

Hastings-Bass: Life after death in the offshore world?

MAY 2013

For more briefings visit mourantozannes.com

This briefing is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this briefing, please contact one of your usual Mourant Ozannes contacts.

Contacts:

Bruce Lincoln
Partner, Jersey

Craig Swart
Senior Associate, Jersey

Morven McMillan
Partner, Cayman Islands

Lucy Diggle
Senior Associate,
Cayman Islands

St John Robilliard
Partner, Guernsey

Matthew Guthrie
Senior Associate, Guernsey

For contact details,
please see the end
of this briefing.

In March 2011 our Jersey office reported on the death of 'Hastings-Bass' in the UK as a remedy for trustee "mistakes" following the Court of Appeal's decisions in *Pitt v Holt* and *Futter v Futter*. ([Click here.](#))

In a long awaited post mortem, the Supreme Court has confirmed in its judgment of 9 May 2013, that the 'rule in re Hastings-Bass' under English trust law as practitioners had understood it for a number of years, is now well and truly dead and buried. In essence, the Court will only have jurisdiction to intervene in a matter concerning a trustee's flawed decision, where that decision was within the parameters of a power held by it, if the trustee has acted in breach of fiduciary duty in taking that decision. This rules out bad decisions that result from the trustee having obtained professional advice which advice turned out to be wrong: the principle simply does not apply there since the trustee will not have committed a breach of duty. It also rules out any other decisions that transpire to be disadvantageous but where the trustee did not breach its duties.

The two bits of good news that nevertheless arise from the appeal to the Supreme Court are: first, that Mrs Pitt finally succeeded in setting aside the decision she had taken as receiver for her disabled husband (and thus tantamount to a trustee) based on her alternative argument of mistake (and rightly so); and secondly, that the Supreme Court confirmed that the proper test for mistake in this context is the less restrictive form (and which we note is in the same form as that which is applied by the Jersey Court) based on *Ogilvie v Littleboy* and not *Gibbon v Mitchell*. That is, all that has to be shown is a causative mistake of sufficient gravity, not the metaphysical proof that it was a mistake

as to the "effects" of a decision rather than its "consequences". The facts of *Pitt v Holt* and *Futter v Futter* were summarised in our earlier briefing.

In this note we look at the development of the mistake remedy and the future of 'Hastings-Bass' in Jersey, Guernsey and the Cayman Islands.

Jersey: the position before the Supreme Court's decision

The 'rule in re Hastings-Bass', in Jersey in its present form, is as follows:

- Where trustees act under a discretion given to them by the terms of the trust and they act within the parameters of that discretionary power, but their exercise of discretion has effects other than those which they intended, the Court will set it aside if it is clear that those trustees 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.
- It is not a prerequisite that there has been a breach of duty by the trustees (or by their advisors or agents).
- Unintended fiscal consequences are among the matters which may be relevant for the purposes of the principle.

This is the same formulation of the rule as set out in the English case of *Sieff v Fox* [2005] 3 ALL ER 693 and has been the approach in Jersey since at least the decision in *In the matter of the Green GLC Trust* [2002] JLR 571, where Birt, Deputy Bailiff (as he then was) said that:

- *'the principle in 'Hastings-Bass' ... is but a manifestation of the general principle*

BRIEFING

that a trustee must act in good faith, responsibly and reasonably'.

- *the 'Hastings-Bass' decision merely elaborated the position by making it clear that a decision of a trustee was liable to be quashed where the trustee has taken account of irrelevant factors and/or ignored relevant ones;*
- *the principle was consistent with precedent and principle and with Jersey law and that accordingly the 'Hastings-Bass' principle is part of Jersey law.*

Generally, therefore, the Jersey Court has, at least until now, considered the rule as nothing more than a label for that part of its jurisdiction to intervene in the administration of trusts for the protection of beneficiaries, in particular those that cannot speak for themselves. As a matter of policy the Jersey Court considers the alternative of expensive litigation against professional advisors as less than desirable. The comments of Bailhache, Commissioner, in *In the Matter of the S Trust* [2011] JLR 375 on the Court of Appeal's decision (in the context of the effect/consequence debate) resonate strongly: *"The remedy for Mrs Pitt, according to the Court of Appeal, was to sue her legal advisers. Having been failed by one set of advisers, she was to entrust herself to another set and to commit herself to the risks, uncertainties and expense of further litigation."*

Not every judge in Jersey has been so sanguine about the correct articulation of the 'Hastings-Bass principle'. In obiter comments that appear prescient in *In the matter of the B Life Interest Settlement* [2012] JRC 229, Bailhache, DB saw the formulation of the principle as set out in, for instance, the *Green GLG Trust* case as a charter for sloppy trusteeship. Indeed, he considered previous Jersey decisions under *Hastings-Bass* as being clearly wrong. Part of his reasoning was that he saw there to be no reason in principle why a person should be in any better position as a beneficiary of a trust where the trustees have taken a particular step, than he would have been had he taken the same step personally in relation to his own legal interests. This fits well with Lord Walker's analysis in the Supreme Court's decision, which requires the trustees to have been in breach of duty before the

'Hastings-Bass principle' can be engaged: if they are not, because they have taken proper professional advice, there is no jurisdiction by which the Court can intervene.

The facts of the *B Settlement* case were that the trustee had exercised its power of appointment to create three sub-funds with separate life interests, one for each of the settlor's two sons and their families and the third to retain a diluted interest for the settlor and his wife. The appointment had the effect of being a potentially exempt transfer for UK IHT purposes, with its success from a tax planning point of view depending on the settlor surviving for seven years after the appointment. Unbeknown to the trustee at the time, the settlor, who was then 57, was suffering from a very rare but undiagnosed aggressive form of Alzheimer's disease that led to his premature death three years later, with adverse IHT consequences. The settlor had for a period of around two years before the appointment become increasingly concerned about his failing memory. He saw his doctor on a number of occasions and his symptoms were simply diagnosed as the effects of stress. An examination by a neurosurgeon following an MRI scan was inconclusive at the time and the settlor was later referred to as being a 'diagnostic puzzle'. It was only some six months after the appointment that the settlor was properly diagnosed when a second opinion was sought.

The trustee sought to set the appointment aside on the basis of mistake and in the alternative under the 'Hastings-Bass principle'. The Court rejected both these arguments.

In relation to the mistake argument, it confirmed that the remedy of mistake is indeed available in Jersey to a fiduciary and the Court has to ask the following questions (more or less the same test as now confirmed by the Supreme Court):

1. Was there a mistake on the part of the trustee?
2. Would the trustee not have made the appointment *"but for"* the mistake?
3. Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property or interest appointed?

MOURANT OZANNES

BRIEFING

On the facts the Court found that 1 and 2 were satisfied, but 3 only in part and not sufficiently. Although the mistake was acknowledged as being serious the Court did not consider it unjust for the appointment to stand. The Court felt that as the settlor and his family had an inkling that all was not in fact right with him at the relevant time, it was not unjust for the beneficiaries of the sub-funds to retain the benefits they had received and therefore the loss should lie where it fell, ie an IHT liability of around £3.8million payable by the trustee.

In considering the alternative 'Hastings-Bass' argument, the Court found that the trustee had in fact considered all relevant matters so even under its existing formulation under Jersey law the principle simply did not apply to the facts.

The position in Jersey in the future

It will be interesting – and significant for trustees and their lawyers – to see how Jersey responds to the developments in England, set alongside Bailhache, Deputy Bailiff's pre-existing, albeit obiter, comments in the *B Settlement* case. In as much as Jersey has followed the *Hastings-Bass* line of authorities as they developed in England it may well – and should, it seems, in the Deputy Bailiff's view – recognise the Supreme Court's analysis of its previous misapplication and its reformulation.

Following the Court of Appeal's decision in March 2011, a trust industry working group set about working on proposed legislative changes to the Trusts (Jersey) Law 1984 (the **Trusts Law**) to confirm, in effect, the principles expressed to be a part of Jersey law by Birt, DB, now the Bailiff, in *Green GLC*. On 17 April 2013, ministerial support was confirmed for the drafting of an amendment to the Trusts Law to crystallise into statute the existing Jersey law on mistake and the 'rule in *Hastings-Bass*'. Drafting of the amendment is now underway and it has been expected to be lodged for debate before the States in the near future.

It is anticipated that the new provisions, if passed without amendment, will specify the circumstances in which the Royal Court may remedy certain kinds of mistakes made by settlors, trustees or other persons. The Court will in effect be empowered to declare, in specified circumstances, that a transfer or

other disposition of property to a trust, or the exercise of powers over or in relation to a trust or trust property, is voidable. It has been expected that fault on the part of trustees will not be a prerequisite and saving provisions will ensure the protection of purchasers for value and other third parties.

The Supreme Court's articulation of the application of mistake principles is close to that Jersey had reached previously and hence it may be likely that the drafting of the provisions in relation to the Court's mistake jurisdiction will continue much as anticipated.

In relation to the 'Hastings-Bass principle', however, there is now a very significant division between the analysis set out in Lord Walker's judgment and the free-standing principle as articulated in *In the matter of the Green GLC Trust*, itself informed by English authorities the Supreme Court has now declared were simply wrong in their analytical foundations. This is not so much a potential divergence of policy between Jersey and England, as a statement by the Supreme Court that there is no legally rational basis for the previous articulation of the principle. In these circumstances, the question arises as to whether Jersey will by its Court or legislation seek to enshrine what the Supreme Court has determined is a mistaken articulation of legal principle. We sense that Jersey will forge its own path. As Bailhache, DB said in the *B Settlement* case:

"Decisions of the English courts in matters of this kind are always likely to be of considerable interest to the Royal Court and will frequently be treated as highly persuasive. Nonetheless, it remains the case that the Royal Court is not subordinate to the English Court of Appeal. The Island of Jersey has its own separate legal jurisdiction and it remains open to the Royal Court, subject to any authority from the Jersey Court of Appeal or the Privy Council, to reach its own conclusions on the law. It may be that from time to time an issue will arise for determination where the Court's decision will be much influenced by issues of domestic policy and the relevant circumstances affecting that policy are quite different in Jersey from

MOURANT OZANNES

BRIEFING

those which may appertain in the United Kingdom. The freedom of the Royal Court in this respect to follow the line it considers appropriate is one which has been long and firmly established in the constitutional rights of the Island and its citizens."

While critics may see the retention (if it is) or reincarnation through statute of the 'Hastings-Bass principle' a 'get out of jail free card' we see it simply as sensible confirmation of an existing jurisdiction of the Jersey Court to supervise the administration of trusts which is the bedrock of the Jersey finance industry. When there are circumstances where it should intervene, the relevant facts should be brought to the Court's attention as soon as possible. Inertia brought about by navel gazing where there is uncertainty could hardly be in the best interests of beneficiaries, especially those who cannot speak through minority or incapacity. It is not a rubber stamp exercise: no application to the Court ever is; the trustee will expose itself to criticism and costs and residual breach of trust and third party claims will always be an issue. As it is a discretionary remedy in any event the applicant will still have all the usual evidential hurdles experienced by the trustee in the *B Settlement* case to satisfy the Court that intervention is necessary and equitable in all of the circumstances.

Cayman

Although the 'Hastings-Bass principle' has been applied by the courts of the Cayman Islands, there have been no reported judgments considering the application of the principle since the Court of Appeal's decision in England in *Pitt v Holt* and *Futter v Futter*.

In the leading Cayman case of *A v Rothschild Trust Cayman Limited* [2004-05] CILR 485, the court adopted Lloyd LJ's summary of the 'Hasting Bass principle' as it was at that time set out in the English case of *Sieff v Fox* [2005] 3 ALL ER 693, namely:

"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". [para 119]

The Chief Justice went on to note that the court's statutory jurisdiction under section 48 of the Cayman Trusts Law (now the 2011 Revision), to give directions on any question respecting the management or administration of a trust is "*convergent with the evolving Hastings-Bass principle*". In the Chief Justice's view, "*if it is appropriate for the court to intervene in order to avoid or mitigate a fiscal consequence which would be injurious to the interests of innocent beneficiaries...the court might well do so notwithstanding the fact that the beneficiaries may have other recourse available to them against the ill-advised or mistaken trustees or their advisors*" [paras 42 and 43].

In the 2010 case of *In the Matter of the Ta-Ming Wang Trust* [2010] (1)CILR 541 the Cayman court again held that the 'Hasting-Bass principle' guided the court's exercise of its statutory powers under section 48 of the Trusts Law and cited with approval the above dicta of Lloyd LJ in *Sieff v Fox*.

In that case, the plaintiffs, who had been beneficiaries of a trust established under the laws of the Cayman Islands, sought to set aside the declaration of a dividend made by T.M. Wang Limited (the **Company**) and procured by the trustee of the trust, who owned all of the common shares of the Company.

The trust had been established to minimise the first plaintiff's tax liability during the five years immediately following his immigration to Canada. The structure, which was compliant with Canadian tax laws, ensured that any dividend paid into the trust during that five year period, would not be subject to Canadian tax. On 25 April 2001 the trustee procured the declaration of a dividend by the Company which it received into the assets of the trust, believing the fifth anniversary to be on 6 May 2001. The Canadian Revenue Agency, however, subsequently determined the fifth anniversary to be 15 March 2001, causing a considerable tax liability to be levied on the trust assets.

The Court held that the trustee's decision to procure the dividend and receive it into the

MOURANT OZANNES

BRIEFING

trust fell squarely within the Hasting-Bass jurisdiction. That decision was liable to be set aside as a decision which the trustee was not authorised to make because it was not a decision that could operate as intended. As such, the decision was found to be void.

The court refused, however, to set aside the decision by the Company's directors to declare the dividend. The court did accept that the 'Hastings-Bass principle' could, in theory, extend to decisions of a company's directors on the basis that it could apply to the exercise of a fiduciary power by any person in a fiduciary position. On the particular facts presented to it in that case, however, the court declined to do so.

Accordingly, it remains to be seen what approach the Cayman courts will take in the light of the unanimous decision of the Supreme Court. The Supreme Court's decision will be regarded as highly persuasive by the Cayman courts but given the court's previous willingness to extend the application of the principle to the exercise of a fiduciary power by any person acting as a fiduciary, it may be that the Cayman court will follow its previous line of authority and follow a course distinct from that of the English court.

Guernsey

It is perhaps surprising given the plethora of cases in Jersey which have considered the 'rule in re Hastings-Bass' and the law of mistake that there has yet to be a single decided case on either as a matter of Guernsey law in the Guernsey Courts.

The closest Guernsey has come to considering the scope of the 'rule in Hastings-Bass' under Guernsey law was an application for such relief by RBC Trust Company (Guernsey) Limited (in its capacity as trustee of the Abacus Global Approved Managed Pension Trust) to have distributions from that pension scheme set aside. The distributions had been made in the form of lump sum payments rather than in the form of a pension and as such had occasioned an otherwise avoidable UK tax liability. HMRC applied to be joined to the proceedings and there was an interlocutory hearing to determine that discrete issue (*Gresh v (i) RBC Trust Company (Guernsey) Limited and (ii) HM Revenue & Customs* [25/2009]). In the first instance decision, Collas, Deputy Bailiff (as

he then was) refused to grant leave for HMRC to be joined to proceedings but the position was reversed on appeal to the Guernsey Court of Appeal. The substantive case on whether or not relief under the 'rule in Hastings-Bass' is available has yet to appear before the Royal Court and it must be doubted if it now will do so following the Supreme Court's decision in *Pitt v Holt* and *Futter v Futter*.

Whilst the Court of Appeal may have reversed the decision of the Deputy Bailiff, his comments on the scope of a 'Hastings-Bass' application under Guernsey law remain prescient and are to date the only judicial comment on the subject in Guernsey. In rejecting HMRC's application to be joined to proceedings, the Deputy Bailiff noted that the availability of relief under the 'Hastings-Bass principle' in the Guernsey Courts would be:

"governed by Guernsey law so the Court will have to establish what the law of Guernsey in this area is; it will not simply be applying English law. In doing so, the starting point is to look at the law of similar jurisdictions...Hence, English decisions interpreting the Hastings-Bass principle will be a starting point but they will need to be considered in light of Guernsey customary and statutory law."

Such an approach would be supported by the decision of the Judicial Committee of the Privy Council in *Spread Trustee Company Ltd v Sarah Ann Hutcheson & Others* [2011] in which Lord Clarke cited with approval the following passage from the Guernsey Court of Appeal in *Stuart-Hutcheson v Spread Trustee Company Ltd* [2002]:

"in thus importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable".

That said, on the basis that there has yet to be a decided case on the 'rule in Hastings-Bass' in Guernsey and having regard to the dicta (albeit obiter) of Bailhache, DB in *In the matter of the B Life Interest Settlement*, it is difficult to envisage the Royal Court not following the Supreme Court's decision in *Pitt v Holt*

MOURANT OZANNES

BRIEFING

and *Futter v Futter*. At present there does not appear to be a move towards creating a statutory remedy along the lines of that currently being considered in Jersey, although if such a change is enacted in Jersey it will doubtless be considered in Guernsey.

Section 11(2)(d) of the Trusts (Guernsey) Law, 2007 expressly provides that a trust will be unenforceable if the Royal Court declares that it was established by mistake but does not elucidate what the correct test for 'mistake' would be in Guernsey. Whilst there have been two cases in which the remedy of mistake on the establishment of a trust or a disposition thereto have been considered in Guernsey, both involved English law trusts in which the Royal Court applied the English law of mistake.

In the recent case of *Dervan et al v Concept Fiduciaries Limited et al* [04/2013], the Royal Court cited with approval Lloyd LJ's summary of the law of mistake in the Court of Appeal decision in *Pitt v Holt* as reflecting the current law in England and Wales. In *Arun Estate Agencies Limited v Kleinwort Benson (Guernsey) Trustees Limited* [2009-10] GLR 437, the Royal Court considered both the wider test for mistake set out in *Ogilvie v Littleboy* and the narrower test articulated in *Gibbon v Mitchell*. On the basis that the narrower test was satisfied it was unnecessary for the Court to consider whether there was a broader test under English law – which has now been answered in the affirmative by Lord Walker in *Pitt v Holt*.

The law of mistake has yet to be articulated in Guernsey and whilst the decision of the Supreme Court in *Pitt v Holt* will no doubt be

persuasive, the following statement by the Deputy Bailiff (now the Bailiff) in *Arun* should be borne in mind:

"any analysis of Guernsey law will, no doubt, start with a consideration of the Norman customary law, as applied in Guernsey, with regard to Donations and may or may not reach a conclusion that is similar to English law".

However, in view of the decision of the JCPC in *Spread Trustee Company Ltd* and the comments made by the Guernsey Court of Appeal in *Rowe v Rich* that it would be unfortunate if the practice were to develop of seeking to "trammel the simple provisions of the Trust Law by reference to ancient relics of La Coutume Normande", it is difficult to envisage the law of mistake in Guernsey departing from English law.

Mourant Ozannes is grateful to Giles Richardson of Serle Court chambers in London, who has provided valuable input in to this briefing.

Contacts:

Bruce Lincoln, Partner, Jersey

+44 1534 676 461

bruce.lincoln@mourantozannes.com

Morven McMillan, Partner, Cayman Islands

+1 345 814 9101

morven.mcmillan@mourantozannes.com

St John Robilliard, Partner, Guernsey

+44 1481 731 440

stjohn.robilliard@mourantozannes.com