Trustees' taxing mistakes – offshore perspectives on the Supreme Court's decision in *Pitt v HMRC*

In our briefing note of last month (*Trustees' taxing mistakes – Supreme Court applies a likeability test*), we discussed the Supreme Court's judgment in the jointly heard appeals of *Pitt v HMRC* and *Futter v HMRC*. This confirmed that the rule in *Hastings-Bass* allows the court to set aside decisions made by trustees only if the trustees have committed a breach of duty. The Supreme Court also stated that the skylight left open to the court to set aside a voluntary disposition on grounds of mistake requires there to be a causative mistake of sufficient gravity. A month on, we revisit the judgment with experts in the offshore trusts community who explain how they expect their jurisdictions to react to the Supreme Court's decision. There are going to be some notable differences which in turn mean that trustees may need to consider migrating a trust from one jurisdiction to another. A failure to do so could itself expose trustees to unwelcome litigation risk.

The rule in *Hastings-Bass*

The rule in *Hastings-Bass* started from the unquestionably correct proposition that, in exercising their powers, trustees must take into account relevant factors, ignore irrelevant factors, and not act capriciously. If the trustees took a step but later realised that this step gave rise to adverse tax consequences, the trustees could argue that they had innocently failed to take into account a relevant factor, namely the correct tax implications, and, as a result, that their decision should be set aside by the court.

The Supreme Court found that where there was an error by trustees in acting outside their powers, the trustees' act is void. However, where there is an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of their powers, the trustee's decision is only voidable, i.e. liable to be set aside by the court. The court will only set aside the decision if it was made by the trustees in breach of their duties.

If the trustees sought advice from apparently competent advisers as to the implications of the course they proposed, and followed the advice, the trustees will not in general be acting in breach of their fiduciary duty even if the advice turns out to have been materially wrong.

Further, even if the trustees have acted in breach of their duties, the court has a discretion not to set aside their decision, taking into account, for example, the effect on third parties and beneficiaries.

The Supreme Court warned trustees that it is not for them to apply to have their own decisions set aside under the rule in *Hastings-Bass*. Beneficiaries or other affected parties should do so. The Supreme Court also commented that, if an application is made, the trustees should not assume that they will be able to recover their costs from the trust fund (though this may depend upon the terms of the trust).

Rescission on the ground of mistake

Pitt v Holt also addressed the jurisdiction of the court to set aside a voluntary disposition on grounds of mistake. The Supreme Court allowed the appeal in *Pitt v Holt* on this basis and set aside the discretionary settlement which was the subject of that case. The Supreme Court held:

- The requirement for rescission on the ground of mistake is simply

that there is a causative mistake of sufficient gravity. The test for this will normally be satisfied only when there is a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which is basic to the transaction.

- Consequences (including tax consequences) are relevant to the gravity of the mistake, whether or not they are basic to the transaction.
- A mistake must be distinguished from mere ignorance, inadvertence, or misprediction. Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but it can lead to a false belief or assumption which the law will recognise as a mistake.
- The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.
- The injustice (or, as Lord Walker put it, *"to use equity's cumbersome but familiar term, unconscionability"*) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable to leave the mistake uncorrected.

Mistake cases are therefore heavily fact sensitive, but where the Court is persuaded that a serious mistake has been made and that, in all fairness, a remedy should be found, it has the legal mechanism to do so, even if the mistake relates to the tax consequences of what was done.

A judicial shot across the offshore bows

In the course of his judgment, Lord Walker sent a critical warning shot across the bows of the offshore trust industry. His comments suggest that judges will scrutinise more carefully in future how trustees go about making their decisions.

Lord Walker affirmed the view of Lloyd LJ's in the Court of Appeal that *"fiscal consequences may be relevant considerations which the trustees ought to take into account"* , but went on to note:

- *"In the private client world trusts are mostly established by and for wealthy families for whom taxes (whether on capital, capital gains or income) are a constant preoccupation. It might be said, especially by those who still regard family trusts as potentially beneficial to society as a whole, that the greater danger is not of trustees thinking too little about tax, but of tax and tax avoidance driving out consideration of other relevant matters."*
- *"That is particularly true of offshore trusts. They are usually run by corporate trustees whose officers and staff (especially if they change with any frequency) may know relatively little about the settlor, and even less about the settlor's family. The settlor's wishes are always a material consideration in the exercise of fiduciary discretions. But if they were to displace all independent judgment on the part of the trustees themselves (or in the case of a corporate trustee, by its responsible officers and staff) the decision-making process would be open to serious question."*

Lord Walker even went on to express his doubts as to the role that some offshore trustees may be playing, *"it may be that some offshore trustees come close to seeing their essential duty as unquestioning obedience to the settlor's wishes"* and noted that, where offshore trustees are acting in this way, i.e. where the trustee is *"a body corporate acting as a sort of in-house facility provided by a firm of* professional advisers", it may be hard to decide whether the separate personality of the trustee insulates it from responsibility for errors by individual professionals within the body corporate.

All trustees, not just those offshore, will want to take Lord Walker's comments into account when updating their internal policies and procedures and their systems and controls and when training and developing their fiduciary officers as to how they should go about making their decisions.

Reactions from offshore

Experts from the offshore trusts community in Bermuda, the British Virgin Islands, the Cayman Islands, Guernsey, the Isle of Man and Jersey have given us their views on how they expect their jurisdictions to react to the Supreme Court's decision in Pitt.

It is clear from the views of offshore counsel that varying approaches are

taken, or are likely to be taken, in different jurisdictions. Jersey in particular seems likely to codify rules which would breathe fresh life into the rule in *Hastings-Bass* for Jersey law trusts. If so, this will raise the question as to whether trustees might seek to migrate a trust to Jersey in order to take advantage of the law there and remedy a past error. If Jersey does so, might the competitive nature of the offshore trusts industry lead other centres to do so too?

In our view, trustees will want to take advice in relation to each specific case and failing to do so may itself be problematic.

Bermuda

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Head of Litigation, Cox Hallett Wilkinson

Bermuda courts will welcome the Supreme Court's decision in *Pitt v HMRC* for the clarification it brings to this area of the law. Although technically only of highly persuasive value, the decision will be followed as if it was binding precedent. As a practical matter, however, it is highly unlikely that any application to the Bermuda Court to undo a trustee act will be challenged by a foreign government taxing authority such as HMRC or the IRS as was the case in *Pitt v HMRC*; and there will be very few cases where the tax liability arising from the trustee's act is a local one as Bermuda does not have income tax or a capital gains tax.

The number of cases in which a *Hastings-Bass* application has been made in the Bermuda Courts is very small (there are no reported decisions in which the principle has been relied upon).The effect of the UK Supreme Court's decision will be to reduce even further this number. Where the trustee acting within the scope of his powers has taken tax advice which turns out to be wrong, the position is now clear that there will not have been any breach of fiduciary duty and, therefore, no basis on which to set aside the transaction; and the trustee will be forced to rely on a possible claim against the advisers to compensate the trust for its loss.

British Virgin Islands

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Neither the BVI courts, nor those of the remainder of the Eastern Caribbean, have yet had to grapple with the issues raised in these cases. As a matter of precedent, whilst the BVI would view *Pitt v HMRC* as highly persuasive, it is not technically binding, and BVI courts routinely review the authorities from other commonwealth jurisdictions so that the judicial views expressed elsewhere, and the development of the law on *Hastings-Bass* and mistake in other countries would be of importance.

To the extent that the public policy of the United Kingdom shaped the Supreme Court's decisions, that consideration is likely to be very different in offshore financial centres, although it is of itself perhaps unlikely to persuade the Court to a different view. It may well be that the first time these issues do come to the fore, the case will end up before the Privy Council, since the differences in approach between the onshore and some offshore courts will be in stark relief, and the parties are unlikely to be content with a first instance or Court of Appeal decision.

Neither will the BVI be shy to legislate with regard to the rule in *Hastings-Bass* – offshore jurisdictions keep a close eye on each other's approach to these issues, and those who are perceived as having stolen a march do not tend to do so for long.

Cayman Islands

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The progress of the *Futter v HMRC* and *Pitt v HMRC* litigation through the English courts has been followed closely by trustees and attorneys in the Cayman Islands. Whilst not strictly binding on the Cayman Islands courts, the decision of the Supreme Court will in principle be regarded as authoritative and of strong persuasive effect. At present the rule in *Hastings Bass* pre-*Pitt* applies in Cayman as set out in the case of *A v Rothschild* [2004-05] CILR 485 and subsequent cases upholding the English decision in *Sieff v Fox* [2005] 1 WLR 3811. In considering the Supreme Court's decision however, the Cayman courts will also likely take into consideration the impact on Cayman's trust industry of restricting the doctrine as previously established and applied here. Their first instincts may well be to resist changing the law if doing so would reduce the potential remedies available to Cayman trustees in seeking to set aside an exercise of discretion.

There is currently no serious discussion in the Cayman Islands about potentially legislating for the application of the pre-*Pitt Hastings-Bass* jurisdiction as in some other OFCs. However, it is significant to note in the Cayman context that in *A v Rothschild*, Cayman's Chief Justice Smellie CJ referred to the court's

jurisdiction under Section 48 of the Trusts Law to give *"direction on any question respecting the management or administration"* of a trust fund or assets upon the application of a trustee as *"convergent with the evolving Hastings-Bass principle"* and which would in his view permit the court to intervene as the justice of the case required. Smellie CJ stated: *"In my view, if it is appropriate for the court to intervene in order to avoid or mitigate a fiscal consequence which would be injurious to the interests of innocent beneficiaries (for example where an unwarranted charge to tax would otherwise arise), the court might well do so notwithstanding the fact that the beneficiaries may have other recourse available to them against the ill-advised or mistaken trustees or their advisors."* [2004-5] CILR 485 at 497 paragraph 43. The reasoning in *Pitt* and *Futter* would seem to run counter to such considerations and may therefore render its application in the Cayman Islands less likely than might immediately be apparent.

As far as the Supreme Court's decision on the law of mistake is concerned, it is certainly possible to foresee the clarification provided by Lord Walker being welcomed and adopted, save that for the reasons already referred to, the Cayman courts are less likely to be troubled by granting relief on grounds of mistake where the only mistake has been brought about in the context of "artificial" tax avoidance, viewed through English public policy considerations. What is clear however is that claims to set aside trustees' decisions under the rule in *Hastings-Bass* may more often be framed as claims to set them aside on grounds of mistake.

Guernsey

Chris Edwards

Partner, Mourant Ozannes

It is perhaps surprising given the plethora of cases in Jersey which have considered the rule in *Hastings-Bass* and the law of mistake that there has yet to be a single decided case on either as a matter of Guernsey law in the Guernsey Courts.

The closest Guernsey has come to considering the scope of the rule in *Hastings-Bass* under Guernsey law was an application for such relief by RBC Trust Company (Guernsey) Limited (in its capacity as trustee of the Abacus Global Approved Managed Pension Trust) to have distributions from that pension scheme set aside. The distributions had been made in the form of lump sum payments rather than in the form a pension and as such had occasioned an otherwise avoidable UK tax liability. HMRC applied to be joined to the proceedings and there was an interlocutory hearing to determine that discrete issue (*Gresh v (i) RBC Trust Company (Guernsey) Limited and (ii) HM Revenue & Customs* [25/2009]). In the first instance decision the Deputy Bailiff (now the Bailiff) refused to grant leave for HMRC to be joined to the proceedings. Whilst the Court of Appeal reversed that decision, theDeputy Bailiff's comments on the scope of a *Hastings-Bass* application under Guernsey law remain prescient and are to date the only judicial comment on the subject in Guernsey. In rejecting HMRC's application to be joined to proceedings, the Deputy Bailiff noted that the availability of relief under the principle in *Hastings-Bass* in the Guernsey Courts would be:

"governed by Guernsey law so the Court will have to establish what the law of Guernsey in this area is; it will not simply be applying English law. In doing so, the starting point is to look at the law of similar jurisdictions… Hence, English decisions interpreting the Hastings-Bass principle will be a starting point but they will need to be considered in light of Guernsey customary and statutory law."

Such an approach is supported by the decision of the Privy Council in *Spread Trustee Company Ltd v Sarah Ann Hutcheson & Others* [2011] in which Lord Clarke cited with approval the following passage from the Guernsey Court of Appeal in *Stuart-Hutcheson v Spread Trustee Company Ltd* [2002]:

"in thus importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable".

The substantive case in *Gresh* on the rule in *Hastings-Bass* has yet to be determined by the Royal Court. Having regard to the dicta (albeit obiter) of Bailhache DB in *In the matter of the B Life Interest Settlement*, it is difficult to envisage the Royal Court not following the Supreme Court's decision in *Pitt v Holt* and *Futter v Futter*.

As to mistake, though section 11(2)(d) of the Trusts (Guernsey) Law, 2007 expressly provides that a trust will be unenforceable if the Royal Court declares that it was established by mistake, it does not elucidate what the correct test for 'mistake' is in Guernsey. Whilst there have been two cases in which the remedy of

mistake on the establishment of a trust or a disposition thereto have been considered in Guernsey, both involved English law trusts in which the Royal Court applied the English law of mistake.

Thus, in the recent case of *Dervan et al v Concept Fiduciaries Limited et al* [04/2013], the Royal Court cited with approval Lloyd LJ's summary of the law of mistake in the Court of Appeal decision in *Pitt v Holt* as reflecting the current law in England and Wales. Previously, in *Arun Estate Agencies Limited v Kleinwort Benson (Guernsey) Trustees Limited* [2009-10] GLR 437, the Royal Court considered both the wider test for mistake set out in *Ogilvie v Littleboy* and the narrower test articulated in *Gibbon v Mitchell*. On the basis that the narrower test was satisfied it was unnecessary for the Court to consider whether there was a broader test under English law – which has now been answered in the affirmative by Lord Walker in *Pitt v HMRC.*

Whilst the decision of the Supreme Court in *Pitt* will no doubt be persuasive in determining the correct test for mistake under Guernsey law, the following statement by the Deputy Bailiff (now the Bailiff) in Arun should be borne in mind: *"any analysis of Guernsey law will, no doubt, start with a consideration of the Norman customary law, as applied in Guernsey, with regard to Donations and may or may not reach a conclusion that is similar to English law".*

However, in view of the decision of the Privy Council in *Spread Trustee Company Ltd* and the comments made by the Guernsey Court of Appeal in *Rowe v Rich* that it would be unfortunate if the practice were to develop of seeking to *"trammel the simple provisions of the Trust Law"* by reference to ancient relics of La Coutume Normande, it is difficult to envisage the law of mistake in Guernsey departing from English law.

Isle of Man

Annemarie Hughes

Partner, Dougherty Quinn

The Isle of Man Court is increasingly asserting its independence from English law and actively developing *"our own local jurisprudence to suit our own local needs"* (*AG v Nightingale and Sheppard*, Judgment of Deemster Doyle, 28 March 2011, paragraph 19).

Without the benefit of any *Hastings-Bass* case law, however, it is likely that if the principle is ever before the Privy Council, as the Isle of Man's ultimate court of appeal the Supreme Court decision in the *Pitt* and *Futter* cases would be followed.

The clarification that a breach of fiduciary duty is required to invoke the principle results in limited application, potentially resulting in increased exposure of beneficiaries to the consequences of trustees' actions.

The interests of beneficiaries, and the desire to protect them from hostile litigation to obtain a remedy, must be balanced against the current economic and political climate and the established reputation of the Island as a leading and co-operative international financial centre. It remains to be seen whether, in the future, any additional changes to Isle of Man statute will bring certainty going forward.

In accordance with current Isle of Man law, the Supreme Court has applied a wider test for setting aside voluntary transactions on the basis of mistake.

Lord Walker's references to considerations of justice and "unconscionableness," echo the Isle of Man Court's emphasis on "unconscionability" (Judgment of Deputy Deemster Corlett in *Clarkson v Barclays Private Bank and Trust (Isle of Man) Limited* [2007] WTLR 1703, paragraphs 23 and 36).

Previously in the Court of Appeal, Lloyd LJ stated that the Isle of Man decisions *"gave wholly inadequate effect to the test"* and *"ignored the distinction between effect and consequences."*

Dougherty Quinn would respectfully disagree with that sentiment, and take the view that the Supreme Court has now echoed the views of the Isle of Man Court that no distinction is to be drawn between the effect of a transaction and its consequence, and that tax consequences are relevant considerations.

Lord Walker's judgment, in rejecting the test in *Gibbon v Mitchell*, accords with the Isle of Man cases (*Clarkson*; *Re: Betsam Trust* [2009] WTLR 1489), also followed in Jersey (*In re the A Trust* [2009] JLR 447; *In the matter of the S Trust* [2011] JLR 117), which described that test as "unworkable" and having "no rational basis."

In future cases of mistake, the Isle of Man Court is likely to continue its own independent line of authority, so that a transaction will be voidable if:

- there is a mistake on the part of the donor/settlor (as to the effect or consequence of the transaction);
- the donor/settlor would not have entered into the transaction but for the mistake; or

- the mistake was of so serious a character to render it unjust on the part of the donee to retain the property.

Dougherty Quinn expect future decisions to confirm this position and to demonstrate the continued development of the Isle of Man's own independent jurisprudence informed internationally by common law.

Jersey

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The Royal Court first declared that the principle in *Hastings-Bass* formed part of the law of Jersey in the case of *Green GLG* in 2002, when it said that the *Hastings-Bass* principle "*is but a manifestation of the general principle that a trustee must act in good faith, responsibly and reasonably*" and that it saw "*… nothing in the decisions … which is inconsistent with Jersey law. On the contrary, they seem entirely consistent and, accordingly, we hold that what is described as the Hastings-Bass principle is equally a principle of Jersey law*".

Having made such a declaration based upon decisions of the English court which have now been found to have come about as a result of a wrong turn, the Royal Court might, in any future case brought in Jersey under the principle in *Hastings-Bass*, feel it necessary to acknowledge that wrong turn, and to adopt the same reformulation of the principle in *Hastings-Bass* as set out in *Pitt v HMRC* and *Futter v HMRC*. The decisions in *Pitt* and *Futter* included a thorough analysis of the law in relation to the *Hastings-Bass* principle, and if the Royal Court considers that that is the correct analysis, then it may be persuaded to follow it.

Indeed, in the case of *The B Life Interest Settlement* [2012], the Royal Court held that if the Court of Appeal's decision in *Pitt v Holt* remained good law after the appeal to the Supreme Court, then a departure from the line of reasoning in the judgments of the Royal Court would be inevitable – either the Royal Court would follow the changed approach of the English courts to the *Hastings-Bass* doctrine, or it would have to adopt some other reasoning, based on principle, for continuing to follow the pre-*Pitt* approach. The Royal Court in that case went on to say that had it actually been required to decide the point in the light of the Jersey and English authorities as they currently stand (which it was not), then its decision would have been that the previous decisions of the Royal Court in connection with *Hastings-Bass* were clearly wrong, but that if the Supreme Court were ultimately to endorse the *Hastings-Bass* principle as it existed pre-*Pitt* (which of course it did not), then the rationale adopted by the Royal Court for its previous decisions could not be impeached, and one would expect the Royal Court at first instance to continue to follow them.

The Supreme Court's decision on the principle in *Hastings-Bass* will, as matters currently stand, undoubtedly be of highly persuasive authority in Jersey.

In the meantime, however, a draft amendment to the Trusts (Jersey) Law 1984 has very recently been lodged, by which the existing Jersey law concerning both matters of mistake and the rule in *Hastings-Bass* will be codified into statute. The draft amendment provides (in relation to Jersey trusts) that (*inter alia*):

- the Royal Court may in certain circumstances declare that the exercise of a power by a trustee or a person exercising a power over or in relation to a trust, or trust property, is voidable and either: (a) has such effect as it may determine; or (b) is of no effect from the time of its exercise, and may make such orders consequential on such declaration as it thinks fit;
- the relevant circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising the power: (a) failed to take into account any relevant considerations or took into account irrelevant considerations; and (b) 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;
- it does not matter whether the circumstances set out above occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power; and
- an application may be made by (*inter alia*) any trustee (whether the trustee who exercised the power concerned or otherwise), or a beneficiary.

In respect of mistake, the Royal Court found in the matter of *In re the S Trust* [2011] that in considering whether a transaction should be set aside it must ask itself the following questions:

- Was there a mistake on the part of the donor?
- Would the donor not have entered into the transaction "but for" the mistake? and
- Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?"

The Royal Court in preceding cases had: (1) reviewed the tests under English law by which a trust or voluntary disposition could be set aside on the ground of mistake; (2) rejected the distinction between the effects and the consequences of the mistake, first articulated in the case of *Gibbon v Mitchell*; and (3) found that the correct test to be applied as a matter of Jersey law was that set out in the earlier English case of *Ogilvy v Littleboy*.

The hearing *In re the S Trust* took place just after the Court of Appeal's decision in *Pitt v Holt* and *Futter v Futter* was handed down, and the Royal Court expressed its concerns and reservations about the effect of the Court of Appeal's decision, saying: "*It does not seem to us … that the purported reconciliation of Ogilvie v Littleboy with Gibbon v Mitchell* [by the Court of Appeal in *Pitt v Holt*] *has necessarily resolved all the problems inherent in the effects/consequences distinction* …" and that

"*justice and fairness seem .. to have been at the heart of the approach adopted in Ogilvie v Littleboy" and that it was therefore "troubling .. that the outcome for Mrs Pitt seems to have been so unjust and unfair* …"

The Royal Court therefore decided to follow its own path on the development of the Jersey law of mistake, rather than that developed up to that point by the English courts.

It is therefore noteworthy from a Jersey perspective that the Supreme Court has now allowed Mrs Pitt's appeal against the decision of the Court of Appeal, and in doing so has developed the English law of mistake along strikingly similar lines to the Jersey test as formulated *In re the S Trust*, namely that there must be a causative mistake (i.e., Jersey tests (1) and (2)) which is of sufficient gravity as to render it unconscionable to leave the mistake uncorrected (i.e. Jersey test (3)).

Clifford Chance is also grateful to Matthew Slater of 3 Stone Buildings for his input on the proposed legislative changes in Jersey.

Conclusion

Generally, the decisions of the UK Supreme Court are not binding offshore but they are highly persuasive, especially if there are no local judgments on point.

The principle in *Hastings-Bass* is now of much narrower application under English law than it was up to 2011, but the law of mistake has been broadened by the Supreme Court. So a trustee who finds out that a serious mistake has been made may still be able to sort out the problem.

Jersey appears to be on the verge of offering something different from the other offshore jurisdictions featured in this briefing and that in turn will mean 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. Whether other centres will allow Jersey to offer this difference for long remains to be seen.

Finally, all trustees (not just those offshore) will want to take account of Lord Walker's criticisms of trustees' practice and procedures, especially when training and developing their fiduciary officers as to how they should go about making their decisions.

Future briefing notes in this area

If you would like to receive copies of the forthcoming briefing note below and other Clifford Chance publications on trusts law and wealth management-related topics, please email: **lyndsey.tolan@cliffordchance.com**

Prest v Petrodel: On 12 June 2013, the Supreme Court's judgment was published, in which the Supreme Court decided on the question as to whether the court has power to order the transfer of properties held by a husband's companies to the wife. The Supreme Court unanimously allowed the appeal by Mrs Prest in respect of the transfer to her of properties held by her husband's companies, deciding that disputed properties vested in companies held by Mr Prest were held on a resulting trust for Mr Prest, and were accordingly *"property to which the [husband] is entitled, either in possession or reversion"*. Our forthcoming briefing note will consider the implications of this case.

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