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Hastings-Bass and Mistake: Should the BVI follow Jersey's example?

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On 25 October 2013 the States of Jersey introduced never before seen statutory provisions which seek to clarify, as a matter of Jersey law, the existence and nature of the Hastings-Bass principle and the doctrine which allows the partial or complete set-aside of dispositions of property into trust and the exercise of trust powers which are made under a 'mistake'. The enactment of these provisions was the execution of a planned response to a decision delivered by the UK Supreme Court some six months earlier which significantly reduced the scope of the Hastings-Bass principle under English law and was therefore not well received in offshore jurisdictions with large professional trustee industries in which the decisions of English courts are persuasive, such as Jersey and the British Virgin Islands (BVI).

What is the Hastings-Bass principle?

The English case of *Re Hastings-Bass* dates back to 1975.¹ In a subsequent case² Lloyd LJ, sitting at first instance, expressed the Hastings-Bass principle in the following terms:

“Where a trustee acts under a discretion given to him by the terms of the trust, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account.”³

The principle is most commonly invoked, under English law at least, when unforeseen and undesirable tax consequences arise as a result of a trustee exercising his powers.

Effect of the Jersey provisions

The new Jersey laws, which can be applied retrospectively, allow the Jersey court to find transfers or dispositions of property into trust (excluding testamentary dispositions) and the exercise of certain trust-related powers (including any discretion as to how an obligation is performed) voidable and either of such effect as the court may determine, or of no effect. Such findings can be made in four situations:

Mistake

1. On the transfer or disposition of property to a trust by a settlor or a person acting on his behalf due to mistake.⁴
2. On the exercise of powers in relation to a trust or trust property by a trustee or other person due to mistake.⁵

In both scenarios it must be shown that the settlor/his representative or the trustee/other person would not have made the transfer/disposition or exercised the powers but for the mistake⁶ and that the mistake "...is of so serious a character as to render it just for the court to make a declaration" that the transfer/disposition or exercise of the powers is voidable.⁷ The mistake may be as to: law, including foreign laws; facts existing before or at the time of the transfer/disposition or the exercise of the powers; or the effect of, consequences of or advantages to be gained by the transfer/disposition or the exercise of the powers.⁸ It appears the mistake may be of a procedural or substantive nature.

These provisions essentially re-state the approach to mistake previously taken by the Jersey courts⁹ which has now been followed in England.¹⁰

Hastings-Bass

3. On the transfer or disposition of property to a trust by exercise of a fiduciary power.¹¹
4. On the exercise of fiduciary powers in relation to a trust or trust property.¹²

Scenario 3 relates to persons who have power to transfer or dispose of property to a trust on behalf of a settlor and who owe a fiduciary duty to the settlor in respect of that power. Scenario 4 relates to trustees and other persons who exercise "...a power over, or in relation to a trust, or trust property" and who owe "...a fiduciary duty to a beneficiary in relation to the exercise of that power".¹³ As with the mistake provisions, it appears that the Hastings-Bass provisions cover both procedural and substantive matters.

In scenarios 3 and 4 it must be shown that the settlor, trustee or other person failed to take into account any relevant considerations or took into account irrelevant considerations, and but for that failure or error "...would not have exercised the power or would not have exercised the power in the way it was so exercised".¹⁴ In a departure from previous Jersey authorities, and the position under English law,¹⁵ scenarios 3 and 4 do not require any fault or lack of care on the part of the person exercising the power or any person giving advice in relation to the exercise of the power.¹⁶

The last points to note about the new statutory provisions are: (a) applications relating to a transfer or disposition of property into trust (scenarios 1 and 3) may be made by the settlor or any of his personal representatives or successors in title,¹⁷ and (b) applications relating to the exercise of fiduciary powers (scenarios 2 and 4) may be made by the trustee or other person who exercised the power in question, any other

trustee,¹⁸ a beneficiary or enforcer, the Jersey Attorney-General (in relation to trusts with a charitable element), or any other person who obtains leave from the court.¹⁹ This is a much more liberal approach than in England where, due to the fact that to bring a successful Hastings-Bass claim the claimant must now show that there was a breach of fiduciary duty on the part of the trustee, it is envisaged that future Hastings-Bass applications will be made by beneficiaries in all but the most unusual circumstances.

Should the BVI follow suit?

Setting aside the legal arguments surrounding whether the widely drawn Hastings-Bass and mistake tests in the Jersey's statutory provisions are justified,²⁰ the commercial upsides are clear. Indeed, the Jersey legislators were arguably influenced by strong economic factors which, in light of its prominent trust industry, are also relevant in the BVI.

It is difficult to imagine why settlors and trustees of BVI trusts would not find the opportunity to reverse unforeseen and harmful consequences, especially tax consequences, of their actions equally as attractive as their Jersey counterparts; the reality is that a significant number of BVI trusts are implemented and administered as part of tax planning and other fiscal strategies. Equally, reducing the risks associated with mistake and Hastings-Bass style errors would no doubt enhance potential settlors' confidence in the BVI as a jurisdiction, just as it has in Jersey.

If the BVI follows Jersey's example then one might expect trustees to become more bullish and perhaps less conscientious. However, the stigma attached to being involved Hastings-Bass and mistake proceedings, especially those which find a trustee to have acted in error, would arguably act as a sufficient deterrent, particularly to corporate trustees.

The likely increase in Hastings-Bass and mistake proceedings would probably be counterbalanced by a corresponding diminution in the number of professional negligence claims brought by BVI trustees and settlors against their professional advisors. This would shed a positive light on the jurisdiction as a whole. The benefit to the professionals is obvious, but settlors and trustees will also benefit from reduced exposure to the vagaries of mounting professional negligence actions; the chance to directly overturn the mistaken exercise of powers offers a much more direct remedy. Contrast this with the confused position under English law (which the BVI courts might feel obliged to follow in the absence of statutory rules to the contrary) in which a trustee who fails to take advice may have a remedy under Hastings-Bass whereas a trustee who takes advice which turns out to be wrong will not.²¹

As things stand, while the new statutory provisions introduce an element of certainty in this area of Jersey law, the BVI and other offshore jurisdictions will have to wait for relevant cases to come before their courts in order to see which way their laws will develop. In the meantime, Jersey practitioners will be able to predict with greater clarity than their counterparts in rival offshore jurisdictions (and indeed England) the costs and prospects of success of potential Hastings-Bass and mistake proceedings. This, combined with the fact that other jurisdictions such as Guernsey are considering implementing similar statutory provisions, will increase the pressure on the BVI to do the same.

The final aspect to consider is the VISTA regime which, among other things, disengages a trustee of a BVI trust which owns BVI company shares (and to which VISTA applies) from the duties he would usually be under to monitor the investments held by his trust. One of the results of this is that the directors of the BVI company, not the trustee, are responsible for all decisions concerning how the assets held by the BVI company are invested.

The introduction of statutory Hastings-Bass and mistake provisions would have to address this issue if they are to be as well received as their Jersey counterparts¹.

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¹ *Hastings-Bass (Deceased), Re* [1975] Ch 25.

² *Sieff v Fox* [2005] 1 WLR 3811.

³ *Ibid.* 3826 at 49.

⁴ Article 47E of the Trusts (Jersey) Law 1984 as amended.

⁵ *Ibid.* Article 47G.

⁶ In the second scenario it is also acceptable for the trustee/other person to show that he would not have exercised the powers in the way he did but for the mistake.

⁷ This is a reformulation of the test espoused by Lindley LJ in *Ogilvie v Allen* (1899) 15 TLR 294, which was approved by Lloyd LJ in his Court of Appeal judgment in *Pitt v Holt and Futter v Futter*.

⁸ Article 47B of the Trusts (Jersey) Law 1984 as amended.

⁹ *Re the B Life Interest Settlement* [2012] JRC 229.

¹⁰ *Supra* at note 2. Previously English law drew a somewhat awkward distinction between mistakes as to effect, which could lead to a transaction being set aside, and mistakes as to consequences, which could not – see *Gibbon v Mitchell* [1990] 3 All ER 338.

¹¹ Article 47F of the Trusts (Jersey) Law 1984 as amended.

¹² *Ibid.* Article 47H.

¹³ *Ibid.* Article 47H(1).

¹⁴ *Ibid.* Articles 47F(3) and 47H(3). The “would not” test is more stringent than the “might not” test previously considered in cases such as *Leumi v Howe* [2007] JRC 248.

¹⁵ *Supra* at notes 2 and 11 respectively.

¹⁶ Articles 47F(4) and 47H(4) of the Trusts (Jersey) Law 1984 as amended.

¹⁷ Article 47FI(1) of the Trusts (Jersey) Law 1984 as amended.

¹⁸ The amendments do not state that the trustee must be a trustee of the trust in question, although surely this is the intention.

¹⁹ Article 47FI(2) of the Trusts (Jersey) Law 1984 as amended.

²⁰ Chief among which are questions surrounding (a) whether it is right for trustees (especially professional trustees) and settlors to be able to set right the mistakes they make when the man in the street cannot, (b) whether the Hastings-Bass principle is inconsistent with other analogous legal principles such as contractual mistake and equitable rectification, and (c) the extent to which the new statutory provisions have departed from the original formulation of the Hastings-Bass principle in the Hastings-Bass case itself.

²¹ This seems palpably unfair and begs the flippant question: “Should English trustees ever take advice as to the consequences of their actions?”

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