersey courts over a trust governed by Jersey law.[396] The Trusts (Jersey) Law 1984, which has been amended seven times through 2023, provides an overarching framework for trust law.[397] Jersey's legal profession includes multiple experienced trust lawyers and the island also has multiple trust management professionals, investment advisors, etc. who support the trust industry. Within that context, the Rule operates a bit differently than it does in a larger jurisdiction. By comparison with Jersey, English judges have a caseload with a lower proportion of trust cases and English trusts statutes are primarily concerned with administrative details rather than substantive issues. While the English bar certainly includes many experienced trust lawyers (including Lord Walker before he was named to the bench) and London provides experienced trust management professionals, investment advisors, etc., those are generally connected to the same firms in Jersey or are readily available to serve trusts governed by Jersey law. The primary difference between Jersey and England with respect to trusts is thus the legal framework (laws and judiciary) under which the trust will operate. The same is true of the other leading IFCs.

By their nature, trusts aim to solve the problem of addressing unknown future issues by delegating discretionary power to a trusted third party to make those decisions (as guided by the trust documents, letters of wishes, etc.). The primary controlling law to ensure that the trustee does not scamper off with the property in question is the

395. Indeed, it does so in a broader class of arrangements offshore, where the Rule has been extended beyond the trust context. *See* ASHDOWN, TRUSTEE DECISION MAKING, *supra* note 6, at 201.

396. Two jurats, a unique feature of the Jersey legal system that brings in non-lawyers with relevant expertise to sit with the judge in hearing the case, will aid the judges that hear trust disputes in contentious matters.

397. Morriss, *supra* note 13, at 11.

imposition of fiduciary duties on the trustee. Lawsuits over breaches of fiduciary duties can thus address gross violations of the trust the settlor has placed in the trustee. However, there are many actions by trustees that can impose losses on beneficiaries without violating fiduciary duties. The Rule addresses one important set of those: bad decisions by trustees made in reliance on bad (which is possibly, but need not be, negligent) advice.[398] These bad decisions frequently have severe tax consequences[399] and it appears that the English courts' change of heart was at least in part the result of a turn in elite opinion against efforts to avoid taxes.[400] In IFCs, judicial and legislative attitudes have been more inclined to the view of Jersey's Royal Court in *In re S Trust*: "In our view, Leviathan can look after itself . . . .[I]n Jersey it is still open to citizens so to arrange their affairs, so long as the arrangement is transparent and within the law, as to involve the lowest possible payment to the tax authority. We see no vice in this approach."[401]

In a small jurisdiction with a small, expert judiciary, giving judges the power to fix errors is a different thing from giving the same power to a larger, less expert judiciary in a large jurisdiction. Moreover, in a jurisdiction whose reputation depends on its persuading people to bring it business in this area, having a safety valve like this – again, one administered by a group of experts – is a useful feature. This is particularly true because of the difficulties of a trust beneficiary seeking relief against a trustee's advisor's bad advice.

Particularly within the context of IFC jurisdictions, therefore, the Rule plays a different role than it does in a jurisdiction like England. The IFCs which have adopted statutory *Hastings-Bass* provisions all provide legal environments in which constraining the Rule's application can be entrusted to the judiciary with greater confidence than it can in a larger jurisdiction. Lord Justice Lloyd's suggestion in *Sieff* that the courts cabin the Rule's application by insisting on stringent application of the tests, taking a reasonable and not overly demanding view of what the trustees needed to take into account, and having a critical approach to the argument that the trustees would have acted differently if they had realized the true position,[402] is more readily accomplished in offshore than it would be in England. In fact, this is exactly what is happening offshore, as seen in Justice Kawaley's opinion in *In re Settlements Made by Declarations of Trust* where he

398. *See supra* Part II.
399. *Id.*
400. *See supra* note 246 and accompanying text.
401. *In re* R [2011] JRC 117, ¶ 39].
402. Sieff v. Fox [2005] EWHC (Ch) 1312, ¶ 82.

took the preliminary view that the Cayman *Hastings-Bass* provision included an implicit requirement of good faith.[403] Indeed, the English judiciary's hostility to the Rule, which seems to stem in part from the political climate with respect to tax avoidance,[404] suggests why a settlor might be less willing to see the English courts as desirable long-term guardians of a trust.

## Conclusion

The statutory developments surrounding the Rule in Hastings-Bass across various IFCs highlight the competitive dynamics within the global law market. By codifying and preserving the Rule, these jurisdictions have strategically enhanced their legal frameworks to offer more certainty and flexibility in trust administration, thereby attracting international business. The adoption by the seven jurisdictions discussed above shows the ability of small jurisdictions to compete in the global law market by innovating in law. The pattern of adoption shows – with the exception of Guernsey – adoptions occurred in the jurisdictions that theory predicts should adopt and not in those which invest relatively little in developing their trust law. In addition, the divergence of English and IFC trust law is further evidence of IFCs' ability to build a trust law that puts greater reliance on the exercise of judicial discretion, highlighting the importance of IFC judiciaries to their success in the global law market.

The statutory interventions in jurisdictions like Jersey, Bermuda, The Bahamas, the Dubai International Financial Center, the Cayman Islands, and the British Virgin Islands represent a positive evolution of the Rule. These jurisdictions have successfully addressed the criticisms and limitations inherent in the pre-*Pitt/Futter* English common law version by clarifying the conditions under which the Rule applies, specifying that actions are voidable rather than void, and ensuring that courts have broad discretion in crafting remedies. By doing so, they have reinforced their positions as attractive destinations for trust formation and administration. The initial application of the statutory rules by IFC courts shows they are using these powers in a thoughtful and constructive way.

These legislative actions reflect a broader understanding of the law market where competition among jurisdictions can lead to improved legal services. The enhancements brought about by

403. *In re* Settlements Made by Declarations of Trust Dated 9 May 2013 (The "Trusts"), FSD 228 OF 2023, ¶ 23 (Grand Ct. of the Cayman Is., Sept. 28, 2023) (VLex).

404. *See supra* note 246 and accompanying text.

statutory *Hastings-Bass* provisions are not merely technical adjustments but strategic moves that underscore the importance of maintaining robust and responsive legal systems that cater to the needs of sophisticated financial and trust services. This adaptability and commitment to providing high-quality legal infrastructure contribute positively to the global economy by facilitating efficient and secure international financial transactions.

Overall, the statutory codification of the Rule in *Hastings-Bass* by these IFCs illustrates how jurisdictional competition can lead to beneficial legal innovation. Rather than engaging in a "race to the bottom," these jurisdictions have demonstrated how thoughtful and targeted legislative changes can enhance their legal offerings, thereby reinforcing the value they provide in the global financial system. Further, the ability to create trust law rules that depend on the careful exercise of judicial discretion is evidence of their evolution into something more than derivatives of English law.