Client Briefing May 2011

Hastings-Bass Revisited

That which once was so commonly referred to as the "Rule in Hastings-Bass" or the "Hastings-Bass principle" is no longer.

In 1974 the Court of Appeal heard an appeal from an order of Plowman J in the now renowned case of Re Hastings-Bass deceased [1975] Ch 25. In a succession of later cases at first instance, starting in 1990 with a pension case, Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587, a principle, described as the rule in Re Hastings-Bass, has been developed and applied to facts very different to those under consideration in Re Hastings-Bass itself. As so developed, the principle became that in the exercise of a discretionary dispositive power by trustees the court had the jurisdiction to declare the same void and set such an exercise aside, even, in some cases, many years after the event, on the basis that the trustees failed to take into account relevant matters when exercising the power, or took into account irrelevant matters in so doing. This principle is what has commonly been referred to as "the rule in Hastings-Bass".

For the first time, on two distinct appeals heard together, that principle, and some of cases involved, have come before the Court of Appeal of England & Wales. The appeals before their Lordships being Pitt v Holt appeal 2010/0385 and Futter v Futter appeal 2010/0762. In these most recent appeals the questions before their Lordships can be summarised as follows:

1. Broadly, where trustees of a settlement exercise a discretionary power intending to change the beneficial ownership of trust property, but the effect of what they do turns out to be different from that which they intended. Can their act be set aside by the court? If so, what is the correct legal test to determine in what circumstances and on what basis the court can intervene?

2. Secondly, what is the correct legal test to be applied if a donor seeks to have a voluntary disposition set aside as having been made under a mistake?

In an extensive judgment spanning over some sixty pages, their Lordships, specifically Lloyd, LJ., came to the conclusion that the principle promulgated first by Warner J in Mettoy, developed thereafter, and even set out by his Lordship himself in paragraph 119(i) of his judgment in Seiff v Fox is not correct, and that, in respect of the first question, two kinds of cases need to be distinguished:

i) Those cases where, because of an inadvertent misunderstanding of the position, an act done by trustees (or any person in a fiduciary position) in the exercise of a dispositive discretion is not within the scope of the relevant power. If this is the case then the action is void.

ii) Those cases where the trustees' act in exercise of their discretion is within the terms of their power, but is said to have been vitiated by their failure to take into account a relevant matter, or their taking something irrelevant into account, when deciding to exercise, and exercising, the discretion. In such cases the trustees' act is not void; however it may be voidable. In order for it to be voidable it must be shown to have been done in breach of a fiduciary duty of the trustees. The duty to take relevant, and no irrelevant, matters into account, is a fiduciary duty. Fiscal consequences may be considered relevant for such purpose. However, if the trustees fulfil such a duty by seeking professional advice from a proper source, and act on such advice, then (in the absence of any other basis for challenge) they will not be deemed to have committed a breach of trust even if, due to the inadequacy of the advice, they act under a mistake as to a relevant matter, i.e. in the absence of a breach of trust, a trustee's act cannot be voidable. Even if it could be considered voidable, it cannot be avoided unless a beneficiary seeks to have it avoided, and a claim to that effect will be subject to the discretion of the court and to the usual range of equitable defences. I

n respect to the second question, i.e. that of mistake, his Lordship adjudicated that the correct test for the equitable jurisdiction to set aside a voluntary disposition for mistake to be invoked, is that there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction. His Lordship left aside cases where there might be an additional vitiating factor such as some misrepresentation or concealment in relation to the transaction.

Further he noted that the mistake must be of sufficient gravity as to satisfy the test as set out in Ogilve v Littleboy (1897) 13 TLR 399 ("In the absence of all circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him" per Lindley LJ).

The result of this judgment is that which once was so commonly referred to as the "Rule in Hastings-Bass" or the "Hastings-Bass principle" is no longer, and has been clarified by the following ratio decidendi: that a disposition by a fiduciary will be void if it is a misapplication of property outside the four corners of discretion; that a disposition will not be void if it is intra vires, even if the manner in which the exercise of discretion was "legally flawed" by the fiduciary's failure to take into account a relevant consideration; that in proceedings to invalidate a disposition on the ground that a fiduciary has left out a relevant consideration or has taken into account an irrelevant consideration, a breach of fiduciary duty must be established; that a claim for breach of fiduciary duty should not ordinarily be brought by the fiduciary themselves, as has happened in Hastings-Bass applications, but rather against a fiduciary by a person claiming to be the object of the power; and that the court's jurisdiction to grant a discretionary remedy, such as rescission of the disposition, or other remedies for breach of trust, is subject to equitable defences.

At long last, and as most succinctly highlighted by Longmore LJ, the appeals:

"…(have) provided examples of that comparatively rare instance of the law taking a seriously wrong turn, of that wrong turn being not infrequently acted on over a twenty year period but this court being able to reverse that error and put the law back on the right course."

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