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UPDATE

# Some mistakes *are* meant to be fixed: a return to a measure of predictability in Guernsey *Hastings-Bass orders*

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In the recent decision of *M v St Anne's Trustees Limited,*[1] the Guernsey Court of Appeal overturned a previous decision of the Royal Court, and in doing so clarified the scope and availability of the so-called Hastings-Bass relief

## Summary

The rule said to emanate from *Hastings-Bass* allows some actions of a trustee to be set aside under certain circumstances. At first instance, the Guernsey Royal Court in *St Anne's Trustees Limited*[2] held that for Hastings-Bass relief to be available:

1. There must be a breach of duty, but that could be a breach of duty of care rather than a breach of fiduciary duty;
2. There must be a casual connection between the trustee's action and the loss suffered;
3. It must be unconscionable to leave the situation unresolved (to be determined at the court's discretion).

That formulation represented a divergence from the test laid out by the English Supreme Court in *Pitt v Holt*.[3] This made the relief more difficult to obtain and also created a level of uncertainty in the Guernsey trust industry.

The Court of Appeal, in overturning the Royal Court's decision, said that *Pitt v Holt* should be followed. That meant there was no need to show a causal connection, nor was unconscionability required. Instead, the Court of Appeal held that a breach of fiduciary duty, of sufficient seriousness (in this case a failure to consider the tax consequences of the transaction in question), was required for the relief to be available and that whether a transaction would be set aside is a matter of the court's discretion. The Court of Appeal also confirmed that a beneficiary rather than the trustee should bring an application and that the transaction was voidable rather than void owing to the court's discretion in deciding whether or not to set a transaction aside.

The facts of *M v St Anne's Trustee Limited* lent themselves to a Hastings-Bass application. M was the beneficiary of a retirement scheme and needed to borrow some £2.6 million from his scheme to facilitate a divorce settlement to his ex-wife. This loan had to be repaid before he could draw down his monthly pension. He asked whether he could repay this loan via the transfer of two residential properties into the scheme, and was advised (by his own tax advisor) that he could do so without any adverse tax

[1] GLR 21/2018.

[2] Royal Court, 12 January 2018.

[3] [2013] UKSC 26.

consequences. The trustees did not ask to see M's tax advice and did not take its own tax advice, notwithstanding that it indicated it would. The transaction went ahead and in fact gave rise to a potential tax liability to HMRC of £1.8m.

The Court of Appeal held that the trustees' failure to seek tax advice was an extremely serious failure to consider a relevant matter and of sufficient gravity to constitute breach of fiduciary duty. Exercising its discretion to set aside the loan, the Court of Appeal noted that as the tax charge was wholly avoidable, it militated towards exercising the discretion. A further point in favour of exercising the discretion was that it was not a transaction simply carried out for tax planning purposes. Rather, it was carried out to repay a loan to the trust, preferably without having negative tax consequences.

## Implications for trustees

The net effect of the Court of Appeal's decision in *M v St Anne's Trustees* is that relief in the form of Hastings-Bass is available and the court is willing to assist those who have a tax issue (or who have suffered some other unintended consequence of a trustee's action). That it is a process which now has a degree of predictability following the Court of Appeal's judgment.

That said, no result is guaranteed and whether to seek relief of this kind will require judgment and experience to manage the relationships and present it to the court in a sympathetic and successful manner. If an issue is identified, those involved with the trust (or pension) should seek advice in early course.

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