The v Settlement

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	28 February 2011
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Text

[2011] JRC 46

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, Esq., Bailiff, **and** Jurats de Veulle **and** Fisher.

In The Matter Of The V Settlement
And In The Matter Of Representation Of Vistra Trust Company (Jersey) Limited And Another

Advocate L. J. Springate **for the Representors**.

Advocate J. S. Dickinson **for the unborn and unascertained beneficiaries**.

Authorities

Green GLG Trust [2002] JLR 571.

Freidman -v- Asiatrust Limited [2006] JRC 187.

Seaton Trustees Limited re the Winton Investment Trust [2007] JRC 206.

Leumi Overseas Trust Corporation Limited -v- Howe [2007] JRC 248.

Re Vistra Trust Company (Jersey) Limited [2008] JRC 111.

Re Seaton Trustees Limited [2009] JRC 050.

Sieff -v- Fox [2005] 1 WLR 3811.

Abacus Trust Company (Isle of Man) Limited -v- NSPCC [2001] WTLR 953.

Mettoy Pension Trustees Limited -v- Evans (1990) 1 WLR 1587.

The Bailiff

1 This is an application under what is known as the Hastings-Bass principle for an order setting aside a deed of appointment dated 1st October, 2008, ("the 2008 deed"). At the hearing the Court granted the relief sought and it now gives its reasons.

Factual background

2 Vistra Trust Company (Jersey) Limited ("Vistra" or "the Trustee") is the trustee of a settlement dated 24th June, 1997, ("the Trust") constituted by the second Representor as settlor ("the settlor"). The original trustee was Cantrust CI Limited but Vistra (under its former name of W J B Chiltern Trust Company (Jersey) Limited) was appointed as trustee in place of Cantrust on 3rd October, 2003.

3 Under the terms of the trust successive life interests were conferred upon the settlor and his wife. On the death of the survivor the trust fund was to be held on certain trusts for the settlor's children provided they were born before the first child attained the age of 25. Clause 7 of the trust deed contained an overriding power of appointment in favour of a discretionary class of beneficiaries ("the discretionary class") which included the settlor, his wife, any children and remoter issue of the settlor, their spouses and other persons who might be added to the class. The power of appointment could only be exercised during the life of the settlor with his consent.

4 On 1st October, 2008, by means of the 2008 deed, the trustee exercised the power under clause 7 so as to convert the trust from an interest in possession trust into a conventional

discretionary trust in favour of the discretionary beneficiaries. The settlor and his wife were parties to the deed so as to give their consent.

5 The execution of the 2008 deed had the effect of triggering an immediate liability to inheritance tax in the United Kingdom of between £54,949 and £65,175 (depending on the value attributed to one of the assets of the trust). Furthermore, the trust will as a result, become liable to the 10 yearly charge to inheritance tax under the relevant UK legislation. In the event of the premature death of the settlor within 7 years of the execution of the 2008 deed, the inheritance tax might double.

6 The Court has received affidavit evidence as to the circumstances in which the 2008 deed came to be executed from the settlor and from Mr Andrew Taylor and Mr Jeremy Rothwell, the two directors of the trustee who were responsible for the affairs of the Trust at the time. The Court has also seen the contemporaneous correspondence which was exhibited to the affidavits. We are satisfied from the evidence that the circumstances in which the 2008 deed was executed are as follows.

7 At all material times, the settlor was on ordinary principles domiciled in Ireland. On moving to the United Kingdom from Ireland, the settlor had been advised that he would become deemed domiciled in the UK for inheritance tax purposes if he remained resident in the UK for 17 years. However, his understanding was that this would not happen until 2010. The trust was created for tax planning purposes whilst he was not deemed domiciled in the UK. As a result, non-UK assets in the trust were excluded property for inheritance tax purposes.

8 On 12th October, 2006, the settlor was sent a letter from Deloitte, his tax advisers, pointing out that certain changes in the 2006 Budget would affect the trust. As a result of the changes, the excluded property nature of the trust would cease on the death of the survivor of the settlor and his wife. Thereafter, there would be a 10 yearly charge to inheritance tax and inheritance tax would also be payable on payments of capital from the trust to the children. Deloitte suggested that it would be possible to retain the excluded property status by converting the trust to a discretionary trust at a time when he was still not deemed domiciled in the UK for inheritance tax purposes. It was the settlor's understanding that this would not occur until 2010 although it is not clear from the evidence how he acquired this understanding. Thus no steps were taken at that stage to act upon this advice.

9 However, on 20th March, 2008, the settlor was contacted by Deloitte and informed that his wife and he would become deemed domiciled in the UK on 6th April, 2008. The settlor immediately contacted the trustee and sent it a copy of the letter of 12th October, 2006, from Deloitte. It is of note that Deloitte were advisers only to the settlor; the trustee was provided with that advice but elected not to obtain any advice of its own. There were further e-mail exchanges and at that time Deloitte was advising that the deed of appointment converting the trust into a discretionary trust should be executed before 5th April, 2008, i.e. before the settlor became deemed domiciled in the United Kingdom.

10 However, in a further e-mail on 31st March, 2008, Deloitte advised that they had identified a difficulty because the trust had loaned money to the settlor and this would be treated as a UK situated asset. They said that if the conversion of the trust to a discretionary trust affected UK assets, it would trigger an inheritance tax charge. However the advice went on to say that there was in fact no need after all to execute the deed prior to 5th April, 2008, and therefore the conversion could be deferred whilst the question of the loan was sorted out. The position of the loan was in fact addressed prior to 5th April by acceptance of certain assets from the settlor in partial repayment of the loan and writing off the balance.

11 In due course a deed of appointment exercising the power conferred by clause 7 of the trust deed so as to convert the trust from an interest in possession trust to a discretionary trust was prepared by the trustee's Jersey legal advisers and this was executed by the trustee on 1st October, 2008, the settlor and his wife having already signed the deed. However, as at 1st October, the trust owned certain UK situated assets and this has given rise to the immediate charge to inheritance tax referred to earlier.

12 It is clear from the advice subsequently taken from counsel and from the other evidence that two separate errors were made in connection with the 2008 deed:-

(i) Deloitte was wrong in advising that the conversion of the trust to a discretionary trust could be effected after the settlor became deemed domiciled in the UK on 5th April, 2008. The result of executing the 2008 deed after that date is that the trust is now subject to the 10 yearly charge to inheritance tax. The 2008 deed should have been executed prior to 5th April, 2008, as originally advised by Deloitte, if this charge was to be avoided.

(ii) The trustee failed to act on the advice from Deloitte that conversion of the trust to a discretionary trust would give rise to an immediate charge to inheritance tax to the extent that there were UK situated assets in the trust. It is not clear whether the directors of the trustee simply forgot the advice —because they did not re-read it prior to executing the deed —or whether they recalled it but failed to notice that there were some UK situated assets in the portfolio.

13 The charge to inheritance tax is payable by the trust but can also be assessed on the settlor, who is given a statutory right to reclaim that sum from the trust. It is an open question as to whether that statutory claim can be enforced in Jersey.

14 We are quite satisfied from the evidence that the trustee, the settlor and the wife of the settlor executed the 2008 deed in the belief that, far from giving rise to an immediate charge to inheritance tax or to a future liability for the 10 yearly charge, conversion of the trust from an interest in possession trust into a discretionary trust would preserve the excluded property status of the trust beyond the death of the survivor of the settlor and his wife. It was therefore intended to improve the inheritance tax position, not make it worse. We are also quite satisfied from the evidence that the trustee and the settlor and his wife would not have

executed the 2008 deed had they realised that this would have the adverse inheritance tax effects which it did.

The law

15 The Hastings-Bass principle is well established under Jersey law having been applied in a number of cases e.g. *Green GLG Trust* [2002] JLR 571; *Freidman -v- Asiatrust Limited* [2006] JRC 187; *Seaton Trustees Limited re the Winton Investment Trust* [2007] JRC 206; *Leumi Overseas Trust Corporation Limited -v- Howe* [2007] JRC 248; Re Vistra Trust Company (Jersey) Limited [2008] JRC 111 and *Re Seaton Trustees Limited* [2009] JRC 050.

16 The courts have regularly taken the judgment of Lloyd LJ in *Sieff -v- Fox* [2005] 1 WLR 3811 as containing a convenient summary of the principle. He said this at para 119:-

> ***"(i) The best formulation of the principle seems to me to be this.*** 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. …
>
> ***(iii) It does not seem to me that the principle applies only in cases where there has been a breach of duty by the trustees, or by their advisers or agents, despite what Lightman J said in*** *Abacus Trust Co (Isle of Man) -v- Barr*. …
>
> ***(v) I am in no doubt that, as a general proposition, fiscal consequences are among the matters which may be relevant for the purposes of the principle…"***

17 In relation to (iii) in the preceding paragraph, the judgment of Commissioner Clyde-Smith in *Leumi* (supra) agreed with the provisional view of Lloyd LJ and held that there was no requirement for there to have been fault or a breach of duty on the part of trustees for the principle to be applicable. We respectfully agree with that decision.

18 It is clear that the fiscal consequences of a decision by trustees are something which trustees should normally take into account. As Patten J said in *Abacus Trust Company (Isle of Man) Limited -v- NSPCC* [2001] WTLR 953 at 964:-

> ***"That decision is clear authority that trustees, when exercising powers of appointment, are bound to have regard to the fiscal consequences of their actions and that where it can be demonstrated that a proper consideration of these matters would have led to the appointment not going ahead, the***

> ***court is entitled to and should treat that as an invalid exercise of power in the sense of it being void ab initio.*** Although the time may yet come when the limits of the **Hastings-Bass** principle fall to be determined by some higher court I can see no reason on the authorities as they stand for not following the decision of Jonathan Parker J in *Green -v- Cobham*. The financial consequences for the beneficiaries of any intended exercise of a fiduciary power cannot be assessed without reference to their fiscal implications. The two seem to me inseparable. Therefore, if the effect of an intended appointment is likely to be to expose the fund or its beneficiaries to a significant charge to tax, that is something which the trustees have an obligation to consider when deciding whether it is proper to proceed with the appointment. Once relevance is established, then a failure to take those matters into account must vitiate the exercise of the power unless (as in **Hastings-Bass** itself) it is clear that on a proper consideration of all relevant matters the decision would still have been the same."

That passage was approved by Lloyd LJ in *Sieff* (see para 86).

19 A failure to have proper regard to the fiscal consequences of an appointment has also featured in most of the Jersey cases.

20 As Clyde-Smith, Commissioner said in *Re Seaton Trustees* (supra) the application of the principle to the facts of the case may be considered by asking the three questions posed by Warner J in *Mettoy Pension Trustees Limited -v- Evans* (1990) 1 WLR 1587:-

> (i) What were the trustees under a duty to consider?
>
> (ii) Did they fail to consider it?
>
> (iii) If so, what would they have done if they had considered it?

21 Having considered the evidence we are in no doubt that the answers to these questions are as follows:-

> (i) The trustee was under a duty to consider the inheritance tax consequences for the trust and the beneficiaries prior to executing the 2008 deed.
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> (ii) The trustee failed to consider these properly. In relation to the fact that there was UK situated property in the trust fund, it failed to consider this at all as described at paragraph 12(ii) above. In relation to the timing of the deed, it failed to consider this properly because of the erroneous advice of Deloitte as described in paragraph 12(i) above.
>
> (iii) As already indicated, we have no doubt that, if the trustee had considered the matter properly, so that it had been aware of the inheritance tax consequences, it

would not have executed the 2008 deed. The same is true of the settlor and the settlor's wife.

22 The settlor is a joint Representor with the trustee and the wife and the children (who are all adults and unmarried with no children) have confirmed they agree to the relief sought in the Representation. Advocate Dickinson was appointed to represent the interest of the unborn and unascertained beneficiaries. For the reasons set out in his detailed skeleton argument, he has concluded that there are no grounds upon which he could properly oppose the application.

23 In the circumstances we find the test for the application of the Hastings-Bass principle is met and we therefore set aside the 2008 deed and declare it to be of no effect, so that the trust fund continues to be held on the trusts that it has always been, namely those contained in the trust deed of 24th June, 1997.

24 We should add that, in the alternative, the Representation pleaded that the 2008 deed should be set aside on the grounds of a mistake. In the light of our conclusion in relation to the Hastings-Bass principle, we have not found it necessary to consider that aspect.