

Trustees' Mis-exercised Discretion: Undo the result – even the tax consequence!

"Directors' Duties & Responsibilities with particular reference to the Company Pension Scheme – and what to do when it all goes wrong"

A talk given to the Scottish Annual Conference of the Chartered Institute of Taxation on 21st November 2009 by Derek Francis, LL.B.,TEP, Advocate, Terra Firma Chambers, Barrister (non-practising), Chairman of TrustBar.

The Companies Act 2006 has codified directors duties. It would not be surprising if it produces an upsurge of litigation, if only because it provides a ready-to-hand tick-list for disaffected members.

It is obvious that those who are (a) directors, (b) pension fund trustees and who may be (c) beneficiaries qua members are particularly exposed to conflict of interest. The talk is not principally concerned with challenges to directors' exercise of discretion based on breach of fiduciary duty. Such challenges may be difficult to mount. The mere possibility that self-interest and duty might come into conflict, absent proof of actual abuse, may not (as is generally the case) be enough. As Lord Justice-Clerk Ross said in *Sarris v. Clark* 1995 SLT 44 at 47 he was:-

"... satisfied that an exception to the general rule *auctor in rem suam* may arise if the truster has expressly or impliedly authorised the conduct alleged to constitute the breach of fiduciary duty."

Often acts of directors/trustees of pension schemes will be within that exception; e.g. *Edge v the Pensions Ombudsman* 1998] Ch. 512 per Sir Richard Scott V-C at 539 to 540; "The notion that, when the discretionary power of amendment is exercised so as to increase an existing benefit or add a new benefit, the member trustees must be excluded from benefit is, in my opinion, quite simply ridiculous.". Where they are, actual abuse needs to be shown. The case law is examined.

The talk looks at:-

- *first* and fleetingly the principles limiting director-trustees' exercise of discretion without breach of fiduciary duty and the consequences when fiduciary duties are breached;
- *second* the challenges (not the remedies) to the purported exercise of discretion available to others (e.g. members of pension schemes; the employer company itself) where fiduciary duty is breached – and the consequences;
- *third* the principles on which it may be possible to set aside the exercise of a discretion or power where trustees have “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” and whether or not such actings involve breach of fiduciary duty; the Rule in *in re Hastings-Bass dcsd.* [1975] Ch 25 and possible Scottish counterparts, notably *Board of Management for Dundee General Hospital v Bell's Trustees* 1952 SLT 270;
- *fourth* the role of error or mistake by the trustee in enabling transactions to be the subject of retrospective judicial control; *Gibbon v Mitchell* [1990] 1 WLR 1304 and reduction uninduced unilateral error *Hunter v Bradford Property Trust Limited* 1970 SLT 173.

It will be evident that the second to fourth bases of challenge are not necessarily discreet – some states of fact will admit of analysis in more than one way – though it is submitted that the doctrines are distinct. The talk looks at the question whether an attack on the exercise of discretion mounted in (a) breach of fiduciary duty (b) *Hastings-Bass* principles results in the decision being void or just voidable. It focuses, particularly, on *Abacus Trust Co v. Barr* [2003] Ch 409 where Lightman J. treated the latter doctrine as an aspect of breach of fiduciary duty, rendering the decision merely voidable and *Sieff*

v. Fox [2005] 1 W.L.R. 3811, Lloyd, L.J., where Lloyd L.J. considered the latter doctrine distinct and to render the seeming decision void. It considers how much, having regard to the Scots law of remedies, this matters. It looks selectively at the welter of English case law in the 35 years since *Hastings-Bass* and the part which *Board of Management for Dundee General Hospital* appears to have played in some .

There is discussion of what to look for in identifying a case in which a challenge on such basis might be brought. Inevitably, some of the more lurid practical consequences of successful challenge – retrospectively eliding tax liabilities which ought not to have been incurred; undoing unwanted commercial consequences – are dealt with. Important stuff for litigators and private client people alike.