Statutory Hastings-Bass Enacted in Bermuda

The Bermuda Government recently approved an amendment to Bermuda’s trust legislation giving the court a new statutory jurisdiction to remedy the negative effects or consequences of acts or omissions made by settlors, trustees or other fiduciaries, otherwise known as the ‘Rule in Hastings-Bass’.

Operative on the 29 July 2014, the Trustee Amendment Act, 2014 (“TAA”) expressly recognises the availability of the rule in Hastings-Bass as it was understood and applied in England (and other common law jurisdictions) prior to 2011 (the “traditional Hastings-Bass rule”). The TAA, which has retroactive application, amends the Trustee Act, 1975 (the “TA”) in order to place the traditional Hastings-Bass rule on a statutory footing in Bermuda law.

Jurisdiction of court to set aside flawed exercise of fiduciary power

The TAA inserts a new Section 47A into the TA. Subsection 47A(1) of the TA is the key provision conferring the Hastings-Bass jurisdiction on the court in relation to the exercise of fiduciary powers. There are two parts to the exercise of the court’s jurisdiction:

a) First, the threshold test: two conditions must be met before the jurisdiction can be invoked (see below);

b) Second, if the jurisdiction is engaged, the court then has a discretion to set aside the exercise of the fiduciary power in whole or in part, and either unconditionally or on such terms and subject to such conditions as it thinks fit, and to make such order consequent on the setting aside of the exercise of the power as it thinks fit.

Meaning of “fiduciary power”

The Section 47A jurisdiction of the court can be invoked in relation to any fiduciary power which is defined as any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the power holder. “Power” is defined as including a discretion as to how an obligation is performed. This definition is not intended to be comprehensive, and the common law meaning of the term ‘power’ is retained.

Conditions for setting aside the flawed exercise of a fiduciary power

The conditions that engage the court’s jurisdiction reflect the standard requirements of the traditional Hastings-Bass rule, as derived from the leading authorities, and are as follows:

The first condition

The first condition is that the “power-holder” (defined as including any person on whom a power has been conferred, whether or not that power is exercisable by that person alone, and any person to whom the exercise of a power has been delegated) has:

- failed to take into account a ‘relevant consideration’; or
- has taken into account an ‘irrelevant consideration’.

What constitutes a ‘relevant’ or an ‘irrelevant’ consideration is not defined so as to give the court maximum flexibility.

The second condition
The second condition is a causation test; in order to justify intervention by the court, the exercise of the power must be so flawed that but for that flaw, the power-holder:

- would not have exercised the power;
- would have exercised it but on a different occasion to that on which it was exercised; or
- would have exercised the power, but in a different manner to that in which it was exercised.

The test is a test of causation in fact (i.e. the ‘but for’ test) and is subjective; in other words, what would the power-holder have done under the circumstances?

Effect of the order

The TAA states that if the exercise of a power is set aside, the exercise of the power shall be treated as never having occurred. The key purpose of this provision is to make it clear that, if the exercise of the power is set aside, the effect is that the exercise is void and treated as if the power was never exercised in the first place.

No need for breach

The TAA makes it clear that it is not necessary for the fiduciaries or their advisors to be shown to have been in breach of trust or in breach of duty in order for the court to exercise its jurisdiction.

Who can make the application?

The TAA restricts who can invoke the court’s jurisdiction. These people include the power holder, the trustees and beneficiaries, the Attorney General (where there is a charitable element), and any other person - with the leave of the court.

Conclusion

The codification of the traditional Hastings-Bass rule demonstrates Bermuda’s commitment to maintaining its position as a leading and competitive jurisdiction for trust business. The new law offers fiduciaries and beneficiaries of Bermuda trusts an attractive alternative to otherwise costly, time-consuming and uncertain litigation based on negligence or breach of duty claims.
This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

ABOUT CONYERS DILL & PEARMAN
Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 140 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and trust and private client matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

For further information please contact: leslie.cline@codancanada.com