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Industry Information

## *Hastings Bass in Guernsey - M v St Anne's Trustee's Limited (Guernsey Court of Appeal)*

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On 20 June 2018 the Guernsey Court of Appeal handed down its eagerly anticipated judgment in *M v St Anne's Trustees Limited*. In so doing it clarified the legal test in Guernsey for the exercise of the Court's discretion under the *Hastings Bass* principle. Prior to the judgment the law in Guernsey as to the precise legal test to be applied and the exact circumstances in which fiduciaries could seek to avoid transactions giving rise to adverse fiscal charges had been uncertain. This much needed clarification will assist professional advisors and their clients in determining the circumstances in which an application for *Hastings Bass* relief may be made before significant costs are incurred.

In summary, the Court of Appeal decided to exercise its discretion in favour of setting aside (avoiding) a decision of the trustee to acquire shares in two property holding companies (and other associated transactions) in satisfaction of loans owing by the principal beneficiary. The trustee's decision had given rise to significant adverse UK tax charges for the Appellant. The Court of Appeal proceeded on the basis that the operation of the *Hastings Bass* principle should be in accordance with the revised approach set out by the UK Supreme Court in *Pitt v Holt*.

The Court of Appeal stated that, in order for the rule to be applied:

- i. there must be a finding that the failure by a trustee to take account of certain matters (typically fiscal consequences) was of sufficient seriousness to amount to a breach of duty (whether fiduciary or otherwise);
- ii. such a breach was a necessary pre-requisite for the exercise of the jurisdiction; and that
- iii. once a sufficient breach had been established, the decision in question was liable to be set aside by a court as a matter of its discretion.

The Court of Appeal stopped short of setting out an exact test for the exercise of its discretion under the *Hastings Bass* principle on the basis that each case was likely to be fact specific. Further, it declined to adopt the position of the Royal Court at first instance which had introduced as a precondition the element of unconscionability as a "*benchmark test*" for deciding whether to avoid the transaction, on the basis that such a test is more appropriate in relation to the doctrine of equitable mistake.

On the facts of *M v St Anne's Trustees Limited* the Court of Appeal found that the trustee's inadequate deliberation was of sufficient gravity to constitute a breach of fiduciary duty and described it as an "*extremely serious failure to consider a relevant matter*". The Court of Appeal exercised its discretion to avoid the transaction on the basis of a number of factors and in particular the substantial prejudice caused to the Appellant as a result of the trustee's breach and the fact that the trustee had neither taken independent tax advice nor enquired whether the Appellant had taken tax advice in circumstances where "*consideration of the possible tax consequences was clearly called for*".

It is clear that, going forwards, a close examination of the particular facts in each case will be needed. As a general rule fiduciaries ought to consider in every case whether tax advice is required in relation to a particular transaction, or at the very least, seek sight of any advice obtained by the beneficiary before deciding to proceed with the transaction in question. Beneficiaries of Guernsey Trusts can, however, take comfort that in appropriate circumstances where a trustee has erred, transactions can still be set aside without the need to demonstrate "*unconscionability*".



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