

## HASTINGS BASS: PROTECTION FOR TRUSTEES REDUCED

The Court of Appeal handed down two decisions in July 2011 in favour of HMRC. The decisions substantially restrict protection for Trustees under the longstanding Rule in Re: Hastings Bass [1974] EWCA Civ 13.

The Court of Appeal heard both cases together, commenting that some of the case law evolving from Hastings Bass had been incorrect. HMRC's Appeals against the application of the Rule was allowed in both Pitt v Holt and Futter v Futter [2011] EWCA Civ 197.

In both cases, the action taken by the Trustees/Fiduciaries had been as a result of professional advice, but there had been unexpected adverse tax consequences. Previously it was thought that where a Trustee or Fiduciary had exercised a discretion mistakenly which resulted in unintended consequences, especially where acting with professional advice the court would exercise discretion and interfere with the Trustees' decision. This would arise by applying to the court to have their decision or act rendered void or voidable.

The Judiciary have over recent years expressed disapproval of the way that the Rule in re Hastings Bass was being so widely applied.

The outcome is that it is less likely in future that Trustees will be able to avoid adverse consequences of the exercise of discretion by applying to the court for such problematic decisions to be set aside. Instead Trustees are more likely to be at risk of facing claims from Beneficiaries. In turn, the Trustees may have to face the more difficult prospect of considering a claim for professional negligence against their professional advisors.

The rationale is that in relying upon professional advice, Trustees are not in breach of their fiduciary duty if it turns out that the advice given to them was materially wrong. The Court of Appeal held that in such circumstances the Trustees' decision taken in reliance on that advice is not void or voidable and cannot be interfered with or "corrected" by the court. As such, Trustees who follow advice in particular on tax from apparently competent advisors would not be regarded as being in breach of their duties.

Consideration was also given to the alternative ground of mistake, but it was held that the tests to qualify for the equitable remedy of mistake had not been fulfilled. The result is that the Rule in Hastings Bass is restricted to pure Trust principles. Rather than Trustees applying to the court on an uncontested basis, in future it is likely to be for the Beneficiaries to challenge the Trustees' actions if they wish to have them set aside.

Trustees and professional advisors will note that in the leading Judgment of Lloyd LJ (paragraph 220) he suggested that the Beneficiaries remedies "*..... lie not in the realms of equity, but by way of a claim for damages for professional negligence ....*".

It is understood that whilst the Court of Appeal refused the Trustees in Futter v Futter permission to appeal, permission may be sought from the Supreme Court.

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The contents of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

