APPLEBY

GRESH v RBC Trust Company (Guernsey) Ltd and HMRC – The Future of *Hastings-Bass* Applications in Guernsey

HMRC's application to be joined as a party to a *Hastings-Bass* application initially brought by RBC Trust Company (Guernsey) Ltd ("RBC") in its capacity as trustee of the Abacus Global Approved Managed Pension Trust (the "Trust") and subsequently brought by Mr Gresh, was ground-breaking in two ways:- it was (i) the first ever application in the Guernsey courts seeking to apply the principle in *Re: Hastings-Bass* and (ii) the first time HMRC has applied to intervene in and be joined to a *Hastings-Bass* application in a court outside the United Kingdom. This Brief provides a summary of the original application, the appeal by HMRC following the decision of the Royal Court to refuse their application and the reasons behind the decision of the Court of Appeal.

Brief Summary

RBC was the sole trustee of the Trust, the purpose of which was to enable unconnected employers to establish pension schemes for their non-Guernsey resident staff using sub-schemes. Mr Gresh was a member of one of the sub-schemes known as the "Banker Trust". HMRC advised Mr Gresh's tax advisers that assuming the "income" which Mr Gresh was entitled to under the Banker Trust represented "payment of pension income" it would not be subject to UK tax unless the income was remitted to the UK.

RBC distributed the assets in the Banker Trust to Mr Gresh in cash and in specie as a lump sum (the "Distribution") – unaware that the form of Distribution gave rise to a 40% UK personal income tax liability on Mr Gresh (under the rules for benefits received from employer-financed retirement benefit schemes), which would not otherwise have arisen if the assets had been distributed periodically/annually rather than as a lump sum.

Mr Gresh applied to the Royal Court in 2009 for an order setting aside (declaring void ab initio) the Distribution under (i) Section 69 of the Trusts (Guernsey) Law, 2007; and (ii) the rule in *Hastings-Bass*. Such application being on identical terms to that made by RBC in 2008, RBC withdrawing their application. In 2008 the Royal Court ordered (1) RBC's application to be served on Mr Gresh and (2) Notice of the application be given to HMRC.

The Solicitor's office of HMRC were instructed to represent HMRC in the matter and instructed local advocates, who applied pursuant to rule 37(1)(b)(ii) of the Royal Court Civil Rules 2008, to be added as a party to Mr Gresh's application. The Royal Court rejected HMRC's application to be joined as a party, finding that HMRC had failed to satisfy the requirements of rule 37 which were:-

> *"(1) There must be a question or issue between HMRC and a party to the action.*
> *(2) The question or issue must arise out of or relate to or be connected with any relief or remedy claimed in the proceedings.*
> *(3) It must be just and convenient to determine that issue as between him and that party as well as between the parties to the proceedings."*

HMRC subsequently appealed the Royal Court's findings.

Court of Appeal Decision

The Court of Appeal found that all three requirements of joinder under Rule 37 were satisfied, granted leave to appeal and allowed HMRC to be joined as an intervener in the *Hastings-Bass* application. In reaching their finding, the Court of Appeal concluded the main issues to be decided:-

(i) Between Mr Gresh and RBC were:-

> *"(1) Whether, in accordance with section 69 of the Trusts (Guernsey) Law, 2007 and the rule in Hastings-Bass, the Distribution should be declared void ab initio, or voidable?*
>
> *(2) What was the effect of the revocation?"*

(ii) Between HMRC and Mr Gresh were:-

> *"(1) Whether the Distribution was void or valid.*
>
> *(2) Whether the Distribution is subject to UK tax."*

The Court of Appeal found:-

- The validity of the Distribution arising between HMRC and Mr Gresh was related or connected with the claim that the Distribution be declared void or voidable.

- HMRC had a direct interest in the subject matter of the action (i.e. the validity of the Distribution), commenting that if the circumstances in the Jersey *Seaton Trustees Limited* case were the same as this case, they would regard that approach as mistaken!

- HMRC were not seeking to directly or indirectly enforce UK revenue law, but rather resolve an issue which may be important in due course in enforcing that foreign revenue legislation in its home state, and the Court noted that if it were an attempt to indirectly enforce a foreign revenue law, HMRC would not be permitted to join the proceedings.

- It was just and convenient to determine as between HMRC and Mr Gresh, as well as between RBC and Mr Gresh, the question of the validity of the Distribution, preventing the matter being re-litigated in England, and enabling the Guernsey courts to benefit from informed and experienced argument on both sides of the debate, HMRC having *"unrivalled experience in dealing with the issues raised by the rule in Hastings-Bass and…[being] able to provide that experience to the Royal Court".*

The Court of Appeal did, however, state that they considered the ramifications of their decision to be very limited because the situation in this case was very unusual in that it was not highly contentious, which most *Hastings-Bass* applications are. In addition, the Court doubted HMRC (or any foreign revenue authority) will wish to apply to join any normal proceedings between parties to trusts disputes and that in most cases the requirements outlined above would not be satisfied. The Court stated that if these conditions were satisfied, the Court's discretion would be unlikely in a normal case to be exercised in favour of their joinder. Finally, the Court commented that the fact HMRC is allowed, exceptionally, to appear before the Royal Court and argue for the validity of the Distribution, will carry no more weight than the strength of arguments themselves.

Conclusion

It would appear that Lloyd LJ has got his wish, stating in the *Sieff v Fox (2005)* case *"the court's task might be easier in some cases if the Inland Revenue did not always decline the invitation to take part in cases of this kind…"*. HMRC's policy of not wishing to participate in *Hastings-Bass* applications (or indeed any application to rectify or vary the terms of a trust which might have UK consequences) seems to be changing. We may, in the near future, see an increase in the number of applications by HMRC (and potentially other foreign revenue authorities) to join *Hastings-Bass* applications which "might" have UK (or foreign) consequences. Some comfort should however be taken from the comments of the Court of Appeal regarding the situation of this case being unusual, their view that the ramifications of their decision would be "*very limited indeed*" and their opinion "*that such applications will be few and far between*". That said, rather than applying for *Hastings-Bass* relief or rectification, with the possibility of a tax authority seeking to take part with

knock-on time and cost effects, settlors/beneficiaries may opt to sue the trustees/other advisors for the consequences of the mistake rather than apply to the Courts to have the mistake declared void ab initio.

NOTE: Mr Gresh has appealed to the Privy Council Judicial Committee.

Should you have any questions or requests for further information please contact:

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