

Two islands, two courts, two laws – and two different approaches to Hastings-Bass

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The rule in *Hastings-Bass* gives the court discretion to set aside an exercise of power if a trustee failed to take into account relevant considerations when exercising the power, or took into account considerations which should properly have been disregarded. This rule has been at the forefront of Guernsey jurisprudence in recent months due to the two decisions in *M v St Anne's Trustees Limited* and *Re the Achilles Trust*, resulting in what appears to be quite a difference in approach between the Channel Island Courts, though this is largely as a result of Jersey having adopted legislation in respect of this area. Ogier examines in brief those differences in approach.

In England, the rule in *Hastings-Bass* was revised by the cases of *Futter v HMRC* and *Pitt v HMRC* which effectively limited the protection afforded to beneficiaries to cases of 'aberrant' conduct. Some offshore jurisdictions (including Jersey) appeared to consider that the limitation of the rule was wrong in principle and should be reversed.

Jersey

The States of Jersey enacted legislation in the form of the Trust (Amendment No 6) (Jersey) Law 2013 ("Amendment 6"), which effectively restored the breadth of the old *Hastings-Bass* doctrine. Articles 47G&H of Amendment 6 empowered the Court to set aside a transfer or disposition of a property due to a mistake provided (a) there was a mistake on the part of the settlor or person exercising a power, (b) the settlor or person exercising the power would not have entered into the transaction "but for" the mistake, and (c) the mistake was of so serious a character as to render it unjust on the part of the donee to retain the property.

Where a fiduciary power is exercised to transfer or dispose, the Court can set aside provided (a) the person failed to take into account any relevant considerations or took into account irrelevant considerations, and (b) but for that, would not have exercised the power, or not in that way.

Guernsey

In *M*, M took tax advice regarding a proposed transfer, which confirmed there were no adverse consequences. It transpired the transaction gave rise to a significant tax liability and M sought *Hastings-Bass* relief. The Royal Court examined the *Pitt* and *Futter* cases, and held that as legislation (equivalent to Amendment 6) had not been enacted, there was no reason not to accept the approach in *Pitt*.

The Court declined to grant the relief as two policy matters identified in *Pitt* militated in favour of some restraint: (1) the need not to put beneficiaries of trusts in a stronger position than other ordinary individuals, (2) the interests of not imposing too stringent a test in judging trustees' decision making. The appropriate test was whether or not the Court found it unconscionable that the transaction should be left to stand. On the facts, the Court did not find the transaction unconscionable – instead it found that an ordinary person who made an investment with dire consequences on the basis of incorrect advice, would be obliged to take action to obtain compensation from their adviser.

In *Re Achilles*, the Court took a different approach, though the trustee was in breach of fiduciary duty, and no legal or tax advice had been obtained by it, the innocent beneficiary was exposed to consequences in which he had played no part. The Court therefore agreed to grant the relief sought.

The decision in *M* (though not binding) may well mean that *Hastings-Bass* relief is not as easily available as it once was (or as it is in Jersey), with a beneficiary instead being expected to sue his professional advisers for negligence. However, we understand there is an appeal to the Court of Appeal, and its decision *will* be binding on the Royal Court.

Conclusion

In the event that the appeal in *M* is successful, it might not be considered necessary to enact legislation equivalent to that in Jersey. However, if unsuccessful, there may well be pressure from the trust and legal profession for the position to be enshrined in statute, to ensure there is no mistaking what the law in Guernsey is.

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