

18/4/10



IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NO. FSD 0089 OF 2010

IN THE MATTER OF THE TA-MING WANG TRUST

BETWEEN:

- (1) **TA-MING WANG**
- (2) **KUO-YING SHIANG**

PLAINTIFFS

AND:

- (1) **CIBC BANK AND TRUST COMPANY (CAYMAN) LIMITED (Former Trustee of the Ta-Ming Wang Trust)**
- (2) **T.M. WANG LIMITED**

DEFENDANTS

IN CHAMBERS
THE 25th DAY OF MARCH 2010 and 12th APRIL 2010
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE

APPEARANCES: Mr. Christopher Russell with Miss Rachael Reynolds of Ogiers for the Plaintiffs

Mr. Kenneth Farrow, QC for the 1st and 2nd Defendants

RULING

INTRODUCTION

1. The First Plaintiff (“TMW”) and members of his family were the beneficiaries under a trust known as the Ta-Ming Wang Trust (“the Trust”) established by a settlement dated 2nd May 1996 made between his mother,

Wu Hsiu-Yen Wang, as settlor and the First Defendant (“CIBC”) as the original trustee. The Second Plaintiff is TMW’s wife, Kuo-Ying Shiang (“KYS”), and is the present trustee of the Trust. The Second Defendant (“the Company”) was struck off the Register of Companies as part of the Trust migration process described below, but has now been restored to the Register for the purposes of this application.

2. The Plaintiffs are seeking to set aside the declaration of a dividend made by the Company and procured by CIBC which owned all the common shares in the Company as trustee of the Trust.
3. The ground on which the Plaintiffs seek this relief is that CIBC in deciding to procure payment of the dividend and to accept payment of it, and/or the directors of the Company at the instance of CIBC in resolving to declare and pay it, failed to take into account the fiscal consequences of their decisions. The transaction should consequently be set aside as void under the principle of English law known as the Hastings-Bass principle. Following the decisions in Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain Grand Court Cause No. 475 of 2004 (unreported) and in A v Rothschild Trust Cayman Limited 2004-05 CILR 485 the principle is recognised in the courts of the Cayman Islands.
4. The Plaintiffs’ primary case is that the declaration of the dividend should be declared void based on the ill-advised actions of CIBC in procuring the

payment of the dividend through the Company of which it holds all the common shares and whose subsidiary companies (by their officers) were the directors who declared and paid the dividend (so that the entire transaction is to be regarded as that of CIBC). Further, that the actions of the Company through its directors in resolving to pay and actually paying the dividend, if regarded as the decision and action of the directors as distinct from that of CIBC, should be declared void for the same reasons and based on the same principles. The Plaintiffs' secondary case is that it should be at least declared that the decision of CIBC as trustee to direct the Company to declare the dividend and then to receive the dividend, is void.

B. The basic facts are described in the following chronology (as adapted from the written submissions of Counsel)

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| 15 th March 1996 | TMW arrived in Canada from Taiwan |
| 30 th April 1996 | The Company was incorporated in the Cayman Islands. |
| 1 st May 1996 | CIBC as trustee of the intended Trust acquired all the common shares in the Company.

CIBC appointed 2 of its subsidiaries, Commerce Corporate Services Limited and Commerce Advisory Services Limited, directors of the Company. |
| 2 nd May 1996 | The Trust was established by TMW's mother, CIBC was the sole trustee. The relevant terms of the Trust Deed are as follows:- |

- (a) The Distribution Date was defined as the 150th anniversary of the trust, subject to a power in the Trustees to declare an earlier date.
- (b) The proper law of the Trust was the law of the Cayman Islands, subject to a power in the Trustees to change it.
- (c) The trust fund was to be held on discretionary trusts of a familiar kind for the benefit of a class of Beneficiaries, as defined, with wide powers of appointment among the Beneficiaries, power to pay or apply income for the benefit of Beneficiaries with a trust to accumulate any balance of such income, and power to pay or apply capital for the benefit of Beneficiaries. There was an ultimate trust for the Beneficiaries living on the Distribution Date and, in default of there being any, for the Final Repository, being a person appointed by the Protector.
- (d) The Beneficiaries were defined as TMW, his two children and KYS. The Trustees had power to exclude a person from being a Beneficiary or to add a person as a Beneficiary.
- (e) The Trustees had power to appoint new or additional trustees provided that no Beneficiary (among others) could be appointed.

TMW subscribed for preference shares in the Company.

- 7th May 1996 Mr. Garson Lee, TMW's accountant, advised him that 6th May 1996 was the date on which he would be treated as having become resident in Canada for tax purposes. This would be a significant date relative to a tax holiday, a 5-year period, to be explained below.
- 20th April 2001 Mr. Nowak, TMW's lawyer, initiated the process of migrating the Trust to Canada on the basis that the 5 year period would expire on 6th May 2001. That process included the steps which follow.
- 25th April 2001 Deed of Declaration of Excluded Person excluding KYS as a Beneficiary.
- Procurement by trustee of Resolution of Directors of the Company to declare and pay a final dividend to CIBC as trustee of the Trust equal to the retained earnings, contributed surplus and current income to date of the Company.
- Promissory Note by the Company in favour of CIBC as trustee of the Trust in the sum of US\$854,050; representing final dividend of retained earnings.
- Receipt by CIBC as trustee of the Trust of the Promissory Note in payment of the dividend declared by the Company.
- Redemption of TMW's preference shares.
- 4th May 2001 Deed of Retirement and Appointment under which CIBC appointed KYS and Mr Nowak as trustees in its place.
- 5th May 2001 Deed of Change of Proper Law executed by the new trustees changing the proper law of the trust from that of the Cayman Islands to that of British Columbia, Canada, thus completing the process of migration.
- 7th May 2001 Deed of Resignation of Mr Nowak as trustee of the Trust, leaving KYS as sole trustee.
- 14th May 2001 Resolution by KYS as trustee to make a capital distribution from the Trust to TMW of US\$830,000.

Acceptance by TMW of the distribution of US\$830,000.

14th June 2001 Deed of Appointment by KYS appointing 31st July 2001 as the Distribution Date as defined in the Trust.

31st July 2001 Notice by KYS of an intention to distribute the balance of the capital and income of the Trust, being US\$52,314.75 to TMW and TMW's acceptance of the distribution.

Memorandum of Decision by KYS to make the distribution of the balance of the trust fund to TMW.

Deed of Termination by KYS declaring that, there being no further assets or liabilities, the Trust has been terminated on 31st July 2001.

28th Sept 2001 The Company was struck off the Register of Companies.

19th March 2010 The Company was restored to the Register.

C. THE CANADIAN TAX POSITION

6. The Trust was created as part of a structure ("the Structure") designed to minimise TMW's liability to Canadian tax during the period of 60 months (or 5 years) following his immigration to Canada ("the Tax Holiday"). Such structures are widely recognised and used and are fully compliant with Canadian tax laws. In summary, they effectively ensure that foreign source (that is, non-Canadian) income earned by a non-resident company owned by a non-resident trust does not attract Canadian tax when it is paid to the trust by way of a dividend provided that the payment is made within the Tax Holiday.

7. The basis on which the Structure was set up in this case, the way in which it was intended to operate and the tax consequences were set out in a detailed letter from Mr. Nowak to TMW dated 24th May 1996.
- 7.1 Throughout the letter it is assumed that the date on which TMW became resident in Canada (“the Canadian Residence Date”) was 6th May 1996.
- 7.2 It was an essential feature of the Structure that both the Trust and the Company, including the directors of the Company, would be resident outside Canada and that all business of the Trust and the Company would be conducted outside Canada.
- 7.3 On the basis of the Trust having been so established, it was, however, decided that CIBC would not make any income distributions from the Trust before its termination but would accumulate and treat as capital any income received.
- 7.4 The Trust would migrate to Canada by appointment in place of CIBC of new trustees resident in Canada on or before 1st March 2001 or, at the latest, two days before the 5th anniversary of the Canadian Residence Date and would be terminated one month after migration.
- 7.5 The Company would pay each fiscal period a dividend equal to its profits for that period. It appears that this was not an essential feature of the Structure but designed to limit the potential tax liability if the tax authorities challenged the Canadian Residence Date.
- 7.6 The Trust would not be liable to Canadian tax on foreign source income earned prior to 31st December 2000 or during the period from 1st January 2001 until the migration of the Trust to Canada.

- 7.7 After migration the Trust would be liable for tax on any income earned after its migration.
- 7.8 The beneficiaries would not be liable for tax on any capital distributions (including distributions of foreign source accumulated income).
- 7.9 In the event of the Trust not migrating before the 5th anniversary of the Canadian Residence Date it would be deemed to have become resident in Canada after the year 2000 and be liable to tax on all income earned after 31st December 2000.
- 7.10 The Company would not be subject to tax on its foreign source income earned prior to its being wound up.
8. As events transpired, the Canadian Revenue Agency (“CRA”) determined that TMW’s Canadian Residence Date was 15th March 1996 with the consequence that the 5th anniversary was on 15th March 2001 and not 6th May 2001 as believed. The Trust was consequently assessed to tax on the dividend of US\$854,050 paid on 25th April 2001.
9. If the Company had paid the dividend during the Tax Holiday the Trust would not have been subject to Canadian tax, see 7.6 above. Once the Tax Holiday had expired the Company, instead of declaring a dividend, could have made the same payment to the Trust of its retained earnings by way of a distribution upon its winding up. If it had done so, only an amount equal to the income of the Company for the period commencing on 1st January 2001 would have been subject to tax. This amount is only US\$51,317. Payment of the prior years’ earnings would have been treated as a return of

capital and only taxed on any increase in the value of the shares in the Company between 31st December 2000 and the date of the distribution.

10. If the Court were to declare that the payment of the dividend is void, TMW has been advised by his Canadian Counsel, Mr. Kenneth Affleck Q.C., that the payment made by the Company to the Trust will be treated as a distribution made in the course of a winding up with consequence that only US\$51,317 will be subject to income tax. This is also advised in Mr. Nowak's Second Affidavit.
11. The CRA has notice of this application and does not oppose it.

D. THE TRUSTEE'S DECISION

12. In its administration of the Structure the intention of CIBC was to assist TMW in benefiting from the Tax Holiday in compliance with the relevant Canadian tax laws and in accordance with Canadian tax advice.
13. CIBC's understanding was that TMW's Canadian Residence Date was 6th May 1996 and that the Trust would be migrated to Canada before 6th May 2001.
14. Mr. Walton, the Senior Trust Officer dealing with the Trust on behalf of CIBC, was advised in a letter dated 20th April 2001 from Karen Wong, an attorney associate of Mr. Nowak, that prior to the migration of the Trust the Company should declare a dividend in respect of the Trust's common

shares. CIBC had no reason to believe that TMW's Canadian Residence Date was other than 6th May 1996 so it acted on the advice in the letter, believing that in doing so it would be carrying out the main object of the Trust.

15. CIBC consequently on 25th April 2001, procured through its nominee directors of the Company the declaration of the dividend and its payment by way of the promissory note and CIBC accepted that payment.
16. If CIBC had known that TMW's Canadian Residence Date was 15th March 1996 it would have realised that the advice to pay a dividend was incorrect, since such a payment would not achieve the fiscal purpose of the Trust, and would not have acted on such advice. This too is plain from Mr. Walton's affidavit.
17. The correct advice, if it had been realised that TMW's Canadian Residence Date might be regarded as 15th March 1996, would have been to pay the Company's retained earnings to the Trust by way of a distribution in its winding up. If CIBC had been given such advice it would have followed it and the bulk of the income tax liability would have been avoided. Again, this is confirmed by Mr. Walton.

E. THE HASTINGS-BASS PRINCIPLE

18. This principle of English law derives its name from the Court of Appeal decision in Re Hastings-Bass [1975] Ch.25 which has been applied in a large number of cases decided at first instance in England. It has also been applied at first instance in the Cayman Islands in Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain, and A and Others v Rothschild Trust Cayman Limited (both above).
19. The purpose of the Trust as an “Immigration Trust” was to assist Mr. Wang in benefiting from the Tax Holiday applicable to the period of 5 years immediately following upon his commencement of residence in Canada.
20. That period is deemed incontrovertibly by the CRA to have expired on 15th March 2001, whereas Mr. Wang’s advisers had believed it was to expire on 6th May 2001. It was that belief that informed the advice they gave for the establishment of the Trust and for its subsequent migration to Canada. It was that advice which in turn informed the decision of CIBC as trustee, in the exercise of its fiduciary discretionary powers, to procure the declaration by the Company (by its directors) of the dividend and to receive the payment of that dividend as an asset of the trust, at the point in time when CIBC did those things.

21. It is now common ground that that advice was wrong, given on the mistaken basis that the Tax Holiday was to have expired on the 6th May 2001 instead of when it actually expired on 15th March 2001.
22. It is clear that had CIBC received the correct advice in light of the real significance of the 15th March 2001 as the expiry date – and it is so established in the evidence of Mr. Walton on behalf of CIBC – it would not have procured the declaration of dividend but it would have ensured that the Company paid the relevant sums as a winding up distribution which would have minimized the Trust’s tax liability to income earned on or after 1st January 2001.
23. That being so, I must now consider whether CIBC’s decision falls within the ambit of the Hastings-Bass principles and of the remedial powers vested by section 48 of the Trusts Law; which powers this Court (in A v Rothschild above) has described as being convergent with the Hastings-Bass principles insofar as section 48 provides that “*Any trustee...shall be at liberty, without instruction of suit to apply to the Court for and opinion, advice or direction on any question respecting the management or administration of the trust ...and the trustee...acting upon the opinion, advice or direction given by the Court shall be deemed so far as his own responsibility to have discharged his duty as such trustee...in the subject matter of the said application...*”. Thus, the Hastings-Bass principles are

to be regarded as guidance for the exercise of the statutory powers in circumstances such as those to which the principles may be applicable.

24. The recent formulation of the Hastings-Bass principles which has found favour with this Court as being a clear exposition of them (See A v Rothschild (above)) is that given by Lloyd LJ in Sieff v Fox [2005] 1 W.L.4. 381 as follows:

“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 that 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.”

25. I am satisfied that CIBC’s decision of the Trustee to procure the declaration of dividend and to receive it into the assets of the Trust falls well within that formulation of the principles. In deciding to procure the payment of the dividend and to receive it based on the erroneous advice which had been received, CIBC took into account the 6th May 2001 as the expiry date of the relevant tax holiday and failed to take into account the correct date for those purposes – the 15th March 2001. That is a decision which I am satisfied CIBC would not have taken had it been aware of the true consequences. On

that basis of CIBC's decision as trustee having been so erroneously taken with the detrimental consequences for its Trust, its decision is liable to be set aside as being a decision which CIBC was not authorized to make because it was not a decision that could operate as intended for the benefit of its Trust. As such it was a decision which was *void ab initio* (see *A v Rothschild* above at paragraphs 13) and I so declare.

26. There is the further question whether the decision of the directors of the Company to declare and pay the dividend, should also be declared to be void. This would facilitate the retained earnings of the Company being treated as a distribution on winding up for which purpose the Company has been restored to the Register. Without this further declaration that same objective could nonetheless be achieved. However, it must be noted that it is not for me to determine whether the receipt of the dividends by CIBC has been set aside as void and so the dividends must be regarded by the Company as undistributed.
27. It is now established in the case law, at least at first instance, that the *Hastings-Bass* principle may apply to decisions of directors.
28. The rationale is that when they act as such, directors are fiduciaries who owe fiduciary duties which are akin to those owed by trustees to their beneficiaries.

29. In *Hunter v Senate Support Services* [2004] EWHC 1085 (Ch), a decision of directors of a company was set aside because they failed to take into account considerations which they should have taken into account. The decision in question was the forfeiture of the claimant's shares for non-payment of a call for subscription dues and the directors acted on the mistaken basis that forfeiture was the only course of action open to them. In reaching his conclusion the judge (Mr John Randall QC) while recognising that the analogy between company directors and trustees was not exact, considered the position of trustees and the Hastings-Bass principle to be relevant. He concluded that the directors' decision was flawed for neglecting to take into account matters which ought to have been taken into account, was one which would or might have been different but for that flaw, and was therefore voidable and should be set aside.
30. In *Pitt and Another v Holt and the Commissioner's of Her Majesty's Revenue and Customs* [2010] EWHC 45; a settlement and associated assignment were set aside under the Hastings-Bass principle on the ground that they had adverse inheritance tax consequences which had not been considered by the parties to the transactions or their advisers. The new feature of this case is that the transaction was entered into, not by trustees but by a receiver acting on behalf of and in the name of the settlor; i.e. acting in a fiduciary capacity.

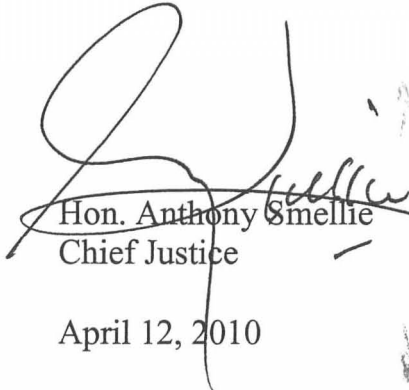
31. The judge in Pitt (at paras 25 and 39) accepted a submission that the Hastings-Bass principle is capable of applying not only to trustees but also to other fiduciaries. He noted that while there is no decided case authority to this effect, Lewin on Trusts (15 Ed) at paras 29-111, 29-120, 29-124 and 29-165, supports that proposition.
32. It was found in the case that Mrs. Pitt's power to deal with her husband's property as his receiver, was a fiduciary power to be exercised in his interests and the duty to take all relevant considerations into account should apply to a discretion being exercised for the benefit of another. The principle is capable of application to the exercise of a fiduciary power by any person in a fiduciary position, not only a trustee.
33. In the present case, it is submitted by Mr. Russell with the support of Mr. Farrow Q.C. that it is to be assumed that the directors of the Company, which was established for the purposes of facilitating Mr. Wang's immigration trust, understood that their company held its assets for the purpose of assisting in the fulfillment of that objective. As such, the fiduciary powers held by the directors were held to be exercised only for those purposes and the erroneous exercise of their powers which brought about or facilitated the declaration of and payment out to CIBC of the dividend with its detrimental consequences, was therefore unauthorized and liable to be set aside on the Hastings-Bass principles.

34. While as a matter of inference that proposition appears to be reasonable, there is however, no evidence to enlighten me as to what the directors actually had in mind when they took their decisions. Unlike the case of CIBC which relies on the factual evidence of Mr. Walton, there is, regrettably, simply no evidence of what, if any, advice the directors considered and therefore no evidence to assure me that when the directors resolved to declare the payment of dividend out to the Trust, they so acted on the erroneous advice or belief that their decision would have had the desired benefit of achieving the objectives of the Trust. It is fundamental and trite law that directors, as fiduciaries, owe their duties to their companies. Thus, there is no basis in law that allows me to assume that the directors would have had directly in mind the interests of the Trust or of its beneficiaries. The holder of the common shares in the Company is CIBC as trustee. It seems from all the circumstances, that in all probability the directors acted simply on the instructions of CIBC, inquiring into and having to be satisfied about nothing more than that it was in the interest of the Company itself in the guise of CIBC as the holder of the common shares, to resolve as they did. Certainly, from all the circumstances as described in the evidence and in the absence of further evidence as to the specific state of mind of the directors, that is the only reasonable inference to be drawn. Moreover, I should add having regard to the further submissions here, that the directors deciding and acting in that way in no

sense makes their decisions and actions attributable to CIBC as CIBC's decisions and actions, simply because CIBC procured them to act.

35. I am told that the records of the Company relevant to this period of time are no longer available and all that was produced before me was the impugned resolution signed by the officers of the directors which, on its face, tells nothing about what they may or may not have had in mind in relation to the erroneous advice and misconceived assumptions arising from it leading to the present issue. Without evidence that positively establishes what their state of mind was, it follows that there can be no basis for concluding that the directors' belief was itself erroneous because it would have been informed (even if indirectly through CIBC having procured them to act) by the same mistaken advice that caused CIBC to take its decision and that, had they had the correct advice, the directors would have decided and acted differently. The practical reality of the directors' status being no more than as nominees of CIBC does not permit the Court to overlook the legal obligation placed on directors to act independently on behalf of the Company of which they are fiduciaries. Indeed, it would be a contradiction in terms to hold that the decisions of directors who are mere "nominees" and acting merely on the directions of their principal, can be set aside on Hastings-Bass principles which require that the decision in question is that of the fiduciary decision-maker and of no one else.

36. It follows that there is insufficient basis for concluding that the Hastings-Bass principle may be applied so as to regard the directors' decision as amenable to being set aside.
37. As this Court did in A v Rothschild (and as Lloyd LJ did in Sieff v Fox), I should add that I have also considered the fact that a number of years have passed since the impugned decision was taken in this case by CIBC as trustee on 25th April 2001. I am, however, satisfied that there can be no prejudice arising to anyone from the retrospective effect of the declaration now granted and by which the trustees' decision falls to be regarded as void.
38. Especially in this regard and as already noted, I have in mind that the CRA are aware of this application and do not object.
39. Accordingly, the declaratory relief sought in paragraph 3 of the Plaintiff's Originating Summons (as amended) is granted for the setting aside of CIBC's decisions taken as trustee while no such relief can be granted on paragraphs (1) and (2) in respect of the directors' decisions.


Hon. Anthony Smellie
Chief Justice

April 12, 2010

