The Green GLG Trust

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	09 December 2002
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ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq**., Deputy Bailiff, **and** Jurats Quérée **and** Le Breton.

In the matter of the Green GLG Trust
and in the matter of Article 47 of the Trusts (Jersey) Law 1984.

Advocate M.J. Thompson **for the Representor**.

Authorities

In re Hastings-Bass, Deceased [1975] Ch. 25.

Mettoy Pension Trustees v Evans [1991] 2 All ER 513.

Scott v National Trust [1998] 2 All ER 705.

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

Green & Others v Cobham & Others [2002] STC 820.

Finance Act 2000: s.92; Schedules 25 & 26.

Taxation of Chargeable Gains Act 1992

Ex parte Representation of Abacus (C.I.) Limited seeking directions.

Deputy Bailiff

THE

1 This is an application by Abacus (C.I.) Limited as trustee of the Green GLG Trust ("the Settlement") for a declaration that four appointments of capital to one of the beneficiaries should be declared void. It raises the question of whether what has been referred to as the principle *In re Hastings-Bass Deceased* [1975] Ch.25 is part of the law of Jersey, and if so, whether it results in the appointments in question being void.

The background

2 The Court has been provided with a number of affidavits from which the factual background can be stated as follows. The Settlement was established on the 29 th February, 2000. The settlor is Mr Jonathan Green, who is and was at all material times domiciled and resident in the United Kingdom. Abacus is the trustee. The Settlement is expressed to be governed by the law of Jersey.

3 It provides for a life interest in the income to the settlor, described as the principal beneficiary, followed by a life interest to his widow, with a power of advancement, subject to the protector's consent, to each of them respectively. After the death of the settlor and his widow the trust fund is to be held on discretionary trusts for the settlor's children and remoter issue and for charitable purposes. There is an over-riding power of appointment conferred on the Trustee which is subject to the protector's consent.

4 Abacus was first approached to act as trustee by Mr Leslie Schreyer, a partner of Chadbourne & Parke LLP, New York Attorneys. Mr Schreyer was subsequently named as protector to the Settlement. Mr Schreyer informed Abacus that UK tax advice had been sought from Mr Dennis Moore of Wiggin and Co and Mr William Massey QC. Subsequently,

Abacus sought and obtained confirmation from Mr Moore that, subject to minor amendments, the draft trust deed supplied by Chadbourne & Parke was effective as an interest in possession settlement. As already stated the Settlement was executed on 29 th February, 2000.

5 The underlying objective of the Settlement was to hold an interest in a new investment management business which was to be launched by the settlor and three other individuals, all of whom had had successful careers in the investment business and were at the time employed by Lehman Brothers International Europe Limited which company, or an affiliate, was to take a minority stake in the new business.

6 A complex structure was to be established to reflect the Settlement's interest in the new business. It is set out in the affidavits but we do not think it necessary to rehearse the details in full in this judgment. Essentially the Settlement was to take shares in four companies which are referred to as the GLG entities. The Agreement in respect of these investments was entered into by the Trustee on 6 th April, 2000, but it was subject to obtaining various authorisations for the underlying businesses. The proposal envisaged the Settlement borrowing funds and making certain capital distributions to the settlor as part of the overall arrangements.

7 Following authorisation of the underlying investment business in the United Kingdom in August 2000 by IMRO, the arrangements were put into effect in September, 2000. Accordingly, the Settlement subscribed for shares representing 20% of the GLG entities. On 18 th September, it borrowed funds from Lehman Brothers Bankhaus AG (“Lehman Brothers”). This was a limited recourse loan in that the lender was only to have recourse to certain of the Settlement's shares in the GLG entities in the event of default.

8 On the 9 th September, 2000, in accordance with Clause 22(b) of the Settlement the protector had given a general consent until further notice to any payment of capital to or for the benefit of the settlor. On the 18 th September, 2000, the Trustee made two appointments of capital in favour of the settlor. The source of these funds was the loan received from Lehman Brothers. On 5 th April, 2001, the Trustee made a further appointment of capital to the settlor following an increase in the loan from Lehman Brothers and on 9 th April, 2001, a small additional capital sum was also paid to the settlor. These are the four appointments which it is now sought to have declared void.

The tax position

9 At this stage we should digress to describe changes in the United Kingdom tax legislation, which were taking place at about this time. On the 21 st March, 2000, the Chancellor of the Exchequer of the United Kingdom made his annual budget speech. It included proposals to counter schemes known as “flip-flops” which were designed to avoid UK capital gains tax

arising in relation to certain offshore trusts. Those schemes were conveniently described in paragraph 7 of the Inland Revenue Budget announcement of the same date in the following terms:

> ***"The third element in the package is designed to counter an avoidance device which has become commonly known as a "flip-flop".*** This is a device for extracting gains from a trust tax-free or with a significant tax saving. At its simplest, the trustees of a trust in which a UK resident settlor has an interest (so that the settlor is charged in respect of trust gains) borrow money on the security of assets in the trust and advance the money to another trust. The settlor then severs his interest in the first trust. In the following tax year the trustees sell the assets and use the proceeds to repay the debt. The settlor receives his money from the second trust. If successful, the outcome of the device is that in the case of an offshore trust no tax is paid by the settlor."

10 In due course the proposals to counter "flip-flops" were enacted as Section 92 and Schedules 25 and 26 of the Finance Act 2000 of the United Kingdom. They came into force on 28 th July, 2000, but had effect from the 21 st March, 2000, which was the date of the budget announcement. The legislation amended the Taxation of Chargeable Gains Act 1992 (" TCGA") by introducing a new Schedule 4B.

11 Although the announcement had referred to countering "flip-flops" the amending legislation went much further. The Court has been provided with an affidavit from Mr Peter Trevett, Q.C. setting out the effect of the legislation. In essence the legislation provides that where a transfer of value (e.g. a capital appointment to a beneficiary) is made at a time when there is an outstanding borrowing by the trustee the proceeds of which have not been used for normal trust purposes, there will be a deemed disposal of the trust fund at market value followed by an immediate re-acquisition. In other words any unrealised capital gains in the trust assets will be treated as realised. By virtue of other provisions of the TCGA such gains can be attributed to the settlor, even if no payment has been made to him. The settlor has a right to re-claim any such capital gains tax from the trustees of the settlement but there is clearly an issue as to whether any such right of indemnity would be enforceable in Jersey.

12 In the present case there is no doubt that on the 18 th September, and on the dates that the other capital payments were made to the settlor, the Settlement had outstanding borrowings from Lehman Brothers. The result is that, if the appointments are valid, the settlor will be liable to capital gains tax on any unrealised gains in the trust fund at the date of such appointments respectively.

The Trustee's knowledge

13 This possibility was unknown to the Trustee until February, 2002, when it received a questionnaire from the Inland Revenue for completion in the ordinary way. Question 4 asked: "have the trustees made a transfer of value treated as linked with trustee borrowing

so triggering a deemed disposal within schedule 4B TCGA 1992 in the period 21 st March 2000 to 5 th April, 2001?" The Trustee sought advice on its response to this question from Mr Moore on the 8 th February, 2002, and it was in this way that it became aware of the problem.

14 The Trustee through its directors, Mr Neil Ritchie and Mr Charles Blampied, asserts that it relied for its UK tax advice on Mr Moore and Mr Massey Q.C. It understood that Mr Moore, in particular, continued to have a watching brief in relation to UK tax matters throughout the relevant period. Thus Mr Moore was either a party to or was copied in on various e-mail communications to which the Trustee was also a party in 2000, 2001 and early 2002. The Trustee therefore believed that there were no UK tax problems in relation to the various steps which were being taken. The transaction entered into by the Settlement was nothing like a 'flip-flop'. The Trustee was not aware that the legislation designed to counter 'flip-flops' would also affect transactions of the type to be entered into by the Settlement. The Trustee asserts that, had it known that the capital appointments could result in any unrealised gains in the Settlement being deemed to be realised and attributed to the settlor, it would not have made the appointments.

15 The protector, Mr Schreyer, has also sworn an affidavit. He states that, as a US attorney, he relied upon Mr Moore and Mr Massey for UK tax advice. He was not aware of the capital gains tax consequences (resulting from the changes to the TCGA brought about by the Finance Act, 2000) of appointing capital to the settlor at a time when the loan from Lehman Brothers was outstanding. He states that, had he been aware of the potential tax consequences before the 9 th September, 2000, he would not have given a general consent in the form in which he gave it. He further states that if he had been made aware of the position after that date he would have revoked his consent.

16 In effect it is submitted that it was not appreciated by the UK tax advisers that the capital gains tax changes, introduced subsequently to the decision to proceed with the arrangements entered into on 6 th April, went further than dealing with 'flip-flops' and also caught transactions of the type entered into in this case.

17 In the light of the evidence before us we are quite satisfied that if the Trustee and the protector had been made aware that, as a result of the UK tax changes introduced on 21 st March and enacted as part of the Finance Act 2000, the making of the four appointments of capital to the settler would trigger deemed disposals and re-acquisitions of the trust assets for UK capital gains tax purposes and thereby the risk of a capital gains tax charge attributable to Mr Green, as settlor, then the Trustee would not have resolved to make the appointments and the protector would not have consented to them.

The Law

18 The question then is whether this finding affects the validity of the appointments. After all, it is not the law that whenever trustees do something which they later regret and think that they ought not to have done, they can say that they never did them in the first place. Mr Thompson argues that the facts in this case fall fairly and squarely within what has come to be known as the principle in *Hastings-Bass*. It is necessary for us, therefore, to refer to a number of English authorities in relation to that principle in order to see what it amounts to. The first case is *Re Hastings-Bass* [1975] Ch 75 where Buckley LJ articulated the principle in the following terms at 41:

> ***"To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) 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."***

On the facts of that case the Court of Appeal held that the deed of advancement in question did not breach the principle.

19 The next case is *Mettoy Pension Trustees Limited v Evans* [1991] 2 All ER 513, where Warner J, had to consider the principle in relation to a deed of appointment by the trustees of a pension scheme. In that case there was a dispute as to whether there was indeed a principle as described. After considering a number of authorities, Warner J said this at 555:

> ***"I have come to the conclusion that there is a principle which may be labelled 'the rule in Hastings-Bass'.*** I do not think that the application of that principle is confined, as Mr Nugee suggested, to cases where an exercise by trustees of a discretion vested in them is partially ineffective because of some rule of law or because of some limit on their discretion which they overlooked. If, as I believe, the reason for the application of the principle is the failure by the trustees to take into account considerations that they ought to have taken into account, it cannot matter whether that failure is due to their having overlooked (or to their legal advisers having overlooked) some relevant rule of law or limit on their discretion, or is due to some other cause .
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> ***It is not enough, however, for the principle to apply, that it should be shown that the trustees did not have a proper understanding of the effect of their act.*** It must also be clear that, had they had a proper understanding of it, they would not have acted as they did."

20 It is clear from an earlier passage in Warner J's judgment (at 553) that the principle was not a new one declared for the first time in *Hastings-Bass*; it had been established by a line of authorities, *Hastings-Bass* being merely the latest and most convenient expression of the principle. Later (at 555) Warner J set out the questions which the court should ask itself

when considering the matter and he said this:

> ***"In a case such as this, where it is claimed that the rule in Hastings-Bass applies, three questions arise: (1) what were the trustees under a duty to consider?*** (2) Did they fail to consider it? (3) If so, what would they have done if they had considered it?"

On the facts of that case Warner J held that although the pension trustees had failed to consider relevant matters it had not been shown that they would have acted otherwise if they had taken those matters into account and accordingly the deed was not declared void.

21 In *Green & Ors v Cobham & Ors* [2002] STC 820 the trustees of an offshore will trust appointed assets of the trust upon two accumulation and maintenance trusts. The trustees were not aware that the accumulation and maintenance trusts and the original will trust would all be treated as a single composite settlement for UK capital gains tax purposes. On that basis there were at the time of the appointments 10 trustees, of whom 6 were non-resident and 4 were resident in the UK. The composite settlement therefore remained offshore. However, shortly afterwards, one of the trustees ceased to be treated as non-resident so that there was no longer a majority of non-resident trustees. If the composite settlement was no longer treated as non-resident there would be significant adverse UK capital gains tax consequences because of substantial accrued gains in the offshore will trust. Jonathan Parker J applied the *Hastings-Bass* principle to declare the appointments void. The decision is conveniently summarised at the end of his judgment on page 828 as follows:

> ***"I therefore conclude that this is a clear case for the application of the*** *Hastings-Bass* ***principle.*** In my judgment there is no real room for doubt on the evidence that had the then trustees of the will trust had regard to the possible capital gains tax consequences of the proposed appointment in favour of Camilla, they would not – and I stress would not – have gone ahead with it. What other course they might have taken is, I accept, not entirely clear. However, what is entirely clear, in my judgment, is that had the trustees directed their minds, as they should have done, to considerations of capital gains tax, they would not under any circumstances have made an appointment which gave rise to any significant risk that the will trust might thereafter become a United Kingdom resident trust for capital gains tax purposes."

22 Although the judgment does not give details of the legal advice taken by the trustees in that case we have been provided with an affidavit sworn, with the consent of the clients in that case, by Mr Michael Fullerlove who was the solicitor to the trustees of the will trust. He confirmed that, before making the appointment, the trustees sought advice from English solicitors who in turn instructed junior counsel to provide comprehensive tax and trust advice on the proposed appointments. However, that advice focused largely upon income tax matters but there was some advice in relation to capital gains tax but the substance of the advice was that the capital gains tax consequences of the proposals would be neutral. In effect the question of whether the appointments created sub-funds was never addressed

by the advisors, nor was the question of whether the identify and residence of the trustees of the sub-funds could affect the non-resident status of the will trust itself for capital gains tax purposes.

23 Advocate Thompson submits that this case is very similar to *Green v Cobham*. In each case the trustees sought and received tax advice on the proposed course of action but the advice received overlooked a critical point.

24 Finally the Court was referred to *Abacus Trust Company (Isle of Man) Ltd v NSPCC* [2001] WTLR 953. In that case there was a "flip-flop" scheme. The trustees of the settlement in the Isle of Man received advice from leading counsel on the order and timing of the appointments to be made as part of the scheme. The trustees ignored the specific advice of leading counsel because of erroneous advice from the English solicitor and made the appointment to the NSPCC a few days before the end of the previous tax year instead of at the beginning of the next tax year. The result was that the whole "flip-flop" arrangement failed and a liability to capital gains tax on the settlor arose. The trustees applied to the court for a declaration that the deed of appointment to the NSPCC was void because, in making the appointment, the trustees had failed to have regard to the advice of leading counsel that the appointment should not be made before the 6 th April, 1998 i.e. the commencement of the next tax year. In the course of his judgment Patten J, having considered *Green v Cobham*, said this at page 965:

> ***"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 Hasting-Bass itself) it is clear that on a proper consideration of all relevant matters the decision would still have been the same."

On the facts Patten J applied the *Hastings-Bass* principle to declare the deed void.

25 In our judgment the principle in *Hastings-Bass*, as it has been described, is but a

manifestation of the general principle that a trustee must act in good faith, responsibly and reasonably. The position is helpfully summarised by Robert Walker J in *Scott v National Trust* [1998] 2 All ER 705 at 717:

> ***"I have heard a lot of submissions about the duties of trustees in making decisions in exercise of their fiduciary functions.*** Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves before making a decision on matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts. This sometimes creates real difficulties, especially when lay trustees have to digest and assess expert advice on a highly technical matter (to take merely one instance, disposal of actuarial surplus in a superannuation fund) .
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> So the general principle is clear. In *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 (a Scottish appeal in the House of Lords which, nevertheless, seems also to reflect the law of England) Lord Reid (at 905) said that even where trustees are expressed to have an absolute ***discretion—***
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> ***'If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or they did not act honestly or in good faith, then there was no true decision and the court will intervene'*** .
>
> ***The development of these principles is, I think, still continuing especially in cases connected with pension schemes: see*** *Re Hastings-Bass (dec'd)* [1974] 2 All ER 193, [1975] Ch 25 ***(a case on a private family trust) and*** *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513; [1990] 1 WLR 1587; ***and*** *Stannard v Fisons Pensions Trust* [1992] IRLR 27 ***(both pensions cases)."***

26 In our judgment the *Hastings-Bass* decision merely elaborated the position by making it clear that a decision of a trustee was similarly liable to be quashed where the trustee has taken account of irrelevant factors or has ignored relevant ones. In this respect there is a parallel with the well known grounds of judicial review for quashing the decision of a public authority.

27 We consider that the *Hastings-Bass* principle is entirely consistent with precedent and principle. The Trusts (Jersey) Law 1984 draws substantially on general principles of English trust law and we see nothing in the decisions that we have described which is

inconsistent with Jersey law. On the contrary they seem entirely consistent and accordingly we hold that, what is described as the *Hastings-Bass* principle, is equally a principle of Jersey law.

28 It is clear that the limits of the principle are still to be developed. As we have observed earlier it is certainly not every decision by trustees which they later come to regret that can be declared void. In particular there is some discussion in the English cases as to whether, before declaring a decision void, the Court has to be satisfied that the trustees would not have taken the decision if they had known the correct facts, or whether it is sufficient that the trustees might not have come to the same decision. It is not necessary for us to resolve this difference in the present case because of our decision that, on the facts of this case, the higher test is met; but we incline to the view that 'would' is the correct test rather than 'might' and we note that that was the word used by Buckley LJ in *Hastings-Bass* itself.

29 We are conscious also that there has been no adversarial argument in this case. The settlor does not dispute that the appointments should be set aside. However, in accordance with his duty, Advocate Thompson has considered any arguments he could think of for saying that the principle should not be declared to be part of the law of Jersey. He is unable to point to any aspect of Jersey trust law which is inconsistent with the principle. But he did put forward the possibility that, as a matter of policy, the Court might decide that such matters should best be settled by way of litigation between the trustees, beneficiaries and any negligent advisers rather than be dealt with by finding the decision in question to be void. The Court is not attracted by that suggestion and sees no reason to follow a different path in this jurisdiction to that which has found favour with the English courts.

30 Applying the principle to the facts of this case we are in no doubt that, in the light of our finding that the Trustee would not have made, and the protector would not have consented to, the appointments had they known of the possible capital gains tax consequences for the settler caused by the amending legislation, we hold that the Court should declare that the four appointments of capital are void *ab initio* and we so declare.