

## Hastings Bass

### Key points

A recent Court of Appeal ruling will make it harder for trustees to unscramble past decisions. Trustees' decisions have been successfully revisited in a string of cases over the last twenty years but the scope for this has now been further cut back. This is of general application to all trustees, including corporate trustees.

Broadly, trustees' decisions can now only be overturned by beneficiaries, such as bondholders, and probably only where the trustees have acted without professional advice. In most cases it will no longer be open to trustees to use the Hastings-Bass route to go back on decisions where they later wish they had acted differently.

### Further information

The consolidated appeals in *Pitt v Holt* and *Futter v Futter* are the first occasion on which the Court of Appeal has comprehensively examined the scope and effect of the *Hastings-Bass* decision since the original judgment in that case was given in 1975.

In outline, the *Hastings-Bass* decision has been interpreted in *Mettoy* and other High Court cases as meaning that where trustees exercise a discretion, but the effect of doing so is different from what they intended, the decision could be declared invalid if the trustees had failed to take into account relevant considerations or if they had taken into account irrelevant considerations. It gave trustees a "powerful weapon" enabling them to un-wind past decisions which later turned out to have unforeseen and undesirable consequences.

The key points in the Court of Appeal's judgment are as follows:

- If the exercise of the discretion is outside the scope of the trustees' powers it will be void – this accords with well-established principles.

- Where the discretion is exercised within the scope of the trustees' powers, it is voidable (but not void) only if the trustees acted in breach of their fiduciary duties.
- Failing to take into account relevant considerations or taking into account irrelevant considerations would normally constitute such a breach of duty. An example of this would be if the trustee failed to take into account relevant matters in making a determination as to whether or not an exercise of discretion would result in "material prejudice" to bondholders when providing its consent to a modification, amendment or waiver.
- However, the trustees will not be in breach of duty – and the exercise of the discretion will not be voidable – if the trustees have acted on appropriate professional advice. This highlights the importance of obtaining appropriate legal or other professional advice to ensure that decisions are taken on the correct legal and factual basis.
- If the exercise of the discretion is voidable, it will normally be for the beneficiaries to have the trustees' decision set aside – and whether such a claim succeeds will be at the discretion of the Court. There may be occasions where it would be appropriate for trustees to take the initiative in bringing proceedings, for example to seek a declaration from the Court where beneficiaries allege breach of trust but do not then bring their own proceedings.

In circumstances where trustees have acted upon a direction from the requisite majority of bondholders, and depending on the terms of the bondholders' resolution, there may be scope for the application of this principle where an element of discretion remains with the trustee. For example, in respect of the timing or manner in which the direction is exercised or the exercise of a discretion in the implementation of matters that may be incidental to the direction.

It is more likely that the re-stated principle is used by aggrieved bondholders who have suffered from the

adverse consequences of a trustee's exercise of discretion. However, it will be necessary for bondholders to grasp the nettle of alleging and proving a breach of fiduciary duty on the part of the trustee.

Trustees who fail to take professional advice may be in a more vulnerable position, although corporate trustees will often be protected personally by a limitation of liability provision in the trust deed. If it is not possible to recover against the trustee, action will need to be taken instead against the professional adviser if wrong advice was given. This is an action that the trustees may be faced with having to commence. Although such claims can be difficult, there is a potential for an increase in professional negligence claims against professional advisers.

If you would like more information, please get in touch with your usual contact at Mayer Brown.

***Andrew Legg***

Partner

Tel: +44 20 3130 3386

***Edmund Sautter***

Partner

Tel: +44 20 3130 3940

***Rani Mina***

Partner

Tel: +44 20 3130 3903

***Andriana Zacharia***

Associate

Tel: +44 20 3130 3578

---

Mayer Brown is a leading global law firm serving many of the world's largest companies, including a significant portion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, São Paulo, Washington DC  
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai  
EUROPE: Berlin, Brussels, Cologne, Frankfurt, London, Paris  
TAUIL & CHEQUER ADVOGADOS in association with Mayer Brown LLP: São Paulo, Rio de Janeiro  
ALLIANCE LAW FIRMS: Spain (Ramón & Cajal); Italy and Eastern Europe (Tonucci & Partners)

Please visit our web site for comprehensive contact information for all Mayer Brown offices. [www.mayerbrown.com](http://www.mayerbrown.com)

Mayer Brown is a global legal services organisation comprising legal practices that are separate entities (the Mayer Brown Practices). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership (regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown JSM, a Hong Kong partnership, and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the individual Mayer Brown Practices in their respective jurisdictions.

© 2011. The Mayer Brown Practices. All rights reserved.