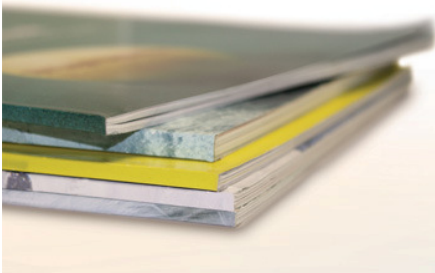


The Rule in Hastings-Bass: Some Recent Developments and What November May Hold

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The principle known as “the rule in Hastings-Bass” derives from the English Court of Appeal judgment of the same name in 1975. The use of the rule is, in a fiduciary context, to undo what has been done.

In practice, it is used most often where trustees have done something which has resulted in an unintended (and unanticipated) tax liability. Upon discovering the problem, the trustees seek an order from the court stating that their action was void (and therefore the tax liability does not arise). For that reason, a number of Hastings-Bass applications are opposed by Her Majesty’s Revenue and Customs (“HMRC”).

The rule was analysed in depth by Lloyd LJ in **Sieff v. Fox** [2005] EWHC 1312 (Ch), and his following statement has been held to be a comprehensive statement of the rule as it currently stands:

“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.”

From the point of view of trustees and their advisors (as well as the insurers of both), this can be an enormously helpful rule. Under normal circumstances if trustees fail to take into account some aspect of a transaction and undesirable consequences ensue, they may well find that they are facing a claim that they have acted negligently. However, **Hastings-Bass** means that, in the right circumstances, trustees are able to ask the court to turn the clock back as if the problematic event never happened.

The first clear requirement is that the trustees must be exercising a discretionary power under the terms of the trust instrument and not acting under a duty to act. This means that the action must have occurred when they had discretion (as opposed to an obligation) as to whether they did something and that thing produced the unintended consequences.

The next requirement is that the effect of the exercise of the trustee’s discretion is different to that which they intended. In this respect, the fiscal effect of an exercise of discretion has been held to be a relevant consideration:

“The financial consequences for the beneficiaries of any intended exercise of a fiduciary power cannot be assessed without reference to their fiscal

implications. The two seem to me inseparable. Therefore, if the effect of an intended appointment is likely to be to expose the fund or the beneficiaries to a significant charge to tax that is something which the trustees have an obligation to consider when deciding whether it is proper to proceed with the appointment. Once relevance is established then a failure to take those matters into account must vitiate the exercise of the power unless (as in Hastings-Bass itself) it is clear that on a proper consideration of all relevant matters the decision would still have been the same.”

Patten J in **Abacus Trust Company (Isle of Man) Ltd v. NSPCC** [2001] WTLR 953 at para 16.

It is also important that the trustee is able to show that, had they considered the exercise of their discretion properly, they would not have done what they did. In many cases this will be straightforward, particularly where the action by the trustee has resulted in a very significant tax liability. However, the quantum of any liability is not necessarily determinative of the issue. In **Futter and Another v. Futter and Others** [2010] EWHC 449 (Ch), an unintended tax charge of £1,762 for each beneficiary concerned was the issue. The court determined that this was a matter to which the rule in **Hastings-Bass** applied. Its reasoning was not based on the quantum of the liability involved, but upon the process of consideration of the distribution; if the trustees had been aware of the true position would they not have acted as they did?

In **Pitt and Another v. Holt and Another** [2010] EWHC 45 (Ch), it was said:

*“It may well be that the time is ripe for the Court of Appeal to consider the rule in Hastings-Bass. Save for a brief, but certainly not critical, reference to the rule in **Stannard v. Fisons Pensions Trust** [1992] IRLR 27, [1991] PLR 225, all the authorities since the original Hastings-Bass decision are first instance.”*

It appears that this was something of an omen. Both the decision in **Pitt v. Holt** and **Futter** are now being appealed by HMRC, and are due to be heard by the English court of Appeal commencing on 23 or 24 November 2010. At first instance the court showed, in each case, a strong reluctance to depart from the principles it had developed and established over time. Should the appeals go ahead, the Court of Appeal’s decision has the potential to set out an authoritative (and binding) statement of the rule in **Hastings-Bass** which could curtail its application. Whatever the outcome, the decision will be significant to trustees, advisors and insurers alike.

The timing is also of real interest to those practicing in Guernsey (and, no doubt, other similar jurisdictions). In **Gresh v. HMRC** 42/2009, the Guernsey Court of Appeal granted HMRC’s request that it be joined as a party to Guernsey proceedings seeking **Hastings-Bass** relief. The **Gresh** matter remains to be substantively heard in Guernsey. There is little doubt that any English Court of Appeal decision in November will be considered in detail by the Guernsey Royal Court in relation to any application in Guernsey for **Hastings-Bass** relief.

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