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HIGGS & JOHNSON COUNSEL & ATTORNEYS-AT-LAW | VOLUME 61, ISSUE 1/2017

The Bahamas codifies the Rule in Re Hastings-Bass

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On 29th December 2016 the Trustee (Amendment) Act, 2016 was passed and, amongst other matters, added section 91C to the Trustee Act, 1998 (“Principal Act”). In effect, this new section preserves a *Re-Hastings-Bass* styled remedy that may be used to undo an exercise of fiduciary power where the exercise of the fiduciary power results in unintended consequences. The inclusion of this new section in the Principal Act was prompted by the UK Supreme Court’s decision in the combined cases of *Futter v HMRC; Pitt v HMRC [2013] UKSC 26* (“Pitt & Futter”).

The Rule in Re Hastings-Bass

The new provisions in section 91C are modeled after the Rule in *Re-Hastings-Bass* (“Rule”) which emanates from the UK Court of Appeal’s decision in the case of *Re-Hastings-Bass [1975] Ch 25*. In its articulation of the Rule, the court provided that 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 unauthorized 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.

The Rule provided trustees with a useful means of unwinding any perceived harsh consequences flowing from exercises of power conferred upon them by the terms of a trust. Once applied, it enabled the court to void the relevant transaction with the effect that it was deemed never to have occurred. Case law illustrates that the Rule has most often been applied to reverse exercises of power made by trustees in light of incorrect tax advice which had resulted in significant and unforeseen tax liability.

The Rule after Pitt & Futter

In Pitt & Futter the Rule, as it had been employed over the past twenty or more years, was severely curtailed. In giving judgment, the UK’s Supreme Court held that a precondition to the application of the Rule was that a trustee must be in breach of duty. It was further held that an exercise of power could only be set aside at the instance of the beneficiaries and at the discretion of the court, thereby precluding the trustees themselves from applying to the court to set the exercise aside. In light of the ruling, in common law jurisdictions, such as The Bahamas, where a trustee made a decision that was within the power afforded to him, the court would have no jurisdiction to intervene if the decision was not made in breach of duty. Additionally,

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intervention by the court would only be made on an application by the beneficiaries.

The Rule preserved in Section 91C

Section 91C preserves the essence of the Rule as it had operated prior to Pitt & Futter, while simultaneously bolstering its effectiveness.

At subsection 91C(2) the court is granted the jurisdiction to set aside an exercise of

fiduciary power, not only at the instance of a beneficiary but also at the instance of a trustee, protector, authorized applicant (in the case of a purpose trust), or any other person to whom the court grants permission. It is expressly provided at subsection 91C(4) that an exercise of power may be set aside despite the fact that there is no breach of trust or some other fault on the part of the person exercising the power or

advising on its exercise.

Section 91C also clarifies that such exercises may be deemed voidable by the court, and not necessarily void, and that the court may make such further determinations it deems fit, including the effect of the exercise of the power. This provision adds further flexibility, allowing an order made by the court pursuant to section 91C to be tailored to the surrounding circumstances of each case. 



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