Leumi Overseas Trust Corporation Ltd v David Howe, Louise Howe, Derek Howe, Sheila Howe, Mark Howe, Timothy Howe and Elizabeth Howe

Jurisdiction:	Jersey
Judge:	J.A. Clyde-Smith, Jurats Le Brocq, Le Cornu
Judgment Date:	24 December 2007
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Text

[2007] JRC 248

ROYAL COURT

(Samedi Division)

Before:

J.A. Clyde-Smith, **Esq., Commissioner and** Jurats Le Brocq **and** Le Cornu.

In the Matter of the Howe Family Number 1 Trust made on 6th November 1995.

And in the matter of Article 51 of the Trusts (Jersey) Law 1984

Between
Leumi Overseas Trust Corporation Limited
Representor

and
David Howe
Louise Howe
Derek Howe
Sheila Howe
Mark Derek Howe
Timothy Howe
Elizabeth Alice Howe
Respondents

Advocate A.J. Dessain **for the Representor**.

Advocate N. G. A. Pearmain **for the minor and unascertained beneficiaries**.

Authorities

In Re Hastings-Bass v Inland Revenue Commissioners [1975] 1 Ch 25.

In Green GLG Trust [2002] JLR 571.

Barclays Private Bank & Trust (Cayman) Limited v Chamberlain & Ors [2004] 9 ITELR 302.

Sieff and Ors v Fox and Ors [2005] EWHC 1312 (Ch).

Mettoy Pension Trustees Limited v Evans [1990] 1 WLR 1587.

Friedman v Asiatrust [2006] JRC 187.

Abacus Trust Co (Isle of Man) v Barr [2003] Ch 409.

Lewin on Trusts 17 th Edition.

Snell's Equity 31 st Edition (2005).

Thomas and Hudson and the Law of Trusts.

Underhill and Hayton, Law on Trusts and Trustees 17 th Edition (2007).

Trust Law International (Vol 21 No 2 2007).

Abraham's Will Trust [1969] 1 Ch 463.

THE COMMISSIONER:

1 This is an application by Leumi Overseas Trust Corporation Limited ("the Trustee"), in its capacity as trustee of the Howe Family Number 1 Trust ("the Trust"), made under the principle in *Hastings-Bass and others v Inland Revenue Commissioners* [1975] 1 Ch 25 ("

Hastings-Bass"), to set aside certain borrowings made by its predecessor as trustee.

2 The Trust is a discretionary trust governed by Jersey law. The beneficiaries comprise the Settlor Daryl Howe, the children and remoter issue of the Settlor, any spouse, widow or widower of the Settlor and of his children and remoter issue, the Settlor's father, the Settlor's mother and a named charity.

3 The Settlor and his wife have consented in writing to the remedy being sought by the Trustee. The Settlor's adult children have been convened and Mr Pearmain was appointed to represent his minor child and any further children or remoter issue of the Settlor and any future spouse, widow or widower of the Settlor and his children and remoter issue. The adult children did not appear or communicate any objection to the remedy being sought by the Trustee. Out of an abundance of caution the Trustee also convened the beneficiaries (other than the above) of two other connected family trusts and they have not appeared or communicated any objection to the remedy being sought by the Trustee. The named charity has been notified of the proceedings and has responded in writing saying that it does not wish to make representations on the matter. As there is an ultimate default trust in favour of charities or charitable purposes the Attorney General has been notified of the application and has not sought to be joined in as a party. The company from whom the borrowings have been obtained namely Sandtown Limited has consented to the remedy being sought by the Trustee. In the circumstances we are satisfied that everyone who has an interest in this matter has either consented, or been convened or notified.

Background

4 The Trustee was appointed trustee on 21 st February 2002 and the events which concern us took place under the trusteeship of its predecessor Lazard Trustee Company (Channel Islands) Limited, which we understand has since merged with Standard Bank Trust Company Limited under the merged name of Standard Bank Offshore Trust Company Jersey Limited. For convenience we will use the expression "the Trustee" as connoting both the predecessor and the current trustee.

5 In early 2000 the Trustee proposed to make an investment in Westbourne Growth Fund PCC ("Westbourne"). The investment was to be made partly by way of subscription for preference shares in the appropriate cell of Westbourne (5%) and partly by way of loan to that cell repayable on demand (95%). It was proposed that the investment should be made through Sandtown Limited, a private investment company owned by the Trust and the two other connected family trusts.

6 The Settlor of the Trust was at all material times resident, ordinarily resident and domiciled in the UK for UK tax purposes and this investment vehicle was chosen so that underlying equity investments could be sold without generating an immediate liability to UK Capital Gains tax. The Trustee sought advice from PricewaterhouseCoopers ("the accountants") on

the tax implications of the investment. That advice was given on the 18 th February, 2000, and on the basis of the law as it then stood, the accountants advised that the investment should not be made through Sandtown Limited but through the Trust and that Sandtown Limited should transfer the funds to the Trust by way of an interest free loan to enable that investment to be made.

7 The loans to the Trust and the investments in Westbourne were made as follows:

(i) On or about 13 th June, 2000, Sandtown Limited made a loan of £1,510,000 to the Trustee ("Trust Borrowing 1") which the Trustee shortly thereafter invested in Westbourne by applying £75,500 by way of subscription for shares in the cell and by advancing £1,434,500 to that cell ("Investment 1").

(ii) On or about 29 th June, 2000, Sandtown Limited made a further loan of £2,001,091 to the Trustee ("Trust Borrowing 2") of which approximately £1.5 million was invested in Westbourne by applying £75,000 by way of subscription for shares in the cell and £1,425,000 by way of loan to the cell and this in tranches between the 7 th and 10 th of August 2000 ("Investment 2").

(iii) Other investments were made with the remaining proceeds of Trust Borrowing 2.

(iv) On 20 th February, 2001, the Trustee made a loan of £50,000 to the Settlor interest free and repayable on demand. On 5 th April, 2001, the Trustee lent him a further £41,000 on the same terms ("the Settlor Loans").

8 The tax problems that have arisen as a result of this investment stem from precisely the same changes in UK tax law that were the subject of the *Hasting-Bass* application in the case of *In the matter of the Green GLG Trust* [2002] JLR 571 and *Barclays Private Bank & Trust (Cayman) Limited v Chamberlain and Ors* [2004] 9 ITELR 302—indeed the latter case also involved an investment in Westbourne. In brief on 21 st March, 2000, the Chancellor of the Exchequer of the United Kingdom announced certain proposals to counter schemes known as "flip-flops" which were designed to avoid UK capital gains tax arising in relation to certain off-shore trusts. These changes were incorporated into statute on 28 th July, 2000, but had effect from 21 st March, 2000, and went further than the announcement had indicated.

9 Richard Vallat of English counsel has advised that, on the basis of these changes, when the Trustee made loans to Westbourne and when it made the loans to the Settlor it had outstanding trustee borrowings for the purpose of the Taxation of Chargeable Gains Act 1992 (" TCGA") Schedule 4 (B). The effect of that Schedule was to treat it as disposing of and reacquiring a proportion of the trust assets. The gain on the deemed proposals was approximately £2,950,500. Section 86 of the TCGA treated the Settlor as realising gains of an equal amount on which he was liable to tax at 40% with a right of reimbursement in respect of the tax paid against the Trustee. This result would have been avoided entirely

had Sandtown Limited, rather than the Trustee, invested in Westbourne and made the loans to the Settlor.

Application of the Hastings-Bass Principle

10 The principle in Hastings-Bass as known under English law is equally a principle of Jersey law as was made clear in the *Green GLG Trust* case. A summary of the principle under English law can be found in the recent decision of *Sieff and Ors v Fox and Ors* [2005] EWHC 1312 (Ch), in which Lloyd LJ said:

> ***"119. I will however summarise the** Re Hastings-Bass **principle as I see it, as follows:***
>
> ***(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 .
>
> ***(ii) I have expanded the formula from that set out at paragraph 49 above to include expressly the proposition that the trustees are not acting under an obligation, so as to distinguish cases such as** Kerr v British Leyland (Staff) Trustees Ltd **and** Stannard v Fisons Ltd. **It is only in cases, such as those, where the trustees are obliged to act, that the "might" test applies.*** Stannard should not be treated as applying or endorsing the *Re Hastings-Bass* ***principle, but as being in the same line as cases such as** Kerr.*
>
> ***(iii) It does not seem to me that the principle only applies 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.*
>
> ***(iv) His conclusion that, if the principle is satisfied, the act in question is voidable rather than void is attractive, but seems to me to require further consideration, in the light of earlier authority** .*
>
> ***(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** .*
>
> ***(vi) There are limits to what trustees have to consider in such a situation."***

11 . We note also his comments on the limits of the principle in paragraph 82:-

> ***"82. I do not need to decide between "void" and "voidable" in order to decide this case: all Counsel agreed that nothing turned on that distinction in this instance. It seems to me, however, that on authority, the main ways at present open to the court to control the application of the principle are: (a) to insist on a stringent application of the tests as they have been laid down, (b) to take a reasonable and not over-exigent view of what it is the trustees ought to have taken into account, and (c) to adopt a critical approach to contentions that the trustees would have acted differently if they had realised the true position, perhaps especially so in cases (unlike the present) where it is in the interests of all who are before the court that the appointment should be set aside. As Park J said in*** *Breadner*, [2001] Ch at 543, ***in paragraph 61:***
>
> ***"It cannot be right 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 it in the first place.""***

12 On the question whether it is sufficient that trustees "might" have acted differently or whether it must be shown that they "would" have done so, the view as expounded above by Lloyd LJ is consistent with that expressed by Birt, Deputy Bailiff, in the *Green GLG Trust* case at paragraph 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 was 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"*** .

13 This is similarly not an issue that this Court has to resolve because it is satisfied that the "would" test has been met. As we make clear below in our view the Trustee would not have effected the borrowings and made the investments and loans to the Settlor if it had appreciated the true tax position.

14 In *Mettoy Pension Trustees Limited v Evans* [1990] 1 WLR 1587 Warner J, set up three questions that the court should ask itself when considering the principle in *Hastings-Bass*:

> (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?

15 Taking each of these questions in turn and on the basis of the evidence before us:

(i) As Lloyd LJ made it clear in *Sieff v Fox*, the tax consequences of trustees' decisions are in general relevant. In this case the purpose of the investment in Westbourne was to enhance the value of the trust fund by the use of a vehicle which would enable equity investments to be sold without generating an immediate liability to UK Capital Gains Tax that might otherwise arise on the disposal of such investments. It must therefore have been relevant to consider the UK tax treatment of that investment. In other words since the purpose of the investment was to defer UK tax, it must have been relevant to consider the UK tax consequences of making the investment and in particular it must have been relevant to consider changes in UK tax law that would result in the investment crystallising UK tax liabilities. In each case the UK tax liability would be that of the Settlor with a right of re-imbursement under English law against the Trustee. There is clearly an issue as to whether any such right of indemnity would have been enforceable in Jersey, but it would no doubt be enforceable against the UK situated assets held by the Trust.

(ii) When the borrowings and investments were made the Trustee was unaware of and did therefore fail to consider the true UK tax position and in particular was unaware that making the investments, for which the borrowings were a necessary first step, and the loans to the settlor would give rise to a liability on the part of the Settlor with a right of reimbursement from the Trustee.

(iii) The Trustee would not have procured the borrowings from Sandtown Limited or made the loans to the Settlor had it appreciated the true tax position. Instead it would have proceeded as it originally intended by making the investments through Sandtown Limited.

16 Consistent with the approach of the English court in *Sieff v Fox* and this Court in *Friedman v Asiatrust* [2006] JRC 187, we will avoid the issue of whether the decision of the Trustee should be regarded as void *ab initio* or simply voidable by setting aside the decision and declaring it to be of no effect.

Requirement for fault

17 In *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409, Lightman J decided that it was necessary to establish fault on the part of the Trustee in order to invoke the *Hasting Bass* principle, a decision we understand that has been much criticised and, as can be seen above, doubted by Lloyd LJ in *Sieff v Fox*. In subsequent cases the courts (including the courts here) have been able to avoid this issue because they have been able to find fault either on the part of the trustee or its advisors. In this case we are not able to find fault certainly in respect of Investment 1. The order of play is relevant here:

(i) The Trustee received its tax advice on 18 th February, 2000.

(ii) The Chancellor of the Exchequer announced the proposed changes on 21 st March, 2000.

(iii) Investment 1 was made on 13 th June, 2000.

(iv) The TCGA was made amended on 28 th July, 2000, but the amendments had effect from the 21 st March, 2000.

(v) Investment 2 was made between 7 th and 10 th August, 2000

18 Clearly it was relevant for the Trustee to consider changes to UK tax law and by the time of Investment 2 there had not only been the announcement of the Chancellor on 21 st March, 2000, but the changes to the TCGA had been implemented. Six months or so had elapsed from the date that advice had been obtained and in our view it could be argued that a prudent trustee would have sought confirmation from the accountants, as to whether the changes in the tax law affected the advice given, before proceeding. At that time the accountants would have been aware of the precise changes to the TCGA and would no doubt have advised against Investment 2 proceeding by way of loan from Sandtown Limited.

19 In relation to Investment 1, however, the changes to the TCGA had not been implemented. The Chancellor's announcement was aimed at schemes known as 'flip-flops'. It is helpful to set out the text of the announcement:

> *"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 (the said settlor is charged in respect of trust gains) borrow money with 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 pay 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".

20 In the event the changes to the TCGA went further. As we understand it the Finance Bill 2000 was published on the 7 th April 2000. The provisions which related to the Capital Gains Tax implications of the borrowings and investments under consideration in this matter were in the same form, in the Bill, as the provisions which appeared in the Finance Act 2000 which came into force on the 28 th July 2000. Accordingly, whilst the Chancellor's announcement may not have indicated the full extent of the changes which were to be implemented, the changes which ultimately did become binding were in fact capable of

being ascertained on or after the 7 th April 2000. Thus if, prior to proceeding with Investment 1, the Trustee had sought confirmation from the accountants as to whether the announced changes impacted on the advice given, the accountants would have been able to ascertain the changes that were likely to be implemented and to advise the Trustee against proceeding by way of loan from Sandtown Limited. Is it reasonable to criticize the Trustee for not seeking such confirmation when it had so recently obtained the advice from the accountants and in the light of the public announcement of the Chancellor?

21 In *Barclays Private Bank & Trust v Chamberlain*, a case involving almost identical facts, the trustee invested in Westbourne in May 2000, after the announcement by the Chancellor but before the TCGA was amended. Mrs Justice Levers said, with reference to the requirement for fault, that if she was to go so far as to requiring the establishment of a breach of duty, the test in *Abacus v Barr* was satisfied because up to date advice from the U.K. was not obtained before carrying out the transaction. She did not elaborate further.

22 If it is not reasonable to expect the Trustee to seek confirmation from the accountants before proceeding with Investment 1, were the accountants (whose advice at the time it was given was perfectly correct) at fault for not updating their advice following publication of the Finance Bill 2000? Arguably the same point could be made in relation to Investment 2. The duties of the accountants in this respect would depend upon the terms of their retainer of which this court has no knowledge. The accountants have not accepted that they were at fault in this way and have not been convened before the court and given an opportunity to respond to the accusation. Not surprisingly therefore we are not prepared to find fault on their part.

23 In a case like this which, absent the requirement for fault, falls so clearly within the *Hasting Bass* principle, there may be a temptation on the part of a court to find fault on the part of the trustee too readily in order to meet that requirement and avoid the issue. It seems to us that such a finding could create, unfairly, a rod for the backs of trustees in future cases. Furthermore, we are conscious that, in this case, we are examining the conduct of the predecessor trustee which has not been convened and been given the opportunity to be heard and in principle it would be wrong to find fault in its absence, other than in a clear case. In the circumstances we do not think it is reasonable to find fault on the part of the Trustee certainly in relation to Investment 1 and we decline to do so.

24 In his opinion, Mr Vallat had expressed the view that the *obiter dicta of* Lloyd LJ in *Sieff v Fox* would be adopted were the point to be in issue in the English courts. We therefore asked for a further more detailed submission on this point. We were provided with a joint opinion from Mr Vallat and Robert Ham Q.C. who are firmly of the opinion that under English law no fault is required and that they would expect the *obiter dicta* of Lloyd LJ to be the conclusion of the English Court of Appeal if the point were to be considered.

25 Before setting out their criticisms of *Abacus v Barr*, counsel pointed out that in neither the *Hastings-Bass* case itself nor any of the other cases before *Abacus v Barr*, whether before

or after *Hastings-Bass*, is there any suggestion that it is necessary to establish fault on the part of the trustees in order to invoke the *Hastings-Bass* principle. Thus in *Hastings-Bass* itself (at page 41) the Court of Appeal summarised its conclusion on this aspect of the case in the following terms:

> ***"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, 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."

And in *Mettoy Pension Trustees Limited v Evans* Warner J said:

> ***"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 of 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.
>
> ***For the principle to apply, however, it is not enough 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." (their underlining) .

26 The first suggestion that fault on the part of the trustees was required came in *Abacus v Barr* where the point was raised by the judge rather than by counsel. In that case, a settlor asked trustees to exercise the power of appointment over 40% of the trust assets in favour of his sons but, as a result of a mistake on the part of the accountant who acted as intermediary for the settlor in transmitting his wishes to them, the trustees thought he wanted an appointment of 60% (see paragraph 7). They therefore made such an appointment. Lightman J said (para 23 - 24):

> ***"23. In my view it is not sufficient to bring the rule into play that the trustee made a mistake or by reason of ignorance or a mistake did not take into account a relevant consideration or took into account an irrelevant consideration. What has to be established is that the trustee in making his decision has, in the language of Warner J in*** *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1625, ***failed to consider what he was under a duty to consider. If the trustee has in***

accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect. For example, if the settlor had wished for an appointment of 40% of the trust fund in favour of the sons, but in a letter to the trustee informing the trustee of his wishes by reason of a slip by him or in a clerical error by his secretary the settlor had stated that he wanted an appointment of 60% of the trust fund, and if the trustee in accordance with that erroneous expression of wishes had made an appointment of 60%, neither could the trustee be criticised nor could the appointment be challenged under the rule. The trustee took into account the relevant consideration, the wishes of the settlor, and acted reasonably and properly in relying on the letter as the expression of those wishes. The fact that the trustee misapprehended the settlor's true intentions is irrelevant. Likewise a decision by the trustee to appoint quoted shares to a particular value to a beneficiary is not flawed if the shares subsequently turn out at the date of the appointment to have been immensely more valuable or less valuable than their quoted price by reason of a fact not reasonably ascertainable at the time e.g. an imminent take-over bid or a massive fraud perpetrated on the quoted company.

24. In summary the rule affords to the beneficiaries the protection of a requirement that the trustee performs its duty in exercising its discretion, and a remedy in case of a default. In the absence of any such breach of duty the rule does not afford the right to the trustee or any beneficiary to have a decision declared invalid because the trustee's decision was in some way mistaken or has unforeseen and unpalatable consequences."

27 The fact that the trustees made a mistake as to the settlor's intentions did not therefore in itself justify setting aside the appointment. However, Lightman J went on to find that the fault of the accountant in transmitting the settlor's wishes to the trustees was attributable to the trustees because he was their agent for the purpose of ascertaining those wishes. Accordingly, Lightman J held that the *Hastings-Bass* principle applied.

28 Counsel then went on to set out their criticisms of *Abacus v Barr* as follows:

(i) The decision of Lightman J immediately gave rise to controversy and it has been much criticised by commentators. Counsel drew particular attention to an article by Mr Green, Q.C., published in [2003] Trust Law International 114 and without wishing to detract from that article, which as counsel say repays careful study, I would extract by way of brief summary the following from that part of the article dealing with the decision in *Abacus v Barr*:-

(a) Considering or taking account of a relevant consideration is not merely a matter of identifying the consideration but also requires the establishment of the

content of the consideration which may then be factored into the decision making process.

(b) Thus on the facts of *Abacus v Barr* identifying the settlor's wish as an appropriate subject for investigation was no more than a necessary preliminary to establishing what that wish actually was. The issue from a Hastings Bass stand point was, or ought to have been, whether the trustee had taken account of the settlor's actual wishes. If not, then the condition for relief in *Hastings-Bass* was made out, and that (subject to the question of whether the trustee would/might have acted in the same way regardless, and to any issue of whether the court ought on some other ground to be denying relief) was an end of the question.

(c) Lightman J having identified the settlor's wishes as the relevant consideration did not follow through and take the further step of recognising that it was the settlor's actual wish which was the relevant consideration and that something other than the settlor's actual wish was in the circumstances an irrelevant consideration. That further step would have enabled the case to be resolved on an orthodox application of the Hastings Bass principle. Instead the judge setoff on his own path.

(d) Lightman J found that what was necessary to ground a claim for relief was a finding of some separate breach of fiduciary duty on the part of the trustee; namely a failure (by the accountant) to 'use all proper care and diligence' to ascertain the settlor's actual wish.

(e) In setting this extra condition Lightman J fundamentally shifted the focus of the test. The orthodox *Hastings-Bass* approach finds the necessary breach of fiduciary duty in the failure to take account of relevant considerations and/or the taking into account of irrelevant considerations. Nothing more. In this respect therefore, *Abacus v Barr* is not a Hastings-Bass case at all but one based on a finding of trustee's [agent's] negligence.

(f) There is no trace in the case law pre- *Abacus v Barr* of any suggestion that it is a necessary pre-condition for the invocation of *Hasting-Bass*, that it must be proved that a trustee has not 'used all proper care and diligence in obtaining the relevant information and advice relating to a relevant consideration, before the failure to take account of the relevant consideration can qualify for relief.

(g) It is clear that a trustee may have been scrupulous in obtaining relevant information and advice, and yet, by reason of such information and advice being wrong, it will exercise its discretion on a footing which fails to take account of what, on any view, is a relevant consideration. Alternatively the trustee may be completely cavalier in the assembly of this information relating to the content of the relevant consideration, and yet by accident, good luck and/or the actions of a third party, who cannot on any view be regarded as the trustee's agent, become cognisant of such matters, and duly consider them.

(h) The issue from a *Hastings-Bass* standpoint is what the trustee does with the information when he has it, not whether he was negligent in obtaining it. The additional hurdle for which Lightman J contends creates the wholly undesirable result that relief is available in respect of the acts of the negligent trustee but not in respect of the acts of the careful trustee, even though the substantive basis for impugning the trustee's decision is the same in each case.

(i) There are further unsatisfactory aspects to the introduction of this additional and unwarranted hurdle. First, it is not an additional hurdle which would significantly restrict the operation of the *Hastings-Bass* principle at all, since some form of negligence on the part of the trustee or its agent will very often be present. Second, having introduced the additional hurdle Lightman J then proceeded to find as a matter of fact that it was surmounted in that case, which made the exercise of introducing the new condition for relief particularly arid in the circumstances. Third, the concept of a trustee having committed a breach of fiduciary duty by virtue of having relied on a negligent agent appointed in good faith is unprincipled and (were it correct) would be of a far-reaching import which extends conventional notions of when a trustee might be said to have committed such a breach of trust. The judge effectively imported a strict concept of vicarious liability into the trustee/agent relationship, which paid no regard to the reasonableness of the appointment of the accountant as the trustee's agent for the present purpose, or to the fact there was no suggestion that he had not been appointed in good faith. Fourth, if relief really is to be conditional on a finding of want of proper care and diligence on the part of the trustee the whole nature of the proceedings changes from one of technical failure to consider, to one involving a finding of trustee negligence. The proceedings become ones that trustees are less likely to bring, and ones which if brought may well have to be actively defended. The scope, scale and cost of such proceedings is liable to change accordingly. From the standpoint of the beneficiaries of the trust in question, this can hardly be a desirable development.

(j) Mr Green concludes that if the *Hastings-Bass* principle is to be curtailed, the importation of an additional hurdle of trustee negligence (let alone trustee's agent's negligence) is not the way forward. He described the requirement for fault as a wholly new departure, which sets up a false and unnecessary trail, and one which it was hoped would not be followed by the English courts.

(ii) The judgment of Lloyd LJ in *Sieff v Fox* is important because the Lord Justice (giving the reserved judgment in his last case as a puisne judge after his promotion to the Court of Appeal) deliberately set out his view of the current requirements for and limitations of the *Hastings-Bass* doctrine after a thorough review of the authorities. There is no doubt in *Sieff v Fox* that the trustees had received and acted on incorrect tax advice so Lloyd LJ's comments were obiter but his reasoning is, in the joint opinion of counsel, compelling. He points out that one simply cannot find a breach of duty in some of the cases on which the principle is founded:

"80. Nevertheless it seems to be questionable whether the application of the doctrine should be regarded as depending on a

> ***breach of duty, and whether its consequences should be aligned with those of a breach of trust. It seems to me that it would have been hard to say that the trustees who made the advancement which was held to be completely ineffective in*** *In re Abrahams' Will Trust* [1969] 1 Ch 463 ***acted in breach of their duty. What was wrong with their act was the application of the rule against perpetuities in a way quite different from that which seems to have been regarded as normal and legitimate at the time, and which was held valid by Danckwerts J at first instance in the*** *Pilkington* ***case*** [1959] Ch 699.
>
> ***81. Taking together, first, the fact that only if the exercise was void could the Inland Revenue have succeeded in having the advancement set aside in*** *In re Abrahams' Will Trusts* [1969] 1 Ch 463 ***(and, at first instance, in the*** *Hastings-Bass* ***case*** [1975] Ch 25 ***itself) and, secondly, the difficulty of showing that in either of those cases there was any breach of the trustees' duty, it seems to me that Lightman J's conclusion that the appointment was voidable is open to doubt, as also is his introduction of a factor, not previously mentioned in the cases, that the trustees or their advisers or agents must have been at fault in some way for the principle to apply."***

Lloyd LJ sees the principle as providing protection for beneficiaries from trustees' mistakes (including innocent mistakes), rather than merely breaches of duty. See paragraph 86

> ***"I have no doubt that....*** a material difference between the intended and actual fiscal consequences of the act may be sufficient to bring the principle into play."

(iii) The question has not, to the knowledge of counsel, been considered in England and Wales since *Sieff v Fox* but they refer to the following:

> (a) The editors of the supplement to Lewin on Trusts 17th on line edition refer to *Abacus v Barr* and *Sieff v Fox* without expressing a view of their own.
>
> (b) The editors of Snell's Equity 31st Ed (2005) appear to regard the principle as founded on mistake rather than breach: see 9-10, 13-2 and 27-2 (as amended in the on line supplement in light of *Sieff v Fox*).
>
> (c) The authors of Thomas and Hudson on the Law of Trusts refer with approval to Mr Green's article and say: "This is an entirely novel feature and seems inconsistent with earlier decisions on *Hastings-Bass*".
>
> (d) The editors of Underhill and Hayton, Law of Trusts and Trustees 17th Ed (2007) see the principle as dependent on mistake, not breach of trust (see 61.18).

We would add to that H.M. Revenue & Customs Tax Bulletin (TB 83 June 2006) to which we refer below in which they agree with Lloyd LJ in *Sieff and Fox* that breach of

duty is not a requirement.

29 Mr Pearmain drew our attention to an article by Tang Hang Wu, an Associate Professor at the University of Singapore, in Trust Law International (Vol 21 No 2 2007) headed "Rationalising re *Hastings-Bass*: a duty to act on Proper Bases". Unlike Mr Vallat and Mr Ham, Mr Wu commences his analysis of *Hastings-Bass* from a different point of departure in that the thesis of his paper is that the doctrine is not based upon mistake but rather upon the trustees duty to act on a proper basis. He concludes in any event that the requirement for fault as expressed by Lightman J is not sustainable.

30 We find the joint opinion of counsel very persuasive and agree with their conclusion that the approach of Lloyd LJ in *Sieff v Fox*, which sees the principle as founded on mistake rather than breach of duty, is correct, particularly in light of the authorities (e.g. *In re Abraham's Will Trust* [1969] 1 Ch 463) in which no breach of trust was or could reasonably have been established. We decline therefore to follow *Abacus v Barr* in this respect. We appreciate that the matter has not been the subject of adversarial argument before us but we find that the *Hastings-Bass* principle under Jersey law remains as set out in the *Green GLG Trust* case and that, when applying the principle, there is no requirement under jersey law to find fault or breach of duty on the part of the trustee or its agents.

Contrary argument

31 It is in the interests of those before the court that the decision of the Trustee be set aside and we have heard no argument to the contrary. Consistent with his duty Mr Dessain has considered arguments he could think of for saying that the principle should not be applied. An alternative to applying the principle would be for the matter to be settled by litigation between the Settlor, the Trustee and the professional advisors, a suggestion that did not as a matter of policy attract the court in the case of *Green GLG Trust*.

32 Mr Dessain did draw our attention to the HM Revenue & Customs Tax Bulletin (TB 83 June 2006) referred to above which had been provided by HM Revenue & Customs ("HMRC") who have been informed of the application. In that article the HMRC argue that any positive formulation of the principle should state that the court "may" interfere with the trustee's decision not that it "will" do so and that the effect of the principle, if applied, should be to render decisions voidable not void. They tentatively suggest that the principle as it develops should be assimilated with the general principles of law by which decisions of trustees may be impugned and the voluntary decisions of trustees set aside for mistake. They agree with Lloyd LJ in *Sieff v Fox* that the relevant test is whether the trustees "would" have acted differently not "might" have done so and that, as mentioned above, breach of duty is not a requirement. Thus far none of these arguments impact upon our approach to the matter save that they do go on to argue that, whilst accepting that fiscal consequences are generally matters trustees should take into account, there should be a distinction between cases where the trustees fail to take into account fiscal considerations at all and cases where they take steps to obtain advice and that advice turns out to be to be wrong. In

the latter case they feel that the principle should not apply. We decline to make such a distinction which is based presumably upon the policy that where there are tax advisors who have advised incorrectly, the Trustee should suffer the tax consequences and pursue its remedies against the tax advisors. This is the same suggested policy which the court rejected in *Green GLG Trust* and we see no reason to depart from that.

33 We therefore set aside Trust Borrowing 1 and Trust Borrowing 2 and the Settlor Loans and declare them to be of no effect. It follows from this that we further declare that Investment 1 and Investment 2 and the other investments made with the proceeds of Trust Borrowing 2 are investments held by the Trustee as bare trustee for Sandtown Limited.

34 We note there is no application for costs.