

Hastings-Bass – Trustee Mistake

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Guernsey

1. Guernsey's most recent case of relevance is the decision in **Gresh v. RBC Trust Company and HMRC** (16 September 2009) Guernsey Court of Appeal. Gresh is not a Hastings-Bass case as such – it was a decision which permits HMRC to join as a party to proceedings seeking Hastings-Bass relief in Guernsey. At first instance the Royal Court stated that it believed that HMRC's application was the first time HMRC had applied to intervene and be joined to a Hastings-Bass application in a court outside the United Kingdom.
2. The substantive Gresh proceedings are yet to be heard. They are unlikely to be heard before the **Futter v. Futter** and **Pitt v. Holt** appeals in England.
3. Guernsey has not yet had a Hastings-Bass decision. One of the initial issues before the Court is likely to be whether Hastings-Bass relief is even available under Guernsey law.
3. It is considered that the Guernsey Royal Court is likely to find that Hastings-Bass relief is available under Guernsey law:
 - (a) Hastings-Bass relief has been sought and obtained in Jersey a number of times, albeit only at first instance, see **Green GLG Trust** [2002] JLR 571, **Freidman v. Asia Trust** [2006] JRC 187, **Seaton v. Morgan** [2007] JRC 206, **Leumi v. Howe and Others** [2007] JRC 248, **Representation of Vistra Trust Company (Jersey) Limited** [2008] JRC 111 and **Re Seaton Trustees Ltd** (2009) JRC 050. The trust law of Guernsey and Jersey is similar and each jurisdiction will often look to relevant judgments of the other as persuasive authority,

particularly from the appellate Courts. The panel of judges in each Island's Court of Appeal is the same. The ultimate appellate court for both Islands is the Judicial Committee of the Privy Council;

- (b) Both Islands' trust law is strongly influenced by relevant English decisions;
- (c) Whilst strictly *obiter*, in the Royal Court proceedings Collas DB commented, in relation to the interpretation of the Hastings-Bass principle under Guernsey law, and whether a successful application renders the transactions concerned void or voidable:

“75. As I have said, these issues are governed by Guernsey law so the Court will have to establish what the law of Guernsey in this area is; it will not simply be applying English law. In doing so, the starting point is to look at the law of similar jurisdictions. The Judicial Committee of the Privy Council recognised in Vaudin v. Hamon that legal arguments may be based on analogy with the law of similar jurisdictions and may have force if “the system of law to which appeal is made in general, or the relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter” (page 164).

76. Further, the Guernsey Court of Appeal discussed the influence of English law on our law of trusts in Stuart-Hutcheson v. Spread Trustee Company Ltd at para 20:

“20 That, prior to the 1989 Law, trusts had become part of Guernsey law is not in dispute; what is in issue is the extent to which the general law of trusts in England had become part of the law of Guernsey. To that question the answer is, in my judgment, to be found by a consideration of the process by which trusts came to be part of Guernsey law. They did so because settlers established trusts, whether inter vivos or by will the validity of which was recognised and, where necessary, enforced by the Royal Court. In addition the Legislature in a number of Laws recognised and adopted the notion of trusteeship. In thus importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with its usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable.”

77. Hence, English decisions interpreting the Hastings-Bass principle will be a starting point but they will need to be considered in the light of Guernsey customary and statutory law.”

- (d) Whilst only an observation, when dealing with the joinder application the Guernsey Court of Appeal did not appear to suggest or infer that Hastings-Bass relief was unknown or novel at Guernsey law.

Jersey

4. **In Re Seaton Trustees Limited** (2009) JRC 050, this was a matter where the trustee took advice as to the tax consequences of accessing trust funds for distribution to a beneficiary. The trustee admitted that it incorrectly interpreted the advice and that this misunderstanding informed the decisions subsequently made.
5. There were two methods of obtaining monies from the life policies which formed the majority of the trust fund – either by withdrawal or by surrender (which would be more tax efficient for large amounts). The fact that there were two different procedures for the withdrawal of funds from the life policies was not provided or explained to the tax advisers before they provided their advice.
6. The action taken by the trustee resulted in the beneficiary having a tax liability of just over £1,500,000 when he was anticipating a liability of approximately £100,000.
7. HMRC were notified of the proceedings and declined to appear, but did make written submissions to the Court.
8. The Court referred to and followed the English decisions of **Mettoy Pension Trustees Ltd v. Evans** [1990] WLR 1587 and **Sieff v. Fox** [2005] 1 WLR 3811.
9. The Court dealt with three topical issues:
 - (a) *Is the test whether the trustee 'would' or merely 'might' have acted differently?* In this instance the Court decided that the trustee would have acted differently, and therefore the test did not fall to be determined by the Court;
 - (b) *Must there be some breach of fiduciary duty on the part of the trustee before the principle can be invoked?* There is no requirement under Jersey law to find that the trustee was at fault: **Leumi v. Howe and Others** [2007] JRC 248, but that the facts were such that, if needed, a finding of fault would have been made; and

- (c) *Is a decision caught by the principle void ab initio or simply voidable?* The Court found that “[this was] sidestepped in Sieff by the Court setting aside the relevant decision and declaring it to be of no effect and that approach has been followed in Jersey in subsequent cases (see **Seaton, Leumi** and **Vistra**. We intend to follow the same approach.”
10. The Court decided that the test for Hastings-Bass relief was met and therefore it proceeded to set aside and declare to be of no effect the two transactions concerned.

Cayman

11. In the Matter of the Ta-Ming Wang Trust Grand Court Cause No. FSD 0089 of 2010. This decision confirmed that Hastings-Bass relief is recognised in the courts of the Cayman Islands. Previous Cayman Hastings-Bass decisions include **Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain** Grand Court Cause No 475 of 2004 and **A v. Rothschild Trust Cayman Limited** 2004-05 CILR 485. All are first instance decisions.
12. In this matter, the trustee procured the payment of a dividend from a company in which the trustee owned all of the shares. The trustee (and its officers, who were also directors of the underlying company) failed to ensure that the dividend was paid at a time when it would not be subject to tax on its foreign source income. The dividend was paid approximately one and a half months after the closure of a tax ‘holiday’ and the trust was consequently assessed to tax on the dividend. The trustee stated, and the Court accepted, that its understanding (based on advice it had received) of when the tax holiday closed was incorrect and further stated that had it known this then the dividend would not have been procured.
13. The Canadian equivalent of HMRC, the CRA, had been made aware of the application but did not object to it.
14. The Court found Lloyd LJ’s dicta in **Sieff v. Fox** as being the formulation of the Hastings-Bass principle which ought to be followed (and had previously been followed by that Court in **A v. Rothschild**).
15. The Court held that the trustee’s application was well founded and declared that the decision was *void ab initio*, following **A v. Rothschild**.

16. A point worthy of note is the discussion on whether Hastings-Bass relief also applied to the decisions of the directors of the underlying company (they also being subject to fiduciary duties). Ultimately such relief was not granted as there was insufficient evidence before the Court. Smellie CJ stated “*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 the [the trustee] having procured them to act) by the same mistaken advice that caused [the trustee] to take its decision and that, had they had the correct advice, the directors would have decided and acted differently*”. However, had such evidence been before the Court then it appears possible that the Court would have been willing to extend the Hastings-Bass principle to the acts of the directors.

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