

# The time has come for Guernsey to codify its "get out of jail free" card...

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**March 2018**

In two cases from 2018, *M –v- St Annes Trustees Limited* and *In the matter of the Aylesford and Achilles Trusts*, the Royal Court embarked on an analysis of the Hastings Bass doctrine which was recently clarified in England by the Supreme Court in the case of *Pitt v Holt*.

In *Pitt v Holt*, the Supreme Court "reined in" the doctrine which had previously been a first port of call for the undoing of transactions which had "gone wrong" in a trust context and, for example, given rise to adverse tax consequences, where the Supreme Court firmly established that the doctrine could only be invoked if there had been a breach of duty by the trustees.

Whereas other jurisdictions, including Jersey, Bermuda, Cayman and the Isle of Man, have found ways to avoid the effect of *Pitt v Holt*, in Guernsey no legislation has been enacted.

## **M –v- St Annes Trustees Limited (12 January 2018)**

M had borrowed, perfectly properly, a large sum from a pension scheme in order to fund a payment to his wife on their divorce. M needed to repay the loan before he could start to draw a periodic pension.

The loan was repaid by M transferring into the scheme two property owning companies which were wholly owned by him. The trustees did not take tax advice themselves, but encouraged M to take tax advice on the proposed transaction, which he did via his English solicitors. A subsequent review by PwC revealed that the advice given to M had been incorrect and the transaction had given rise to a very significant personal income tax liability for M in the United Kingdom.

M applied to the Royal Court for the trustees' implementation of the transaction, effectively the acceptance of the assets/repayment, to be set aside. M invoked the Court's jurisdiction under the doctrine which has become known as the "*rule in Hastings Bass*".

The Royal Court refused to exercise its discretion to set aside the transaction.

## **In the matter of the Aylesford and Achilles Trusts (27 February 2018)**

The settlor was diagnosed with a tumour that required urgent surgery. He was anxious to put adequate succession plans in place for his family before he went into hospital.

The trustee sprang into action and came up with a plan to transfer assets from one trust to another. The settlor was asked to sign certain documents from his hospital bed.

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The trustee failed to take any advice in relation to the transaction which unfortunately gave rise to seriously negative tax consequences.

The settlor applied to the Royal Court to set aside the transaction under the *Hastings Bass* principle and the Court exercised its discretion to do so.

### Analysis

In both cases, the Royal Court embarked on an analysis of the *Hastings Bass* doctrine which was recently clarified in England by the Supreme Court in the case of *Pitt v Holt*.

In *Pitt v Holt*, the Supreme Court "reined in" the doctrine which had previously been a first port of call for the undoing of transactions which had "gone wrong" in a trust context and, for example, given rise to adverse tax consequences. The decision of the Supreme Court in *Pitt v Holt* firmly established that the doctrine could only be invoked if there had been a breach of duty by the trustees.

Other jurisdictions have either very quickly found ways to avoid the narrowing effect of the Supreme Court's decision in *Pitt v Holt* by enacting legislation to cover the situation (for example Jersey and Bermuda), or have suggested that they will reject the modification of principle laid down in *Pitt v Holt* and continue to apply the old "fault free" *Hastings Bass* principle (for example Cayman Islands and the Isle of Man).

The Court in the Isle of Man has taken a robustly independent line in the recent case of *AB v CD (2016)*, where Deemster Doyle warned that: *"It would be a mistake to assume that Manx law would automatically follow English law especially in respect of a decision which appears largely driven by UK policy and UK tax law revenue considerations"*.

This is to be contrasted with the position in Guernsey where, pending legislation, the Royal Court of Guernsey has been applying the narrow *Pitt v Holt* test:

*"Unless and until legislation is enacted in this jurisdiction, I continue to hold that Guernsey law should follow Pitt v Holt and I respectfully decline to follow the robust view expressed by Deemster Doyle in the Isle of Man" (In the Matter of the Aylesford/Achilles Trusts)*

*".... I can see no reason not to accept the appropriateness of the revised approach in Pitt v Holt. The legal rationale for limiting the liberal availability of the Hastings Bass jurisdiction is the same for Guernsey law as for English law. It would therefore not be right, in my judgment ....to follow the course which has been trailed in the Isle of Man" (M v St Anne's Trustees Limited)."*

Practitioners in Guernsey have made appropriate representations to the relevant States Committee with a view to enacting legislation following the wider test similar to that already brought in by other offshore jurisdictions. The Royal Court of Guernsey has also shown a willingness to be flexible to grant similar applications brought under the doctrine of equitable mistake.

We expect the *Hastings Bass* regime in Guernsey to be subject to further change in the near future.

### Practice point

For the time being, trustees must take advice before establishing any wealth planning structures and before authorising any significant transactions in relation to those structures.

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Furthermore, trustees should also be very cautious about seeking to rely on tax advice which is addressed to family members as the trustee may not be able to rely on it if something goes wrong and the trustee's position may not necessarily be aligned to that of the family.

Trustees should always take tax advice, make sure that that it's understood, shared with the trustee team and refreshed regularly.

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