Judgment 25/2009 **Gresh v (i) RBC Trust Company (Guernsey) Ltd (as Trustee of the Abacus Global Approved Managed Pension Trust and (ii) HM Revenue and Customs (Applicant Intervenor) – Royal Court (Civil Action File 1254) – 29 May 2009**

Royal Court Civil Rules, 2007 (Rule 37) – application by HMRC to be joined in the action by Mr Gresh against RBC seeking to apply the principle in Re Hastings-Bass – held that none of the three limbs of Rule 37 have been satisfied by HMRC – held that HMRC were seeking indirectly to enforce a foreign revenue law, and that the case came within the principle in Government of India v Taylor

Approved Judgement
29 May 2009

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **EMMANUEL GRESH** **The Applicant**

-v-

RBC TRUST COMPANY (GUERNSEY) LIMITED **The Respondent**

As Trustee of

The Abacus Global Approved Managed Pension Trust

Application by Her Majesty's Revenue & Customs

To be Joined as a Party

Date of hearing: 7th May 2009

Decision handed down: 29th May 2009

Before: Richard John Collas Esq., Deputy-Bailiff sitting alone

Advocate for Applicant: **S H Davies**
Advocate for Respondent: **J P Greenfield**
Advocate for HMRC: **R I C E Harris**
Crown Advocate W P T Nicol-Gent as Amicus Curiae
Cases referred to:

1) *Re Hastings-Bass [1975] Ch 25*
2) The Royal Court Civil Rules 2007, rule 37(1).
3) *Re Vandervell's Trusts [1971] A.C. 912*
4) *Tetra Molectric Limited v Japan Imports Limited [1976] R.P.C. 541*
5) *Sanders Lead Co Inc v Entores Metal Brokers [1984] 1 WLR 452*
6) *Seaton Trustees Limited v Morgan [2007] JRC 206*
7) HMRC's tax bulletin, Issue 83
8) Paragraph 5 – 023 of the Fourteenth Edition of Dicey, Morris & Collins on the Conflict of Laws
9) *Re State of Norway's application (1990) 1A.C.723*
10) *Re Ellastone Limited, Royal Court of Jersey 5th June 2008*
11) *Vaudin v Hamon O-en-C XXIV, page 154*
12) *Stuart-Hutcheson v Spread Trustee Company Ltd*, Guernsey Court of Appeal 15th July 2002
13) *Government of India v Taylor (1955) A.C. 491*
14) *In the matter of Seaton Trustees Limited [2009] JRC 050 (the "Seaton Judgment")*

Introduction

1. Her Majesty's Revenue and Customs ("HMRC") have applied to be joined as a party to the application by Mr Gresh dated 24th March 2009 for an Order setting aside decisions taken by RBC Trust Company (Guernsey) Ltd in its capacity as trustee of the Abacus Global Approved Managed Pension Trust ("RBC") to distribute assets to Mr Gresh from the Pension Trust. The decisions were taken on 17th November and 20th November 2006 and the assets were distributed on 21st November 2006 and 30th January 2007.

2. Mr Gresh's application is believed to be the first ever application to the Royal Court of Guernsey seeking to apply the principle in *Re Hastings-Bass [1975] Ch 25* in this jurisdiction.

3. Another first is that the application by HMRC is believed to be the first time that HMRC has applied to intervene in and be joined to a *Hastings-Bass* application in a court outside the United Kingdom.

Background

4. RBC is the sole trustee of the pension fund known as the Abacus Global Approved Managed Pension Trust, the purpose of which is to enable unconnected employers to establish pension schemes (in the form of sub-trusts) for their non Guernsey resident staff. Mr Gresh was a member of the trust scheme established on or around 1st January 1993 by Bankers Trust Company for the benefit of employees or directors in the service of that company. The name given to such scheme was the Bankers Trust International Pension Scheme.

5. The reason for the application by Mr Gresh is summarised at paragraphs D and E of his application:

> *"D. The Respondent [RBC] distributed the assets held under the Bankers Trust Scheme for the Applicant [Mr Gresh,] in cash and in specie as a lump sum to the Applicant on 21 November 2006 and 30 January 2007. It has since been established that the distribution of the assets in that form gives rise to a UK tax liability on the Applicant. Had the Respondent appreciated that fact, it would have distributed the assets in periodic,(or annual) form, rather than a lump sum. The Applicant and the Respondent are working with their respective advisers to implement a tax migration scheme for the Applicant, part of which requires the lump sum distribution to be set aside, and to be replaced by annual payments of a pension.*
>
> *E. The Applicant accordingly seeks an order of the Royal Court in accordance with the provisions of Section 69 of the Trusts (Guernsey) Law, 2007 and the Rule in Hastings Bass that distribution (sic) referred to at paragraph D above be declared void ab initio."*

6. Mr Gresh seeks the following orders and/or directions:

> "*1) An Order that the distribution (sic) referred to at paragraph D be declared void ab initio; and*
> *2) Such other orders or directions as the Court shall see fit".*

7. The events giving rise to Mr Gresh's application are set out in some detail in an affidavit sworn by Lisa Hélène Crawford, a director of RBC, on 15th August 2008 and in the documents exhibited thereto. It is not necessary in this judgment to go into the facts in any detail. For the purposes of this judgment the facts are sufficiently summarized in paragraph D of the Application quoted above. As to the chronology I need only to add the fact that it was at some time during 2007 that RBC became aware that the distributions to Mr Gresh would be treated, not as a pension, but as a lump sum and hence would be subject to 40% UK personal income tax under the rules for benefits received from employer-financed retirement benefit schemes.

Procedural History

8. The matter commenced with an application by RBC which first came before the Royal Court in August 2008 when RBC applied to set aside the distributions in terms that were identical to the application now brought by Mr Gresh. Later, in March 2009 RBC withdrew its application and Mr Gresh took over the conduct of the matter by bringing his own application in the same terms. I will refer to the procedural history in some detail in order to explain why it has taken time for the matter to come before the Court for hearing. I do not believe that any party should be held responsible for the delays and although there have been delays, I do not believe they are of such significance that I need to take them into account when deciding whether to grant HMRC's present application.

9. On 27th August 2008, I gave various directions including orders that RBC's application be served on Mr Gresh and that notice of RBC's application be given to Her Majesty's Revenue and Customs, in accordance with what Advocate Greenfield advised me appeared to have been a practice that had been adopted in other

jurisdictions when dealing with similar applications under the *Hastings-Bass* principle.

10. On the return date, 26th September 2008, there was no appearance by any party other than RBC and I directed that the substantive hearing would take place on the 7th October 2008. Later on 26th September, the solicitor's office of HMRC contacted the Greffe and also Carey Olsen to advise that they had been instructed to represent HMRC in this matter but they had only received notice of the application on the day before so had not had an opportunity to appear.

11. On 6th October, HMRC's Solicitors wrote to say that leading English counsel had been instructed to draft a skeleton argument to put before the Court and requested that HMRC be allowed two weeks to do so, with RBC being allowed two weeks thereafter to respond (a copy of the relevant correspondence is exhibited to the first affidavit of Simon Anthony James Hart, a senior lawyer in the Business and Property Tax and Litigation Group at HMRC Solicitor's Office, sworn on 12th December 2008).

12. At a hearing on 7th October 2008, I was unsure as to whether HMRC should be allowed, or invited, to join in RBC's application and requested assistance from the Law Officers of the Crown. Crown Advocate Nicol-Gent was instructed and has been of great assistance. His role, as clarified by him on 28th November 2008, is that of *amicus curiae*.

13. At a further directions hearing on 4th November, when the *amicus* was not able to be present, Advocate Harris advised the Court that he had been instructed on behalf of HMRC and he wished to participate at the main hearing of RBC's application. The matter was adjourned to 14th November to enable the *amicus* to attend. On 11th November, Advocate Harris, on behalf of HMRC submitted a formal application pursuant to rule 37(1)(b) of the Royal Court Civil Rules, 2007 to be added as a party to RBC's application. The matter was further adjourned to 28th November 2008 when various directions were given for exchange of skeleton arguments by the parties with a view to a hearing of HMRC's application on 4th February 2009.

14. Revised directions were given on 16th January 2009 because Advocate Davies had received instructions to represent Mr Gresh in the proceedings. Prior to then, Mr Gresh had not played any active part in RBC's application. I set down HMRC's application to be joined to RBC's application for hearing on 19th March.

15. On 19th March, Advocate Greenfield advised the court that RBC was withdrawing its application. Advocate Davies indicated that Mr Gresh wished to take over conduct of it. After some discussion as to the best way of proceeding with a minimum of wasted costs, it was ordered that RBC's application be withdrawn and that Mr Gresh submit his own application, which he duly did, dated 24th March 2009. Mr Gresh's application came before the Court on 27th March 2009 and, on the same day, HMRC applied to be joined as a party to it. HMRC's application was heard by me on the first available date, 7th May.

16. In order to save costs, the parties have, wherever possible, adopted the affidavits and skeleton arguments previously lodged in respect of RBC's application and HMRC's application to be joined thereto.

Rule 37 of The Royal Court Civil Rules 2007

17. HMRC's application is brought under rule 37(1)(b) of the Royal Court Civil Rules 2007 ("RCCR 2007"), or more specifically under sub rule (ii) of that rule, which provides as follows:

> *"37. (1) The Court may in any proceedings order that –*
>
> *(b) any person -*
>
> *(ii) between whom and any party to the proceedings there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which, in the opinion of the Court, it would be just and convenient to determine as between him and that party as well as between the parties to the proceedings,*
>
> *shall be added as a party."*

18. Rule 37 is the same as rule 34 of The Royal Court Civil Rules, 1989 which it replaced and rule 34 was based on a similar rule in the Rules of the Supreme Court, Order 15 Rule 6(2), the relevant part of which read as follows:

> *RSC Order 15, Rule 6(2)*
>
> *(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –*
>
> *(b) order any of the following persons to be added as a party, namely –*
> *(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."*

19. Advocate Davies submits that the RSC Order 15, Rule 6(2) is broader than rule 37(1)(b)(ii) as the verb used in the sub-section is "*may exist"* in England and "*exists"* in Guernsey. The similar rule in Jersey, rule 6/36 of the Jersey Royal Court Rules 2004 is the same in that regard as the English rule. Advocate Harris submits that the distinction is not determinative in this case.

20. Advocate Harris explained that RSC Order 15 Rule 6(2)(b)(ii) was introduced in August 1971 following the decision of the House of Lords in *Re Vandervell's Trusts [1971] A.C. 912*. Buckley L.J. explained in *Tetra Molectric Limited v Japan Imports Limited [1976] R.P.C. 541* at page 544, starting at line 22, that in *Vandervell* it had

been held, in a dispute between trustees and beneficiaries, that the Inland Revenue was not a necessary party within the terms of what became sub-paragraph (i) of paragraph (b) of sub-rule (2) so in order to widen the discretion of the court, the rule was amended by adding sub-paragraph (ii).

21. It is interesting to understand how the rules have been amended and why they have evolved in this way but, in my view, the history does not mean that HMRC is to be given any preferential treatment in the Guernsey Courts. The language of rule 37 must be given its ordinary meaning and applied as appropriate to the facts of the application by HMRC that I am now considering. My decision on HMRC's application would be the same if the rule said "may exist" rather than "exists".

Advocate Harris' submissions on behalf of HMRC

22. Advocate Harris submitted that rule 37 of RCCR 2007 imposes three requirements:

> *"(1) There must be a question or issue between HMRC and a party to the proceedings (in this case, Mr Gresh);*
> *(2) Which arises out of, is related to, or is connected with, any relief or remedy claimed in the proceedings; and*
> *(3) It would be just and convenient to determine that question or issue, as between HMRC and that party as well as the parties to the proceedings."*

23. He said that it is entirely clear that HMRC has an interest in the issue before the Court, because the distributions, if valid, will constitute taxable income in the hands of Mr Gresh. He argued that HMRC's legal rights to collect tax will be affected by the outcome of Mr Gresh's application.

24. Advocate Harris was at pains to point out that HMRC is not asking the Royal Court to determine if any UK tax is payable by Mr Gresh, nor is it asking the Court to collect any tax from him; such proceedings, he acknowledged, will have to be heard in the UK. HMRC are not conceding whether what is proposed will be effective for UK tax purposes. In paragraph 3 of HMRC's first skeleton argument dated 15th December 2008, it said

> *"The [Hastings-Bass] Proceedings are driven entirely by the UK tax considerations of Mr Gresh. As presently made, the Distribution represents fully taxable income of Mr Gresh. RBC has entered into complex alternative arrangements intended to provide Mr Gresh with an equivalent distribution to be made on terms by which UK tax will be wholly avoided. Whether these alternative arrangements will achieve this objective is another matter entirely and HMRC expresses no view whatsoever in that regard."*

25. In paragraph 10 of Simon Hart's second affidavit, sworn on 10th March 2009, he further explains:

> *"For the sake of clarity, HMRC will accept the final decision of the Guernsey courts regarding the status of the Distribution, provided that it is given the opportunity to participate in RBC's Application and make submissions on the*

> *applicability of the Hastings-Bass principle. It follows that provided that HMRC can participate in these proceedings then, whether RBC's application is accepted or dismissed, that will be the end of the matter as regards the status of the Distribution."*

26. The validity or otherwise of the distributions made by RBC to Mr Gresh is the subject matter of the *Hastings-Bass* application and is also, Advocate Harris argued, a question or issue between HMRC and Mr Gresh arising out of, or connected with the relief claimed by Mr Gresh in his application. So, he said the first two requirements of rule 37 are satisfied.

27. Advocate Harris argued that there were essentially two reasons why it is just and convenient for HMRC to be joined to Mr Gresh's application. Firstly, if they are not joined, they will not be bound by the decision of the Royal Court and the issue of the validity of the distributions will have to be dealt with in proceedings before the Special Commissioners, especially if either there were points of law that had not been raised before the Royal Court which HMRC might consider would have affected the decision, or if the evidence before the Royal Court had not been adequately tested in cross-examination. Thus, there would be a duplication of proceedings and a possibility of different findings being reached on the same issue.

28. HMRC also argued that in the absence of HMRC, there will be no effective defendant to Mr Gresh's application which would be especially important as this is the first time the rule in *re Hastings-Bass* has come before the Royal Court; the scope of the jurisdiction remains contentious in the United Kingdom and needs to be carefully considered if it is to be correctly applied. Advocate Harris added that there would be no unfairness caused to any party if HMRC is joined.

29. Finally, the joinder of HMRC would be entirely consistent with the overriding objective in Part 1 of the RCCR 2007.

Advocate Davies' submissions on behalf of Mr Gresh

30. Advocate Davies argued that there is no issue or question in the proceedings between HMRC and either Mr Gresh or RBC. The issues at stake are whether the *Hastings-Bass* principle (however formulated) applies in Guernsey and, if so, whether the principle should be applied in this case to render the distributions void *ab initio*. The issues are solely matters of Guernsey law and arise between Mr Gresh and RBC only.

31. He argued that HMRC's interest is in the UK tax consequences that may follow from the decision of the Royal Court and those consequences are not in issue in the proceedings. At best, HMRC's interest in the proceedings is indirect and contingent on the orders that the Royal Court will actually make. He relied upon a judgment of Kerr LJ in *Sanders Lead Co Inc v Entores Metal Brokers [1984] 1 WLR 452 at page 460* where, when considering the meaning of RSC Ord 15, Rule 6(2)(b)(ii), he said:

> *"In my view the rule requires some interest in the would-be intervener which is in some way* ***directly*** *related to the subject matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action is not enough.*

> ...
> *... there must be some **direct** interest in the subject matter ... though even in such cases the interest of **the intervener must raise an existing issue and not merely a contingent one …**"* [emphasis added]

32. Advocate Davies also relied upon a decision of the Royal Court of Jersey in the *Seaton* Judgment, handed down on 19th March 2009. The Jersey Court granted an application, pursuant to the *Hastings-Bass* principle, declaring to be of no effect, two partial withdrawals made from a Canada Life Bond held by a trustee and distributed to a UK resident but non-domiciled beneficiary. Before the funds were withdrawn, advice had been taken from PWC in England as to the tax consequences to the beneficiary. As I understand the facts set out in the judgment, the trustee misunderstood the tax advice when it formally resolved to withdraw the funds from Canada Life, believing a tax liability of some £100,000 would arise, whereas the income tax actually payable amounted to £1,522,300. If, instead of withdrawing funds, the Trustee had surrendered the whole policy, or segments thereof, the tax liability would have been much less.

33. Regarding the involvement of HMRC, the *Seaton* Judgment states at paragraphs 22 and 23:

> *"22. PWC wrote to HMRC on 19th August 2008 giving notice of the possibility of this application being made and asking whether HMRC wished to make representations to the Court or to appear. After further correspondence HMRC wrote to PWC on 6th February 2009 indicating that it did not intend to appear at the hearing but had written directly to the Court by letter of the same date which we have received.*
>
> *23. Before commenting on the points raised by HMRC, we should make it clear that whilst we can appreciate the courtesy extended by PWC to HMRC, the latter has no interest in the application (only in the UK tax consequences that may flow from it) and therefore no **locus standi** upon which to seek to intervene. That being said, we are prepared to extend the same courtesy to HMRC by dealing with the points they raise in their letter ……".*

34. Advocate Davies questioned the accuracy of an affidavit sworn in connection with HMRC's application in the matter now before me. In the affidavit of Simon Hart (of HMRC Solicitor's Office) sworn on 27th April 2009, he said that he had not been involved in the Jersey matter, but he understood from a colleague:

> "*that the decision taken to write to the Royal Court of Jersey rather than to apply to appear at the hearing before the Royal Court of Jersey was due principally to the shortage of time available to HMRC's Solicitor's office in which to instruct local Advocates and to prepare a case after HMRC were notified on 23rd January 2009 of the 12th February 2009 hearing date. Instead, the letter dated 6th February 2009 was sent to the Royal Court of Jersey, which is quoted at length in para 23 of the Commissioner's judgment".*

35. In my view, nothing significant turns on the possible discrepancy between these two explanations as to when HMRC first learned of the application, or the hearing date in that matter; as I explain later, I have reached my decision without drawing assistance from the decision in the ***Seaton*** Judgment.

36. Advocate Davies relied upon the Jersey Court's finding that HMRC has no interest in the application *"only in the UK tax consequences that may flow from it"*. Although HMRC had not argued its case before the Jersey Court, Advocate Davies refuted the suggestion that the issue had not been properly considered by the Court.

37. Advocate Davies submitted that there are five factors to be considered in relation to the test of whether it is just and convenient for HMRC to be joined to the proceedings.

38. The first was Advocate Harris' submission that the *Hastings-Bass* application would otherwise be undefended. Advocate Davies submitted there is no requirement for it to be defended; the burden rests with the Applicant to demonstrate the relevant legal principles and to satisfy the court on the facts of the case. Mr Gresh will rely heavily on the materials produced by RBC, in particular the affidavit of Lisa Crawford which appears to contain a full and proper disclosure of the evidence, as required by the court.

39. He submitted the parties had been frank in their submissions, especially legal submissions. In reply to a criticism by Advocate Harris, he acknowledged that the text of a speech on the subject of the *Hastings-Bass* principle delivered by Lord Walker had not been included with the materials but as a text, it is informative rather than persuasive as a judgment would be. There may be other similar materials or academic content which has not been produced because it would be impossible to produce it all.

40. The second factor he relied upon concerned the submission that this is the first *Hastings-Bass* application in Guernsey. He was critical that HMRC has declined many opportunities to participate in similar proceedings in England and elsewhere. He suspects that the motive of HMRC is to seek to argue that the *Hastings-Bass* principle should be interpreted more narrowly in Guernsey than elsewhere. HMRC's tax bulletin, Issue 83; pages 1292 – 1294, indicated HMRC's views on some aspects of the principle. HMRC wrote, at page 1293, (right hand column):

> *"An interesting, but perhaps not surprising, feature of the majority of these cases is that the unintended consequence of the mistake by the trustees was a liability to tax. For this reason HMRC have been interested in this area of the law, as it develops and is shaped by the courts. In recent years it has been the usual practice of HMRC to decline invitations to be joined as a party in cases where the court is being asked to set aside a transaction in reliance on the principle.*
>
> *However, in Sieff v Fox Lloyd LJ observed in paragraph 83 that the court's task might be easier in some cases if HMRC did not always decline the invitation to take part in cases of this kind. In the light of that observation, and our increasing concern (which is shared by many commentators) that the principle as currently formulated is too wide in its scope, HMRC will now give*

> *active consideration to participating in future cases where large amounts of tax are at stake and/or where it is felt that we could make a useful contribution to the elucidation and development of the principle. We will be particularly ready to intervene in cases where there would otherwise be no party in whose interest it would be to argue against the application of the principle."*

41. Advocate Davies submitted it cannot be just and convenient to allow HMRC to come to Guernsey to argue for a narrower interpretation of the principle than applies in HMRC's home jurisdiction.

42. With regard to the amount of tax at stake, he pointed out that in the *Seaton* Judgment in Jersey, the amount of tax involved appeared to be three times the amount concerned in Guernsey, yet HMRC declined the opportunity to intervene.

43. The third factor to which Advocate Davies drew attention was the risk of a multiplicity of proceedings. Advocate Davies regarded HMRC's comment that it will not be bound by the decision as to the validity of the distributions if it is not allowed to participate in the hearing as being in the nature of a threat. He was surprised that HMRC should issue a threat in such a manner and that HMRC would not respect a decision reached by the Royal Court when it is clearly the court of competent jurisdiction to deal with matters arising under the trust.

44. He criticised HMRC for being coy in not identifying what will be the tax consequences of the court's decision and by reserving its position in the manner indicated in Mr Hart's affidavit.

45. The fourth factor argued was that it would be unfair for HMRC to be joined as its intervention would add unnecessarily to the length and expense of the proceedings. For example, the proposed hearing date for the application of 28th May 2009 would almost inevitably have to be vacated if HMRC is allowed to intervene.

46. The fifth factor was that it would be unfair on the parties and in particular Mr Gresh, for HMRC to be given the opportunity of indirectly enforcing what is a foreign revenue law. The substance of the intervention was to enable HMRC to preserve, or establish, a tax liability so that HMRC could then collect the tax due in its own home jurisdiction. He referred to paragraph 5 – 023 of the Fourteenth Edition of Dicey Morris and Collins on the Conflict of Laws:

> *"5-023 Direct enforcement occurs where a foreign State or its nominee seeks to obtain money or property, or other relief, in reliance on the foreign rule in question. But indirect enforcement is also prohibited, for a foreign State cannot be allowed to do indirectly what it cannot do directly. ……. Rule 3(1) relates only to* ***enforcement****, but it does not prevent* ***recognition*** *of a foreign law of the type in question, and it is sometimes difficult to draw the line between an issue involving merely recognition of a foreign law and indirect enforcement of it."*

47. He said this is plainly an example of indirect enforcement of a foreign revenue law. HMRC are seeking to influence the outcome of the application before the Guernsey court and are threatening not to be bound by the court's decision if they are not

allowed to intervene. It is distinguishable from the facts of *Re State of Norway's application (1990) 1A.C*. HMRC's participation in the Guernsey application would be different, and would go beyond, an application for the provision of information.

48. Advocate Davies also referred to a recent decision of the Royal Court of Jersey *In the matter of Ellastone Limited 5th June 2008*. HMRC had asked the English Solicitors acting in the matter for an adjournment whilst it considered leave to intervene. It is implicit in the judgment that the court declined to do so in reliance upon the comments at paragraphs 5-020 and subsequent paragraphs of Dicey and Morris (see for example paragraph 18 of the judgment).

Crown-Advocate Nicol-Gent's Submissions as *Amicus Curiae*

49. In his helpful submissions as *amicus*, Crown Advocate Nicol-Gent adopted the arguments put forward by Advocate Davies on behalf of Mr Gresh. He submitted that HMRC are seeking to enforce indirectly UK Revenue Law through their participation in the Guernsey proceedings. HMRC's application therefore falls squarely within the rule in *Government of India v Taylor*. Although in *Re State of Norway's application* the law was developed to permit evidence gathering for use in the home jurisdiction of the applicant, it was not analogous to the situation in the present case where HMRC is not seeking to gather information for use in proceedings elsewhere, but is seeking to influence the outcome of the case and, furthermore to influence the development of Guernsey law as to whether it should apply the rule in *Hastings-Bass* and, if so, how it should interpret that rule.

50. Interestingly, Crown Advocate Nicol-Gent also questioned whether *Re State of Norway's application* would still be regarded as good law when governments, including the States of Guernsey, have negotiated tax exchange information agreements and there are statutory provisions in place to enforce evidence gathering by foreign revenue collectors.

51. The *amicus* was concerned by the suggestion that HMRC would not consider itself to be bound by the decision of the Royal Court if it was not a party. He said that flies in the face of normal rules of comity between nations. It is also inconsistent with experience in other cases where Guernsey courts give recognition to the decisions of English courts and vice versa.

52. He was critical of HMRC's apparent assumption that the Royal Court would be likely to follow English law in its interpretation of the rule in *re Hastings-Bass* when that is not necessarily the case as our trust law is statutory based and is not identical to English Trust Law and he mentioned, for example, the requirement of a trustee in Guernsey to act *"en bon pére de famille"*. Advocate Nicol-Gent pointed out there was no requirement for there to be a defendant to the application. The court is being asked to exercise its supervisory jurisdiction in respect of trust matters and as such it assumes an inquisitorial role. Furthermore, the court will not grant the relief sought unless the applicant has made out a case to the satisfaction of the court.

Advocate Greenfield's Submissions on behalf of RBC

53. Having withdrawn its own *Hastings-Bass* application, RBC has adopted a neutral stance to Mr Gresh's application and has not objected to him using the affidavits and legal submissions filed by RBC in connection with the earlier application.

54. Advocate Greenfield made two observations. First, he assumed that HMRC's position was that the Royal Court of Jersey's judgment in the ***Seaton*** Judgment was wrong. Second, he refuted any suggestion of any fault on the part of RBC in making the distributions.

Advocate Harris' Submissions on behalf of HMRC in Reply

55. Advocate Harris argued that the ***Seaton*** Judgment is of no assistance to Mr Gresh as there was no application before the Jersey Royal Court for HMRC's joinder and the Court heard no submissions from HMRC on the question of its joinder. Further, there does not appear to have been any discussion of the true nature of HMRC's interest in the case and none of the points raised or in issue in the present application by HMRC appear to have been considered. In any event, they were not fully or properly argued before the Jersey Royal Court.

56. Advocate Harris denied that there was any discrepancy between what is said in the judgment and in Mr Hart's affidavit as to the date on which HMRC was advised of the date of the hearing which, he said, was only in late January, too late to participate.

57. Advocate Harris assumed it will be of assistance to the Royal Court to have a party to the proceedings who will be making competing legal submissions and testing the evidence and arguments of the other parties, especially as this is the first application in Guernsey seeking to apply the rule in *Hastings-Bass* and as the scope of that rule is to some extent contentious.

58. He referred to the lecture or speech delivered by Lord Walker (then Sir Robert Walker), at King's College London on February 26th 2002, in which he expressed some disquiet as to the manner in which the principle had been developed in the courts. Advocate Harris expressed surprise that the lecture had not been referred to by the other parties to the proceedings, especially as it is so well known and is referred to in many text books. He cited it in support of the proposition that there might be relevant authorities overlooked by the other parties which could be of assistance to the court in determining the scope of the principle.

59. Advocate Harris disputed Mr Gresh's submission that it would be unfair to him if HMRC is joined as a party. Advocate Harris submitted that it is not a proper basis on which to object to the joinder of a party.

60. As to the possibility that the joinder might cause delay in the outcome of the proceedings, Advocate Harris pointed out that two years have already elapsed since RBC became aware there might be a problem and more than two years have elapsed since the distribution was made. By comparison with the delays that have already occurred, any further delay resulting from the joinder of HMRC would not be significant.

61. He repeated a number of the submissions he had already made and asserted that the legal test as to whether HMRC have a sufficient interest in the application by Mr Gresh is clearly made out. HMRC has a direct and immediate interest in the validity or otherwise of the distributions made by RBC to Mr Gresh. The question of whether those distributions are valid or void is the very issue on which Mr Gresh is seeking relief from the Royal Court in his application.

62. He repeated that HMRC's legal rights to collect income tax may be affected by the outcome of Mr Gresh's application but its proposed intervention does not amount to the direct or indirect enforcement of a foreign revenue statute as the concept of enforcement amounts to collection or recovery of tax and there is no issue of that being pursued in Guernsey. Ascertaining the validity of the distributions assists in computing Mr Gresh's tax liability but it does not amount to indirect enforcement.

Conclusion

63. I agree with Advocate Harris that each of the three limbs of rule 37(1)(b)(ii) must be satisfied before I can grant HMRC's application but I am unable to agree with Advocate Harris' submission that it is entirely clear that HMRC has an interest in the issue that is before the court in the *Hastings-Bass* application.

64. Advocate Harris has carefully defined the issue as being the validity, or otherwise, of the distributions made by RBC to Mr Gresh. I am not convinced that is the correct way of defining the issues and I have endeavoured to clarify in my mind what the issues are.

65. My judgment is that in Mr Gresh's *Hastings-Bass* application, the issue before the Court is whether RBC's decisions to make the distributions to Mr Gresh were made in such circumstances that the court should declare the distributions to be void *ab initio*. That requires the Court to establish the circumstances in which the decisions were made and, in particular, to examine the information that was then available to RBC. The Court will then have to decide whether, as a matter of Guernsey law, it has the power to set aside the decisions in such circumstances and, finally, if it does have such power, the Court will have to decide whether to exercise its discretion to set aside the decisions in this case.

66. The parties who are directly affected by the *Hastings-Bass* application are RBC, Mr Gresh as a beneficiary of the trust and any other beneficiaries. (When RBC tabled its own *Hastings-Bass* application, I was satisfied that no other beneficiaries needed to be joined as a party. I have not addressed that issue with Mr Gresh's counsel in relation to Mr Gresh's application, but I will do so once I have delivered this judgment.) The issue is governed by Guernsey law and the Royal Court is the court of competent jurisdiction to deal with the issue.

67. RBC, as trustee of a Guernsey trust, is entitled to have regard to the tax consequences of any distribution it may make to a beneficiary and is entitled to administer the trust in a way that is tax efficient in order to maximise the benefits available for a beneficiary. In doing so, it is entitled to seek assistance from the Royal Court, if it so

wishes. However, it is not for the Royal Court to determine the tax liability that may be incurred by a beneficiary who receives a distribution in another jurisdiction.

68. On the other hand, the issue between HMRC and Mr Gresh is whether he has, or will have, any liability to UK Income Tax arising from the distributions and/or from the scheme that is now proposed. It appears that Mr Gresh does not dispute the contention made by HMRC (in the passage from paragraph 3 of its first skeleton argument that I quoted above) that, at present, the distributions represent taxable income. The question whether any tax liability will arise from the scheme that is now proposed if Mr Gresh's *Hastings-Bass* application succeed is a matter of UK law which will not be determined by the Royal Court especially as HMRC has expressly reserved its view.

69. I have therefore concluded that the issue to be determined in the *Hastings-Bass* application is not the issue that is to be determined between HMRC and Mr Gresh. Even if I am wrong and it could properly be said that the question of Mr Gresh's UK income tax liability arises from, relates to, or is connected with the subject matter of the *Hastings-Bass* application, the requirements of rule 37 of the RCCR would not be satisfied because that question will not be determined by the Royal Court.

70. Next I have to consider whether the third requirement of rule 37 is satisfied namely that it would be just and convenient for HMRC to be joined.

71. In reserving its view as to the tax consequences of the proposed scheme, the only concession that HMRC has made is that if it is allowed to intervene and make submissions, it will accept the decision of the Guernsey Courts as to the validity or otherwise of the distributions and otherwise it will not be bound by the Royal Court's decision.

72. HMRC say that the question of the validity or otherwise of the distributions may have to be separately litigated in proceedings before the Special Commissioners. I do not understand why that should be so when the Royal Court is the court of competent jurisdiction to determine that question. I am surprised that HMRC considers it will not be bound by the decision but such an attitude does not, in my opinion, entitle it to join in the Guernsey proceedings. I accept all that Crown Advocate Nicol-Gent said about the comity between nations and the respect that courts normally have for each other's decisions.

73. I reject HMRC's submission that without the participation of HMRC, Mr Gresh's *Hastings-Bass* application will not be effectively defended. There has been no suggestion that RBC and Mr Gresh have failed in their obligation to make full and frank disclosure of all relevant evidence; all the relevant evidence will therefore be before the Court. The Court is able to adopt an inquisitorial role if necessary. I am not aware that there are any substantial factual disputes that will have to be determined but, if necessary, the Court can ask the *amicus* to assist. (After this judgment has been delivered, I will discuss with counsel for Mr Gresh and RBC whether to involve the *amicus* further.)

74. Advocate Harris argued that it is necessary for HMRC to intervene so as to ensure that the Court correctly interprets the legal principle involved, especially as the

Hastings-Bass jurisdiction has developed on a piecemeal basis and also because the question of whether the distributions are void or merely voidable requires careful consideration.

75. As I have said, these issues are governed by Guernsey law so the Court will have to establish what the law of Guernsey in this area is; it will not simply be applying English law. In doing so, the starting point is to look at the law of similar jurisdictions. The Judicial Committee of the Privy Council recognised in *Vaudin v Hamon* that legal arguments may be based on analogy with the law of similar jurisdictions and may have force if "*the system of law to which appeal is made in general, or the relevant portion of it, is similar to that which is being considered, and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter"* (page 164).

76. Further, the Guernsey Court of Appeal discussed the influence of English law on our law of trusts in *Stuart-Hutcheson v Spread Trustee Company Ltd* at para 20:

> *"20 That, prior to the 1989 Law, trusts had become part of Guernsey law is not in dispute; what is in issue is the extent to which the general law of trusts in England had become part of the law of Guernsey. To that question the answer is, in my judgment, to be found by a consideration of the process by which trusts came to be part of Guernsey law. They did so because settlers established trusts, whether inter vivos or by will the validity of which was recognised and, where necessary, enforced by the Royal Court. In addition the Legislature in a number of Laws recognised and adopted the notion of trusteeship. In thus importing, as it were, the English concept of a trust and trustees those concerned must be regarded as having intended to introduce the trust concept with it usual incidents, unless they were inconsistent with some provision of Guernsey customary or statute law or otherwise inapposite or inapplicable."*

77. Hence, English decisions interpreting the *Hastings-Bass* principle will be a starting point but they will need to be considered in the light of Guernsey customary and statutory law. HMRC can make its views known to the Royal Court even if it is not joined as a party.

78. HMRC has been notified of Mr Gresh's application and hence it has the opportunity, if it wishes, to make written submission on the law which the Court will take into account. Advocate Harris was concerned that there may be relevant authorities not drawn to the attention of the court. The court has given notice of these proceedings to HMRC so HMRC may make its legal submissions, drawing all the authorities it seeks to rely upon to the attention of the court and arguing for whatever interpretation it seeks to urge upon the court. Again, that will be considered by the court and, if it considers necessary, it can seek the assistance of an *amicus*.

79. In my view, this is a case where HMRC are seeking indirectly to enforce a foreign revenue law. Their intention appears to be to make representations on what Guernsey law is, or should be, in this area and it has already stated that courts elsewhere have gone too far in their development of the principle. Further HMRC are seeking to

argue that the distributions to Mr Gresh should not be set aside in order to maintain the liability to UK Income Tax that exists at present. I therefore believe that the case comes within the principle established in *Government of India* and described in the extract from Dicey and Morris quoted above.

80. Counsel devoted much of their submissions to the Jersey decision in the *Seaton* Judgment. With respect to them, I wish to say that I am comforted to see that I have reached the same conclusion as the Royal Court of Jersey found in the *Seaton* Judgment but whilst I take note of the Jersey decision, as it gives little or no indication of how the issue was argued in the Royal Court of Jersey (if it was argued at all), the weight that I have been able to attach to the decision is limited and I have therefore reached my findings independently of that decision.

81. I therefore dismiss the application by HMRC. If there are any applications arising from this decision, they are to be submitted in writing. I direct counsel for Mr Gresh to list his application in the Interlocutory Court on Friday 22nd May for further directions. I ask counsel for RBC and the *amicus* also to be present.

