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## **Breaking new ground with Hastings Bass**

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### **The “Morning After Pill” for Trustees**

The Hastings Bass principle is often referred to as the ‘morning after pill’ for trustees; a provocative title but a good one to explain what the principle is and how it works.

The principle was first set out in a trust case decided in 1975 by the English Chancery Court and which involved a trust set up by a Mr Hastings-Bass. The principle therefore bears the imaginative title of the *Hastings-Bass* principle or the rule in *Hastings-Bass* (who said lawyers weren’t creative!).

### **The “Hastings-Bass principle”**

In simple terms, the *Hastings-Bass* case concerned a transaction which had been entered into by the trustees, with unintended consequences. By applying the principle, the court allowed a transaction by the trustees to be set aside. The court said that the principle could be invoked where a transaction has resulted in unintended consequences. In addition, it has to be clear that the trustee would not have entered into the transaction, if the trustee had taken proper account of all relevant considerations or if he had ignored considerations which weren’t relevant. If these points can be shown, then the courts will allow the transaction to be undone and in that way provide an antidote to the mistake: hence the expression, the “morning after pill”.

The unexpected consequences of transactions are often focussed on tax liabilities. The principle is often invoked where a trust arrangement has set up with a view to minimising tax liabilities but turns out to have the unintended consequences of increasing substantially the tax which is due. The fact that successful *Hastings-Bass* applications can result in the tax-man (usually in the UK) losing out has resulted in close attention being paid to such applications by the tax-man.

From its humble beginnings in 1975, the *Hastings-Bass* principle has expanded over time to the much wider formulation below:

*"Where a trustee acts under a discretion given to him by the terms of the trust, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account"*<sup>1</sup>.

### **The focus turns on Guernsey**

Against this backdrop, along came a *Hastings-Bass* application in the Royal Court of Guernsey, in the case of *Emmanuel Gresh v RBC Trust Company (Guernsey) Limited*. The judgment in the case was issued on 29 May 2009 and has attracted interest from the offshore fiduciary world because of the involvement of the UK tax-man or, to use the proper title, Her Majesty's Revenue and Customs ("HMRC").

The background to the case was that HMRC asked the Royal Court to allow HMRC to participate in proceedings which had been commenced by Mr Gresh. In the proceedings, Mr Gresh asked the Royal Court to set aside a transaction which had been entered into by the trustees of a pension trust of which he was a member. The transaction had resulted in an unintended tax liability to HMRC.

The Royal Court was asked to apply the *Hastings-Bass* principle and declare the transaction which had led to the tax liability void from the outset ('*ab initio*'). HMRC, perhaps not surprisingly, was not particularly happy at the prospect of losing out on the tax which would otherwise be due, hence the request to be allowed to participate in the proceedings and make representations as to whether or not Mr Gresh's request should be granted. This was the first known case of HMRC seeking to become involved in proceedings outside the UK, so the decision of the Royal Court was of considerable interest to trustees and their advisors, both local and international.

The Royal Court dismissed HMRC's application and upheld the application of the *Hastings-Bass* principle. The Royal Court adopted a robust stance, in a welcome sign that the Guernsey courts will, in appropriate circumstances and in accordance with Guernsey's Trusts Law, offer assistance to Guernsey trustees, even in the face of protest by HMRC.

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<sup>1</sup> Statement by Mr Justice Lloyd in *Sieff v Fox* [2005] 1 WLR 3811 at para 49.

The Royal Court found that HMRC had failed to satisfy the requirements of the procedural rules applicable to an application to be allowed to participate in proceedings, which in this case meant that:

1. there had to be a question or issue between HMRC and Mr Gresh;
2. the question had to arise out of, be related to, or be connected with, the relief or remedy claimed in the proceedings; and
3. it was just and convenient to decide that question or issue, as between HMRC and Mr Gresh, in addition to deciding the question between the persons who were parties to the proceedings.

The Royal Court rejected HMRC's submission that it had an interest in Mr Gresh's application, based on the argument that the outcome might affect HMRC's right to taxation in the UK. The Royal Court found that the issues in Mr Gresh's application were between him and the trustee, RBC, only. HMRC only had a contingent interest in the outcome of Mr Gresh's application involving RBC.

The Royal Court also found that HMRC was trying to enforce its revenue laws, contrary to the long-established rule of international law that foreign revenue claims from one state are not enforceable in other states.

Finally, the Royal Court held that it would not be just and convenient to allow HMRC to join the proceedings. In this regard, the Royal Court took into account the fact that it was not necessary for HMRC to be present in court in order to ensure that the Royal Court correctly interpreted the relevant legal principles, bearing in mind also that there was no suggestion that Mr Gresh and/or RBC had failed in their duty to provide full and frank disclosure to the Court. In concluding, the Court pointed out that, as with any other non-party to proceedings in the Royal Court, HMRC was at liberty to write to the Royal Court setting out its views and the Court was then at liberty to deal with such written submissions, as it felt was appropriate.

## **The future**

The present indication is that HMRC are appealing the Royal Court's decision. The amount of revenue at stake, if not on this particular instance of the *Hastings-Bass* principle then in relation to the cumulative cases, might indicate a likelihood that a defeat for HMRC in the Court of Appeal might not be the end of the matter. Looks like the courts should hold onto those prescription pads a little bit longer...