

In the Matter of the Ta-Ming Wang Trust, 12 April 2010 (Unreported)

Facts

In this recent case, the Grand Court held that the Hastings Bass principle applied, not just to the actions and decisions of a trustee, but also to the actions and decisions of directors of a company owned by the Ta-Ming Wang Trust (the "Trust"), in declaring dividends, at the instance of the trustee in favour of the trustee; but that, on the available evidence, the decision of the directors could not be impugned.

Background

The case arose from a Canadian immigration trust tax structure, the fiscal purposes of which failed because the then trustee, CIBC Bank and Trust Company (Cayman) Limited, acting on professional advice, failed to take the steps necessary to achieve those purposes. The trustee controlled the company in question through shareholding, and through the company's directors which were nominees of the trustee.

Under this well known tax saving structure, a foreign national immigrating into Canada can obtain a five year Canadian tax holiday on foreign source income earned by a non-resident company, owned by a non-resident trustee; that is, on income by way of dividends paid by the company to the Trust during the five year tax holiday.

On the facts of the case, following an error in the calculation of the start date of the five year period, the declaration and payment to the Trust of the dividend by the company outside that period failed to achieve the intended tax saving purposes. There was nevertheless a significant tax saving to be made if, instead of declaring a dividend, albeit outside the five year period, the company had paid the same money to the Trust by way of a distribution in a winding up of the company.

Plaintiff's arguments

The case for the Plaintiffs, Mr Ta-Ming Wang as a beneficiary, and his wife, Ms Kuo-Ying Shiang, the current trustee, was twofold: first, the actions of the trustee in deciding to procure the declaration of the dividend, and to receive the payment as a dividend, fell within established Hastings Bass principles, and the actions of the directors in declaring the dividend by the company and the payment of the dividend by the company to the Trust, having regard to the substance rather than the form of the transaction, were similarly liable to be set aside: the entire transaction was orchestrated by the trustee and was therefore to be

regarded as the act of the trustee, acting through its nominee directors, so that the entire transaction, including the declaration and payment of the dividend, failed, on Hastings Bass principles, without the need to consider the acts or understanding of the directors themselves.

Secondly, and alternatively, the Hastings Bass principle applied to the acts of the directors themselves, and their actions, in resolving to declare the dividend and paying it to the Trust as a dividend, being intended, but failing, to achieve the fiscal purposes of the trust structure of which the company was an integral part, were themselves void on Hastings Bass principles.

Decision

The Grand Court had little difficulty in concluding that the actions of the trustee itself, in procuring the payment of the dividend and in accepting payment of the money as a dividend, were void on the Hastings Bass principle, which is recognised in the Cayman Islands. The Court held that the trustee's decision fell well within the recognised formulation of the Hastings Bass principle stated by Lloyd L.J. in *Sieff v. Fox* [2005] 1WLR 3881. In deciding to procure the payment of the dividend, and to receive it on the erroneous advice which it had received as to when the tax holiday would be deemed to commence, the trustee took into account the wrong expiry date of the relevant tax holiday. That was a decision which the Court was satisfied the trustee would not have taken had it been aware of the true consequences. On that basis, the decision of the trustee, having been so erroneously taken with the detrimental consequences for its trust, was liable to be set aside as being a decision which it was not authorised to make, because it was not a decision that could operate as intended for the benefit of the Trust. Accordingly, it was a decision which was void ab initio.

In considering the further questions, whether the decision of the directors of the company to declare and pay the dividend, could and, if so, should, also be declared void, the Court found it to be established, at least at first instance, that the Hastings Bass principle applied to the decisions of directors, following *Hunter v. Senate Support Services* [2004] EWHC 1085 (Ch) and *Pitt and Another v. Holt and The Commissioners for Her Majesty's Revenue & Customs* [2010] EWHC 45 (Ch). It was submitted, for the applicant, that it could be assumed that the directors of the company, the very object of which was to give effect to the tax saving purposes of the Trust, understood that the company held its assets for the sole purpose of assisting in the fulfilment of that objective. As such, the



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fiduciary powers held by the directors were to be exercised only for those purposes, and the erroneous exercise of their powers which brought about the declaration and payment to the trustee of the dividend, with its detrimental fiscal consequences, was accordingly unauthorised, and liable to be set aside on Hastings Bass principles.

By the time the matter came to Court, the dividend had been declared some years earlier, and the records of the company relating to that period were no longer available. There was no evidence available before the Court about what the directors may or may not have had in mind in relation to the erroneous advice or misconceived assumptions arising from it. Therefore, the Court found, on the basis that directors as fiduciaries owed their duties only to their company, there was no ground that allowed the Court to assume that the directors would have had in mind directly the interests of the Trust or its beneficiaries. In the absence of available evidence as to the directors' state of mind, there could be no basis for concluding that the directors' belief was itself erroneous, and the practical reality of the directors' status being no more than nominees of the trustee, did not permit the Court to overlook the legal obligation placed on directors to act independently on behalf of the company of which they are fiduciaries.

With regard to the submission for the applicant that the entirety of the transaction was in substance to be regarded as the action of the trustee, the Court said that it would be a contradiction in terms to hold that the decisions of directors who are mere nominees and acting merely on the directions of their principal, could be set aside on Hastings Bass principles, which require that the decision in question is attributable to the fiduciary decision maker and to no one else.

The Court accordingly declared that the decision of the trustee, in procuring the declaration and payment of the dividend and deciding to receive it, was void. The Court declined to make the further declaration sought, that the decision of the directors themselves to resolve to pay the dividend, and the act of the company in paying the dividend, were also void on Hastings Bass principles.

Comment

Interestingly, it is clear from the Judgment that, had there been evidence as to the intentions and state of mind of the directors of the company, sufficient to attract the Hastings Bass principle, the Court would have been prepared to make the further declaration sought.

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