

The Representation of L

Jurisdiction:	Jersey
Judge:	Sir Philip Bailhache, Kt, Jurats Clapham, Morgan
Judgment Date:	20 April 2011
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Text

[2011] JRC 85

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Kt., **Commissioner, and** Jurats Clapham **and** Morgan.

In the Matter of L
Representation of Mrs P
And In The Matter Of The R Trust
And In The Matter Of The Inherent Jurisdiction Of The Royal Court

Advocate R. J. MacRae for the Representor.

Authorities

Re Green GLG Trust [\[2002\] JLR 571](#).

Futter -v- Futter [\[2010\] EWHC 449 \(Ch\)](#)

Pitt -v- Holt [\[2010\] EWHC 45 \(Ch\)](#).

THE COMMISSIONER:

- 1 On 20th January, 2011, the Court heard an application by Mrs P (“the Representor”), in her capacity of Protector of the R Trust (“the Trust”) seeking relief under the Hastings-Bass principle. The Court granted the application and indicated that we would give our reasons at a later date. This we now proceed to do.
- 2 The Trust was established by deed dated 15th October, 2003, between Merrill Lynch Bank and Trust Company (Cayman) Limited as appointor and HSBC Trustee (C.I.) Limited (“HSBC”) as the original trustee. The Trust is governed by Jersey law and we accordingly have jurisdiction to hear this application. The deed provides that the beneficiaries are those persons specified in the third schedule together with such other persons as may be added by the trustees in accordance with the powers conferred upon them. The only beneficiaries at present are the Representor and the NSPCC, although the inclusion of the latter is to take effect only upon the death of the Representor.
- 3 Clause 5 of the trust deed provides that the trustees are to hold the income of the trust fund to pay the same to the Primary Beneficiary during her life, or until the end of the trust period (if earlier) with power to appoint capital to the Primary Beneficiary. The Primary Beneficiary is the Representor. Clause 18 of the trust deed provides in terms that the Protector of the Trust shall have the power to remove trustees and to appoint new trustees. The Representor is currently the Protector.
- 4 Clause 1(a)(vi) of the trust deed defines “Excluded Persons” as including any persons or classes of persons specified in the fourth schedule. The fourth schedule specifies the trustees, their officers and employees as being the Excluded Persons. Clause 12 of the trust deed provides that no Excluded Person shall be capable of taking any benefit under the provisions of the Trust.
- 5 On 7th October, 2009, in accordance with tax advice obtained by her, the Representor exercised her power as Protector of the Trust to appoint herself and her English legal adviser, Mr James Edmondson, a partner in Farrer & Co, as trustees in place of HSBC. The deed of retirement and appointment was drafted by Mr Edmondson. This process was intended to take place as part of the winding up of the Trust. One aspect of the advice received by the Representor’s tax advisers was that the Trust should first become “resident” for tax purposes in the UK; this involved the appointment of trustees resident in the UK. Clause 18 of the trust deed provides that *“there shall be no obligation to have more than*

one corporate trustee or two individual trustees of this Settlement". The Representor was accordingly advised that it was necessary for her to exercise her powers to appoint two individual trustees to act in that capacity.

- 6 HSBC agreed to retire and on 7th October, 2009, as we have stated, the Representor executed a deed of retirement and appointment, appointing herself and Mr Edmondson as trustees. Mr Edmondson then prepared a draft deed of appointment whereby the entire trust fund was to be appointed to the Representor. She was advised by Mr Edmondson to take independent advice on the terms of certain indemnities included in the draft deed. This she did.
- 7 It was at this stage that the problems were realised. The Representor was advised that as a result of her appointment as trustee, (1) she had become an Excluded Person, incapable of benefiting under the Trust and (2) a charge to UK Inheritance Tax ("IHT") had arisen. The Representor has sworn an affidavit setting out the course of events from her perspective. She came to the UK from the former Yugoslavia in 1967; her spoken English is reasonable but her written English is not so good. She relied completely upon her professional advisers. If she had known that these problems would be the result, she would not have exercised her discretion in the way that she did. She accordingly made a representation to the Court asking the Court to set aside the appointment of herself as a trustee, and to declare the appointment to be of no effect under the Hastings-Bass principle.
- 8 The Hastings-Bass principle was first applied in Jersey in *Re Green GLG Trust* (2002) JLR 571 where the Court stated at page 580:-

"In our judgement, 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 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."
- 9 The principle is of course equally applicable to others exercising fiduciary functions in the context of trusts, for example, as in this case, protectors.
- 10 Counsel for the Representor drew our attention to the effect upon various third parties of the relief being granted. If the appointment of the Representor was declared to be of no effect, that would leave Mr Edmondson as sole individual trustee, which would not be permitted by the terms of the Trust. The effect of this would be that HSBC's purported retirement would have been ineffective and that HSBC would be deemed to have continued as co-trustee with Mr Edmondson. HSBC had confirmed in writing that it was content with that outcome.

- 11 Her Majesty's Customs and Excise ("HMRC") had been informed of the issues arising from the appointment by the Representor's tax advisers in October 2010. At the convening hearing on 15th December, 2010, the Court ordered that HMRC should be notified of the representation and served with a copy of it, but should not be convened. HMRC responded by letter of 13th January, 2011, to draw attention to its appeal to the English Court of Appeal against two judgments of the High Court in *Futter -v- Futter* and *Pitt -v- Holt*, and to suggest an adjournment of the hearing of this representation to await the outcome of those appeals. The letter was drawn to the Court's attention by counsel, but we did not consider it appropriate to defer the hearing in that way.
- 12 The NSPCC is not currently a beneficiary of the Trust, although it will become so on the death of the Representor. The NSPCC was notified of the hearing, but has not responded.
- 13 Her Majesty's Attorney General was also informed on behalf of the general charitable interest but, after certain exchanges with the Representor's legal advisers, indicated that he did not wish to participate in the hearing.
- 14 Applying the law to the facts of this case, we were entirely satisfied that the Representor would not have acted as she did in executing the deed of appointment if she had been aware that the effects of her action were (1) to exclude her from having any beneficial interest in the Trust and (2) to give rise to a substantial tax liability. We therefore granted the relief sought.