

> Are there two rules in Hastings-Bass?

Decisions of trustees may be void, or voidable, under the rule in Hastings-Bass, if the trustees disregarded some relevant matter or relied on some irrelevant matter, and it is shown that they would, or might, have acted differently if they had directed themselves correctly.



Mark Herbert QC

Three questions arise:

- (a) Is it necessary to show that the trustees would have acted differently if properly directed: *In re Hastings-Bass deceased* [1975] Ch 25 (CA) *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587? Or is it enough that they might have done: see *Kerr v British Leyland (Staff) Trustees* [2001] WTLR 1071 (CA)?
- (b) Is the effect of applying the rule that the act of the trustees is void: *In re Abrahams' Will Trusts* [1969] 1 Ch 483? Or is it voidable: *Abacus Trust Company (Isle of Man) v Barr*, [2003] 5 ITELR 602?
- (c) Is it necessary to show that the trustees are at fault: *Abacus v Barr*?

It is not even clear whether there is one Hastings-Bass rule or two. One expression of the rule was famously given by Warner J in *Mettoy* (above). The question there was certainly whether the trustees would have acted differently if they had understood that the employing company was being given power to augment benefits on the winding-up of the scheme. Soon afterwards in *Stannard v Fisons Pension Trustees* [1990] PLR 179 (later upheld on appeal [1991] PLR 225) the same judge set aside a transfer

payment from one pension scheme to another on the ground that the trustees had been in ignorance of the increased value of the fund at the date of transfer, even though he found as a fact that the trustees would not have acted differently if they had been advised of the new value. The judge's own explanation was that *Stannard* was not based on the rule in Hastings-Bass.

Similarly in *Abacus v Barr* (above) Lightman J was faced with an application to set aside an appointment by trustees on the ground that they had misunderstood the settlor's wishes on the matter. He described this as an application of the rule in Hastings-Bass, but contrasted it with a different rule: **'Where a mistake is made as to the effect of an appointment it may be possible to invoke the court's jurisdiction to rescind the appointment: see *Anker Petersen v Christensen* [2002] WTLR 313.'**

This reference is curious because the *Anker-Petersen* case was not concerned with an appointment by trustees, but rather with the rescission of voluntary assignments by beneficiaries.

My own view is that there are, or at least were, two rules.

One is that acts of trustees may be set aside if, in breach of their

duties, the trustees disregard relevant factors or rely on irrelevant ones. In the context of this rule it should be enough that the trustees might have acted otherwise if properly directed. Examples of cases in which this rule has been applied are: *Kerr v British Leyland*; *Stannard v Fisons*; *Abacus v Barr*.

The other rule is what is known generally as the rule in Hastings-Bass, and it is not based on fault but rather on the misunderstanding by the trustees of the effect of their action. Examples of cases in which this rule has been applied are: *In re Pilkington's Will Trusts* [1961] Ch 466 (CA), [1964] AC621 (HL); *Abrahams* (above). In these cases the misunderstanding related to the application of the perpetuity rule, but other misunderstandings can lead to the same result: *In re Vestey's Settlement* [1951] Ch 209 (CA), involving the non-application of section 31 of the Trustee Act 1925; *Mettoy*; *AMP (UK) Plc v Barker* (2000) 3 ITELR 414.

The basis of this rule is that the true effect of the trustees' action is fundamentally different from what they had intended, and as a result they cannot be said to have properly exercised their discretion. As a result the action is void, and for this purpose the misunderstanding must be such that the trustees would

have acted differently if correctly informed. If the mistake is less fundamental, the trustees' act stands: see *Hastings-Bass* and *Mettoy*. Later applications of this rule have been widely criticised, particularly *Green v Cobham* [2000] WTLR 1101. In that case an appointment on accumulation and maintenance trusts was set aside, not solely by reason of a mistake as to the effect of the deed, but rather because the trustees had not considered the tax consequences of the combination of two factors, namely (i) that the appointment was not exhaustive of the beneficial trusts and (ii) that one of the trustees (an English solicitor) later retired from his professional firm.

And the future? My prediction is that, when a case raising the rule in Hastings-Bass next reaches the Court of Appeal, the rule will be restricted to cases in which the trustees' misunderstanding is fundamental and relates to the immediate effect of their act, not to its tax consequences. That will bring it more in line with cases dealing with voluntary dispositions by individuals, such as *Gibbon v Mitchell* [1990] 1 WLR 1304 and *Anker-Petersen v Christensen* [2002] WTLR 313.

Mark Herbert QC

> Time to accumulate



Shân Warnock-Smith QC

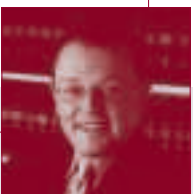
It will come as good news to all but the most retro practitioner that the end may be nigh for the rule against excessive accumulations. Complete abolition was proposed in 1998 by the Law Commission (Law Com. 251) for private trusts and last year the Government announced that the Law Commission proposals would be implemented as soon as time permitted.

There is now a consultation paper and we seem to be limping slowly in the right direction. One estimate (by the Technical Committee of STEP) assumes that worrying about excessive accumulations adds on average one hour of professional time per trust for the 260,000 trusts known to the Revenue so that the total professional costs amount to millions of pounds each year. Attractive though that thought may be to the professional involved, if correct the case for reform is urgent. It is also suggested by STEP that the presence of a rule against excessive accumulations renders the English-law trust uncompetitive as

compared with other trust jurisdictions which never had, or have abolished, the rule. The big question is whether accumulations could be dealt with separately and ahead of the proposed reform of perpetuities (to introduce a fixed statutory period of 125 years). The point here is that the former might be able to be dealt with by a Regulatory Reform Order; the latter will need primary legislation. It must, surely, be desirable to deal with both at the same time. Given the inevitable complexity involved in applying new law to old trusts (just consider how you still need to know the

pre-1964 law) the thought of learning two new sets of law with different commencement dates has one reaching for the smelling salts if not something stronger.

Shân Warnock-Smith QC



David Rees

Sales by attorneys under an Enduring Power of Attorney (EPA) may cause problems is where all or part of the donor's property is the subject of a specific legacy under his will.

> Beware: your EPA attorney can wreck your will

Consider the situation where the attorney is the donor's son. The donor's will leaves his house to his daughter absolutely and residue to the attorney. If, after the power has been registered, the attorney should use his power under the EPA to sell the house, the gift to the daughter is likely to be adeemed. The Supreme Court of Queensland has held (*Re Viertel* [1996] QSC 66) that the sale by an attorney acting under an EPA does not adeem a specific gift of that property in the donor's will. However, it is far from certain that an English Court would be prepared to follow this decision.

Ademption would not have occurred if the sale had been by a receiver acting under the authority of the Court of Protection as section 101 of the Mental Health Act 1983 operates to prevent ademption in these circumstances and turns the gift of the house into one of the proceeds of sale.

If the intended beneficiary becomes aware of the transaction before it takes place, then he can ask the Court of Protection to prevent the sale under section

8(2) of the Enduring Powers of Attorney Act 1985.

An alternative remedy where it is clear that the donor's own interests require the sale to take place would be to apply to the Court of Protection for the proposed sale to be authorised under section 96 of the Mental Health Act 1983. If the sale takes place under the specific authority of the Court under section 96 then section 101 will operate to prevent ademption taking place.

Where the transaction only comes to light after it has been effected, then the appropriate remedy would be ask the Court of Protection to make a statutory will on behalf of the donor, to provide the intended donee with an alternative legacy.

David Rees



Tracey Angus

Judges are regularly asked to carry out the difficult task of determining whether a person had capacity to enter into a transaction made many years earlier. Two recent decisions demonstrate a contrasting approach.

> Capacity to make a gift or contract: a shifting burden

In *Mastermann-Lister v Brutton & Co*,¹ the Court of Appeal was asked to consider the claimant's capacity to bring and compromise litigation more than fifteen years earlier. The Court of Appeal emphasised the serious implications of a finding of lack of capacity, the effect of which may be to deprive a person of his civil rights, such as his right to litigate or to manage his own property. It was stressed that the law should be slow to interfere with those rights - one member of the Court expressed concern that CPR Part 21, which enables litigation to be brought on behalf of a person without a judicial finding of incapacity, probably contravened the articles 6 and 8 of the European Convention. The test of capacity is always issue specific; and, when applied to different issues, it may yield different answers. Moreover, a person is always to be presumed to be capable and the burden of proving lack of capacity in relation to the relevant issue lay with the person arguing to the contrary.

A submission that this burden of proof might shift in circumstances where a prior period of incapacity could be demonstrated was rejected².

However, the concept of a shifting burden of proof has long been accepted in contentious probate claims. A prior period of severe mental illness can raise a presumption against a will. Just as with a contentious probate claim, where the disposition under challenge is an inter vivos transaction, the Court will often be forced to decide the issue of capacity without the benefit of evidence from the main protagonist, in circumstances where the material events took place many years before the trial and without the benefit of a contemporaneous medical assessment. Common sense would seem to require the Court to take a similar approach to the burden of proof to a Court trying a contentious probate claim.

This approach found favour with Rimer J in *Re Morris, The Special*

*Trustees for Great Ormond Street Hospital for Children v Rushin*³.

The Judge held that, once it had been shown that Mrs Morris suffered from a material degree of Alzheimers at the time the relevant transaction was entered into, the burden of proving she did have capacity to enter into it shifted to the other parties to the transaction. More recently still, in *Williams v Williams and another* (unreported, 27 February 2003) Deputy Judge Kevin Garnett QC held that in circumstances where it was shown that the donor's disability meant that he would only have understood a particular transaction if it had been explained to him in a particular way, the burden of proving that he did receive that explanation shifted to those upholding the gift.

Tracey Angus

¹ (2003) WTLR 259.

² See also *Re W* [2001] Ch 609, 616.

³ [2001] WTLR 1137, 1196E

> Members' News



No fewer than 12 of the members of chambers have been listed as legal experts in personal tax, trusts and probate law in the Legal Business report *Legal Experts 2003*. **Henry Harrod** (our head of chambers, and Conveyancing Counsel to the Court) has in particular been advising on international trust matters, as has **Shan Warnock-Smith QC**, who has been dealing with a wide variety of trust issues both in and out of Court and has also been busy in the Cayman Islands. **Chris Whitehouse** is the co-editor of *Dymonds Inheritance Tax* and is always in demand as a speaker at technical tax lectures and was busy with pre-budget planning. **Mark Herbert QC** is advising on confidential trust and tax problems arising from settlements and estates in England and Jersey, and in disputes between

trustees and beneficiaries before the Pensions Ombudsman. **Mark Blackett-Ord** appeared in the Court of Appeal in the leasehold restrictive covenant case of *Williams & anr v Kiley T/A CK Supermarkets Ltd*: [2003] 06 EG 147 CA and has been gratified by the warm reception that has been given to the second edition of his book *Partnership* (Butterworths, (2002)). **Barry McCutcheon** (of *McCutcheon on Inheritance Tax*) continues to practice in the field of advanced private client tax work. **Martin Farber** is the acknowledged expert on Costs, and has also been acting in a Group Action for 238 house owners in Merthyr Tydfil in a claim for nuisance and breach of human rights against a waste disposal site operator in Wales.

> Members' News continued

Launcelot Henderson QC has been sitting as a deputy High Court Judge in London and Birmingham and appearing in important cases for the Revenue in the ECJ and in London. **Andrew Simmonds QC** is advising Equitable Life on GAR issues/mis-selling claims and is preparing a Privy Council case on damages for trespass and a House of Lords case on partnership. **Penny Reed** is co-editing the Trust Quarterly Review; she appeared in *Nathan v Leonard* (2002) WTLR 1061 which is now the leading case on forfeiture clauses in wills. **Christopher Tidmarsh QC** took silk last year since which time he has been advising (and litigating) on matters as diverse as the winding up of pension schemes and tax aspects of share buy-backs (*Strand Securities v Vojak* (Ch D) *Sema v ITC* (CA)).



Barbara Rich appeared in the proprietary estoppel case *Ottey v Grundy* which is to be heard by the Court of Appeal in June. **Karen Walden-Smith** is busy with her usual wide variety of property litigation and recently appeared before Neuberger J. in *Pesticcio v Huet, Abbey National plc and Ors* where issues of capacity and undue influence were given detailed consideration. **Tracey Angus** has appeared in *Bayoumi v WTA Educational Trust* (The Times, 21 January 2003) where the Court considered the effect of a contract entered into by a charity contrary to s.36 of the Charities Act 1986. **Henry Legge** is involved in both professional negligence and private client work, in particular as an expert on variations of trusts. **David Rees** is a major contributor to Heywood & Massey's Court of Protection Practice and he appeared for the Inland Revenue before the CA in *Jerome v Kelly* [2003] STC 206.

Michael O'Sullivan has been involved in heavy litigation in such cases as *Cama Deceased* and *Asylum Seekers Management Ltd v Adelphi Hotels* (CA), and has been contributing to *Tolleys Trust Drafting and Precedents*, as has **Emma Chamberlain** who is also a major contributor to *Tolleys Finance Law for the Older Client* and is co-editor of *Dymonds Inheritance Tax*. She lectures and writes widely on trust and tax structures and has been very busy with pre-budget tax planning for private clients. Property and mortgage specialist **Patrick Rolfe** has been involved in a lengthy arbitration concerning a hotel complex bordering Silverstone Race-track.

Anna Clarke has been appearing in County Court and High Court cases including contested will constructions and a disputed application to replace a trustee/settlor of a family trust. **Leon Sartin** has a growing practice which covers all ground from non-contentious private client work to landlord and tenant cases in the County Court. **Sarah Haren** also has a flourishing practice in the County Court which has been interrupted by several visits to the Cayman Islands to assist with disclosure in a case of Christopher Tidmarsh's. **Tom Entwistle** joined us late last year and has developed a practice in the lower courts in all aspects of Chancery work.

> Speaking Events Seminars

29-9-03 – 02-10-03

Shân Warnock-Smith QC

will be speaking at the IBC International Trust and Tax Planning Summit in Miami

01-7-03

Chris Whitehouse

STEP Summer Conference

03-7-03

Law Society Probate Conference

16-5-03

Mark Herbert QC

British-German Jurists Association
"Foundations, Trusts & Charities"

20-5-03

Barry McCutcheon

Informa Conference
"Cutting Edge Tax Planning"

2&3-6-03

Barry McCutcheon

Informa Conference
"Cutting Edge Tax Planning"

5-6-03

Barry McCutcheon

Informa Conference
"The Capital Taxes Planning Conference"

13-5-03

Emma Chamberlain

STEP Spring and Autumn Conferences
IBC 'HINWIs' Conference



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