

TRUSTEE DECISION MAKING

The Rule in *Re Hastings-Bass*

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INTRODUCTION

Re Hastings-Bass: The Origins of a ‘Rule’

In 1958 the trustees of a settlement, established in 1947 by Sir William Bass for the benefit of Captain Hastings-Bass and his issue, exercised the statutory power of advancement¹ to transfer £50 000 from that settlement to the trustees of another trust fund created in 1957 for the benefit of Captain Hastings-Bass’s son, William,² and William’s issue. What the trustees could not then foresee was that the later decision of the House of Lords in *Re Pilkington’s Will Trusts*³ would render some of the 1957 trusts perpetual and void. The Commissioners of Inland Revenue argued that this oversight rendered the purported exercise of the power of advancement void, and that in consequence they were entitled to claim estate duty on the £50 000 when Captain Hastings-Bass died in 1964. In 1974 the Court of Appeal rejected this argument, holding that the 1957 trusts created a life interest vested in William Hastings-Bass, and that this life interest survived even though the remoter interests were void for perpetuity.⁴ **1.01**

From this rather dry, unpromising start has grown one of the great enigmas in the recent history of the English law of trusts, the so-called ‘rule in *Re Hastings-Bass*’. The details of the rule have changed as it has developed through a long series of decisions in first instance cases, but the basic premise has remained the same:⁵ that certain decisions of trustees, and perhaps other fiduciaries too, should be treated as invalid because of flaws in the way in which they were made. This is a necessarily vague generalization, because almost every element of the rule has been disputed over the years. The rule has been consistently applied to trustees, but there has been disagreement over extending it to other fiduciaries such as company directors.⁶ The **1.02**

¹ Trustee Act 1925, s 32.

² William Edward Robin Hood Hastings-Bass, 17th Earl of Huntingdon.

³ *Re Pilkington’s Will Trusts* [1964] AC 612 (HL).

⁴ *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

⁵ Although this premise is not in fact to be found in *Re Hastings-Bass* itself, which was concerned primarily with perpetuity, and the severance of void interests from valid ones: *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [22]–[25]. See also paras 2.12, 2.19, and 3.43.

⁶ *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175; *Segesta Ltd v HMRC* [2010] UKFTT 235 (TC). See paras 7.14–7.18.

requisite flaw in the trustees' decision making has usually been expressed in terms of the trustees failing to take account of relevant considerations, or taking account of irrelevant considerations in making their decision.⁷ Early cases, however, treated the true legal effect of the decision as a relevant consideration, so that any decision which produced unanticipated results was treated as flawed.⁸ There was some suggestion that the tax implications of a decision might not count as a relevant consideration because it might not be desirable to allow decisions to be challenged simply because they produced an unexpected tax liability.⁹ The causal link required between the flaw and the decision was a further point of dispute: was it enough that the trustees *might* have acted differently had they not failed to take relevant considerations into account or to exclude irrelevant considerations? Or was it a requirement that they *would* have acted differently?¹⁰ The case law was mostly concerned with the exercise of dispositive powers, such as powers of advancement and appointment, and with powers to amend the rules of pension schemes, and it remained uncertain whether the rule applied equally to trustees' administrative powers.¹¹ Often trustees had acted on professional advice, and it was unclear what effect this had on any assessment of their decision making.¹² It even remained unclear whether an allegation of flawed decision making was an allegation of breach of duty against the trustees, and if so, whether that breach of duty was a necessary element of the *Re Hastings-Bass* principle:¹³ it might alternatively be seen as a form of discretionary intervention by the court, acting in its supervisory jurisdiction, without any implication of wrongdoing on the part of the trustees. Even the consequences of successfully invoking this most uncertain of legal rules were not clear: it was hotly disputed whether the impugned decision was wholly void *ab initio*,¹⁴ or merely voidable,¹⁵ and so capable of being set aside on the application of a party with standing to do so, but otherwise valid and effective.¹⁶

⁷ Eg. *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1621; *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [58]; *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [16]; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [76].

⁸ *Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 [15]; *Sieff v Fox* (n 7) [86].

⁹ *Sieff v Fox* (n 7) [31], [86]; *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [20]–[24].

¹⁰ See para 5.11.

¹¹ *Seaton Trustees Ltd v Morgan* [2007] JRC 206 (Royal Court of Jersey) [16]. See para 7.02.

¹² *Mettoy Pension Trustees Ltd v Evans* (n 7) 1626.

¹³ *Abacus Trust Co (Isle of Man) Ltd v Barr* (n 7) [23]; *Sieff v Fox* (n 7) [80], [119].

¹⁴ *Green v Cobham* [2000] EWHC 1564 (Ch), [2002] STC 820, 828; *AMP (UK) Plc v Barker* [2001] WTLR 1237 [90]; *Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* (n 8) [19]; *Sieff v Fox* (n 7) [114]; *Futter v Futter* (n 9) [33]; *Jiggins v Low* [2010] EWHC 1566 (Ch), [2010] STC 1899 [18].

¹⁵ *Abacus Trust Co (Isle of Man) Ltd v Barr* (n 7) [33]; *Gallaber Ltd v Gallaber Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [170]; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [79]; *Wjatt v Tyrrell* [2010] EWHC 3633 (Ch) [26].

¹⁶ See para 6.01.

Pitt v Holt: The 'Rule' Reformulated

But in 2011, some 37 years after *Re Hastings-Bass* itself was decided, and during which time no *Re Hastings-Bass* case had ever been argued before an appellate court, the first instance decisions in the cases of *Pitt v Holt* and *Futter v Futter* reached the Court of Appeal.¹⁷ Lloyd LJ radically reshaped the law, and appeals to the Supreme Court followed.¹⁸ In 2013 Lord Walker, giving the only judgment in the Supreme Court, upheld Lloyd LJ's new approach, and answered many—though not all—of the questions which had previously arisen. **1.03**

In the light of the Supreme Court's decision it is now possible to state the *Re Hastings-Bass* rule with a hitherto unachievable degree of clarity. Where trustees exercise a dispositive power or discretion, they must do so in accordance with their duty to give due consideration to that exercise, which entails taking legally relevant considerations (including the tax implications of the decision¹⁹) into account, and excluding those which are legally irrelevant.²⁰ If the trustees breach this duty, the exercise of power or discretion is voidable, and liable to be set aside²¹ at the instance of a beneficiary²² and at the discretion of the Court.²³ Where the trustees have taken proper care over the decision-making process, such as by taking appropriate professional advice, they are unlikely to have committed a breach of duty, even if the advice they receive is incorrect and their decision produces unforeseen consequences.²⁴ There is no separate test of whether the trustees would or might have acted differently but for their breach of duty; that will simply be a factor for the Court to take into account in deciding whether to set aside a voidable exercise of power or discretion.²⁵ **1.04**

It would be misleading, however, to paint a picture of absolute certainty and clarity in the aftermath of *Pitt v Holt*. Some of the old issues remain unresolved: the rule applies to some non-trustee fiduciaries, such as receivers appointed under the Mental Health Act 1983, but it is not yet clear which other fiduciaries are within its compass;²⁶ the English courts have not yet had the opportunity to decide whether the rule can be applied to the exercise of trustees' administrative powers.²⁷ Some issues have arisen for the first time from the Supreme Court's decision: can there really be no **1.05**

¹⁷ *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

¹⁸ *Pitt v Holt* (SC) (n 5).

¹⁹ *Pitt v Holt* (SC) (n 5) [65].

²⁰ *Pitt v Holt* (SC) (n 5) [40]–[41], [60].

²¹ *Pitt v Holt* (SC) (n 5) [43], [93].

²² *Pitt v Holt* (SC) (n 5) [69]–[70].

²³ *Pitt v Holt* (SC) (n 5) [93].

²⁴ *Pitt v Holt* (SC) (n 5) [41], [78]–[88], [90].

²⁵ *Pitt v Holt* (SC) (n 5) [91]–[92].

²⁶ See paras 7.14–7.18.

²⁷ See paras 7.02–7.09.

firm distinction between cases where the trustees' flawed decision making *might* have made a difference to their decision, and cases where it *would* have made a difference?²⁸ Will taking professional advice always immunize trustees' decisions from challenge on *Re Hastings-Bass* grounds?²⁹ Can trustees incur personal liability for a breach of their *Re Hastings-Bass* duty, and will an exemption clause shield them effectively?³⁰ A final set of issues comprises those which will have to be worked out case by case, no matter how clear the structure of the law: whether a particular matter qualifies as a relevant or irrelevant consideration,³¹ whether the Court should, in particular circumstances, set aside a voidable exercise of power or discretion, and whether it should do so on terms.³²

- 1.06** Now that the law has achieved at least a measure of clarity as to the scope and operation of the *Re Hastings-Bass* rule—notwithstanding the many points of detail which remain to be resolved—there are also wider questions in need of an answer. In particular, how does the rule fit in with other controls imposed by English equity on the exercise of powers and discretions? The most obvious analogues are the much older doctrines of fraud on a power³³ and mistake.³⁴ But the *Re Hastings-Bass* rule does not behave quite as might be expected if modelled on these: for example, it is well established that where the purported exercise of a power is treated as a fraud on a power, it is wholly void, and not merely voidable.³⁵ The law of mistake is concerned with decision-making error, but unlike *Re Hastings-Bass* it is not concerned with breach of duty: a decision of an individual dealing with his or her own property can be set aside for mistake, notwithstanding that the individual owes no duty to anyone in respect of it.
- 1.07** It would be profoundly misguided, although perhaps tempting, to characterize this as an interesting but essentially obscure field of scholarly enquiry. The broad scope of the *Re Hastings-Bass* rule, together with its overlap with other trust law doctrine, means that there will rarely be a case in which trustees' conduct is challenged which does not potentially raise *Re Hastings-Bass* issues. In the context of the broad latitude given to trustees to make their own decisions without interference, it is one of only a few ways to impugn their exercise of discretion, and it is still vitally important as a means of undoing that which trustees have done, but which they ought not to have. The volume of case law, both in England and offshore,³⁶ makes clear the frequency

²⁸ See paras 5.11–5.31.

²⁹ See paras 8.01–8.08.

³⁰ See paras 5.32–5.35 and 5.39–5.40.

³¹ See paras 5.03–5.10.

³² See para 6.23.

³³ See ch 9.

³⁴ See ch 10.

³⁵ *Cloutte v Storey* [1911] 1 Ch 18 (CA). See paras 9.20–9.39.

³⁶ The *Re Hastings-Bass* rule has been accepted as an element of the trusts law of Jersey (*Re Green GLG Trust* [2002] JLR 571 (Royal Court of Jersey)), Guernsey (*Gresh v RBC Trust Co (Guernsey)*

with which these issues arise and the significance of what is at stake in such cases. *Re Hastings-Bass* cases have typically arisen in the context of pension funds,³⁷ extensive family wealth³⁸ or disputes over sizeable tax liabilities.³⁹ There remain questions as to how far the *Re Hastings-Bass* rule can assist in tax mitigation—and how far the revenue authorities can limit such use.⁴⁰ A detailed understanding of the possibilities for *Re Hastings-Bass* challenges is therefore vital to be able to advise or litigate effectively in any matter touching on the law of trusts.

A New Analysis

This book presents a new analysis of the *Re Hastings-Bass* rule, as it is now understood in the light of *Pitt v Holt*. It seeks to set out and to explore in detail the *Re Hastings-Bass* rule itself; to address those questions which continue to give rise to difficulty; and to examine how the *Re Hastings-Bass* rule fits into the bigger picture of equity's controls on the exercise of power and discretion. **1.08**

Chapter 2 begins with *Pitt v Holt* itself, explaining the radical new approach put forward by Lloyd LJ in the Court of Appeal and endorsed by Lord Walker in the Supreme Court. **1.09**

Chapters 3 and 4 consider the doctrinal basis of the *Re Hastings-Bass* rule, seeking to defend and explain the Supreme Court's understanding of the rule. Chapter 3 shows that the Supreme Court's analysis provides the best explanation for the extensive *Re Hastings-Bass* case law, and that it is justifiable by reference to long-established principles of equity drawn from important decisions of the House of Lords in *McPhail v Doulton*⁴¹ and *Gisborne v Gisborne*.⁴² Chapter 4 examines the *Re Hastings-Bass* duty of consideration, and how it fits with established concepts of fiduciary duty and the duty of care. **1.10**

Ltd [2009–10] GLR 216 (Royal Court of Guernsey) and the Cayman Islands (*A v Rothschild Trust Cayman Ltd* [2006] WTLR 1129 (Grand Court of the Cayman Islands)). See paras 11.02–11.13. Other common law jurisdictions have been more cautious: see JC Campbell, 'Should the 'Rule in *Hastings-Bass*' Be Followed in Australia?—Trustees' Duty to Enquire and Trustees' Mistakes' (2011) 34 Aust Bar Rev 259.

³⁷ Eg *Mettoy Pension Trustees Ltd v Evans* (n 7); *AMP (UK) Plc v Barker* (n 14); *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317; *Gallaher Ltd v Gallaher Pensions Ltd* (n 15); *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), [2006] All ER (D) 91; *Smithson v Hamilton* (n 15).

³⁸ Eg *Sieff v Fox* (n 7).

³⁹ Eg *Green v Cobham* (n 14); *Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* (n 8); *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569; *Sieff v Fox* (n 7); *Pitt v Holt* (SC) (n 5).

⁴⁰ *Pitt v Holt* (SC) (n 5) [135]; see paras 8.17–8.21.

⁴¹ *McPhail v Doulton* [1971] AC 424 (HL).

⁴² *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

- 1.11** Chapters 5 to 8 turn to matters of immediate practical concern. Chapter 5 addresses those issues which arise in applying the *Re Hastings-Bass* rule to any concrete scenario: what is a relevant consideration? What causal link (if any) must be proved between the trustees' breach of duty and their decision? Under what circumstances will trustees incur personal liability under the rule, and what defences are available to them? Chapter 6 is concerned with the consequences of successfully invoking the rule, and in particular with what it means for a decision to be voidable, and when such a decision will be set aside. Chapter 7 looks at situations outside the confines of the paradigm *Re Hastings-Bass* case: does the rule apply to trustees' administrative powers? Or to fiduciaries other than trustees? Or to the exercise of non-fiduciary powers? Chapter 8 addresses a number of specific problems which have arisen: what protection is afforded to trustees acting on legal advice? Does the rule apply in the same way where tax liability is in issue, or in the context of a pension scheme? Can the exercise of a power or discretion be rendered only *partially* invalid by a *Re Hastings-Bass* challenge, and who has standing to bring such a challenge in the first place?
- 1.12** Chapters 9 and 10 work out how the *Re Hastings-Bass* rule fits in to the overall scheme of controls on the exercise of trustees' powers. Chapter 9 deals with fraud on a power, and chapter 10 with mistake.
- 1.13** Finally, chapter 11 takes a broader look at the context in which the *Re Hastings-Bass* rule has developed, and its prospects for the future. This chapter has a particular focus on the rule's reception offshore, and the enactment in other jurisdictions of statutory *Re Hastings-Bass* rules which do not quite follow the present state of the law in England and Wales.