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Following its participation in the case of Pitt and Anor v Holt and Ors [2010] EWHC 45 (Ch), HMRC has once again directly intervened in a Hastings Bass application in England and had its arguments rejected at first instance. HMRC had for some time been of the view that the current formulation of the Hasting-Bass principle is too wide in scope. While Courts in England, and indeed Jersey and Guernsey, have been aware of HMRC's views for some time, it is clear that HMRC is now making extensive efforts to limit the application of the principle.

This case is also interesting in that the Judge held that the consequence of invoking the rule in Hastings Bass is to make the deed or transaction void, rather than voidable. In doing so, he provided a measure of clarification to a line of inconsistent authority which Judges in previous decisions had not resolved.

The facts

In 1985 Mr Futter had established two life interest settlements. By 2008, each contained "stockpiled gains" for UK capital gains tax purposes. It was anticipated that if those "stockpiled gains" were brought onshore after 5 April 2008 they would be taxed at an overall effective rate of 28.8% so that the total CGT liability for winding up the settlements was likely to be in the region of £163,000.

The trustees were advised that personal losses of Mr Futter and his children could be used to offset

the “stockpiled gains”. Accordingly, using their powers of enlargement and advancement, the trustees terminated one settlement and paid the entire capital of that fund to Mr Futter. The trustees also advanced sums from the other settlement to Mr Futter’s three children.

However, that advice was incorrect. It had not taken account of section 2(4) of the Taxation of Capital Gains Act 1992, which specifically says that, in relation to such attributed gains, allowable losses cannot be set off.

The trustees applied Court under the rule in *Hastings Bass*, stating that they had failed to consider the true fiscal consequences, and had they done so they would not have acted as they did because minimising the CGT payable on the extraction of funds from the settlements was a priority, and the perceived tax consequences determined the form of the advancements.

The decision

HMRC submitted that the rule in *Hastings Bass* had been carried to almost absurd lengths, and advanced arguments that the rule in *Hastings Bass* was but one aspect of the general law of mistake, and therefore the key question was whether the trustees understood the effect of the transaction. The Judge rejected this, holding that the Rule in *Hastings Bass* had its origin in the law of powers and drew no distinction between “effect” and “consequences”, and that therefore a material difference between the intended and actual fiscal consequences of an act may bring the rule into play.

HMRC also submitted that the trustees had taken the relevant considerations into account, and that the fact that the advice was wrong should not mean that the rule in *Hastings Bass* is engaged. However, the Judge held that the rule existed to ensure that beneficiaries do not suffer by invalid exercise of a power, and thus the failure to take into account a particular factor and its true effect on the exercise of that power was the relevant question.

The Judge also held that the consequence of invoking the rule in *Hastings Bass* is to make the deed or transaction void, although he stated that the rigours of this analysis may be mitigated in particular cases where a change of position defence is available, or by application of equitable considerations.

Comment

This case is important insofar as HMRC’s arguments have been clearly rejected by the English courts of first instance. HMRC is appealing the decisions in both *Futter* and *Pitt v Holt*. In any event, the rule in *Hastings Bass* will finally be subjected to appellate level scrutiny, and a definitive ruling is therefore likely

It also remains to be seen what effect developments in England will have on HMRC’s attempts at

intervention in the Channel Islands. In particular, HMRC was given leave to intervene in the Guernsey Court of Appeal in the case of Gresham v RBC Trust Company (Guernsey) Limited, which decision may also persuade HMRC to re-attempt such an intervention in Jersey (having previously been denied leave at first instance by the Royal Court in Re Seaton Trustees Limited (unreported, 19 March 2009)).

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Meet the Author



[Edward Mackereth](#)

Global Managing Partner

[Jersey](#)

E: edward.mackereth@ogier.com

T: [+44 1534 514320](tel:+441534514320)

Key Contacts



Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: +44 1534 514318



Oliver Passmore

Partner

Jersey

E: oliver.passmore@ogier.com

T: +44 1534 514247

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