

In the matter of the B Life Interest Settlement [2012] JRC 229

Insights - 11/02/2013

Facts

This was an application by a Trustee asking the Royal Court to exercise its powers to set aside a Deed of Amendment, a Deed of Exclusion and a Deed of Appointment by reason of mistake and/or seeking relief under the *Hastings Bass* principle. This was in effect the first opportunity the Court in Jersey had had to consider the *Hastings Bass* remedy since the Court of Appeal in England's decision in *Pitt v Holt* and *Futter v Futter*. The Bailiff had directed that in the instant case an amicus be appointed to argue before the Royal Court on the *Hastings Bass* issue.

The settlement was governed by Jersey law. It was a life interest trust for the settlor and thereafter his spouse. The settlor's two sons would ultimately benefit. The deeds in question were part of a tax planning undertaken by the Trustee. The intended effect was to transfer life interests in two thirds of the Trust to the settlor's sons, free of the life interest held by 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 that would only be fully effective if the settlor lived for a period of seven years from the date of the re-structuring.

Unfortunately the settlor did not survive seven years. Shortly after the deeds were executed in April 2008, the settlor was diagnosed with an aggressive and ultimately fatal form of Alzheimer's disease. The settlor died in September 2011. The mistake, claimed the Trustee, was in believing the settlor to be fit and healthy at the time of executing the deeds. If it had known of his condition, it would not have put in the place the planning.

The Law

Mistake

The Deputy Bailiff affirmed the test for mistake as set out in *Re S* [2011] JLR 375. In essence the Court is bound to ask itself the following questions:

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

Before making its findings the Court made some interesting obiter comments about whether the customary law of *erreur* was relevant in this area. The Court concluded that if there was a consideration of the validity of a gift of assets into a trust, then the principles of *erreur* may well be relevant. However, as this case revolved around an exercise of Trustee discretion, which did not involve a gift being made *per se*, it was not appropriate to consider the law on *erreur*, but rather the Court should consider the usual equitable principles which have derived from English law over the years.

Hastings Bass

The Trustee also sought to set the arrangements aside on the basis that it had failed to take all relevant matters (ie the true state of the settlor's health) into account.

The Court considered the various Jersey cases which had applied the rule in *Hastings Bass*. The Court rejected the Trustee's submission that the cases showed that Jersey law had established its own principle which could continue to survive in its pre *Pitt v Holt* form. The Court held that if *Pitt v Holt* remains good law after the appeal to the Supreme Court in England, a departure from the line of reasoning in the judgments 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 pre *Pitt v Holt* approach.

Findings

On the matter of mistake, the Court concluded that as the question of whether life insurance should be put in place had been canvassed with the settlor, it showed the issue of the settlor's health had been considered. The Court did not understand why life insurance was not taken out. Accordingly 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.

As regards *Hastings Bass*, the Court said that as the settlor's survival for seven years was a key part of the planning, the Trustee was under a duty to consider whether the settlor was likely to survive that period. In terms of whether there was a breach of that duty, the Court found that

as the settlor's health was considered (it again referred to the possibility of life insurance being taken out), it did not think the Trustee had failed to consider a matter 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. It had taken the key matter (the settlor's health) into account. The Court then made some obiter remarks concerning the *Hastings Bass* regime generally. This Court thought that loss should lie where it fell. It thought that if a professional had been negligent, then the loss should fall there. It was not good for Trustees to have the fail safe ability to undo decisions made if this were not something available for an individual in respect of their own private affairs. Accordingly the Court concluded that if it had been required to decide the matter in light of the Jersey and English authorities as they currently stood, the decision would have been that the previous decisions of the Royal Court in connection with applications under *Hastings Bass* were wrong. If the Supreme Court however were to endorse the *Hastings Bass* approach, then the rationale previously adopted by the Royal Court could not be impeached and one would expect that a Court of first instance would follow them.

Comment

This is clearly an important decision. Ultimately the Court affirmed the Jersey approach on mistake, but, through its obiter comments, has raised serious doubts over whether *Hastings Bass* can survive if the Supreme Court upholds the Court of Appeal decision in *Pitt v Holt*. Consideration is being given in Jersey to a possible statutory *Hastings Bass* test.

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