A CRITICAL DISCUSSION OF THE RULE IN RE HASTINGS-BASS AND ITS SCOPE

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Although the rule has been described by one senior judicial commentator as a ‘magical morning-after pill for trustees suffering post-transaction remorse’, it is not a panacea for all fiscal ills.¹

The rule in Hastings-Bass² allows a court to set aside a trustees’ decision where unintended consequences have arisen. In this case the court refused to interfere because the trustee would still have been justified in acting as they did if the proper issues had been regarded. The courts are reluctant to interfere with discretionary decisions as it is the responsibility of the trustee, however, Buckley LJ indicates that a court can intervene within the original negative form of the rule.³ The courts should not intercede unless it is clear that they would not have acted as the trustee had. It is argued that the purpose of this rule is to protect both trustees and beneficiaries and in some instances third parties.⁴ The principle is an “easy way for trustees and advisors to escape responsibility...of their negligent behaviour.”⁵ Alternatively, it would be inequitable if a trustee misapplies her powers and the result is that trust property is misappropriated. Therefore there needs to be a means for setting aside the misapplication of powers.⁶ Gordon describes the rule as a “get out of jail free card.”⁷

The rule was further developed in positive form⁸ whereby a court has a duty to intervene where the stated conditions are satisfied in that the trustee would reach a different conclusion when considering the relevant facts.⁹ Patten J presents questions as to what should have been considered and what would they have done if they had considered it.¹⁰ This will depend on the facts of the case, for example, failing to

³ ibid 40, per Buckley LJ: “… a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he had achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.”
⁸ Mettoy Pensions Trustees v Evans [1990] 1 WLR 1587, per Warner J: “where a trustee acts under a discretion given to him under the terms of the trust, 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 consideration which he ought to have taken into account.”
⁹ ibid: “It is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did.”
taking into account fiscal consequences or the settlor’s wishes is likely to make a decision void. This permits a justifiable approach, however, it has been put forward that the rule is too wide and needs to be restricted: “the application of the principle is of potentially worrying breadth if it cannot be confined or controlled”.

It is clear that the rule can be described as a ‘morning after pill,’ however, Lightman.J attempted to set restrictions in Abacus v Barr. Lightman.J suggested four prerequisites necessary to set a trust aside. There must be a breach of trust; a trustee must follow the correct procedure and take all relevant but no irrelevant factors into account. It was clear in Burrell that the trustees had been in error though in Barr the solicitor was at fault therefore the trustee was not in breach. This can be compared with Futter in that power was exercised legitimately, yet the trust was set aside even though there was no breach. It is held that there does not need to be a breach and this removes the potential disparity when a beneficiary cannot prove a breach has occurred.

Secondly, should the decision of a trustee be void or voidable? If a decision is made voidable it allows the court to take into account various factors before nullifying a decision, whereas if it was void these considerations are ineffective. This would be a just approach as it brings in other equitable remedies such as rectification. For example Turner failed to exercise a discretion however in Barr discretion was exercised but the duty was not fulfilled therefore in this instance one is more serious.

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12 Abacus Trust Company (Isle of Man) v Barr [2003] 2 WLR 1362.
13 Sieff v Fox [2005] EWHC 1312 (Ch), per Lloyd J.
14 Abacus (n 11) per Lightman J: “In my view it is not sufficient to bring the rule into play that the trustee made a mistake or by reason of ignorance or a mistake did not take into account a relevant consideration or took into account an irrelevant consideration. What has to be established is that the trustee in making his decision has failed to consider what he was under a duty to consider. If the trustee has, in accordance with his duty, identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect. … [T]he rule does not afford the right to the trustee or any beneficiary to have a decision declared invalid because a trustee’s decision was in some way mistaken or has unforeseen and unpalatable consequences.”
15 ibid: “1. Whether or not the trustees’ actions were sufficiently fundamental; 2. Whether the trustee had failed to consider something which she was duty-bound to consider and failed to act with sufficient diligence in identifying that necessary information; 3. Whether the trustee was at fault for failing to give effect to the settlor’s objectives; 4. Whether the exercise of the power was void or voidable.”
18 Burrell (n 10).
19 Abacus (n 11).
20 Futter and another v Futter and Others [2010] STC 982.
21 Sieff (n 12).
22 Turner v Turner [1984] Ch 100.
than the other and HMRC\textsuperscript{24} agrees that the latter should not be set aside. This would mean a decision could be “defeated on discretionary and equitable grounds...such as affirmation and laches.”\textsuperscript{25} This principle appears to be welcome and would reduce the circumstances where the rule can be invoked; however Norris.J\textsuperscript{26} renders the rule void so as to be consistent with previous cases.\textsuperscript{27}

Thirdly, the requirement as to whether a trustee ‘would’\textsuperscript{28} or ‘might’\textsuperscript{29} have acted differently has been controversial and it has been used under both terms. ‘Might’ presents a lower threshold enabling a decision to be changed easily, which is particularly important under pension trusts\textsuperscript{30} as consideration is provided under contracts of employment. ‘Might’ was applied in \textit{Kerr v Britch}\textsuperscript{31} and followed in \textit{Stannard v Fisons}\textsuperscript{32} whereas in \textit{AMP v Barker}\textsuperscript{33} and \textit{Hearn}\textsuperscript{34} either test would have sufficed on the facts. ‘Might’ would potentially open a floodgate therefore Lloyd.J stated under a discretionary trust a trustee must indicate he ‘would’ have acted differently while the ‘might’ test is subject to trustees under a duty to act, based on the balance of probabilities.\textsuperscript{35} There are numerous rules which seem to be perplexing and puzzling however, the definitive definition is within \textit{Sieff v Fox}\textsuperscript{36} as when a trustee is acting under discretion, and the effect is different from what was intended, the court will interfere.

The main reason that a trustee wishes to set aside a decision is for tax avoidance, it has been confirmed in \textit{Futter}\textsuperscript{37} that tax is an issue that must be taken into consideration. Previously HMRC has refused to be part of a case until \textit{Futter}\textsuperscript{38} where

\begin{itemize}
\item \textsuperscript{24} K Gordon and J Howard (n 7).
\item \textsuperscript{25} \textit{Sieff} (n 12).
\item \textsuperscript{26} \textit{Futter} (n 19) per Norris J.
\item \textsuperscript{27} \textit{AMP v Barker} [2001] PLR 77.
\item \textsuperscript{28} \textit{Betafence v Veys} [2006] EWHC 999 (Ch).
\item \textsuperscript{29} \textit{Kerr v British Leyland (Staff) Trustees Ltd} [2001] WTLR 1071.
\item \textsuperscript{30} J Hilliard (n 3): “Where beneficiaries are challenging a decision made by pension trustees to reject their claim, it seems proper that they can compel trustees to reconsider a decision made on incomplete evidence if the decision might be different once the evidence is complete. Beneficiaries may be regarded as having earned a legitimate reasonable expectation of this in the light of becoming settlor-beneficiaries by virtue of entering into a contract of employment with a company.”
\item \textsuperscript{31} \textit{Kerr} (n 28).
\item \textsuperscript{32} \textit{Stannard v Fisons Ltd} [1992] IRLR 27.
\item \textsuperscript{33} \textit{AMP} (n 26).
\item \textsuperscript{34} \textit{Hearn} (n 15).
\item \textsuperscript{35} \textit{Sieff} (n 12).
\item \textsuperscript{36} ibid, per Lloyd J: “Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.”
\item \textsuperscript{37} \textit{Futter} (n 19).
\item \textsuperscript{38} ibid.
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it put forward its arguments as large amounts of tax were at stake. “The fact that there are further unanticipated consequences, such as an unexpected tax charge...is of no relevance.”39 Norris.J disagreed because the true state of affairs had not been looked at. In this case the trustee had considered consequences and taken advice therefore exercising their power validly; however, the tax analysis was incorrect. There should be a distinction where trustees fail to take into account tax consequences and where the advice turns out to be wrong. Where steps have been taken to achieve precisely the effect that was intended, why then should the trustee have the decision set aside as a fiscal consequence arises?40 It is “arguably inappropriate, the courts should choose to exercise their greatest vigilance in cases in which the outcome...will be to open the way for ‘improved’ tax avoidance.”41 Norris.J comments that tax consequences may not need to be taken into account, this will give the courts flexibility in what the trustee is expected to take into account.42

The principle proves to be a huge benefit for trustees and allows them to make decisions in confidence “the principle seems to result in heads the trust wins, tails the Revenue loses”43 and it also allows their advisors to breathe a big sigh of relief as they are able to avoid negligence claims. It provides that a decision can be reversed due to a mere oversight and liability is escaped as trustees would have to suffer the loss. 44 “So the principle protects beneficiaries...whose trustees are not merely improvident, badly advised, or missing something, but even where the trustees are entirely sensible and well advised, but...mistaken in what they understand or expect.”45 It will also mitigate the harshness of the rule where unfair consequences fall on someone who is blameless46 and putting limits upon it would narrow its application.

On the other hand, the rule is described as a ‘mess’47, it creates great uncertainty and disobeys the primary requirements of any legal principle. The name can be disputed as Hastings-Bass was upheld and based on unintended breach. The rule that has been adopted is inconsistent and unclear as to what it applies to. It also seems to be unreasonable and deceitful; if money has been received from a trust and time has passed and it later transpires that the transaction is invalid, the money has to be paid back, this seems unwarranted and creates ambiguity. 48 As presented above are the various factors that might be taken into account when applying the rule; however, it is still vague as to what should be considered. In some instances the decision is void

39 K Gordon and J Howard (n 7).
42 Futter (n 19).
44 Target Holdings v Redferns [1996] 1 AC 421.
45 Lord Neuberger (n 42).
46 Pitt v Holt [2010] EWHC 45 (Ch).
47 Lord Neuberger (n 42).
48 ibid.
because of a failure to consider although in others the decision is not void despite failing to consider some important factor. Lastly, what factors are trustees’ obliged to take into account? There is a need to ensure Hastings-Bass is “not used simply when parties are mistaken...or have second thoughts.”

The Hastings-Bass rule is based on pragmatism and economic efficiency. It can be said to be a morning after pill because it permits a decision to be invalidated, “[i]t grants a second bite of the cherry to trustees who have erroneously caused the beneficiaries to suffer a liability to tax.” However it is not a cure because it only has the effect of protecting trustees and is only applicable in relation to fiduciary powers, it does not apply to gifts, nor will it protect settlors of private trusts or employers who establish a pension-scheme plan. If a power is applied correctly it is not likely to be set aside despite a mistake being made. Whilst the rule gives added protection for trustees, it appears that there are few limits in place and the rule needs to be ‘reined in,’ the principle is still being developed and the courts have been trying to determine its limits since the 1975 case, adding to the ambiguity of the rule, although a rigid test may impose intolerable burdens on trustees who often undertake heavy responsibilities for no financial rewards. “The rule is being abused by big-fish tax avoiders who wish to avoid being taxed like the rest of us when their tax planning goes upstream.”

51 K Gordon and J Howard (n 7).
52 AMP (n 26) per Lawrence Collins J.
53 G Watt (n 40).
54 A Hudson (n 5).
55 K Gordon and J Howard (n 7).
56 Sieff (n 12).
57 J Hilliard (n 3).
58 Re Vestey’s Settlement [1951] Ch 209, 221: ‘Then a result is produced substantially or essentially different from that which was intended’.
59 C Mitchell (n 4).
60 K Gordon and J Howard (n 6).