

Make no mistake – Unwinding trustee errors in the Cayman Islands

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The judgment in *Re Settlements made by Declaration of Trust dated 9 May 2013*¹ (“**Re Settlements**”) is a useful guide to the interpretation of the statutory *Hastings-Bass* jurisdiction in the Cayman Islands. It offers a helping hand to trustees and other holders of fiduciary powers who might unearth problematic scenarios when administering a trust and provides practical tips for those who wish to seek similar relief from the court.

The rule in *Hastings-Bass*

In light of the judgment of the UK Supreme Court in *Pitt v Holt*² the future of the rule in *Hastings-Bass* has been a hot topic both onshore and offshore for many years. As originally formulated, the rule allowed the court to unwind a decision made by trustees if they could demonstrate that they had failed to take into account relevant considerations. Following *Pitt v Holt*, a court would only be able to void a transaction if the trustee’s error amounted to a significant breach of their fiduciary duty.

As in other offshore jurisdictions, in 2019 the Cayman Islands legislated to provide for what is often referred to as “statutory *Hastings-Bass*” relief for trustees of Cayman Islands law trusts (in addition to other parties such as beneficiaries, protectors, and enforcers). Section 64A of the Trusts Act (as revised) incorporates the rule into statute in its original form and

reinstates the broader authority of the court to set aside fiduciary actions due to inadequate deliberation even where this does not amount to a breach of duty.

Background to the proceedings

The case of *Re Settlements* concerned three Cayman Islands family discretionary trusts settled in 2013 (the “**Trusts**”) which had been established to preserve and accumulate the settlors’ substantial wealth. In early 2014, the settlors, a married couple, transferred shares in a Cayman Islands company into each of the trusts without the settlors or the original lay trustees seeking advice regarding the tax implications of the transfers. As the judge noted: “*Everyone assumed, by all accounts, that the settlement in question would serve to preserve rather than diminish the family fortune.*”

Years later, when Maples Trustee Services (“**Maples**”) were appointed as the new trustee, it was identified that the transfer of shares into the trusts triggered unexpected tax liabilities in the settlors’ home jurisdiction. Penalties and interest continued to accrue at a relatively remarkable rate and the surviving settlor was unequivocally committed to pay whatever sums were found to be lawfully due as a consequence of the legal action discussed below.

¹ FSD 228 of 2023 (28 September 2023)

² (2013) UKSC 25

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Application under section 64A

The trustees applied under section 64A for an order to declare the settlements of company shares as *void ab initio* under a seemingly typical *Hastings-Bass* scenario, however there were several unusual features to the case:

Identity of the applicant

The application was made solely by the trustees as a statutory *Hastings-Bass* application, rather than by the settlors as a mistake application in reliance on common law (both forms of application had been advanced in the alternative in *Pitt v Holt*).

Change of trustee

As Maples was not the original trustee, they had not made the mistake or failed to give adequate deliberation to the transaction. However, it was accepted by the learned judge that the original unremunerated lay trustees would not have accepted the shares had they been aware of the potentially catastrophic tax consequences of doing so.

Fiduciary power in issue

The fiduciary power under consideration was the trustee's power to accept additional assets on trust, rather than the settlor's actions in mistakenly settling assets on trust. The question was whether the original trustees had given adequate deliberation to this before accepting trust assets.

The decision

Kawaley J granted the requested orders and, recognising the absence of written judicial consideration of section 64A, provided reasons for his decision.

He confirmed that under section 64A there is no need to establish a breach of fiduciary duty in the Cayman Islands to obtain *Hastings-Bass* relief (departing from the English position in *Pitt v Holt*). However, the court must identify facts which would have amounted to the improper exercise of a fiduciary power, meaning either relevant matters were disregarded, or irrelevant matters were considered. In some instances, this may be indistinguishable from establishing a breach of fiduciary duty of due deliberation but the statutory regime "*cuts through the conceptual thickets*" arising from *Pitt v Holt*.

The judge noted that normally the application for relief would be made by a trustee. However, section 64A allows for a beneficiary, enforcer, holder of the power or the Attorney General "*or any other person*" to bring an application. The judge found that different considerations might apply in circumstances where an application is brought by someone under the 'catch-all category'. As it was not necessary to elaborate in this case on what these might be, it will be interesting to see how the flexibility of section 64A will be interpreted in due course.

Interestingly, the judge suggested that there was an implied requirement that "*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*". He noted that this implied requirement would benefit from further analysis in future cases which gives room to further develop local law on this front.

Carey Olsen acted for D1 in the proceedings.

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