



*A recent Jersey judgement may have important ramifications for Jersey trustees*

# Royal Court Awaits Hastings-Bass Ruling

*Advocate Nigel Pearmain and English Solicitor Daniel Walker of Voisin's Trust team review a recent Jersey judgement which may have important ramifications for Jersey trustees.*

## Background

This was an application by the Trustee requesting the Royal Court to set aside and/or confirm to be invalid as having been made by mistake a deed of amendment, a deed of exclusion and a deed of appointment.

This was the first time the Court in Jersey has had to consider the continued applicability of the rule in *Hastings-Bass* since the English Court of Appeal decision in *Pitt -v- Holt* and *Futter -v- Futter*.

The B Life Interest Settlement was established in 1994 under Jersey law. The case concerned a restructuring arrange-

ment in 2008 the purpose of which was to mitigate the incidence of inheritance tax in the United Kingdom and extensive UK tax and legal advice was taken. The intention of the restructuring was to transfer life interests in two thirds of the Trust to the settlor's sons, free of the life interest of the settlor and his spouse, thus creating new transitional interests under relevant UK tax legislation. The re-structuring would reduce the value of the settlor's estate for the purposes of inheritance tax, but would only be fully effective if the settlor lived for a period of seven years from the date of the restructuring.

Unfortunately, it subsequently transpired that the settlor was suffering from an aggressive form of Alzheimer's disease which was not diagnosed until November 2008 and as a result of which he died in September 2011. The Trustee gave evidence that it undertook the restructur-

ing in the mistaken belief that the settlor was a fit and health 57 year old man and the Trustee would not have undertaken the restructuring had it known that the settlor was not fit and healthy.

## Law on Mistake

The Court confirmed that the test for whether a voluntary disposition can be set aside by a settlor under Jersey law is different from English law as developed in *Pitt -v- Holt*.

The Jersey courts affirmed the test for mistake in *Re S* [2011] JLR 375, which stated that the Court has to ask itself the following questions:

- (i) was there a mistake on the part of the settlor?
  - (ii) would the settlor not have entered into the transaction "but for" the mistake
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(iii) was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

The Court further held that the aforementioned test could be reformulated in respect of an application in relation to an appointment by Trustees (as opposed to the settlor).

## Application of the Mistake Principles to the Facts of this Case

In this case, there was no question that the tax advice was in any sense wrong or misplaced. The alleged mistake was that when the Trustee made the appointments it did so in the mistaken but reasonable belief that the settlor was fit and healthy whereas in fact he was not. The Court found that the family of the settlor had indeed been aware that the settlor was having health problems although it was not until after the appointments had been made that the extent of his illness was diagnosed. The Court further noted that the Trustee had considered obtaining life insurance for the settlor for the required period, but had left arranging such insurance to the settlor.

On the matter of mistake, the Court concluded that as the question of whether or not the settlor would survive for seven years had been considered by the parties (as the issue of life insurance was raised) it did not consider that the mistake was of so serious a character as to be sufficient to avoid the Trustee's exercise of power on the grounds of mistake.

## Hastings-Bass Principle

The Hastings-Bass principle has been summarised as follows:

“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.”

In this case the Trustee also sought to set the arrangements aside on the basis that it had failed to take the true state of the settlor's health into account. The Court considered in detail the various Jersey cases which had applied the rule in Hastings-Bass.

The Court concluded that there is no doubt that the decisions of the Royal Court in this area so far have simply been to apply the historic Hastings-Bass rule as developed in first instance in other English decisions and that the Court would have followed these decisions were it not for the decision in Pitt -v- Holt in the English Court of Appeal. The Court held that if that decision stands, after the appeal to the Supreme Court in England, a departure from the line of reasoning in the judgements of the Royal Court based on previous authorities is inevitable – either the Court has to follow the changed approach of the English Courts to the Hastings-Bass doctrine, or it has to adopt some other reasoning based on principle for continuing to follow the historic approach.

## Application of Hastings-Bass to the fact of the case

As regards Hastings-Bass, the Court stated that in its judgement the Trustee took the settlor's state of health generally into account (as the possibility of life insurance being taken out was considered). The Court therefore held that in the circumstances it did not think the Trustee had failed to consider anything which it had been under a duty to consider. Accordingly, the Court did not need to consider the third limb of the Hastings-Bass test, namely whether the Trustee would have acted differently had it taken relevant matters into account.

The Court then made some obiter remarks concerning the Hastings-Bass

regime generally. The Court expressed sympathy with the criticism of the Hastings-Bass regime as a ‘get out of jail free card’ for trustees, to be applied when convenient and that the approach of the Royal Court should be to ensure that loss lies where it should.

Accordingly, the Court stated that if it had been required to decide the point in the light of the Jersey and English authorities as they currently stand, the decision would have been that the previous decisions of the Royal Court in connection with applications under Hastings-Bass were clearly wrong. If the Supreme Court in Pitt -v- Holt however were to endorse the historic Hastings-Bass approach or something similar to it, then the rationale previously adopted by the Royal Court for its decisions on this point could not be impeached and one would expect that the Court at first instance would follow them.

## Comment

This is clearly a very important decision. Although the Court affirmed the Jersey approach on mistake, through its obiter comments, it has indicated that it is not in favour of the Hastings-Bass principle and that it would be inclined to follow the reformulation of the Hastings-Bass principle in Pitt -v- Holt if it was confirmed by the Supreme Court or to abolish the principle entirely if that is the outcome of the appeal. The future of the principle of Hastings-Bass in Jersey therefore rests upon the outcome of the Supreme Court hearing.

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