

Undoing past moves

Philippa James and Stuart Pickford offer an update on the recent legal decision to cut back the circumstances in which trustees can go to court to unwind past decisions

In a landmark decision on 9 March 2011, the Court of Appeal substantially cut back the circumstances in which trustees can go to court to unwind their past decisions.

Over the last twenty years, pension scheme trustees have looked to the so-called rule in *Hastings-Bass* to unwind decisions which were later shown to have unforeseen and undesirable consequences.

The rule in *Hastings-Bass* was understood to mean that where trustees exercise a discretion but the effect of doing so is different from what they intended, the court will intervene where it is clear that they would not (or in some cases, might not) have acted as they did had they not failed to take into account relevant considerations or they had not taken into account irrelevant considerations.

The rule gained momentum in *Mettoy* in 1990, where it was argued that a deed was void as the trustees had overlooked relevant matters. The *Mettoy* application failed on its facts, but clearly showed the potential for *Hastings-Bass* to be used by pension scheme trustees to turn the clock back on past decisions.

That is, of course, until the Court of Appeal stepped in. In *Pitt v Holt* and *Futter v Futter*, the Court of Appeal took the opportunity to take *Hastings-Bass* back to its original foundations, concluding that *Mettoy* and other later cases had taken the law down the wrong path and this needed to be put right.

Where are we now? Where the trustees have exercised a discretion outside the scope of their powers it will be void. Where they act within their powers, the Court of Appeal has set out three significant hurdles before

the courts should intervene.

The first is that the courts will only interfere where the act under scrutiny amounts to a breach of fiduciary duty by the trustee – this includes a failure to give proper consideration to all relevant matters. However, it appears from the Court of Appeal ruling that trustees will not be in breach where they have relied on professional advice which turns out to be wrong or incomplete. This underlines the importance of taking appropriate advice and recording how that advice has informed the trustees' decision making process.

If there is no breach then *Hastings-Bass* cannot apply. Although this makes sense in the context of unforeseen tax liabilities, where the trustees could potentially look to their advisers to compensate any adverse impact on the trust assets, it is more problematic in those cases where unwinding the act or decision is the only realistic way to put things right.

Secondly, the court saw *Hastings-Bass* as giving beneficiaries a remedy rather than giving trustees the means to put right acts or decisions which they later come to regret (albeit trustees would often be doing so to save beneficiaries from the consequences of those acts or decisions). This does not mean that trustees can no longer take the initiative where beneficiaries question whether a decision was validly made and this needs to be resolved. In the pensions context, court applications are often brought by trustees to resolve issues raised by members through IDRPs, the objective being to have those issues finally resolved in one hearing, rather than in multiple cases before

the Pensions Ombudsman.

Thirdly, even if a breach of duty can be established, the court also needs to be persuaded that it is appropriate in the circumstances to set aside the prior exercise of the trustees' powers – the practical difficulties of unwinding the act or decision may well prove critical.

Although the above points were decided in two appeals concerning the taxation of private trusts, the legal principles seem to be of general application. The detail of how they will be applied in relation to pension schemes has been left to be worked out in future cases. There is a case currently before the High Court where some of these issues are likely to be explored in a pensions context, so further guidance is not far away.

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