

“Hastings-Bass and his Scottish Friends”
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The author considers the English cases re Hastings-Bass, Decd. and Sieff v. Fox and assesses whether the principle derived therefrom can be relied upon in Scots law.

Consider this situation. You act for beneficiaries under a trust. On the basis of professional (be it legal, tax or accounting) tax-mitigation advice the trustees have taken steps which, they were told, would reduce tax liability. So far from reducing liability, the steps have increased it. The clients and/or the trustees have no remedy against the tax advisor. The advice given and implemented proved, in the event, to have been wrong, but reflected a view of the law which an ordinarily competent member of the profession exercising reasonable skill and care might have held at the time; many did. It was not *Hunter v Hanley* 1955 SLT 213 negligent. In fact, there was at the time authority which supported the view. The authority was subsequently disapproved. What remedy is there?

A possible answer may be the *Hastings-Bass* principle; recently glossed by HMRC in Tax Bulletin 83 of 23rd June 2006. It is so-called after *in re Hastings-Bass dcsd.* [1975] Ch 25. The latest restatement of the principle is to be found in *Sieff v. Fox* [2005] 1 W.L.R. 3811 where at paragraph 119 Lloyd, L.J. said:-

“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*.”

The *Hastings-Bass* Principle is plainly not confined to the somewhat extreme factual situation described. It is, however, clear from the part of the passage concerned with “considerations” (italicised) that the omission to take account of relevant or taking account of irrelevant matter need not be a breach of trust. An understanding of the effect of the exercise of a discretion based on a view of law quite acceptable at the time, but proved to be wrong in the light of subsequent judicial clarification, might

involve no breach of trust (see *Raes v. Meek* (1888) 15 R. 1033) but might still come within the sweep of the principle.

Unintended fiscal consequences are amongst the unlooked-for effects which the English courts have held may attract the application of the principle. In Tax Bulletin 83, HMRC note that “it seems that there is no equivalent principle in Scotland”. It might be more accurate to say that there is no exact counterpart case law in Scotland. At any rate, the principle has not taken root and flourished as it has in England. But could it?

It is a feature of Scottish trust law that, in contrast to the position in England, the courts have shown a marked reluctance to involve themselves in the exercise of discretions vested in trustees. In England it has been said in *Morice v the Bishop of Durham* (1804) 9 Ves. 399, 404-405 *per* Sir William Grant MR that “there can be no trust, over the exercise of which the court will not assume a control”. In Scotland, by contrast, one finds in *Joy Manufacturing Pension and Life Assurance Scheme Trustees, Petrs*, 2000 SLT 843 statements stopping very little short of suggesting that there are no circumstances in which trustees’ discretion may be surrendered to the court; see also Lord President Inglis in *Orr Ewing v Orr Ewing’s Trs.* (1884) 11 R, 627-628. Can the *Hastings-Bass* principle be invoked in a jurisdiction with this famously “hands-off” tradition?

Before embarking upon what would otherwise be a futile examination of the English case law, it should be made clear that the writer would propose the answer “yes” to this question. The reasons justifying that view follow upon a consideration of two landmark English authorities dealing with what the *Hastings-Bass* principle is and what its effects are. It is impossible here to do more than touch upon the numerous cases which have canvassed the principle in the thirty years intervening between those two cases. *Sieff v. Fox* provides an excellent review of them.

The English Authorities

Re Hastings-Bass was a case in which funds held on an earlier settlement were advanced in exercise of an English statutory power on the trusts of a later settlement in circumstances in which certain ulterior trusts, though thought to have been effective at the time of the advancement, proved to be void for perpetuity. The transfer was made on the view (tenable at the time and subsequently receiving judicial support) that the trusts, including the ulterior trusts were effectual. By the time the matter came before the Court of Appeal it was common ground that the ulterior trusts were void for perpetuity – this on the basis of supervening House of Lords authority.

The Court of Appeal considered that, as the primary life tenancy was effective to achieve that which the trustees had intended, it could not be said that the exercise of the trustees’ discretion was vitiated. On the facts of the case it was not evident that the trustees would not have done as they did had they appreciated that the ulterior trusts would fail. The primary estate duty saving was achieved by the life tenancy conferred through the advancement. The exercise of the power remained beneficial to the person intended to be benefited. In any other case, the court would have set aside its exercise. In its judgment the Court of Appeal took the opportunity to state principles on which the exercise of trustees’ discretion might be reopened and set aside by the court. It stated them thus at 41:-

“To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32[of the Trustee Act 1925]) 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.”

Sieff v. Fox is a prime example of the principle being used to redress unintended fiscal consequences – and a horrid cautionary tale. The trustees of the Woburn Abbey trusts were advised to make an appointment of relevant property within 3 months of the last periodic charge on the view that there would be no Inheritance Tax (“IHT”) consequence and that the chargeable gain would be eligible for holdover relief under s. 260 of the Taxation of Chargeable Gains Act 1992.

What was overlooked by the solicitor advising (and counsel who endorsed the advice) was the fact that, not being a chargeable transfer for IHT purposes, the provisions of section 260 were not satisfied and hold-over relief for CGT was not available. This threw up a potential CGT charge circa £1,000,000.

There were other unintended consequences of the disposition which are dealt with in the report.

The writer would suggest that the following propositions may be advanced on the basis of *Sieff v. Fox*. The *Hastings-Bass* Principle is quite distinct from the English courts’ jurisdiction (i) in relation to rectification for mistake (ii) to set aside written instruments for mistake: at pp 3825-3826, paras 85 - 86 Lloyd L.J. considered an argument to the effect that error as to fiscal effect was not a relevant error for the purposes of mistake, but concluded that even allowing that to be so, it did not follow that it was not a relevant error for the purposes of the *Hastings-Bass* Principle (iii) to undo the consequences of breach of fiduciary duty.

The distinctness of the *Hastings-Bass* principle is illustrated in *Sieff v. Fox* in several ways. As Lloyd L.J. notes at paragraph 72, the consequence of trustees’ decision being taken in breach of fiduciary duty is that it is voidable, whereas the balance of English authority in the *Hastings-Bass* line treats the decision as void. A thread running through the discussion in *Sieff v. Fox* is, however, whether breach of duty on the part of trustees has anything to do with *Hastings-Bass* and whether a decision struck at by the *Hastings-Bass* principle is likewise rendered voidable; *passim* and especially paragraph 119.

The cases canvassed in *Sieff v. Fox*, including *Saunders (Exxx of the Will of Rose Maud Gallie, Dcd) Appellant v. Anglia Building Society Respondent* [1971] AC 1004, suggest that in England, as in Scotland, a restrictive approach to treating documents granted by individuals as void for error as to effect is adopted. A plea of *non est factum* is not available in a question with a third party relying on a document *bona fide* and for value.

The corresponding Scottish position is discussed in Gloag on Contract under reference to a tract of authority at 445 from which the proposition is distilled that “the authorities in Scotland, so far as they go, are in favour of the view that where a man of ordinary education and intelligence has signed a document which he knew to relate to business he is bound by it in a question with third parties and cannot defend himself on the plea

of *non est factum*, i.e., that he thought document was something different from what it was.”. See also *Stewart v. Kennedy* (1890) 17R. (H.L.) 25 and *Steel’s Trustees v. Bradley Homes (Scotland) Limited* 1974 SLT 133, Lord Dunpark, where the court held that an onerous contract which has been reduced to writing in unequivocal terms is not reducible on the ground that one party has misread a material term, the other party not having contributed to, known of, or had grounds for suspecting, the misreading. It would seem, however, that at least where the error is as to fiscal consequences, that need not necessarily stand in the way of a *Hastings-Bass* remedy.

Faced with a submission that, to be relevant, error or mistake had to be as to the substantial legal effect of the transaction or as to a matter of fact, such as the true nature of the settlor’s wishes, Lloyd L.J. (Sieff, p. 3838, para 85) held that even if, in English law, fiscal consequences are irrelevant as regards cases of mistakes by individual donors, that is no sufficient reason for regarding them as irrelevant to the application of the *Hastings-Bass* principle.

The Hastings-Bass Principle – what is it?

It is a misunderstanding of the actual effect of the exercise of the discretion which is at the centre of the *Hastings-Bass* principle. This is brought out in Lloyd L.J.’s judgment (at p 3836, para. 77).

Where trustees are not under a duty to act, it needs to be shown that they *would* have acted differently, whilst where a beneficiary is entitled to require the trustees to act, it is enough to show that they might have acted differently (*ibid*); and see Warner J. in *Mettoy* 1990] 1 WLR 1587 at 1624; cited in *Sieff v Fox*.

At p 3836, paragraph 77 Lloyd, L.J. said

“It seems to me that, for the purposes of a case where the trustees are not under a duty to act, the relevant test is still that stated in the *Hastings-Bass* case [1975] Ch 25, namely whether, if they had not misunderstood the effect that their actual exercise of the discretionary power would have, they *would* have acted differently. In my judgment that is correct both on authority, starting with the *Hastings-Bass* case itself, and on principle. Only in a case where the beneficiary is entitled to require the trustees to act, such as the *Kerr* case [2001] WTLR 1071 or the *Stannard* case [1991] PLR 225, should it suffice to vitiate the trustees’ decision to show that they *might* have acted differently.”

HMRC’s View

In Tax Bulletin 83 HMRC states its view that the *Hastings-Bass* principle as formulated is too widely drawn. It considers that it should not be available to trustees who have taken advice which proves to be wrong. It favours the view that the effect of the principle, if and where it applies, should make the transaction voidable rather than void (there is discussion of this in *Sieff v. Fox* and in *Abacus Trust (Isle of Man) v. Barr* [2003] Ch 409). That would enable broad equitable considerations to be taken into account in determining whether a remedy lies.

As an alternative, it suggests that, if the exercise of the discretion is void, equitable considerations should determine whether a remedy is granted. Such an approach is not

unknown here; the availability of reduction can be subjected to equitable restraint – e.g. *Zannetos v. Glenford Holdings* 1982 SLT 453, Lord Ross.

HMRC criticises the positive formulation (see above, Lloyd L.J.’s *dictum*) – “the court **will** interfere” – originating in *Mettoy Pension Trs. v. Evans & Ors.*

HMRC, has in the past refrained from being joined as a party. This was a matter for comment in *Sieff v. Fox*. It indicates that in the future it will give consideration to that course.

The Position in Scotland

Can the *Hastings-Bass* principle be relied upon in Scots law? There is no doubt that the remedy in England lies in equity – e.g. *Sieff v. Fox* at p 3837 – a less than promising start.

The first step is, however, to identify whether the principles which formed the basis for the test applied in *Hastings-Bass* as restated in *Sieff v. Fox* have any Scottish counterpart.

In *Hastings-Bass* considerable weight was placed on the fact that the statutory power of advancement was a fiduciary power; *ibid.* at 37. The trustees could “only properly exercise such a power after giving due consideration and weight to all relevant circumstances” – and, as was emphasised in *Sieff v. Fox*, at p. 3839 para 86, that necessarily included fiscal consequences to which the trustees in question might be expected to have had regard.

Board of Management for Dundee General Hospital v Bell’s Trustees 1952 SLT 270 was also concerned with such a fiduciary power. There a testator, who died on 16th April 1947, directed his trustees to pay a legacy to Dundee Royal Infirmary, but only if his trustees should in their sole and absolute discretion be satisfied that at his death the infirmary had not been taken over by the State or otherwise placed under State control. The trustees intimated to the infirmary authorities that they were not satisfied that the infirmary was at that date free from State control, and that they had therefore decided in the exercise of their discretion that the legacy was not payable. The infirmary authorities brought an action of payment against the trustees. At a proof before answer the trustees disclosed the grounds for their decision which included the effect of sec. 9 (8)j of the National Health Service (Scotland) Act, 1947 – a provision concerned with the vesting of property in the NHS. Counsel had advised that the decision to refuse to pay the bequest was, in his opinion, justified having regard to the terms of the 1947 Act. No challenge was made of the trustees’ *bona fides*, but it was averred that no grounds existed upon which they, exercising their discretion reasonably and according to law, could have decided as they had, and that their refusal to pay the legacy was arbitrary, capricious, and an abuse of discretionary powers, and fell to be disregarded. The House of Lords affirmed the Judgment of the First Division, holding that the legacy was a conditional one, dependent on the trustees’ being satisfied that at the date of the testator’s death the hospital was not subject to State control, and that, whatever the merit of the other reasons for their decision, it was impossible, having regard to the provisions of sec. 9 (8), to say that they had been unreasonable in failing to be so satisfied. Accordingly, the legacy was not payable. The trustees were made sole judges of the essentially legal question as to whether there was state control. In his speech, at 275, in what is probably the leading statement of principle in Scots law, Lord Reid considered the circumstances in which, against that backdrop, the discretion of trustees might be reviewed. He said

“But, by making his trustees the sole judges of a question, a testator does not entirely exclude recourse to the Court by persons aggrieved by the trustees’ decision. If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith then there was no true decision ...”

That passage, it would seem, reflects the irreducible minimum criteria which trustees’ exercise of a fiduciary power or discretion must satisfy if it is to be immune from challenge. Allowing for minor differences of rhetoric and notwithstanding the very different approaches of the courts in regard to their willingness to involve themselves in the administration of a trust/ exercise of discretion, the language and content of the quoted passage – with its *Wednesbury/ Wordie Properties* overtones – is strikingly similar to that in *re Hastings-Bass* and *Sieff v. Fox*. (Needless to say, the test was not met on the facts of that case. As Lord Reid said at pp 275-276, if the appellants were to succeed, they would have needed to say that any reasonable man in the position of the respondents would have been satisfied that counsel was wrong.). The Scottish Law Commission supported Lord Reid’s test coupled with review for irrationality – para. 5.8 of its Discussion Paper No. 126 on Trustees and Trust Administration (December 2004). Earlier authority e.g. *McTavish v Reid’s Trs.* (1904) 12 SLT 404, Lord Kyllachy, calling for averment of “*mala fides*”, or, in other words, of abuse by the trustees of the discretion vested in them” is probably reconcilable with Lord Reid’s dictum, if properly understood.

On the basis of *Board of Management for Dundee General Hospital v Bell’s Trustees* it may be suggested that the *Hastings-Bass* principle can be invoked in Scotland. Here, just as in England, in exercising a discretion or power the trustees are bound to give due consideration and weight to all relevant circumstances.

Even if that is wrong, something very like the *Hastings-Bass* principle appears familiar enough – the notion that the exercise of the trustees’ discretion may be vitiated for a breach of fiduciary duty. In some cases this analysis might get one home. This was the analysis adopted by Lightman, J. in *Abacus Trust (Isle of Man)* and his reason for thinking the appointment in that case voidable rather than void.

Lloyd, L.J. in *Sieff v. Fox* in arriving at the restatement rehearsed above, doubted the correctness of that view. He preferred to foot the principle on misunderstanding the actual effect of the exercise of the discretion. He pointed to *in re Abrahams’ Will Trusts* [1969] 1 Ch 463 as an example of a case where it could not be said that the trustees acted in breach of their duty. *Hastings-Bass* itself seems to have been a case in which there could have been no question of it having been possible to point to trustees’ breach of duty. In both cases they simply understood the English rule against perpetuities in a way current at the time but subsequently disapproved by the courts.

There is a view that a principle akin to *Hastings-Bass* operates in Scotland with reference to gratuitous unilateral acts and deeds granted in error (e.g. as to effect/ consequences of not granting). *Hunter v. Bradford Property Trust* 1970 SLT 173 is an example of that principle. It was a case in which 2 sisters agreed to sell a property encumbered by debt to a property company. At a settlement meeting, the day before auction, a director of the purchaser maintained that the terms of a joint minute, drawn by a solicitor acting for both parties, which gave the sisters half of the sale proceeds without reference to the debt, did not reflect the terms agreed. The purchaser’s director

insisted on the deed being “rectified” by a second minute in a way which meant that the repayment of debt became an expense in arriving at the sisters’ share. The sisters sought to reduce the second deed on the view that it was granted gratuitously and in error as to their being bound to grant it. They succeeded.

This does not appear to be a cognate Scots principle to *Hastings-Bass* with reference to gratuitous unilateral acts and deeds. No doubt it might enable a similar result to be got in appropriate circumstances, but it is concerned with grants of individuals. If such a case or a case of breach of fiduciary duty were available, one might want to run it in tandem with *Hastings-Bass*. The *Hastings-Bass* principle – at any rate, the restatement of it – in *Seiff v. Fox* would appear to be broader. In *Seiff v. Fox* rescission for mistake was, moreover, canvassed and sustained as a ground distinct from the rule in *Hastings-Bass*, see para. 36 under reference to *Gibbon v. Mitchell* [1990] 1 WLR 1304. In so holding, Lloyd, L.J. expressly refrained from deciding anything as regards the relevance or otherwise of tax consequences to dispositions by individuals of their own property. It barely needs saying that the considerations affecting such individuals would be different – if only in that it is not incumbent upon them (however prudent it might be) to take into account certain considerations and disregard others in reaching decisions affecting their own affairs.

Whether the exercise of the discretion is vitiated for breach of fiduciary duty, gratuitous grant in unilateral error or on some separate principle through the trustees’ failure to take into account what ought to be taken into account or taking into account what ought not – or some combination – it is probable that the principle could travel north of the Border. It has travelled to several Commonwealth jurisdictions, Eire and the Cayman Islands. It has seen service in numerous cases involving pension fund trustees. If any particular case also sounds in the (more familiar) breach of fiduciary duty / gratuitous grant in unilateral error, the journey might be easier. One would hope that, in a revenue law context, our courts would strive to attain for the taxpayer the same consequences attending trustees’ mis-exercised discretion as one finds in other parts of the U.K. It may be suggested that no undue struggle would be required.