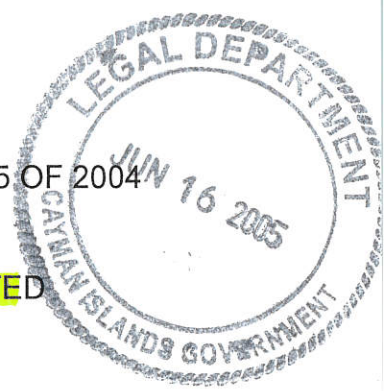


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IN CHAMBERS
IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 475 OF 2004



BETWEEN:

BARCLAYS PRIVATE BANK & TRUST (CAYMAN) LIMITED
Plaintiff

AND:

(1) BENN THOMAS CHAMBERLAIN
(2) FLEUR ELIZABETH CHAMBERLAIN
(3) ALDERLEY HOLDINGS LIMITED

Defendants

BEFORE: The Honourable Madam Justice Levers

APPEARANCES:

Counsel for the Plaintiff: Mr. Robert Ham, Q.C. instructed by Ms. Sara Collins
and Mr. Nigel Sanders of Walkers

Counsel for the Defendants: Mr. Kenneth Farrow of Quin & Hampson

HEARD: May 3, 2005

RULING



Levers J.

This is an application by the Trustee of a Settlement dated 26 May 1994 made by
a Mr. Chamberlain. The Settlement was created for UK Capital Gains Tax
("CGT") reasons and the Settlor, Mr. Chamberlain is a resident in the UK for tax
purposes. He is also the principal beneficiary and his wife and children are also
beneficiaries.

At the material times this Trust was governed by the British Virgin Islands law.

1 On 18 February 2005, I directed that the Plaintiff serve Notice of these
2 proceedings on the UK Inland Revenue Commissioners. Mr. Ham, Q.C.
3 instructed by Ms. Sara Collins and Mr. Sanders of Walkers informs this Court that
4 the attorneys have heard from the Commissioners advising them that they did
5 not wish to take part in these proceedings.

6
7 In 1999 PriceWaterhouseCoopers advised the Settlor and the then Trustee that
8 there would be advantages in investing in an overseas non-close investment
9 company and in January and May 2000 it was decided to make two investments
10 of £10,000 and £750,000 in a Guernsey protected cell company, Westbourne
11 Growth Fund PCC Limited. The purpose of this was to defer CGT on chargeable
12 gains on the underlying investments held in the Settlement's cell within
13 Westbourne.

14
15 In March 2000 there was a change in the UK legislation and the Trustee was not
16 informed of the change in UK tax law before deciding to make the second
17 investment in Westbourne in May 2000, after the changes had been announced.
18 The essential facts with regard to the May transaction are that:

- 19
20 1. Alderley Holdings Limited an investment company controlled by the
21 Trustees paid £750,000 to the Trustee; and
22 2. The Trustee applied that sum:
23 (a) as to £712,500 in a loan to Westbourne;

1 and

2 (b) as to the remaining £37,500 in a subscription for shares .

3

4 Under the new UK law, the consequences of this would be a substantial tax
5 liability on the settlor. This application is made on two limbs. First, that the
6 money was not in fact, loaned by Alderley to the Trustee and alternatively, that
7 the Trustee's decision to accept a loan is void or voidable under the rule in **Re**
8 **Hastings-Bass** [1975] Ch 25 and if voidable should be avoided *ab initio*.

9

10 The application is supported by an affidavit of Ron E. Stoll of Barclays Private
11 Bank and Trust Limited. He confirms that the objective of this investment, the
12 subject matter of these proceedings, was to enable UK capital gains tax on the
13 underlying investments to be deferred. He states that as a result of a change in
14 the UK legislation with effect from the 21 March 2000, the effect of the purported
15 loan from Alderley for the purposes of the investment in Westbourne in 2000 was
16 to give rise to a charge to CGT on the Settlor. He submits on behalf of Barclays
17 that the change in UK law was a relevant consideration since the whole purpose
18 of the investment in Westbourne was to defer CGT and that it is plain that the
19 Trustee would not have taken the purported loan if it had been informed of it.

20

21 He submits that, on the basis of the ruling in **Re Hastings- Bass** quoted
22 previously. If and so far as there was a loan from Alderley in May 2000, it is
23 either void or voidable and if the latter that it should be avoided.

1

2 It is clear from his affidavit that if the Court grants the relief sought Barclays have
3 been advised by PriceWaterhouseCoopers, the tax advisors to the Settlor and
4 Barclays, that the adverse fiscal consequences to the settlor Mr. Chamberlain
5 should be avoided.

6

7 Under the terms of a Deed dated 16 November 2000, the proper law of the
8 Settlement was changed with effect from the 16 November 2000 from the law of
9 the BVI to that of the Cayman Islands. However, the Court is advised that at the
10 time of the transaction in question, the Settlement was governed by BVI law.

11 There is evidence before the Court from a BVI law firm of Farara George-Creque
12 & Kerins which confirmed that the BVI Court would be guided by the decisions of
13 the English Courts in the absence of any local legislation or decision pertaining to
14 this particular aspect of trust law. I am therefore persuaded that the rule in **Re**
15 **Hastings – Bass** would be the law applied in the BVI. Turning to the rule in **Re**
16 **Hastings –Bass**, the main statement of principle in that case is:

17

18 “ where by the terms of a trust (as under section 32
19 [of the English Trust Act 1925 – the statutory power of
20 advancement]) a trustee is given a discretion as to
21 some matter under which he acts in good faith, the
22 court should not interfere with his action
23 notwithstanding that it does not have the full effect
24 which he intended, unless (1) what he has achieved is
25 unauthorised by the power conferred upon him, or (2)
26 it is clear that he would not have acted as he did (a)
27 had he not taken into account considerations which
28 he should not have taken into account, or (b) had he

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not failed to take into account considerations which he ought to have taken into account.”

Reinforcing this principle Warner J made this explicit when he restated the principle in positive terms in **Mettoy Pension Trustees Ltd v Evans** [1990] 1WLR 1587, 1621H:

“where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account.”

The two cases quoted above make it incumbent on the trustees to have taken into consideration those matters that they should have taken into consideration. However, Justice Lightman went a little further in **Abacus Trust Company v Barr** [2003] Ch 409:

“it is not sufficient to bring the rule into play that the trustee made a mistake or by reason of ignorance or a mistake did not take into account a relevant consideration or took into account an irrelevant consideration. What has to be established is that the trustee in making his decision has, in the language of Warner J in **Mettoy Pension Trustees Ltd. v Evans** [1990] 1 WLR 1587, 1625, failed to consider what he was under a duty to consider. If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect.”

1

2 Justice Lightman requires the need to establish a breach of duty.

3

4 All the above principles have been reconfirmed in the case of **Burrell v Burrell**
5 [2005] EWHC 245 Ch. In the Burrell case the applicant sought to set aside part
6 of a deed of appointment on the footing that they failed to appreciate, consider
7 and take into account, the fact that the appointment generated very considerable
8 inheritance tax liabilities. They invoked what is known as the principle in
9 **Hastings-Bass**. The relief sought was granted after a careful review of cases in
10 which the **Hastings-Bass** principle had been invoked. The decision reaffirmed
11 the proposition that Trustees must consider the fiscal consideration of their acts
12 and that a failure to do so is capable of leading to the application of the
13 **Hastings-Bass** principle if it is clear that they would not have acted as they did if
14 they had appreciated the true fiscal position.

15

16 The case at hand in my view falls within the Hastings-Bass principle for the
17 following reasons:

18

- 19 1. The whole purpose of the investments in Westbourne was to defer CGT.
- 20 2. The change in the UK legislation was therefore plainly a relevant
21 consideration which the Trustees did not consider and even if I was to go
22 as far as requiring the establishment of a breach of fiduciary duty, the test

1 is satisfied because up-to-date tax advice from the UK was not obtained
2 before carrying out the transaction.

3

4 In my view it is clear that the Trustees would not have acted as they did if
5 they had taken the proposed change in the law into account and in those
6 circumstances I hold that the loan is voidable under the rule in **Re Hastings-**
7 **Bass** and should be avoided *ab initio*.

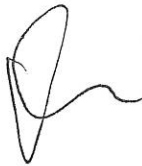
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9 Mr. Farrow appeared for the Defendants in this matter and submitted that if the
10 Court was of the view that this was a proper application to be made under the
11 Hastings-Bass rule then the Defendants would leave the matter in the hands of
12 the court. The Order therefore is that the loan is void *ab initio*. Costs of all the
13 parties to be paid out of the Trust Fund on an indemnity basis.

14

15 Dated this 5th day of May, 2005

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19 Judge of the Grand Court