

Relief for Pension Trustees facing tax liability

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M v St Anne's Trustees Limited (June 2018) - In the Court of Appeal in Guernsey

DAC Beachcroft and Carey Olsen acted for the trustee in this successful appeal that held that a pension trust transaction, which inadvertently resulted in a £1.8million tax liability, was voidable and should be set aside under the "so called" Hastings Bass principle.

This is the first time the Court of Appeal of Guernsey has considered the application of the Hastings Bass principle since the English approach altered in *Pitt v Holt and Futter v Futter* (2013). Put simply, the principle protects beneficiaries by allowing the courts to set aside erroneous decisions made by trustees (e.g. where trustees have failed to take into account relevant considerations or have taken into account matters that they should not have done) and avoid liabilities that would otherwise have arisen.

This landmark decision confirms that Guernsey law will follow the Hastings Bass approach where it is just to do so.

The facts

The application was brought by M, a member of a QROPS pension trust, who had moved his personal UK pension scheme into the QROPS in 2007. In 2013, M borrowed £2.6million from the scheme. Under the scheme rules, M had to repay the loan before he started to draw his pension. In November 2013, M asked whether he could repay the loan by transferring two residential investment properties into the scheme via a transfer of shares from companies which owned the properties. The Trustee requested confirmation that M had taken 'appropriate' tax advice and proposed to take its own independent advice. Ultimately however the Trustee did not follow up with M and did not obtain its own tax advice. Unfortunately, although M did obtain tax advice from their solicitors, this was incorrect. This meant that neither M nor the Trustee were aware that a substantial unauthorised payment charge would be imposed by HMRC if the pension scheme acquired an interest in residential property (under section 208 of the UK's Finance Act 2004). The Trustee allowed the transactions to take place. In 2015, M's accountants discovered that a tax liability of £1.8million had arisen.

With the support of the Trustee, M applied to the Royal Court of Guernsey to set aside the transactions, on the basis of inadequate deliberation of the tax consequences by the Trustee before it allowed the transactions. At first instance, the application was denied. M appealed to the Guernsey Court of Appeal, again with the Trustee's support.

The decision

The Hastings Bass principle was reviewed by the Supreme Court in *Pitt v Holt*, which has restricted its use, following concern that the law had 'taken a wrong turn'. It was uncertain whether the Guernsey Courts would follow the English approach on the tests to be applied or would develop its own approach.

In deciding M's case, the Court of Appeal of Guernsey concluded that:

- It would proceed on the assumption that the English decision in *Pitt v Holt* applied under Guernsey law.
- In M's case, the Court had no hesitation in deciding that the Trustee's inadequate deliberation was of sufficient gravity to constitute a breach of fiduciary duty.
- Once the threshold of seriousness has been reached to constitute a breach of trust, the court has jurisdiction to grant relief.
- There is no need to show causal connection between the breach and damage to the beneficiaries or trust fund. Instead, the court may take damage or loss into account when considering whether to grant the relief.
- There is no "extra hurdle" required beyond the breach of duty.
- Setting aside a voidable transaction is not an "extraordinary" or "extreme" remedy. The discretion to avoid should be exercised when the court considers it just to do so.
- It is rare that the possibility of a claim against professional advisers will be relevant when considering how to exercise the discretion.

The Court concluded that it would allow the appeal and exercise its discretion by setting aside the transactions, so that these are to be treated as never having occurred. As ever, the Court was keen to stress that the judgment was not a full statement of current Guernsey law and there is an opportunity for fine tuning in future case law. However, this case does

indicate that Guernsey is not plotting a course which would make it an unattractive venue for trustees.

For more information about this case, please contact Rebecca Smith or Lindsay Elliott.

Authors



Rebecca Smith

Bristol

rsmith@dacbeachcroft.com



Lindsay Elliott

Bristol

lelliott@dacbeachcroft.com


DAC BEACHCROFT