



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 228 OF 2023 (IKJ)

**IN THE MATTER OF SETTLEMENTS MADE BY DECLARATIONS OF TRUST DATED 9 MAY
2013 (THE “TRUSTS”)**

AND IN THE MATTER OF SECTION 64A OF THE TRUSTS ACT (2021 REVISION)

BETWEEN

MAPLES TRUSTEE SERVICES (CAYMAN) LIMITED

Plaintiff

AND

- (1) AB**
- (2) CD**
- (3) EF**
- (4) GH**
- (5) IJ**
- (6) KL**
- (7) MN**
- (8) OP**

Defendants

IN CHAMBERS

Appearances:

Ms. Shân Warnock-Smith KC of counsel and Mr Quentin Cregan and Ms Allegra Crawford of Maples and Calder (Cayman) LLP for the Trustee

Ms Bernadette Carey and Mr Graham Stoute of Carey Olsen for the First Defendant (“D1”)

Mr Carlos de Serpa Pimentel and Mr Esmond Brown of Appleby (Cayman) Ltd. for the Second to the Eighth Defendants (“D2-D8”)

Before: The Hon. Justice Kawaley

Heard: On the papers

Date of decision: 5 September 2023

Draft Reasons circulated: 15 September 2023

Reasons Delivered: 28 September 2023

HEADNOTE

Ex parte Originating Summons-application by trustee for declarations that trust settlement transfers void ab initio-statutory Hastings-Bass principles- Trusts Act (2021 Revision), section 64A-Grand Court Rules Order 15 rule 13

REASONS FOR DECISION

Background

1. By an Ex Parte Summons dated 3 August 2023, the Trustee applied for a Confidentiality Order in relation to the present proceedings which I granted administratively on 7 August 2023. The Originating Summons was issued on 21 August 2023.
2. All beneficiaries had essentially the same interests and supported the relief sought by the Trustee on an urgent basis. It was accordingly directed that the substantive application could also be heard on the papers. The Hearing Bundles including the pleadings, evidence, skeleton arguments and authorities were delivered to the Court on 28 August 2023. The relief sought was to set aside the transfers made to Trusts 1, 2 and 3 under this Court’s statutory *Hastings-Bass* jurisdiction.

3. On 5 September 2023, I granted an Order in the terms sought by the Trustee with affirmative support from D1 and D2-D8. Counsel indicated that there appeared to be no published judgments dealing with section 64A of the Trusts Act (2021 Revision) (the “Act”) and presented fulsome submissions on this new jurisdiction. Accordingly, I now give reasons for this decision.

The factual matrix

4. The Trusts were established in the Cayman Islands in 2013 by a husband and wife (the “Settlors”) domiciled in an onshore jurisdiction to preserve and accumulate their largely inherited family wealth. They had a home in Cayman and Caymanian friends. Two close friends agreed to become trustees of the Trusts (the “Initial Trustees”), which essentially held shares in a Caymanian company (“Caymanco”) which the settlors transferred to them to be settled upon the respective Trusts. Neither the Settlers nor the Initial Trustees obtained professional tax advice from the Settlers’ domicile about the tax implications for the Trusts, the Settlers and/or the beneficiaries of settling the Trusts in the way which was done. Everyone assumed, by all accounts, that the settlements in question would serve to preserve rather than diminish the family fortune.
5. The Trusts were each settled with the initial nominal sum of US100.00 in 2013. In early 2014, the three transfers of Caymanco shares were made by the Settlers to the Initial Trustees on behalf of each of the three Trusts. Neither of the Initial Trustees had ever acted as professional trustees and they received no remuneration. By the end of 2019 they had both retired and been replaced by the Trustee, a professional corporate trustee. One of the two Settlers had sadly died. In response to a proposed restructuring, the Trustee obtained initial tax advice in 2021 and was advised that the now impugned transfers, rather than taking the transferred assets out of the onshore tax regime, had triggered substantial potential tax liabilities including penalties covering several years. It was obvious that had appropriate tax advice been taken at the relevant time, the relevant settlements would not have been made.
6. The surviving Settlor (D1) and the current holder of all of the family wealth unequivocally deposed to an intention to deal appropriately with the relevant tax authorities and pay whatever sums were found to be lawfully due in the event that the Trustee’s application to set aside the impugned transfers was successful. The result of the setting aside would be that the relevant assets would revert to her ownership. The adult beneficiaries were all content to benefit through D1’s personal succession arrangements and supported the Trustee’s application to set aside the settlements

without exception. One child of the Settlers was appointed (GCR Order 15 rule 13) to represent the interests of the children and unborn beneficiaries and supported the application on their behalf.

7. The consensus amongst all beneficiaries was that they all, including the children and unborn, had common interests which the present application would best serve. The Trustee and D1 both filed Skeleton Arguments, as well as evidence, supporting the case for granting the relief sought under the Originating Summons on legal and factual grounds. The representative of the children and unborn beneficiaries filed evidence confirming her support for the application. These averments seemed self-evidently to be valid. The Trusts would be depleted significantly by virtue of their tax liability and D1's personal tax liability would further diminish what the other beneficiaries could potentially receive in any event from D1's estate.
8. The Trustee deposed that there was no *bona fide* third party purchaser who might be prejudiced by the application. There was no reason to doubt the accuracy of this assertion.

Governing legal principles

The statutory regime

9. The Trustee invoked the jurisdiction under section 64A of the Trusts Act (2021 Revision). The functional essence of the jurisdiction is captured by subsection (1):

“Jurisdiction of Court to set aside mistaken exercise of fiduciary power

64A (1) If the Court, in relation to the exercise of a fiduciary power, is satisfied by a person specified in subsection (5) that the conditions set out in subsection (2) have been met, the Court may —

- (a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the Court may think fit; and*
- (b) make such order, consequent upon the setting aside of the exercise of the power, as it thinks fit.”*

9. The function of section 64A is to confer a statutory power on the Court to set aside the exercise of a fiduciary power. The ambit or scope of the power is defined by reference to the conditions set out in subsections (2)-(4):

“(2) The conditions referred to in subsection (1) are that —

(a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and

(b) but for that person’s failure to take into account one or more such relevant considerations or that person having taken into account one or more such irrelevant considerations, the person who holds the power —

(i) would not have exercised the power;

(ii) would have exercised the power, but on a different occasion to that on which it was exercised; or

(iii) would have exercised the power, but in a different manner to that in which it was exercised.

(3) If and to the extent that the exercise of the power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred.

(4) The conditions specified in subsection (2) may be satisfied without it being alleged or proved that in the exercise of the power, the person who holds the power, or any advisor to such person, acted in breach of trust or in breach of duty.”

10. The pivotal conditions for the Court exercising the jurisdiction are, expressing it most broadly, that a fiduciary power was exercised in a way which would not have occurred had the true position been known. Subsection (5) next confers standing on the following applicants to seek relief under section 64A:

“(5) An application to the Court under this section may be made by —

(a) the person who holds the power;

(b) where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested under that trust, or (in the case of a purpose trust) the enforcer;

(c) where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney General; or

(d) with the leave of the Court, any other person.” [Emphasis added]

11. The Trustee clearly had standing to make the present application. Subsection (6) protects *bona fide* purchasers:

“(6) No order may be made under subsection (1) which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which allow the Court to set aside the exercise of a power over or in relation thereto.”

12. Section 64A concludes with a definitions clause:

“(7) In this section —

‘fiduciary power’ means any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person holding the power;

‘power’ includes a discretion as to how an obligation is performed; and

‘person holding the power’ includes any person, whether or not the trustee of a trust, on whom a power has been conferred, whether or not that power is exercisable by that person alone, and any person to whom the exercise of a power has been delegated.

The Submissions

13. In the Skeleton Argument of the Plaintiff, the following introductory legal submission was made:

“14...Section 64A is the statutory enactment and extension of the court’s approach to setting aside fiduciary decisions taken by trustees commonly referred to...as that in

Hastings-Bass. This principle has been repeatedly applied in the Cayman Islands and other offshore jurisdictions, and has (comparatively) recently been restated by the UK Supreme Court in Pitt v Holt. Whilst prior cases [are] illustrative, there are material differences between the case law and the Cayman Islands' statutory regime such that it is now only necessary to consider the terms of the statutory provision itself."

14. The Skeleton Argument of the First Defendant set out the following introductory legal submissions:

"4.1 To the best of the knowledge of the attorneys for the First Defendant, there are presently no written judgments of the Grand Court (either reported or unreported) which have applied or interpreted section 64A following its enactment. We respectfully suggest that, in exercising its discretion as to whether to set aside the transfer of the Shares into the Trusts, it will be instructive for the [C]ourt to consider:

(a) Firstly, the evolution of the rule in Re Hastings-Bass in the comparative and local case law; and

(b) Secondly, the legislative intent behind the introduction of section 64A of the Trusts Act."

15. I accepted both the Trustee's contention that *"it is now only necessary to consider the terms of the statutory provision itself"* and D1's submission that one must (in the absence of any directly relevant case law) consider the evolution of the *Hastings-Bass* rule and the legislative intent underpinning section 64A itself because:

(a) the rule in *Re Hastings-Bass* [1975] Ch 25 as developed in the English courts was applied by Smellie CJ (as he then was) to inform this court's statutory jurisdiction under section 48 of the Trusts Act in cases such as *A-v- Rothschild Trust Cayman Limited* [2004-05 CILR 485] and *Re Ta-Ming Wang Trust* [2010 (1) CILR 541];

(b) this jurisdiction was a very broad and flexible one until the United Kingdom Supreme Court in *Pitt-v-Holt* [2013] UKSC 26 held that *"for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty"* (Lord Walker, at paragraph 73);

(c) various offshore jurisdictions including the Cayman Islands enacted legislation broadly designed to override the constraining effect of *Pitt-v- Holt*. This was

confirmed by reference to ‘*Trusts Law Reform*’, Cayman Islands Law Reform Commission, 5 April 2017; and

- (d) the starting point for the exercise of the new statutory jurisdiction was indeed, now, the statutory provisions themselves.

Applying section 64A; an overview

16. Although the starting point for construing section 64A is indeed the relevant provisions themselves, it is still possible in addition to draw upon the resources of the pre-*Pitt-v-Holt* cases as well. This is no more than one would logically expect if the purpose of the new statutory ‘*Hastings-Bass*’ jurisdiction was to restore the traditional equitable jurisdiction this Court possessed to set aside the exercise of fiduciary powers on the grounds of inadequate deliberation. This legislative purpose can be identified not just by reference to the legislative history of section 64A, but also by reference to the statutory language and persuasive authority.

17. In *Re Ta-Ming Wang Trust* [2010 (1) CILR 541], Smellie CJ opined as follows:

“16 *The recent formulation of the Hastings-Bass principles which has found favour with this court as being a clear exposition of them (see A v. Rothschild (1)) is that given by Lloyd, L.J. in *Sieff v. Fox (6)* as follows ([2005] 1 W.L.R. 3811, at para. 119):*

‘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 that 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.’”

[Emphasis added]

18. The corresponding statutory language has the following key strands. Firstly, the statutory jurisdiction applies to a “*fiduciary power*”. The *Hastings-Bass* principle necessarily applies to fiduciary discretionary powers. In my judgment the jurisdiction is closely connected to (if not derived from) the wider equitable principle that fiduciary duties can only validly be exercised for

their proper or intended purpose. Buckley LJ in *Re Hastings-Bass* [1975] Ch 25 at 37D, 41G made the following remarks in relation to submissions made by Nicholas Browne-Wilkinson QC (as he then was) which were clearly ultimately accepted:

“The power of advancement is, he says, a fiduciary power, and as to this we think there is really no dispute. He says that the trustees can only properly exercise such a power after giving due consideration and weight to all relevant circumstances....”

To sum up the preceding observations, in our judgment, where 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....”

19. Secondly, the statute requires that but for the mistake the power would not have been exercised either in the same way, at the same time or at all. This corresponds to the requirement articulated in *Hastings-Bass* by Buckley LJ (at page 41G) and applied by Smellie CJ in *Re Ta-Ming Wang Trust* that it be “*clear that they would not have acted as they did*”.
20. And thirdly the statute requires there to have been a “*failure to take into account one or more such relevant considerations or that person having taken into account one or more such irrelevant considerations*”. This mirrors very closely the requirement articulated in *Re Tai-Ming Wang Trust* that it be demonstrated that the trustee has “*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*”.
21. Persuasive authority also supports the view that the post-*Pitt-v-Holt* statutory jurisdiction is broadly analogous to the original equitable *Hastings-Bass* jurisdiction. In the Bermudian case of *Re GC Settlement* [2021] SC (Bda) 6 Civ (25 January 2021), Narinder Hargun CJ observed:

“9...It is in these circumstances that the Trustee invokes the jurisdiction of the Court to set aside the flawed exercise of a fiduciary power conferred by section 47A of the Trustee Act 1975. As the judgment of Kawaley CJ holds in In the Matter of the F Trust [2015] SC (Bda) 77 Civ (13 November 2015), at paragraphs 12-13, section 47A was enacted in Bermuda to

introduce the rule in Re Hastings-Bass as it was understood and applied in England (and other common law jurisdictions) in and prior to 2011...”

22. Accordingly, *Hastings-Bass* case law pre-dating the introduction through *Pitt-v-Holt* of the requirement of a breach of fiduciary duty is likely to be of potential assistance in applying the new statutory jurisdiction to set aside the flawed exercise of a fiduciary power under section 64A of the Trusts Act. This conclusion is primarily justified by a straightforward reading of the main strands of the statutory language itself, which corresponds closely to the language developed in the previous case law.
23. I would tentatively suggest an additional implied requirement of section 64A, a matter which will obviously benefit from further analysis if the need arises in future cases. Section 64A confers a judicial discretion and sets out certain mandatory express requirements for the exercise of this jurisdiction. In *Re Hastings-Bass* [1975] Ch 25 at 41G, Buckley LJ described the discretionary power exercised by a trustee which could potentially be set aside as being “*a discretion as to some matter under which he acts in good faith*”. Was this simply distinguishing the jurisdiction from that which would be engaged to set aside a transaction on the grounds of fraud? Or was “*good faith*” an additional discretionary requirement for granting equitable relief? I provisionally prefer the latter view. Bearing in mind that *Hastings-Bass* relief has more often than not been sought to avoid unintended adverse tax consequences flowing from the exercise of a fiduciary power, it seems logical that an implicit requirement for obtaining equitable relief is that the applicant acted in good faith or comes to the Court with ‘clean hands’. In my judgment the starting assumption ought to be that, by necessary implication, section 64A relief can only be obtained when 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, nor indeed designed to procure any other improper benefit.
24. In summary:
 - (a) the statutory regime makes it possible for the Court to grant relief on a basis which cuts through the conceptual thickets which many consider were erected around the traditionally flexible *Hastings-Bass* principle by the Supreme Court decision in *Pitt-v-Holt*. [2013] UKSC 26. Under section 64A, there is no need to establish a breach of fiduciary duty;

- (b) it seems to me that the Court is still required to find facts which would (section 64A apart) have amounted to the improper exercise of a fiduciary power (in the sense that either relevant matters were ignored or irrelevant matters were taken into account). This is to my mind likely in many (if not most) cases to be indistinguishable (legal labelling apart) from having to establish a breach of the fiduciary duty of due deliberation in conceptual terms;
- (c) in practical terms, however, the statutory jurisdiction will be a more liberally available one. Because the purpose of the enactment was clearly to sidestep a perceived narrowing of a previously more flexible jurisdiction, section 64A can confidently be construed as intending to facilitate a flexible approach to setting aside the flawed exercise of fiduciary powers. The courts will generally be obliged, subject to appropriate limitations informed by the facts of each case, to give effect to this important legislative purpose;
- (d) according to the (strictly *obiter*) findings of the UK Supreme Court in *Pitt-v-Holt*, if the impugned transaction is set aside, it is merely voidable. Under section 64A, the flawed exercise of the fiduciary power is explicitly void. In this respect, the statutory regime more explicitly introduces a material difference to the non-statutory legal position.

25. An important qualification must be made to the overview of the statutory regime set out above. The analysis focusses on the most common scenario, thus far, where the applicant for relief is, as in the traditional *Hastings-Bass* cases, a trustee. On the margins, if not in fundamental terms, somewhat different considerations might well apply if the applicant is not a trustee, especially if they are not even a beneficiary, enforcer, holder of the power or the Attorney General, but are invoking the catch-all standing category of “...any other person” (section 64A (5) (d)).

Findings: merits of application

26. In all the factual circumstances of the present case, it was clear that the statutory requirements for setting aside the impugned exercises of the fiduciary powers in question were met because:
- (a) The application was made “*in relation to the exercise of a fiduciary power*” (section 64A(1));
 - (b) the Initial Trustees clearly “*did not take into account one or more considerations... that were relevant to the exercise of the power*”, namely the tax implications of the settlements for the Settlers and/or the Trusts (section 64A (2) (a));
 - (c) but for the failure described in (b), the Initial Trustees clearly “*would not have exercised the power*” at all (section 64A (2) (b) (i));
 - (d) the Trustee clearly had standing to seek relief (section 64A (5) (b); and
 - (e) there were no *bona fide* purchasers who might be prejudiced by setting aside the impugned exercises of the relevant fiduciary power (section 64A (6)).

Conclusion

27. For the above reasons on 5 September 2023, I granted the Trustee’s application for declarations that the transfers of assets purportedly made to the three Trusts by the Initial Trustees in 2014 were void under the provisions of section 64A of the Trusts Act (2021 Revision).



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT