Trust tourists from the future

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Abstract

While the usefulness of the ‘rule in Re Hastings-Bass’ for trustees and other fiduciaries was severely curtailed in England and Wales by the decision of the Supreme Court in Pitt v Holt, Futter v Futter, statutory reform in a number of offshore jurisdictions, including Bermuda, has given new life to the ‘rule’. This article examines the Bermuda statutory reform and the first decision of the Supreme Court of Bermuda in which the statutory ‘rule’ was applied.

The renowned physicist, Professor Stephen Hawking, when considering time travel, has mused that, ‘... we have not yet been overrun by tourists from the future...’.1 In the English law of trusts, the decision of the Supreme Court in Pitt v Holt, Futter v Futter,2 has resulted in turning back the ‘fiduciary clock’ by judicial order, which is rather problematic and unattractive. Going forward, trustee tourists from the future seem certain to be a rarity in English law. In several international financial centres, however, what the common law has taken away, the legislature has given back.3 This case note will examine the first decision of the Supreme Court of Bermuda on section 47A of the Trustee Act 1975. This statutory provision has sought to replicate in Bermuda law the so-called ‘rule in Re Hastings-Bass’ as it was understood in England and Wales before the English Court of Appeal decision in Pitt v Holt in 2011.4

In the Court of Appeal in Pitt v Holt, Futter v Futter, Longmore LJ noted that the appeals in those cases:

... provide examples of that comparatively rare instance of the law taking a serious wrong turn, of that wrong turn being not infrequently acted on over a 20-year period but this court being able to reverse that error and put the law back on the right course.5

The ‘wrong turn’ that Longmore LJ was talking about was the principle established in a succession of English cases and known as the ‘rule in Re Hastings-Bass’. Confusingly, the ‘rule’ had not, in fact, been established in Re Hastings-Bass6 at all, but rather in a line of cases starting with Mettoy Pension Trustees Ltd v Evans,7 the ‘rule’ held that the exercise of a discretionary dispositive power by trustees may be declared void and set-aside by the court (even many years after the event) on the basis that the trustees had failed to take into account relevant matters when exercising the power. This ‘rule’ has over the years proved to be particularly useful in a number of cases when, on the application of the trustees, the court had been persuaded to set-aside prior acts of the trustee on the basis of their own failure to take into account a relevant tax consequence of their actions.8

The analysis of Lloyd LJ in Pitt v Holt, Futter v Futter, later approved by Lord Walker in the Supreme Court,
established that where a trustee has exercised a power that they do have, but they had failed to take into account a relevant consideration, the trustee’s act was not void, but that it may be voidable. It will be voidable if, and only if, it can be shown to have been taken in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set-aside at the suit of a beneficiary, but this would be subject to the exercise of the court’s discretion and subject to any equitable defences. It was further held that where trustees acting within their powers obtained and acted on apparently competent professional advice, they were not in breach of duty where that professional advice turned out to be wrong. As a consequence of this decision, applications by trustees seeking to set-aside their prior acts, which had unforeseen and unattractive tax consequences for the trust fund, will be a thing of the past. In the first place, providing that the trustees had obtained competent tax advice, they will not have been acting in breach of fiduciary duty so as to provide the court with the jurisdiction to declare a past act voidable. Secondly, the reformulated principle will require beneficiaries to make applications a key proof of which will be that the trustees had acted in breach of trust.

Faced with this, on one view, rather unhelpful development in the common law, in July 2014 the Bermuda legislature enacted the Trustee Amendment Act 2014.9 The effect of this statutory reform was to insert a new section 47A into the Trustee Act 1975, which was intended to introduce into Bermuda statutory law the rule in Re Hastings-Bass as it had been understood and applied in England (and in other common law jurisdictions) prior to the decision of the English Court of Appeal in Pitt v Holt, Futter v Futter. The new section 47A provides the Court with the power to set-aside the flawed exercise of fiduciary powers whether those powers were exercised by trustees or others.10 An application can be made under the section by a range of interested parties, including ‘...any trustee...’.11 Section 47A applied to fiduciary powers exercised either before or after the 2014 Act came into force.12 Importantly, the jurisdiction of the court is not dependent upon a finding of blame or any need to establish any breach of trust. Section 47A(4) provides that the statutory test can be satisfied:

... without it being alleged or proved that in such exercise of the power, the person who holds the power, or any advisor to such person, acted in breach of trust or in breach of duty.

The exercise of this statutory jurisdiction is dependent simply upon persuading the court that the power holder had taken into consideration an irrelevant one or failed to take into consideration a relevant one and, but for that failure, the power would not have been exercised (or would have been exercised on a different occasion or in a different manner). Section 47A also makes clear that where the exercise of a power is set-aside under that section ‘... the exercise of the power shall be treated as never having occurred’13 thus, in effect, turning back the ‘fiduciary clock’.

The new section 47A provides the Court with the power to set-aside the flawed exercise of fiduciary powers whether those powers were exercised by trustees or others.

The Supreme Court of Bermuda has now handed down the first decision on section 47A in Re F Trust and Re A Settlement.14 This decision related to two Bermuda trusts in each of which a UK resident trustee had been appointed some years previously, in one case by the then trustees and in the other, by the Settlor.

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9 For previous commentary on the statutory reform, see Bermuda private client law - recent developments by Alec Anderson (2016) 22 Trusts & Trustees 93–97.
10 s 47A(8) sets out a definition of ‘fiduciary power’ as meaning ‘... any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person who holds the power’.
11 s 47A(5).
12 s 47A(7).
13 s 47A(3).
The appointment of a UK resident trustee had, or was likely to have, adverse UK tax consequences, but these differed somewhat between the two trusts. *Re F Trust*, the adverse UK tax implications were only immediate as regards to income tax. More significantly, capital gains tax implications did not arise until two years following the appointment of the UK resident trustee due to a change in UK tax law. *Re A Settlement*, the appointment of the UK trustee had immediate adverse UK tax consequences. No UK tax advice had been taken prior to the exercise of the powers.

Having set out the facts of each case, the Chief Justice turned to consider whether the powers that had been exercised to appoint trustees in each case met the test of being an exercise of a ‘fiduciary power’ so as to fall within the threshold requirement in section 47A(1). The Chief Justice referred with approval to *Re Skeats’ Settlement*15 and the Bermuda case of *Von Knieriem v Bermuda Trust Company Limited*16 in holding that the power of appointment of trustees was a fiduciary power.17 No distinction was drawn by the Judge between the exercise of this power by the trustees in one case and the Settlor in the other. The Chief Justice in granting both applications accepted in each case that there had been a failure to take into consideration a relevant one, namely the UK tax consequences, which the Chief Justice described as:

financially significant factual and legal considerations which were relevant to the exercise of the power...18

While Her Majesty’s Revenue and Customs (HMRC) had been notified of the proceedings and given the opportunity to intervene, it declined to do so, but rather provided written comments that were placed before the Court.19 The Chief Justice rejected the suggestion by HMRC that there could have been no flawed exercise of the power of appointment in the case of the F Trust, because at the date of appointment of the UK resident trustee, no adverse capital gains tax consequences immediately arose.20 This was on the basis that the court accepted that any reasonably competent tax advisor at the date of appointment would have pointed out that public consultation in the UK on proposed capital gains tax changes were already in train.21 The Chief Justice accepted that, had tax advice been sought prior to the appointment of the UK resident trustee, the appointment would not have been made.

In considering the general nature of the Bermuda statutory scheme under section 47A, the Chief Justice referred to several common law authorities decided prior to *Pitt v Holt, Futter v Futter* in which the trustees actions had been set-aside where they had overlooked the tax implications of those actions. Reference was made to both *Green v Cobham*22 and *Re Green GLG Trust*23 as examples of ‘the broad scope of the Hastings-Bass jurisdiction’.24 The Chief Justice declined to formulate any particular test for the exercise of the section 47A discretion. Rather, the court accepted that this new statutory jurisdiction should be applied on the facts of each particular case and the Chief Justice approved counsel for the trustees’ submission that:

the circumstances in which the Court will consider it appropriate to intervene to correct a flawed exercise of
a power could be varied and numerous and specific limits on the Court’s jurisdiction by the articulation of any test could create injustice if it prevented intervention in unforeseen circumstances.25

Thus the Hastings-Bass ‘rule’ lives on in a modified and clarified way in Bermuda statutory law. While not everyone may agree with trustees having the ability to engage in fiduciary time travel, and while perhaps not as difficult as the time travel spoken of by Professor Hawking, it is clear that the statutory ‘rule’ will only be applied in an appropriate case by the rigorous application of judicial discretion.

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25 ibid, para 26.