



Hastings-Bass rule enshrined in law



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Introduction

The recently enacted Trustee (Amendment) Act 2016 amended the Trustee Act 1998:

- clarifying the law relating to trustee indemnities;
- allowing settlors and donors of property to a trust to benefit from provisions in a trust relating to restrictions against alienation; and
- inserting a new Section 91C giving statutory effect to the rule in *Re Hastings-Bass*.**(1)**

Hastings-Bass rule

Under the so-called '*Hastings-Bass* rule',**(2)** as it was understood and applied in England and Wales before 2011, a trustee could petition to the court to have an exercise of a fiduciary power which resulted in unforeseen or unintended consequences set aside and declared void.

In rendering his decision in *Hastings-Bass*, Lord Justice Buckley articulated the rule as follows:

"Where a trustee by the terms of a trust... is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action, notwithstanding that it does not have the full effect which he intended unless 1) what he has achieved is unauthorized by the power conferred on him or where he has acted outside of the power conferred on him or 2) it is clear that he would not have acted as he did a) had he not taken into account considerations which he should not have taken into account or b) had he not failed to take into account considerations which he ought to have taken into account."

Though more often than not employed as an escape route for trustees who had made mistakes giving rise to unforeseen tax consequences, the rule's scope has the potential for encompassing a wide variety of situations involving trustees.

In *A v Rothschild Trust Cayman Ltd*,**(3)** Chief Justice Smellie considered a passage in *Re Bedford Estates Sief v Fox***(4)** identifying the categories of circumstances in which an exercise by a trustee of a discretionary power may be held to be invalid and summarised them as follows:

- "i. There may be a formal procedural defect, such as a failure to obtain prior consent.*
- ii. The power may have been exercised in a way which it does not authorize, for example, by an unauthorized delegation, or by the inclusion of beneficiaries who are not objects of the power.*

iii. *The exercise may infringe some rule of general law such as the rule against perpetuities.*

iv. *The trustees may have exercised the power for an improper purpose, in cases known as fraud on the power. These would generally include circumstances where the exercise is not in good faith.*

v. *The trustees may have been unaware that they had any discretion to exercise.*

vi. *To these categories, the rule or principle in Hastings-Bass is said to add a further class of case, namely, where the trustees have failed to have regard to some relevant consideration which they ought to have taken into account, or have (I add for completeness-as stated in Hastings-Bass itself) taken into account some consideration which is irrelevant."*

However, in the conjoined appeals of *Pitt v Holt Futter v Futter*,⁽⁵⁾ the rule as it had been employed over the past 20 years was effectively abolished.

On the facts of both cases, the trustee in question had exercised its discretion within the ambit of the relevant power conferred upon it and had sought professional advice which proved to be incorrect. In the first-instance court in both cases, the applicants were successful with the courts finding in their favour based on the rule. However, on appeal, the judgments were overturned with the Supreme Court affirming the Court of Appeal decision in ruling against the application of the *Hastings-Bass* principle.

The court drew a distinction between:

- cases where the trustees' act was said to be void because it was not authorised by the power under which they purported to act; and
- acts within the powers of the trustees, but which were said to be vitiated by the failure of the trustees to take into account a relevant factor to which they should have had regard – usually tax consequences – or by their taking into account some irrelevant matter.

The court deemed that the principled and correct approach to cases in the second category above was that the trustees' act was not void, but that it might be voidable if it could be shown to have been done in breach of fiduciary duty on the part of the trustees. If it was voidable then it was capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and the court's discretion.

As a result of the ruling, it is no longer possible for fiduciaries to apply to court to have an exercise of power set aside where the exercise:

- was not *ultra vires*; or
- was pursuant to professional advice which subsequently turned out to be incorrect.

Bahamas legislation

It is against this background of the current position at common law that the impetus arose for legislation to be enacted in the Bahamas to preserve the previous application of the rule, thereby following in the paths of Jersey and Bermuda.

On an application to the court under Section 91C of the Trustee Act 1998, a person may seek a declaration that the "exercise of a fiduciary power" is voidable.⁽⁶⁾

The right to make an application is not limited to beneficiaries.

The application can be made by:

- a trustee, protector or any other person exercising the power;
- a successor in title of the trustee or protector;
- a power holder under Section 81A;⁽⁷⁾
- a beneficiary;
- an 'authorised applicant', as defined in the Purpose Trusts Act;

- for a purpose trust, the attorney general if there is no authorised applicant; and
- any person with leave of the court.

The court has the discretion to declare the exercise of the fiduciary power void or voidable so as to give the court flexibility.

The amendment adopts the traditional formulation of the rule with the court being able to set aside an exercise of a fiduciary power where a person with the fiduciary power:

- has failed to take into account relevant considerations; or
- has taken into account irrelevant considerations; and
- has not exercised the fiduciary power; or
- has exercised the fiduciary power, but on a different occasion or in a different manner to that in which it was exercised.

There is no requirement to allege or prove a breach of duty or breach of trust and no order can be made that would prejudice a *bona fide* purchaser for value without notice.

Matters are limited to the exercise of fiduciary power in relation to trusts and trust property, as well as exercises of fiduciary powers held by personal representatives, thus keeping within the scope of the Trustee Act, while at the same time allowing the provision to be used not only by trustees but also by those holding fiduciary powers connected to the trust (eg, protectors as well as settlors who have reserved powers for themselves).

Comment

With the passage of the Trustee (Amendment) Act, the Bahamas has fortified its position as a leading offshore financial centre. It is expected that the codification of the rule will benefit trustees, protectors, beneficiaries and other persons⁽⁸⁾ who can apply to the court to unwind any perceived hard consequences flowing from an exercise of a fiduciary power, thus offering an attractive alternative to costly and time-consuming litigation based on negligence or breach of duty claims.

For further information on this topic please contact Arthur Seligman at Lennox Paton by telephone (+1 242 502 5000) or email (aseligman@lennoxpaton.com). The Lennox Paton website can be accessed at www.lennoxpaton.com.

Endnotes

(1) *Re Hastings-Bass* [1975] Ch25.

(2) The rule, in fact, emerged in *Mettoy Pensions Trustees v Evans* [1990] 1WLR 1587: "there is a principle which may be labelled the rule in *Hastings-Bass*".

(3) [2004-2005] CILR 485.

(4) [2005] EWHC 1312 (Ch).

(5) [2013] UKSC 26.

(6) Section 91D of the Trustee Act (as amended by the Trustee (Amendment) Act) defines 'fiduciary power' as a:

"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 and in the case of a purpose or charitable trust to advance the purpose of such trust."

(7) A person directing trustees, in relation to investments.

(8) The section also allows for leave to be granted to potentially interested parties, thus leaving the door open for the settlors who are not acting as fiduciaries (ie, pursuant to reserved powers) to be allowed to avail of the provision in the appropriate circumstances.

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