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Correcting trustee mistakes: *Hastings-Bass* in the Cayman Islands

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The Grand Court of the Cayman Islands has released the first published decision applying the statutory expression of the traditional rule in *Hastings-Bass*.

Section 64A of the Trusts Act (2021 Revision) permits the court to set aside decisions made in an exercise of a fiduciary power by a trustee on the grounds of inadequate deliberation by the trustee without the need to establish a breach of fiduciary duty.

The rule in *Hastings-Bass*[1] is a traditional equitable jurisdiction of the court to set aside the exercise of fiduciary powers on the grounds of inadequate deliberation. The court may interfere with a trustee's action if the trustee would not have acted as it did, had it not failed to take into account considerations which it ought to have taken into account, or taken into account considerations which it ought not to have taken into account. The rule was often used to undo transactions that resulted in unintended and adverse tax consequence to the trust.

The rule in *Hastings-Bass* was substantially narrowed by the UK Supreme Court (**UKSC**) in *Pitt v Holt*.[2] The UKSC held that the inadequate deliberation on the part of the trustee must be sufficiently serious as to amount to a breach of fiduciary duty. Relief was not available where the trustee had simply acted on professional advice that turned out to be wrong.

In 2019, the Cayman Islands legislature enacted section 64A of the Trusts Act (2021 Revision) (**Section 64A**) to preserve the flexibility of the rule in *Hastings-Bass* prior to the constraining effect of *Pitt v Holt*. Section 64A confers a statutory power on the court to set aside the exercise of a fiduciary power where it has been exercised in a way which would not have occurred had the true position been known.

Facts

In *Re Settlements made by Declarations of Trust dated 9 May 2023*,[3] is the first published Cayman Islands judgment that considers the application of the new Section 64A.

In this case, three trusts were established in the Cayman Islands by a husband and wife for the purpose of preserving and accumulating their family wealth. Following a change of trustee, the newly appointed trustee obtained tax advice and was advised that the settlement of the trusts, rather than taking the transferred assets out of the onshore tax regime, had triggered substantial potential tax liabilities. The new trustee applied to have the transfers set aside under Section 64A.

[1] *Hastings-Bass (deceased), Hastings and Others v Inland Revenue Commissioners* (2013 UKSC 26).

[2] (2013 UKSC 26).

[3] (Unreported, 28 September 2023, Kawaley J).

Analysis

In considering Section 64A, the Grand Court held that:

(1) The starting point for the exercise of the statutory jurisdiction under Section 64A was the statutory provision itself, however the court may still draw on case law decided prior to *Pitt v Holt*.

(2) The court's statutory jurisdiction is broadly analogous to the original equitable *Hastings-Bass* jurisdiction. The statutory jurisdiction is a liberally available one, intended to facilitate a flexible approach to the setting aside of a flawed exercise of fiduciary powers.

(3) Section 64A applies to fiduciary discretionary powers and requires that, but for a failure to take into account one or more relevant considerations or having taken into account one or more irrelevant considerations, the power would not have been exercised in the same way, at the same time, or at all. In some cases, this may be practically indistinguishable from establishing a breach of the fiduciary duty to due deliberation, but establishing a breach of fiduciary duty is not a requirement of Section 64A.

The court provided an important qualification that different considerations from those described above may well apply if the applicant is not a trustee. The court also went on to highlight two additional factors, namely:

- it suggested, subject to further analysis if the need arises in future cases, that practitioners should assume that there is an additional implied requirement that relief under Section 64A can only be obtained where the applicant has acted in good faith in relation to the impugned transaction and has not deliberately pursued a course of conduct designed to gain some undisclosed and impermissible onshore tax advantage or to procure any other improper benefit; and
- it observed that, in cases where section 64A operates, the flawed exercise of a fiduciary power will be void (not merely voidable, as suggested by the English Supreme Court in *Pitt v Holt*).

Conclusion

The Grand Court held that had appropriate tax advice been taken at the time, the relevant trust settlements would not have been made. Accordingly, it set aside the trust settlements as void under Section 64A.

This decision provides confirmation that Section 64A is intended to restore the broad and flexible jurisdiction traditionally possessed by the court to set aside the exercise of fiduciary powers on the grounds of inadequate deliberation and will be construed liberally by the courts to give effect to this legislative purpose.

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