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Guernsey court adopts restrictive approach to Hastings Bass

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HMRC v Gresh

In the autumn edition of this newsletter, we reported on a decision by the Guernsey Court in the case of *HCS Trustees Limited and another v Camperio Legal and Fiduciary Services Plc and another* (unreported), which confirmed the availability of Hastings Bass relief in the Guernsey jurisdiction. This was an important and welcome decision for trustees, professional advisers and their clients.

Unfortunately the Guernsey court did not hand down a written judgment nor confirm the precise ambit of the Hastings Bass rule under Guernsey law. The general understanding was however that an application to set aside a transaction under the Hastings Bass rule under Guernsey law required a breach of fiduciary duty on the part of the trustee concerned. This differs from the position in Jersey, where the Trusts (Amendment No.6) (Jersey) Law 2013 confirms the court's ability to provide discretionary relief where beneficiaries find themselves materially prejudiced by a trustee's decision. It is not necessary for the fiduciary to be shown to have been at fault. Moreover, the amendment has retrospective effect.

As foreshadowed in our previous article, it was expected that the long running case of *HMRC v Gresh* might provide further guidance about the application of the Hastings Bass principle in Guernsey. Ultimately, however, that did not turn out to be the case.

Mr Gresh hoped to set aside a £1.4m distribution from his pension fund which had resulted in a significant unexpected tax liability in excess of half a million pounds. The case was originally brought by Mr Gresh based on the rule in Hastings Bass. In the interim, the cases of *Futter v Futter* and *Pitt v Hunt* progressed to the UK Supreme Court. Following the outcome of those cases, Mr Gresh recast his application and sought to invoke the equitable jurisdiction of the court to set aside a voluntary disposition on the grounds of mistake.

Mr Gresh's re-cast application was brought on the basis that the trustee of the pension scheme had made the distribution subject to a mistake as to the tax consequences of the same. Mr Gresh had received professional tax advice indicating that the distribution would be tax-free provided that it was not remitted to the UK. However, this advice (which was shared with the trustee) was incorrect and the distribution was subject to a 40% income tax liability in the UK.

The Guernsey court decided that the distribution should not be set aside on grounds of equitable mistake. In reaching this decision, it held that the legal test to be applied is that laid down by the UK Supreme Court in *Pitt v Holt* and the later decision of *Kennedy v Kennedy*. The court considered whether it would be "unconscionable" or "unfair or unjust" not to set aside the disposition taking into account the consequences of doing so (or, alternatively, of not doing so). The court concluded that it was not unconscionable that Mr Gresh should have to retain the proceeds of the distribution made by the trustee, noting that he was the only person affected by the mistake.

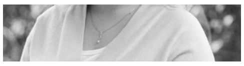
In handing down this decision and setting a very firm boundary to attempts to obtain wide-ranging relief, the Guernsey court will have disappointed the island's large trustee community. The approach taken by the Guernsey court is significantly more restrictive than that of the Jersey court, which granted the relief sought in similar circumstances last year In the matter of the S Trust and the T Trust. In those proceedings, the Jersey court cited the stress of litigation against professional advisers as a factor that required the court's intervention, notwithstanding the fact that the applicant had already obtained an indemnity from his tax adviser before applying for relief.

The approach taken by the Jersey and Guernsey courts to these kind of matters now appears to be markedly different (albeit that we continue to await a reported decision on the precise scope of the Hastings Bass rule under Guernsey law). Given the relatively restrictive approach of the Guernsey courts to date though, parties may increasingly need to resort to professional negligence claims against their advisers in order to recover their losses.

Authors

Rebecca Smith
Bristol
rcsmith@dacbeachcroft.com

Hannah Gregory
Bristol
hgregory@dacbeachcroft.com



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