

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

This article has been updated since originally published in 2013 to take account of the (Bermuda) Trustee Amendment Act 2014 which came into effect on 29 July 2014, the purpose of which to preserve in Bermuda what is known as “the Rule in Re Hastings-Bass” as it was understood and applied in England and Wales (and other common law jurisdictions) in and prior to 2011, when the Court of Appeal of England and Wales delivered its judgment in Futter and Pitt. The new section 47A of the Trustee Act 1975 introduced by the 2014 amendment Act confers a discretionary jurisdiction on the Supreme Court of Bermuda to intervene in certain limited circumstances in relation to the exercise of a fiduciary power. Such discretionary exercise of power will be subject to the Court’s discretion with respect to equitable relief and ameliorates the effect of the judgment of the Supreme Court in Futter and Pitt.

On 9 May 2013 the Supreme Court of the United Kingdom 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 England and Wales. 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.

The judgment of the UK Supreme Court is not binding in Bermuda and its effect here has been ameliorated by the introduction of section 47A to the Trustee Act 1975 in 2014. Section 47A of the Trustee Act 1975 provides a statutory jurisdiction which may be engaged in respect of fiduciary powers, whether conferred or exercised before, on or after the commencement date of the Trustee Amendment Act 2014 (29 July 2014).

Section 47A(2) prescribes the grounds for exercising the jurisdiction conferred on the Supreme Court by section 47A(1) to set aside any flawed exercise of a fiduciary power. The grounds are as follows:

- (a) in the exercise of the power, the person who holds 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
- (b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power—
 - (i) would not have exercised the power;
 - (ii) would have exercised the power, but on a different occasion to that on which it was exercised; or
 - (iii) would have exercised the power, but in a different manner to that in which it was exercised.

Where there is sufficient evidence of a failure to take into account a consideration relevant to the exercise of the power, such as significant tax implications, the

requirements of section 47A(2)(a) will likely be met and the Court will have the jurisdiction to consider whether to set aside the exercise of the power, either in whole or in part, either unconditionally or on such terms and subject to such conditions as the court may think fit and make such order consequent upon the setting aside of the exercise of the power as it thinks fit.

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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