HASTINGS-BASS – THE APPLICATION IN JERSEY

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1 Readers will be familiar with the direction taken by the *Hastings-Bass* principle following Lightman J's judgment in *Abacus Trust Co (Isle of Man) v Barr*[2]. This article concerns a case (*In re Green GLG Trust*[3]) that was heard in the Jersey Royal Court only a few weeks earlier. Although it concerns another Abacus company (in this case, Abacus (CI) Limited)), the Jersey case does not appear to have been referred to in the later proceedings in the High Court. This article reviews the decision in the Royal Court and considers whether the two cases mark the beginning of a divergence between Jersey and English law.

The facts of *Green GLG*

2 The facts, so far as they are relevant, can be simply stated. The Green GLG Trust ("the trust") was established by a UK-resident and domiciled settlor on 29th February 2000. The trust, however, was not treated as UK resident – the trustee being Abacus (CI) Limited. The trust was to be governed by Jersey law. At all relevant times, the trust was settlor-interested – the settlor having a life interest.

3 The trust was established to hold an interest in a business venture being set up by the settlor and three of his colleagues. As part of the business venture, the trust was required to borrow funds and then make capital

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2 [2003] EWHC 114 Ch, [2003] Ch 409

3 [2002] JLR 571, [2003] WTLR 377

distributions to the settlor. UK taxation advice had been provided by an English solicitor and leading tax counsel.

4 The trust also had a protector, a partner of a New York firm of attorneys. In September 2000, the protector gave a general consent allowing any payment of capital to be made to or for the benefit of the settlor until further notice. In accordance with this consent, the trustee made two appointments of capital later that month and two further payments in April 2001.

5 Whilst the scheme had been endorsed by counsel in its infancy, this advice had preceded the introduction of Finance Act 2000, section 92 and Schedules 25 and 26. These provisions were announced on, and took effect from, 21st March 2000. They inserted Schedules 4B and 4C into the Taxation of Chargeable Gains Act 1992, which were designed to counter the schemes commonly referred to as "flip-flop schemes"[4]. This was achieved by deeming there to be a disposal (and immediate reacquisition) of trust assets whenever:

(a) there is a transfer of value from the settlement (as defined by Schedule 4B, paragraph 2) (for example, the advancement of funds to a second settlement), and

(b) at that time, there is outstanding borrowing by the trustee, and

(c) the proceeds of the borrowing are not being used for "normal trust purposes" (as defined by Schedule 4B, paragraph 6).

6 Although the trust in *Green GLG* was not apparently participating in a flip-flop scheme, the transactions nevertheless fell within the terms of Schedule 4B. In particular, notwithstanding the apparently *bona fide* commercial purposes of the transaction, the appointments of capital to the settlor did not sufficiently satisfy any of the conditions listed in Schedule 4B, paragraph 6. Consequently, the trust borrowings were not (as far as the statute is concerned) applied for normal trust purposes. As a result, the trustee was deemed to have disposed of and immediately reacquired

4 Under a flip-flop scheme, a settlor-interested offshore trust would borrow funds on the security of a trust's assets (which are standing at a gain) and advance the borrowed funds to a second settlement. The settlor would then sever any links with the first trust. The previously unrealised gains would then be realised by the first settlement in the following tax year and the funds obtained would be used to repay the borrowings. The original settlor would then receive his (or her) money (generally tax free) from the second settlement

the assets held. This, in turn, gave rise to a chargeable gain which would have been imputed to the settlor.

7 During this time, the English solicitor had maintained a watching brief over the trust's affairs. However, presumably, he did not realise that the Finance Act 2000 changes had affected the Green GLG trust's activities. It was only when the trustee received a questionnaire from the Inland Revenue early in 2002 that the problem became apparent.

8 The trustee and the New York-based protector both asserted their ignorance of the effect of the Finance Act 2000 changes. They also maintained that they would have acted differently had they known that the advances to the settlor would have exposed him to a capital gains tax charge. The Royal Court accepted these assertions and, in particular, that in these circumstances:

(a) the trustee would not have made the appointments to the settlor and

(b) the protector would not have given his consent to such appointments (or would have revoked it).

The *Hastings-Bass* principle

9 Having established the facts, the Royal Court proceeded to consider whether it fell within the scope of the rule known as the principle in *Hastings-Bass*. The Royal Court first noted that the rule was not a creation of the court in the *Hastings-Bass* case[5] itself but the summary of earlier authorities and gained its epithet in the subsequent case of *Mettoy Pension Trustees Limited v Evans*[6]. Under the rule, as formulated by Buckley LJ[7]:

(a) the court would generally not interfere with the action taken by a trustee who is given a discretion which he uses in good faith;

(b) this would be the case even if the consequences of the trustee's action do not fully have the intended effect;

5 *In re Hastings-Bass* [1975] Ch 25

6 [1990] 1 WLR 1587

7 [1975] Ch at 41

(c) however, an exception is made if either:

(i) the trustee did not have the authority to act as he did, or

(ii) it is clear that the trustee would not have acted as he did if either:

- the trustee had not taken into account irrelevant considerations, or
- the trustee had failed to take into account relevant considerations.

10 The *Mettoy Pension* case also emphasised that the principle was not a *carte blanche* to give trustees a second bite of a cherry. Instead it was limited to cases where "the trustees did not have a proper understanding of their act…[and it] must be clear that, had they had a proper understanding of it, they would not have acted as they did"[8].

11 In that case, Warner J also concisely summarised the questions that should be asked in cases where the trustees were claiming to have overlooked a matter.

(a) What were the trustees under a duty to consider?

(b) Did they fail to consider it?

(c) If so, what would they have done if they had considered it?

12 The case of *Green v Cobham*[9] confirmed that the *Hastings-Bass* principle extended to cases where the trustees had failed to consider the fiscal consequences of their actions. The relevance of such taxation consequences (either on the trust itself or its beneficiaries) was further confirmed in the subsequent case of *Abacus Trust Co (Isle of Man) Limited v National Society for the Prevention of Cruelty to Children*[10]. In that later case, however, Patten J did remark that it was open for a higher court to impose limits on the application of the *Hastings-Bass* principle. However, on the basis of the previous authorities, the failure by the

8 [1990] 1 WLR at 1624D

9 [2002] STC 820

10 [2001] STC 1344

trustees to take into account the taxation consequences allowed the court to intervene.

The application of *Hastings-Bass* in Jersey

13 Having reviewed the English authorities, the Royal Court then turned its mind to determining whether the principle had any application in Jersey law. It first commented that the principle was not necessarily a stand-alone principle, but simply "a manifestation of the general principle that a trustee must act in good faith, responsibly and reasonably". The Royal Court illustrated this by citing from the judgment of Robert Walker J (as he then was) in *Scott v National Trust*[11] which itself relied on the authority of the House of Lords in the Scottish case *Dundee General Hospitals Board of Management v Walker*[12]. In that earlier case, Lord Reid held that:

> *"If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene."*[13]

14 As commented by Robert Walker J in *Scott*, this long-established principle is still being developed, referring here to *Hastings-Bass* and *Mettoy*. However, the Royal Court felt that the principle in its extant state was fully consistent with the Trusts (Jersey) Law 1984, noting that the Jersey statute was substantially based on the general principles of English trust law.

15 Consequently, the Royal Court was able to give the trustee the declaration sought determining the appointments of capital to be void from the outset.

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11 [1998] 2 All ER 705 but erroneously shown in the *Green GLG* judgment as also reported at [1998] 1 WLR 226

12 [1952] 1 All ER 896

13 *ibid* at 905A

The Royal Court's view of *Hastings-Bass*

16 Being the first case in the States of Jersey to consider *Hastings-Bass*, the Royal Court took the opportunity to set out its view of the limits of the principle. The Royal Court noted that (even in the English authorities) these limits were still being developed and tacitly implied that it did not wish to make many *obiter* comments.

17 Nevertheless, the Court did make a statement concerning the possible application of the principle in cases where the trustees show that they *might* not have acted in the way they did had they considered all the relevant factors and only these factors. This follows a deviation by the English authorities that started with the decision in *Kerr v British Leyland (Staff) Trustees Limited*[14] and followed by the Court of Appeal in *Stannard v Fisons Pension Trust Limited*[15]. Rather than being an isolated case, this less stringent test was subsequently adopted by Robert Walker J in *Scott*[16] and Lawrence Collins J in *AMP (UK) plc v Barker*[17].

18 The Royal Court made it clear that (at least as far as Jersey was concerned) the doctrine should only be applied if the trustees can show that they *would* not have acted in the way they did had they considered all the relevant factors and only these factors. It is not sufficient for the trustees to show that they *might* not have so acted.

***Abacus v Barr* – summary**

19 The subsequent case of *Abacus v Barr* concerned an instruction from a settlor to the trustee which the latter misunderstood. This misunderstanding led to the appointment of 60% of the trust funds to discretionary trusts for the benefit of the settlor's sons instead of the intended 40%. The settlor at first thought it better to leave matters where they were (although it appears that he did not take legal advice at the time). He came to the same conclusion two years later when reconsidering the matter. It was only a further seven years later (i.e. some nine and a half years after the original error) that the settlor

14 [2001] WTLR 1071 (judgment given on 23rd March 1986, but not reported until 2001)

15 [1991] PLR 225, [1992] IRLR 27

16 *supra* at 718d

17 [2001] OPLR 197, [2001] PLR 77, [2001] WTLR 1237

received advice that the appointment to the discretionary trusts was susceptible to challenge.

"Would" or "might"?

20 Lightman J first addressed the issue that was considered by the Royal Court in *Green GLG* – that is whether rectification is possible if the trustees can only show that they *might* have acted differently. However, the learned judge's comments might be misunderstood as:

(a) he first[18] maintains that "the choice between the two criteria remains open", but

(b) he then asserts[19] (albeit *obiter*) that "all that is required is that the unconsidered relevant consideration *would or might* have affected the trustee's decision" [author's italics].

21 In view of the clear terms of the first statement on this point, it would seem that the use of the words "would or might" was not a case of the judge setting out his preferred view (having been deliberately equanimous at first) but an expression of the two arguments currently in circulation – leaving unsaid the parenthetical comment "depending on the route down which the courts subsequently decide to take the principle".

"Void" or "voidable"?

22 The novel aspect of Lightman J's judgment in *Abacus v Barr* was that he moved away from the Court's previously-held view that the appointment of capital without the trustees' proper consideration of the relevant issues was void. Instead, he held that such appointments were voidable. The stated advantage of making such appointments voidable (as opposed to void) is that the court would have the discretion to refuse to give such a ruling if it would seem inequitable to do so[20]. For example, in *Abacus v Barr*, it is arguable that the sons should not be penalised by the settlor's previous (repeated) acquiescence of the trustee's actions and the subsequent lapse of time.

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18 at 416H

19 at 417D-E

20 At 420C-D

23 Lightman J can trace his reasoning back to the judgment of Staughton LJ in *Stannard*[21] where it could be inferred that the Court held a discretion as to whether it could declare as void a decision of the trustees[22]. However, chronologically, it is perhaps more likely that he was encouraged by the words of Sir Robert Walker (as he then was) in his lecture 'The Limits of the Principle in *Re Hastings-Bass*' given at King's College London on 26th February 2002[23].

24 Sir Robert referred his audience to the judgment of Lawrence Collins J in *AMP*[24] which followed the previous authorities in holding that the unauthorised decisions of the trustees should be void rather than voidable. However, he also considered the "magisterial review" of the principle of *non est factum* given by Lord Wilberforce in *Gallie v Lee*[25] which was followed by the words:

> *"A document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking."*

25 Sir Robert recognised that the appointment by the trustees in *Hastings-Bass* was in breach of the rule against perpetuities and thus conceded that it was correct to determine whether it was in fact void (rather than voidable). However, his views[26] are that the subsequent cases should have been decided on the basis that the trustees' decisions were merely voidable (and so subject to the Court's discretion).

26 This baton has now been picked up by Lightman J.

Reconciling *Green GLG* with *Abacus v Barr*

27 Of the two live issues concerning the *Hastings-Bass* principle, the Royal Court ruled on one and Lightman J ruled on the other. In the

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21 *supra* at 238

22 This inference was criticised as wrong – see Brian Green QC *infra* at 126

23 reported at [2002] PCB 226

24 *supra* at 216F

25 reported as *Saunders v Anglia Building Society* [1971] AC 1004

26 which were accompanied by a disclaimer that they were his "own preliminary extra-curial views…[on which he has] not had the benefit of hearing argument"

circumstances of the two cases it would appear that, had *Abacus v Barr* preceded *Green GLG*, the Royal Court would have:

(a) come to the same conclusion in respect of the "would or might" question, and

(b) simply held the appointments to the settlor as successfully avoided from the outset.

28 Thus, it is the author's view that the decisions by the Royal Court and Lightman J do not indicate a divergence between English and Jersey law on *Hastings-Bass*. For the foreseeable future, one can expect the two jurisdictions to keep in line.

Postscript – whither *Hastings-Bass*?

29 Sir Robert effectively invited the Courts to consider moving away from the view that ill-considered appointments should be void – preferring them to be voidable. This call was answered by Lightman J. However, with respect to the learned judge, one now needs the Court of Appeal to settle this matter one way or the other.

30 Without wishing to prejudice the issue, the various cases to date can be split into two separate categories. This can help to resolve both the would/might issue as well as the question on voidability.

31 With the exception of *Scott*, the decisions that have supported the less stringent "might" requirement have a factor in common that distinguishes them from the other cases discussed in this article. This is that they deal with occupational pension schemes where the beneficiaries are not volunteers in the true sense (see Fox LJ's judgment in *Kerr*[27])[28]. Further, the case of *Scott* did not involve a private trust but the National Trust, a charity. Alternatively, it is also possible to distinguish the "might" cases on the basis that they (mostly) deal with the process leading to decisions being taken by trustees rather than the actual appointment of capital to

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27 at 1079E

28 This distinction was given some judicial backing by Park J in *Breadner v Granville-Grossman* [2001] Ch 523 at 542H

beneficiaries[29].

32 For either of these reasons, it may therefore be the case that the two strands of the *Hastings-Bass* principle can continue to co-exist. It is not suggested, however, that this is necessarily the optimum solution – especially in view of the artificiality of the distinctions in some cases. Nevertheless, it may permit some trustees' decisions to be subjected to a judicial review-style approach (where the Court's power can be limited to requiring the trustees to reconsider a matter) and allow others (those akin to *Hasting-Bass* itself) to retain the stricter test (where the Court actually intervenes and declares an action by the trustees to be void *ab initio*).

33 Following this categorisation, those cases where the trustees *would* not have acted in a particular way (rather than "might not") would then be subject to a declaration that the trustees' decision was void; other cases would be at the Court's discretion. It is also possible that one could circumvent the (not insignificant) arguments concerning acquiescence and laches in *Abacus v Barr* by treating the original appointment as void but the settlor's subsequent acquiescence as validation of a new appointment.

29 For an alternative view, the reader is referred to Brian Green QC, 'The law relating to trustees' mistakes – where are we now?', *Trust Law International*, Volume 17, No. 3, 2003, pp114-128