



## Application of the rule in Hastings Bass in Guernsey

Service area / [Dispute Resolution and Litigation](#)

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Somewhat surprisingly, the Guernsey Royal Court has never previously ruled on whether the Rule in Hastings Bass forms part of Guernsey law. Gresh [2009-10] GLR 216 was the first time a Hastings Bass application is known to have come before the Royal Court of Guernsey. However, following the determination of the preliminary issue regarding HMRC's joinder to that application, the hearing for substantive relief under the Rule in Hastings Bass was held over.

The Royal Court of Guernsey has now finally had the opportunity to consider the application and ambit of the Rule in Guernsey in the matter of HCS Trustees Limited and another -v- Camperio Legal and Fiduciary Services Plc and another (unreported).

### The facts

The L Trust was established under the law of Guernsey on 30 July 2001 by an Italian resident. The principal assets of the Trust comprised shares in a UK plc worth several million pounds. The Trust initially had a Guernsey trustee who transferred the UK shares to a BVI company wholly owned by the Trustee. Owing to the introduction of rules relating to the taxation of trusts in Italy in 2007 and as Guernsey was not on Italy's so-called white list, a US trustee was appointed (the US being on Italy's white list). In 2009 an Italian co-trustee was appointed as part of the participation by the trustees in a tax amnesty process in Italy, the trust being treated as resident in Italy for Italian tax purposes. As the BVI was also not included on Italy's white list and would be treated as a "fictitious interposition" and transparent for Italian tax purposes, the US and the Italian trustees (the "Former Trustees") formed the view that the BVI company no longer served any purpose and decided to transfer the UK shares out of the BVI company to be held

directly by the Former Trustees and to wind up the BVI company. The Former Trustees did not take any UK tax advice. The transfer of the UK shares from the BVI company to the Former Trustees directly gave rise to a charge to UK inheritance tax on the UK shares, which liability was in excess of £1 million.

The Former Trustees were replaced and the Current Trustees brought an application under the Hastings Bass Rule seeking to have the transfer of the UK Shares from the BVI company to the Former Trustees set aside. The Current Trustees applied separately to the BVI Court to reinstate the BVI company. The Current Trustees' application was brought on the basis of the Hastings Bass Rule as reformulated by the UK Supreme Court in *Futter and another -v- HMRC and Pitt and another -v- HMRC* [2013] UKSC 26 (the "UKSC Decision") on the grounds that the Former Trustees had acted in breach of their fiduciary duty in failing to have regard to the UK tax consequences of the transfer of the UK shares.

### The application of the Rule in Guernsey

The matter came before Lieutenant Bailiff Marshall who was satisfied that a version of the Rule exists and must form part of the Guernsey law of trusts. However, she found that the case did not require her to decide the precise ambit of the Rule under Guernsey law and whether Guernsey would follow the position in England or in Jersey (as it had been prior to the UKSC Decision). She noted though that since the UKSC Decision Jersey had enacted legislation to support its previous approach which did not require a breach of fiduciary duty and commented that if Jersey had found it necessary to legislate, and in light of the comments of the former Bailiff of Jersey in the matter of the *Onorati Settlement* (2013) JRC 182, it seemed

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likely that the same considerations would apply in Guernsey and that Guernsey would otherwise follow English law. On either basis she was happy that the Court had the jurisdiction to grant the order setting the transaction aside because she was satisfied that the case fell squarely within the requirements of the Rule as reformulated in the UKSC Decision.

She noted that it was clearly established in previous authorities that a trustee's duty to take all relevant matters into account was a fiduciary duty and that the fiscal consequences of any decision taken by a trustee was one of the first things that a trustee should have in mind. This was not a case of the trustees having taken advice which turned out to be wrong but a failure to have taken any advice at all. In the circumstances, the Lieutenant Bailiff did not hesitate to find a breach of fiduciary duty on the part of the Former Trustees and was satisfied that the Rule was properly invoked in this case.

The Lieutenant Bailiff had no difficulty in finding that a successor trustee (not only a beneficiary) had standing to bring an application under the Rule to set aside a former trustee's actions.

The Lieutenant Bailiff noted further that the exercise of the jurisdiction was subject to equitable defences but she was satisfied that none existed in this case.

In considering whether to exercise the discretion which she had to set the transaction aside under the Rule, the Lieutenant Bailiff was concerned whether the Current Trustees were perhaps seeking "to have their cake and eat it" and queried whether some advantage had been obtained from an Italian tax perspective by transferring the shares from the BVI company to be held by the Former Trustees directly. The parties were required to submit further evidence on this point. Further evidence was submitted that no advantage was obtained from an Italian tax perspective, the position under Italian law being exactly the same whether or not the shares were held in the BVI company or by the Former Trustees directly.

An order was accordingly granted setting aside the transfer of the UK shares by the Former Trustees. No written judgment has been handed down.

## Commentary

Given the detailed consideration of the history and development of the Rule in Hastings Bass as set out in the UKSC Decision and the decision of the Jersey Royal Court in Onorati, the outcome, although not definitive, is unlikely to be surprising, namely that the Rule in Hastings Bass under Guernsey law is the same as formulated by the UKSC Decision and absent intervention by the Guernsey States and an amendment to the Trusts (Guernsey) Law, 2007 an application to set aside a transaction under the Hastings Bass Rule under Guernsey Law will require a breach of fiduciary duty on the part of the trustee concerned.

Carey Olsen partner Natasha Kapp appeared for the Current Trustees.



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