
THE LAW OF UNINTENDED CONSEQUENCES

The Rule In *Re:Hastings-Bass* Reconsidered

In his treatise on *Powers*,¹ Sugden discusses grounds for setting aside the purported exercise of a power.² One such ground is “excessive execution”, that is, a disposition outside the scope of the power (because it was to an unauthorised person, or created an unauthorised interest, or attached unauthorised conditions). The other was the exercise of a power within its terms, but for an improper motive amounting to equitable fraud.³ No other special vitiating grounds are mentioned.⁴ Further grounds of avoidance developed in the Courts, whereby the Court could set aside the exercise of a power *intra vires* where the fiduciary had been unwise enough to reveal bad reasons for its exercise,⁵ or where the exercise was on the basis of no reasons at all.⁶ What the Courts were seemingly not prepared to do was to go beyond that, and review the grounds on which a decision was made to assess whether it could have been made differently, or better. The historic deference accorded to non-professional people shouldering the burden of trusteeship of family settlements may explain that unwillingness to intrude. The underdeveloped principles of substantive review in other areas of law may be a further reason.⁷ Set

¹ Fourth Edition, 1826, Chapter IX, Section 8, page 536.

² He considers the general grounds at pages 402 – 406.

³ At pages 406 – 417. This, he considered, rendered it void at equity.

⁴ An doubtless any ground requiring a review of the reasoning behind such an exercise would run into the difficulty that there is no general duty to give reasons: *Re Beloved Wilkes' Charity* (1851) 3 Mac & G. 440; *re Londonderry's Settlement* [1965] Ch. 918. Pensions may be different as beneficiaries are not volunteers: *Wilson v Law Debenture Trust Corporation plc* [1995] 2 All. E.R. 337.

⁵ E.g. *Klug v Klug* [1918] 2 Ch. 67 (refusal to exercise power of advancement as husband was regarded as undesirable; there, the Court compelled the trustee to act, though usually interference will be to undo or restrain the exercise of a power).

⁶ *Turner v Turner* [1984] Ch 100, what has become known as equitable “*non est factum*”. There, the fiduciaries were mere ciphers for the settlor, and had clearly not grasped their role as decision-makers.

⁷ W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden, K. Smith, *The Oxford History of the Laws of England*, Volume XI: 1820 – 1914: The English Legal Systems, pp. 512 – 522. For a recent illustration of the overlap between concepts from the areas of fiduciaries and public law, see *Charles Terence Estates Limited v Cornwall Council* [2013] 1 W.L.R. 466.

against that background, *Re Hastings-Bass*,⁸ as re-stated in *Mettoy Pensions Trustees v Evans*,⁹ was an evolutionary leap. Warner J formulated the Court's jurisdiction as follows:

[W]here a trustee acts under a discretion given to him by 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 considerations which he ought to have taken into account.

Thus formulated, the Court has an actual duty to interfere with decisions that, but for some relevant omission, should have been made differently. The principle confers on fiduciaries an advantage over and above all other individuals – they can ask the Court to undo a decision which has, with hindsight, become unwise.¹⁰ However, without safeguards, and particularly where third party interests are affected, one can see that the rule could very readily be applied in too wide a range of situations.

The existence of the rule has now been confirmed by the Supreme Court in the conjoined appeal in *Futter v HMRC* and *Pitt v HMRC*, but it has been significantly reined in.¹¹ This note refers to that appeal as *Futter* except where it is necessary to distinguish between the appeals. It will consider the historical evolution of the rule, because it is relevant to understanding why the rule has been regarded as so controversial, before picking up on aspects of *Futter* that merit special attention.

Origins

Equity may not be past the age of childbearing, but occasionally there is a question-mark over the parentage of some of its offspring. The “rule” in *Hastings-Bass* is one such instance. It is the last in line of a succession of three archaic cases involving family settlements. All three cases were cases in which the fiduciaries had decided to exercise a

⁸ [1975] Ch 25.

⁹ [1990] 1 W.L.R. 1587.

¹⁰ C. Mitchell, “Reining in the Rule in *re Hastings-Bass*” (2006) 122 L.Q.R. 35, esp. at pp. 41 – 42.

¹¹ [2013] 2 W.L.R. 1200

power in a particular way, but had misunderstood, or entirely failed to appreciate, a legal impediment that stood in their way. The question for the Court was whether the exercise ought nonetheless to be upheld to the extent that it remained effective, or whether the purported exercise of the power had been so undermined as to be rendered non-beneficial to the beneficiaries. Evidently, an exercise of a power which is completely non-beneficial to the beneficiaries entirely defeats its object, and one can readily understand that such an exercise, which fails wholesale to further the purposes of such a power, is liable to be set aside.

In the first case, *re Vestey*,¹² the trustees of a settlement misunderstood the effect of section 31 of the Trustee Act 1925, thinking that it empowered them to allocate (but then to accumulate and not distribute) income due to infant beneficiaries for later use. It did not, and the question for the Court was whether this rendered the exercise by the trustees void. Evershed M.R. decided that it was not void. While the power could not be exercised in the way that the trustees thought it could, the outcome was still beneficial. The error was as to mere mechanics.¹³

Next came *re Abrahams' Will Trusts*,¹⁴ a case (like *Hastings-Bass* itself) where the trustees had failed to foresee the House of Lords' decision in *re Pilkington*.¹⁵ The cases concerned the termination of a life interest under a testamentary settlement so as to pass on the settled property to the next generation of entitled beneficiaries. This had the effect of saving estate duties. Central to the scheme was the power of advancement allowing the interest of the next generation to be accelerated, and held as an interest under a separate settlement. The unforeseen trouble with this scheme was that, as *Pilkington* eventually held on final appeal, the new settlement had to be treated as if it had been an appointment under a special power contained in the original settlement. As the next generation to be benefited was typically not a life in being at the time of the original settlement, the

¹² [1950] 1 Ch. 209.

¹³ 220 – 221.

¹⁴ [1969] 1 Ch. 463.

¹⁵ [1964] A.C. 612.

scheme fell foul of the rule against perpetuities, and was void. In *Abrahams*, Cross J decided that the effect of the perpetuities rule on the scheme as drawn was so serious as to render it completely void, as, when the offending parts were shorn away, there was no real benefit left in the remainder.¹⁶ Essentially the same problem arose in *Hastings-Bass* itself. However, the Court of Appeal felt able to distinguish *Abrahams* on the facts. Unlike in *Abrahams*, the void parts of the settlement were a subsidiary motive for the transfer of interests, and their invalidity was a legally inconsequential inconvenience. There was still enough about the scheme that remained that conferred benefits, not least in creating substantial tax savings.¹⁷

Pausing there, the above cases were ones in which the trustees were asking the Court either for a declaration as to the effect of what the exercise of their power (*Vestey*, *Abrahams*), or positively to uphold the exercise as far as possible (*Hastings-Bass*).¹⁸ These cases were not ones in which trustees, in a fit of post-transaction remorse, were asking the Court to undo what they had done. Secondly, these were cases in which the Courts were asking themselves whether the exercise of the power was itself effective, not whether the effects of a valid exercise were unwise with a fuller understanding of the consequences.¹⁹ Thirdly, they were cases in which the question for the Court objective, namely, was the exercise, once properly understood, still a beneficial one. It was not an inquiry into the minds of fiduciaries, and the alternative courses of action open to them. This line of cases therefore dealt with very narrow questions which have nothing to do with the rule as it later developed.²⁰

¹⁶ In so concluding, he felt unable to disaggregate various parts of the scheme so as to hold some parts valid, and others not.

¹⁷ 39 C - 40 A . .

¹⁸ Meeting, along the way, challenges by the Revenue, concerned to ensure that the estate duty schemes did not succeed, or rival beneficiaries, concerned to defend their share to the fund.

¹⁹ See too the judgment of Lord Walker in *Futter*, at paragraph [41].

²⁰ This is *Sieff v Fox* [2005] W.L.R. 3811, [66]; and see too Lord Walker in *Futter* at [41].

The rule has evolved out of the unfortunate wording of one part of Buckley LJ's judgment in *Hastings-Bass*, which later cases quoted shorn of the context in which it was decided:

“[W]here by the terms of a trust [...] 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 has 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.”

Limb (1) would have been recognised by Sugden as the old doctrine of excessive execution. It is Limb (2) that has caused all the trouble. What does it mean? It is quite clearly separate from Limb (1), but what does it allow the Court to do, and in what circumstances? It may be that Buckley L.J. simply intended limb (2) to cover situations not within Sugden's rather rigid three-fold classification of excessive execution, as where the exercise of the power turned out to be wholly non-beneficial in its effect (and hence not a proper exercise of a power). One can however readily see how, taken out of its context, Limb (2) can be elided into the different and much wider question of whether the exercise of the power could have been structured in a way that was *more* beneficial. It is to be noted that the Buckley LJ formulation does not go so far. As stated by him, the question for the Court is whether the fiduciary, knowing what he ought to have known, would have acted at all. It does not go so far as to allow a review where, if better informed, the fiduciary would still have acted, but differently. There is a clear difference between these two approaches, and it is the second, and wider, approach which the *Mettoy* reformulation facilitated.

Mettoy

While *Hastings-Bass* was occasionally cited in argument and referred to in judgments,²¹ the supposed rule in limb (2) was not applied or considered until the decision in *Mettoy*, though in that case the rule was not found to apply on the facts. In *Mettoy*, the essential facts arose out of a deed executed in relation to a pension scheme, in relation to one provision. The provision in question – a power of augmentation allowing participants' benefits to be increased in the event of a fund surplus on winding – up – was inadvertently drafted so as to vest that power in the employer and not to the pension trustees. The trustees challenged the provision, claiming that they would not have executed the deed had they known it vested the power in the employer. The matter came before Warner J. Warner J found that the employers held the power in a fiduciary capacity (which operated to protect the employees of the fund), and on that basis was not satisfied that the trustees would in fact have acted differently. What is of interest is that Warner J, though rejecting *Hastings - Bass* applied on the facts, manifestly regarded the application of the rule as involving a forensic analysis of the thought-processes of the fiduciary whose actions were being challenged. In other words, the question was no longer “was the outcome of the action beneficial”, but, rather, “was this action taken for the correct reasons”. The rule therefore moved from an objective assessment of outcomes to a subjective analysis of reasons.

Following *Mettoy*, the rule has become further divorced from the earlier trio of cases. First, the rule as re-drawn imposes a duty to act on the Court (rather than as originally formulated imposing a restraint on judicial interference). Secondly, there has been shift from focusing on an assessment of the benefits of the true effect of the exercise of the power to the different, and subjective, question of what a fiduciary would (or possibly might) have done had he thought about all relevant factors correctly. Thirdly, the focus on what would have happened has allowed factors to be taken into account not confined

²¹ For instance in *Turner v Turner* [1984] Ch 100.

to the intrinsic validity of the exercise of the power, and evolved into to an investigation of what might be called the “external effects” of its exercise, such as its tax consequences. Indeed, the “classic” application of the rule is now to set aside the exercise of the power because a more tax-efficient route has presented itself.²² Fourthly, (as the reformulation of the test to a positive form makes clear) applications under the rule are now made with the express purpose of striking down decisions that have been taken, rather than with a view to upholding them so far as possible.²³

As the rule is so curiously rootless, without a body of cases refining its application over time, the Courts have only recently had to grapple with a number of fundamental aspects of it. The most significant earlier case is *Abacus Trust Co (Isle of Man) v Barr*.²⁴ There, instructions given by a beneficiary were misunderstood, and 60% of shares held under a settlement for him were appointed to discretionary trusts, and not the 40% he has requested. Lightman J decided that, in order to undo the exercise of the power, there was no need for there to be a fundamental mistake, merely a need to show that the trustees would or might have acted differently had they known the full facts. In *Abacus*, they obviously would have done. He further decided that, to engage the rule, there had to be shown to be some breach of duty on the part of the trustees in the decision-making process. It was not enough to show merely that some of the information “inputs” into their decision-making was false, if the information had been collected and considered with appropriate diligence. In *Abacus* there had been a breach on the facts. He went on to decide that the effect of all of this was that the exercise of the power was merely voidable, not void.

²² The usual reason is that the exercise created an unexpected tax liability: see *Green v Cobham* [2002] S.T.C. 820 (considered in *Breadner v Granville-Grossman* [2001] Ch. 523); *Burrell v Burrell* [2005] STC 569; *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain*;

²³ Though note the comments of Lord Walker in *Futter* at paragraph [69], indicating that applications by fiduciaries rather than aggrieved beneficiaries are likely to be more difficult and personally costly.

²⁴ [2003] Ch. 409.

Controversies continued to trouble the Courts, however. First, was a breach of duty a prerequisite for the rule to operate?²⁵ Secondly, was it necessary to show that a trustee would have acted differently, or was it enough merely to show that he might have done?²⁶ Thirdly, was the effect of establishing that the rule applied to render the exercise voidable or void?²⁷ These issues have finally been considered by the Supreme Court.

Futter and Pitt

In *Futter*, stockpiled, undistributed gains had been accumulated by non-resident trustees under the terms of separate settlements. Resident trustees were appointed, and, on the basis of tax advice which turned out to be incorrect, the gains were distributed (entirely *intra vires*), thereby resulting in the beneficiaries incurring unexpected capital gains liability. The beneficiaries applied to Court to have the distributions declared void. In *Pitt*, the personal representatives of the estate of the deceased, who had suffered very serious head injuries in a road traffic accident, received wrong advice in relation to the structured settlement in which his damages were held. Immediate inheritance tax liability was not avoided when it could have been. Again, an application was made to set aside the decision on the basis of *Hastings-Bass*. Both applications succeeded at first instance. The Court of Appeal however reversed both decisions, on the basis that there had been no breach of fiduciary duty. Appropriate professional advice had been taken; it was just that this advice was incorrect. The leading judgment in the Supreme Court was given by Lord Walker, whose judgment contains a detailed survey of the history of the evolution of *Hastings-Bass*. The Supreme Court agreed with the Court of Appeal, but reversed the decision of the Court of Appeal in *Pitt* insofar as it related to mistake.²⁸

That judgment does not kill off *Hastings-Bass*, but it clears up a number of questions left open in relation to this under-developed doctrine. As Lord Walker recognises, in the

²⁵ E.g. *Sieff v Fox*; *re RAS I Trust*

²⁶ E.g. *Amp (UK) Limited v Barker*; *Burrell v Burrell* [2005] STC 569.

²⁷ E.g. *Amp (UK) v Barker*; *re Green GLG Trust* (2002) 5 ITCLR 590.

²⁸ This aspect of the case, also important, is not covered in this case note, but is also of some considerable significance.

modern world of private client trusts, consequences of decisions – in particular fiscal consequences – are highly relevant to beneficiaries.²⁹ The Supreme Court accepted the core of the evolved *Hastings-Bass* principle (though subject to strict qualifications) that decisions could be set aside on the ground that relevant considerations (including as to tax consequences) had not been taken into account. In so doing, a number of points debated in the pre-*Futter* cases have now been settled:

(1) *A Breach of Duty? Whose?*

Futter clearly recognises *Hastings-Bass* as a separate vitiating ground for the exercise of a power by a fiduciary, separate from mistake, *non est factum* and excessive execution.³⁰ It is, however, founded on breach of duty. Lord Walker has made clear that, absent a breach of duty, *Hastings-Bass* does not operate.³¹ Specifically, he was clear that a breach of duty meant a breach by the decision-maker entrusted with the exercise of a fiduciary power. There was no doctrine of attribution of fault whereby the fiduciary could rely upon the breach of duty of an adviser; that was a question of professional negligence, and not one that *Hastings-Bass* could cure.³² Further, the presence of an exoneration clause (if valid) would apparently not preclude the operation of the rule, at least insofar as it was worded as a clause excluding liability (which was taken to mean liability for compensation) for breach of trust.³³

Absent a breach of duty (such breach meaning that there has been no due administration of the trust), the Court has no jurisdiction to interfere with an *intra vires* exercise of a power by a fiduciary.³⁴ The only remedy (applicable generally

²⁹ *Futter* Lloyd LJ (Court of Appeal) at [115]; Lord Walker (Supreme Court) [64] – [66].

³⁰ And not by a non-fiduciary: see [CASE].

³¹ At [68]. He rejected the suggestion that there should be strict liability for such decisions, at [80]., and As already decided by Lightman J in *Barr*, paragraph [23]. And contrast the views of Lloyd L.J. in *Sief* with his view in the Court of Appeal in *Futter*.

³² *Futter* at [81] – [85]. However the line between adviser and decider may be hard to draw; that line was to drawn on the basis of the facts of every particular case: see at [85].

³³ *Futter* at [89].

³⁴ *Futter* at [41]; [73].

to fiduciary and non-fiduciary exercises of a power) would then lie in mistake or on the grounds of fraudulent exercise of a power.³⁵ As analysed by Lord Walker, the rule in *Hastings-Bass* is therefore given its own exclusive conceptual province, even if, on the facts, more than one remedy could apply in any given case. So understood, it becomes clear that *Abrahams*, one of *Hastings-Bass*' doubtful ancestors, cannot be an illustration of *Hastings-Bass* at work. The turn the law took in *Pilkington* was not something for which the trustees were responsible. The reason why the exercise of the power was set aside was not because they had failed to discharge their fiduciary duties. It was because, as the law was declared to be in *Pilkington*, what they purported to do was a legal impossibility, and the unobjectionable residual effect of their decision to act was non-beneficial.

(2) *Would or Might?*

To set aside the exercise of a power in breach of duty, is it wrought that a fully-informed fiduciary would have acted differently, or is it enough that he merely might have done so? Some have suggested that both tests might be appropriate, depending on the context. The “might” test, allowing a more intense review of decisions, could be right where the beneficiaries were not volunteer (as under a pension fund), so that exercises of power are more readily capable of challenge. Lord Walker declined to set down any rule with such rigidity, though he accepted that such a distinction might guide the Court in future. It would, in his view, inhibit the full range of remedial responses open to the Court. It is suggested that, in light of the re-casting of *Hastings-Bass* as founded on breach of duty, questions of what a trustee “would” or “might” are not directly relevant to the question of whether the rule is engaged; what they might be relevant to is the remedy to be

³⁵ E.g. *re Pauling* [1964] Ch 303. However, the effect of a fraudulent exercise at equity remains open to question. *Futter* was clearly dubious about the decision in *Cloutte v Storey* [1911] 1 Ch. 18. *Non est factum* in the *Turner* sense would be another avenue.

imposed: for instance, in assessing what alternative course of action the Court orders the defaulting fiduciary to take.

(3) *Void or Voidable?*

It is now settled that, unlike fraud, or excessive execution, where *Hastings-Bass* applies, there is a right to call on the Court in its discretion to interfere, in which case the exercise of the power is merely voidable. It is therefore clear that the rule is independent of those other concepts, not just in terms of the underlying facts that are required to trigger its operation, but also its operation. It is a right to call for judicial discretionary interference, which might provoke a range of responses. Further, while the consequence of setting aside the exercise of a power under *Hastings-Bass* is generally simply said to be that this allows the exercise of the power to be avoided, as Lord Walker reminds us, when faced with a failure by trustees to exercise a fiduciary power, the Court (as the ultimate enforcer of trusts) may have additional weapons in its arsenal to give effect to the intentions of the settlor or testator.³⁶

Where Are We?

While *Mettoy* has widely been regarded as a wrong turn, the Supreme Court evidently considered that, appropriately restricted it should not be overruled. However, the rule does not serve as an “undo” button for fiduciaries. *Hastings-Bass* has been firmly tied to the concept of breach of duty by a fiduciary (as opposed to by a non-fiduciary adviser, unless the two are inseparable on the facts).³⁷ At this point, it may be observed that modern trustees can regularly be expected to take legal advice, particularly on such important issues as tax consequences of particular courses of action, and to delegate certain complex functions to an appropriately qualified professional. In those circumstances, it may well be that the facts on which a relevant breach of duty is made

³⁶ *Re Baden's Deed Trusts* [1971] A.C. 424, 456 – 457 (per Lord Wilberforce).

³⁷ Requiring an appropriate fact-finding exercise to be undertaken, see *Futter* at [85].

out may be rather rare,³⁸ and it may be that *Hastings-Bass* applications will be replaced with greater frequency by professional negligence actions against advisers.³⁹ However, an application under *Hastings-Bass* will of necessity now entail a finding of potentially serious culpability (in the form of a breach of fiduciary duty) on the part of the fiduciary, creating the risk of adverse costs orders and the other sanctions against that person.⁴⁰ *Hastings - Bass* applications are therefore likely to be regarded as significantly less attractive than they previously were.

³⁸ For a discussion, see *Futter* at [80].

³⁹ Though note the comments in *Futter*, at [90], as to the inherent difficulties of such actions.

⁴⁰ Which the Supreme Court strongly intimated was to be made by beneficiaries, and not regretful fiduciaries: see *Futter* at [69].