The Rule in Hastings-Bass and the decline of the ‘magical morning after pill’

The Supreme Court of the United Kingdom recently (9 May 2013) gave judgment in the appeals in the matters of Futter and another v. The Commissioners for Her Majesty’s Revenue and Customs and Pitt and another v. The Commissioners for Her Majesty’s Revenue and Customs (“Futter and Pitt”). The two appeals were heard together as they raised the same fundamental point for adjudication: whether fiduciaries can be relieved of the consequences of exercising their powers following professional advice where the exercise of those powers unexpectedly leads to significant tax liabilities.

At first instance, the trustees were allowed to undo their decisions under what has become known as ‘the rule in Hastings-Bass.’ This rule (to the extent it has ever been a rule at all) was helpfully summarised in in Mettoy Pension Trustees Ltd v. Evans in the following way:

“[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.”

The basis of the Court’s power to “interfere” with a decision of a trustee is said to be the supervisory jurisdiction of the Court over a trustee or other fiduciary to ensure he exercises his powers (i) properly and (ii) for a proper purpose.

The judgment of the Supreme Court in Futter and Pitt was delivered by Lord Walker of Gestingthorpe and it was the last judgment of his long and illustrious career.

Futter

The appeal in Futter was concerned with incorrect tax advice given by solicitors as to the effect of provisions primarily relating to capital gains tax in respect of gains realised by non-resident trustees.

Pitt

The appeal in Pitt concerned the personal representatives of Mr Derek Pitt. Mr. Pitt had suffered very serious head injuries in a road traffic collision resulting in his mental incapacity. He afterward died. His wife, Mrs Patricia Pitt, was appointed his receiver under the Mental Health Act, and on his death she became one of his personal representatives, and the only beneficiary in his estate. Mr. Pitt’s claim for damages for his injuries was compromised by a structured settlement approved by the court, in the sum of £1.2m. Mrs. Pitt’s solicitors sought advice from a firm of financial advisers said to have specialist experience of structured settlements. They advised that the damages should be settled in a discretionary settlement, and this was done.
Unfortunately, the report of the financial advisors made no reference to inheritance tax liability. The trust could have been established without any immediate liability to inheritance tax if (a) it had been an interest in possession trust or (b) it had been a discretionary trust complying with the relevant legal provisions.

The law

In a speech to the Chancery Bar Association in London in 2009 and afterward published in the Oxford Journal (Volume 15, Issue 4) as ‘Aspects of the Law of Mistake: Re Hastings-Bass’, Lord Neuberger observed that:

‘... it would seem that, unnoticed by the equity judges and academics over the centuries, actions subsequently regretted by trustees have a quality of reversibility. It appears that Doctor Equity can administer a magical morning after pill to trustees suffering from post-transaction remorse, but not to anyone else.’

In the Court of Appeal, Lord Justice Longmore described the rule in Hastings-Bass as being a ‘comparatively rare instance of the law taking a seriously wrong turn’, and he viewed the cases of Futter and Pitt as an opportunity to ‘put the law back on the right course’.

The Supreme Court endorsed the distinction drawn in the Court of Appeal between excessive execution of power (a trustee operating outwith the scope of his power) and inadequate deliberation (a trustee failing to take into account a relevant consideration in making a decision which is otherwise within his power).

Cases of inadequate deliberation will now almost certainly fall outside the rule in Hastings-Bass. In reaching that decision the Supreme Court noted that a trustee should not regard proceedings in which he relies on the rule in Hastings-Bass as uncontroversial; asserting and relying on his own failing or those of his adviser to undo the actions of a trustee should not be assumed.

The Supreme Court also sought to clarify two issues which arose in earlier cases. The first was what the court should look to when considering how a trustee would otherwise have behaved were it not for the decision sought to be impugned. It was inappropriate for the court to be prescriptive in this regard. The court indorsed the judgment of Mr. Justice Lightman made 10 years earlier that when the vitiating error relied upon is ‘inadequate deliberation on relevant matters (rather than mistake) the inadequacy must be sufficiently serious as to amount to a breach of duty’ by the trustee. The second issue was that where the rule in Hastings-Bass applies, the act of the trustee is ‘not void but it may be voidable at the instance of a beneficiary who is adversely affected’. That means that henceforth it will likely be for the cestui que trust to bring an action against the trustee, rather than the trustee bringing an action himself for the consequences of his own act. If the error identified is not sufficiently serious as to amount to a breach of duty by the trustee, the remedy may be an action by the trustee (or cestui que trust) against his
professional advisor in negligence in an amount sufficient to put the trust in the financial position it would have been in were it not for the error of the trustee.

Whilst the judgment of the Supreme Court in *Futter and Pitt* provides welcome clarity in this difficult area of the law, it leaves open the court’s discretion. The nature of the rule in *Hastings-Bass*, being an equitable remedy, the court will always exercise a level of discretion in deciding whether or not to apply the rule.

Whilst the judgment of the UK Supreme Court is not binding in Bermuda, it is likely to be of very persuasive authority should a similar issue arise in Bermuda.

*This article addresses general principles only and is not intended to be a comprehensive exposition of the subject. Specific legal advice should be obtained in respect of any particular issue in Bermuda regarding the liability of a trustee.*

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