

Judgment 42/2009

Gresh v (i) RBC Trust Company (Guernsey) Ltd and (ii) HM Revenue and Customs – Court of Appeal (Civil Appeal 405) – 16 September 2009

Royal Court Civil Rules, 2007 (Rule 37) – Trusts (Guernsey) Law, 2007 (Section 69) and the rule in Re Hastings-Bass – appeal from refusal of application by HMRC to be joined in action by Mr Gresh – Matters to be established when invoking Rule 37 – held that HMRC have a direct interest in the subject matter of the action – not an attempt to enforce a foreign revenue claim – just and convenient to decide the issue between HMRC and Mr Gresh – appeal allowed with costs

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

Civil 401

The 16th September, 2009 before John Vandeleur Martin, QC, presiding, Geoffrey Charles Vos, QC and Clare Patricia Montgomery, QC

EMMANUEL GRESH

Respondent/"Mr Gresh"

V

RBC TRUST COMPANY (GUERNSEY) LIMITED

Respondent/"RBC"

AND

HM REVENUE AND CUSTOMS

Appellant/"HMRC"

In the matter of the appeal by HMRC from the decision of the Royal Court on 29 May 2009 refusing their application to be joined as parties in the proceedings initially brought by RBC Trust Company (Guernsey) Limited and subsequently by Mr Gresh;

THE COURT this day having heard Advocates Ian Swan, for HMRC, Simon Davies for Mr Gresh and John Greenfield for RBC, and Crown Advocate Philip Nicol-Gent as amicus curiae, GAVE JUDGMENT in the attached terms and : -

1. GRANTED LEAVE to appeal;

2. ALLOWED the appeal and ALLOWED HMRC to be joined in the proceedings as an intervener; and
3. ALLOWED HMRC's appeal as to costs and ORDERED Mr Gresh to pay HMRC's costs of both the joinder applications in this Court and in the Royal Court;

AND THE COURT, having heard further from counsel for Mr Gresh and for HMRC, REFUSED an application by Mr Gresh for leave to appeal to Her Majesty in Council and for a stay of the Orders made this day pending the determination of any such appeal.

K H TOUGH
Registrar of the Court of Appeal

IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY

(CIVIL DIVISION)

Wednesday 16 September 2009

Before:

**John Martin Esq, QC, Presiding
Geoffrey Vos Esq., QC
Clare Montgomery QC**

Between:

EMMANUEL GRESH

Applicant

and

RBC TRUST COMPANY (GUERNSEY) LIMITED

Respondent

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Applicant to be joined as a party

Advocate Ian Swan, for the applicant to be joined as a party, the Commissioners for Her Majesty's Revenue and Customs.

Advocate Simon H. Davies, for the Applicant, Mr Gresh.

Advocate J.P. Greenfield, for the Respondent, RBC Trust Company (Guernsey) Limited.

Crown Advocate W.P.T. Nicol-Gent, as Amicus Curiae.

Judgment of the Court

Vos J.A.

Introduction

1. The Commissioners for Her Majesty's Revenue and Customs ("HMRC") seek leave to appeal against the Deputy Bailiff, Richard John Collas's decision handed down on 29th May 2009 refusing their application to be joined as parties to these proceedings. On 8th June 2009, the Deputy Bailiff refused leave to appeal from his decision. On 22nd June 2009, HMRC applied for leave to appeal to the Court of Appeal, and on 2nd July 2000, Sir de Vic Carey, sitting as a single Judge of the Court of Appeal, ordered that the leave application be adjourned to be heard at the same time as the hearing of any substantive appeal.

2. RBC Trust Company (Guernsey) limited (“RBC”) is the sole trustee of a pension fund known as The Abacus Global Approved Managed Pension Trust, established by a trust instrument dated 27th February 1987. A sub-scheme called the Banker’s Trust International Pension Scheme (the “Sub-Scheme”) was created in January 1993. Emmanuel Gresh was born on 1st December 1955 and became a member of the Sub-Scheme, when he was an employee of Banker’s Trust.
3. On 10th October 2006, HMRC advised Frank Hirth plc, Mr Gresh’s tax advisers in England, that Mr Gresh’s pension was not taxable under the special UK tax rules for benefits received under “employer-financed retirement benefit schemes”, and therefore assuming that the “income” to which Mr Gresh was entitled under the Sub-Scheme represented “payment of pension income”, it would only be taxable in the UK if it were remitted to the UK.
4. On 17th and 20th November 2006, RBC decided to make a distribution to Mr Gresh of all the funds held for Mr Gresh’s benefit under the Sub-Scheme (the “Distribution”). A total of £1,462,280.51 was paid to Mr Gresh in the form of a lump sum to Mr Gresh’s offshore bank account at UBS AG Jersey. It may be noted that it is the Distribution which is now said by the HMRC to have attracted tax in the UK, but no assessment has yet been issued in respect of that tax by HMRC.
5. In 2007, it was realised by RBC that the Distribution may not have amounted to the payment of a ‘pension’, since it did not involve any periodical payments over time, and further that if the Distribution were legally effective, it would be treated as a lump sum and be subject to 40% UK personal income tax under the rules for benefits received from employer-financed retirement benefit schemes.
6. Remedial steps were quickly taken, and on 3rd and 4th April 2008, the Distribution was revoked, and funds were provided to RBC on loan, which were used to fund a 3 instalment-pension for Mr Gresh from Freedom 2005 International Pension Plan (“Freedom”). RBC would then be repaid the loan it had obtained and used to fund Mr Gresh’s Freedom pension, from the amount returnable to the Sub-Scheme under any order of the Guernsey Court declaring the Distribution void, whether before or after 6th April 2008. These connected steps are referred to as the “New Scheme”.
7. In these circumstances, RBC first issued proceedings on 15th August 2008, for an order pursuant to section 69 of the Trusts (Guernsey) Law, 2007 and the rule in Re Hastings-Bass [1975] Ch 25, that the Distribution be declared void ab initio. HMRC applied to be joined in to that application on 11th November 2008. On 19th March 2009, RBC withdrew its application with costs reserved, and on 24th March 2009, Mr Gresh issued these proceedings for an order in like terms to those that had been sought by RBC.

HMRC’s application

8. HMRC applied on 27th March 2009 to be joined in to Mr Gresh’s application under Rule 37 of the Royal Court Civil Rules 2007, which provides as follows:-

“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”.

9. It is common ground that Rule 37, therefore, requires the following three matters to be established:-
- (1) There must be a question or issue between HMRC and a party to the action.
 - (2) The question or issue must arise out of or relate to or be connected with any relief or remedy claimed in the proceedings.
 - (3) It must be just and convenient to determine that issue as between him and that party as well as between the parties to the proceedings.
10. It is also clear that, even if these three requirements are satisfied, there is an overriding discretion in the court, as appears from the opening words of Rule 37 to the effect that “[t]he Court **may** in any proceedings order ...” (emphasis added).
11. The Deputy Bailiff held that HMRC had satisfied none of these requirements because (in outline):-
- (1) The issue between the HMRC and Mr Gresh was whether UK tax is payable arising from the Distribution and/or the New Scheme.
 - (2) The issue between the parties to the action was the entirely different one of whether the Distribution was valid or void ab initio.
 - (3) Even if the issues were the same, the requirements would not be met because the Guernsey Court would not be deciding the issue as to the charge to UK taxation.
 - (4) It would not be just and convenient for HMRC to be joined because:-
 - (a) The fact that HMRC have said they will not, unless they are joined, be bound by the Guernsey Court’s decision as to the validity of the Distribution does not justify its joinder.
 - (b) The issue of the validity of the Distribution will not have to be separately litigated if HMRC are not joined.
 - (c) It was wrong to suggest that the proceedings will not be defended or properly defended unless HMRC are joined.
 - (d) HMRC can anyway make written submissions.
 - (e) HMRC are seeking here indirectly to enforce a foreign revenue law.

Grounds of appeal

12. HMRC's main grounds of appeal are as follows:-

- (1) The Deputy Bailiff wrongly characterised the issue between HMRC and Mr Gresh, which was simply the validity of the Distribution. That issue is indeed to be determined in the Guernsey proceedings, and the issue of Mr Gresh's UK tax liability is connected with it.
- (2) HMRC seek to take part in an issue that affects their right to tax. This requires the Guernsey Court to recognise their right to tax, not to enforce it.
- (3) It was indeed just and convenient that HMRC should be joined because:-
 - (a) HMRC will not be bound by the Guernsey Court's decision as to the validity of the Distribution unless they are joined, so the issue will indeed have to re-litigated.
 - (b) The proceedings will not be properly defended unless HMRC are joined.

Leave to appeal

13. It is clear that the Court of Appeal will only grant leave to appeal if there is a reasonable chance of success, and where the exercise of a discretion is challenged, as it is here, it has to be shown that the decision was clearly wrong.
14. Nonetheless, we have taken the clear view that leave should be allowed, because there is a reasonable chance of success. If HMRC's legal grounds set out above were to be right (and we think them to be clearly arguable), the basis of the exercise of the Deputy Bailiff's discretion would be thrown into doubt, and this Court would have to exercise the discretion afresh.
15. We turn then to deal with HMRC's substantive grounds of appeal.

The issues arising between HMRC and Mr Gresh

16. The main issues to be decided between Mr Gresh and RBC seem to us to be:-
 - (1) Whether, in accordance with section 69 of the Trusts (Guernsey) Law, 2007 and the rule in Hastings-Bass, the Distribution should be declared void ab initio, or voidable?
 - (2) What was the effect of the revocation?
17. The Deputy Bailiff held that the issue arising between HMRC and Mr Gresh was whether the Distribution and/or the New Scheme is liable to UK taxation, and plainly such an issue or issues may arise now or in the future in England between them. But the issue of whether the Distribution is liable to UK taxation (the "Taxation Issue") will never arise if HMRC are joined to these proceedings, and the Distribution is declared void ab initio by the Royal Court, and HMRC adhere to their agreement to abide by the Royal Court's decision (if they are allowed to participate in the hearing).

Conversely, of course, the Taxation Issue will arise if the Royal Court refuses to declare the Distribution void. In that event, there may well be a contest before the Tax Tribunal in England. But, in that contest, HMRC will not contend that the Royal Court's decision was wrong or should not be recognised, unless it has not been joined and allowed to participate in the argument before the Royal Court.

18. We have considered carefully the issues that may be said to have arisen between HMRC and Mr Gresh. HMRC has claimed UK tax arising from the Distribution. Though no assessment has yet been issued, Mr Gresh has already acted on that claim by procuring the revocation of the Distribution, and bringing these proceedings to have the Distribution declared void. HMRC has contended that the revocation was ineffective and that the Distribution was valid, and so taxable.
19. It seems to us, therefore, that the issues between HMRC and Mr Gresh that have arisen are as follows:-
 - (1) Whether the Distribution was void or valid.
 - (2) Whether the Distribution is subject to UK tax.
20. Assuming that this application is determined before the issues are decided between HMRC and Mr Gresh in the UK (and if HMRC is not joined and so has not agreed to be bound by the Royal Court's decision), those issues may appear somewhat differently as follows:-
 - (1) Whether the decision of the Guernsey Court should be recognised and applied;
 - (2) If the Guernsey Court decision is not applied, whether the Guernsey Court was right to declare the Distribution void or (possibly) voidable; and
 - (3) Whether, on the basis of the previous decisions, the Distribution is subject to UK tax in Mr Gresh's hands.
21. There are a number of possible permutations, but, in essence, whichever way one regards the issues that have arisen between HMRC and Mr Gresh, we take the view that the primary question that needs to be resolved between them is whether the Distribution is valid or void. This is the essential precursor to any liability to UK tax. If the Distribution is void, there will be no UK tax upon it. If it is valid or voidable, there will or may be such a charge to UK tax.
22. Thus, in substance, the primary issue between HMRC and Mr Gresh is very similar or identical to the first issue before the Royal Court as between Mr Gresh and RBC.
23. At paragraph 69 of his judgment, the Deputy Bailiff said the following: "*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*".
24. We think that the Deputy Bailiff failed to acknowledge that the issue of whether the Distribution was valid or void would arise both between Mr Gresh and the HMRC,

and between Mr Gresh and RBC. The Deputy Bailiff focused on the Taxation Issue without acknowledging that the question of the validity of otherwise of the Distribution was a prior and potentially determinative issue. Moreover, the Deputy Bailiff seems to have thought that the issues had to be identical in order to engage Rule 37. We think he ought to have accepted that it was sufficient for the issue of the validity of the Distribution arising between HMRC and Mr Gresh to have been shown to be related to or connected with the claim that the Distribution should be declared void or voidable in these proceedings. In our judgment, HMRC has shown the necessary relation and connection between these issues.

25. We think also that the issue between HMRC and Mr Gresh falls within the spirit of the rule, as described by Kerr LJ in Sanders Lead Inc v. Entores Limited [1984] 1 W.L.R. 452 at page 460:

*“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.** It may well be impossible, and would in any event be undesirable, to attempt to categorise the situations in which the interests of would-be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that **there must be some direct interest in the subject matter,** such as an alleged infringement of a patent, trademark or copyright with which the intervener is concerned (see Tetra Molectric Ltd. v. Japan Imports Ltd. [1976] R.P.C. 547 and Rexnord Inc. v. Rollerchain Distributors [1979] F.S.R. 119) though even in such cases **the interest of the intervener must raise an existing issue and not merely a contingent one:** see Spelling Goldberg Productions Inc. v. B.P.C. Publishing Ltd. [1981] R.P.C. 280” (emphasis added).*

26. HMRC do not just have a commercial interest in the outcome. They have a direct interest in the subject matter of the action, namely the validity of the Distribution. Furthermore, HMRC raises an existing issue, not a contingent one, since the event giving rise to the alleged charge to tax, namely the Distribution, has already occurred.
27. Finally, in this connection, we would mention the judgment of the Royal Court of Jersey in Seaton Trustees Limited 19th March 2009, where that court said at paragraph 23 that HMRC had no interest in a similar Hastings-Bass application, “*only in the UK tax consequences that may flow from it*”. If the circumstances were the same in that case as they are here, we would regard that approach as mistaken for the reasons we have given above.

Is this an attempt to enforce a foreign revenue claim?

28. In Re State of Norway’s Application (Nos. 1 and 2) [1990] 1 A.C. 723, the House of Lords held that, although the courts would not assist in the direct or indirect enforcement in England of a revenue law of a foreign state, such a rule did not extend to the seeking of assistance in obtaining evidence to be used for the enforcement of the revenue laws of the foreign state in that state itself.

29. Lord Goff endorsed a statement in Dicey & Morris as to indirect enforcement at page 809E as follows:

“... *indirect enforcement occurs*

- (1) *Where the foreign state (or its nominee) in form seeks a remedy which in substance is designed to give the foreign law extraterritorial effect, or*
- (2) *Where a private party raises a defence based on the foreign law in order to vindicate or assert the right of the foreign state”.*

30. Lord Goff continued by saying that he had been unable to discover a case of indirect enforcement going beyond these two propositions. None of the Advocates in this case has been able to do so either. We are satisfied that HMRC is not seeking a remedy from this Court which is in substance designed to give any foreign law extraterritorial effect, and that HMRC is not raising a defence or an argument in this case based on a foreign law in order to vindicate or assert the rights of a foreign state.

31. In our judgment, the situation described in Re State of Norway is very close (though, of course, not identical) to that pertaining here. The foreign revenue authority here (HMRC) wishes to obtain a ruling which it may be able to use so that it can determine a tax liability in its own state. The exercise it is undertaking here in Guernsey is neither directly nor indirectly enforcing UK revenue law – it is resolving an issue which may be important to the authority in due course in enforcing that foreign revenue legislation in its own home state.

32. It may be that the English courts would take a different attitude to foreign tax enforcement claims now that there are rather more tax exchange information agreements in place. But we do not think that the existing law as explained in Re State of Norway can be said to have changed.

33. The Deputy Bailiff was, therefore, at fault in suggesting that HMRC’s participation in these proceedings could be excluded on the grounds that it would thereby be indirectly enforcing or seeking to enforce a foreign revenue law. We make no comment on whether this question arises under the head of ‘just and convenient’ or not. Either way, it is clear that, if this were an attempt indirectly to enforce a foreign revenue law, HMRC would not be permitted to be joined in to the proceedings to do so.

Is it just and convenient to determine any issue between HMRC and Mr Gresh as well as between RBC and Mr Gresh?

34. It is this point that has given us the greatest cause for concern. Plainly, it is an unusual step for HMRC to participate in overseas litigation, let alone Guernsey litigation, and plainly HMRC could make written submissions if they were excluded from joinder. Moreover, we understand the indulgence that it may be thought the court would be granting by allowing HMRC to litigate this difficult point here.

35. But we think that there are a number of compelling reasons why in this very unusual situation it would be just and convenient to determine the issue of the validity of the Distribution between HMRC and Mr Gresh as well as between Mr Gresh and RBC.

36. First, we think the Deputy Bailiff was wrong to think that the same issue would not, in practice, be re-litigated if HMRC were not joined. HMRC have said, as we think they are entitled to do, that they would not accept a ruling of the Guernsey Court as binding unless they were a party (see In Re Vandervell's Trusts [1971] A.C. 912 per Lord Reid at page 928C-D). Whatever one may think about the prospects of HMRC persuading a different court or Tax Tribunal to depart from such a decision, it would undoubtedly be their privilege to attempt to do so. But if HMRC are joined, they have accepted and agreed that they will not challenge the outcome even in UK proceedings. This will avoid re-litigation of the issue of the validity of the Distribution, and will lead to a saving of time and costs for all parties.
37. Secondly, we think that there will be advantages to all parties and to the Royal Court in having HMRC as parties to this issue. It is not just that RBC has no interest in contesting the issue. But HMRC has unrivalled experience in dealing with the issues raised by the rule in Hastings-Bass and will be able to provide that experience to the Royal Court. Of course, they will be partisan, but the courts can gain much assistance from the carefully considered arguments of litigants on all sides.
38. Moreover, HMRC will be able to test the factual evidence before the Royal Court if it is joined, whereas neither RBC nor Mr Gresh is likely to do so. Paragraphs 3.4 to 3.6 of the affidavit of Ms Crawford show that there may well be scope for questions to be asked as to precisely what views were formed and what actually occurred in the period leading up to the Distribution.
39. We are conscious also that, unless HMRC is joined, it is unlikely that the decision of the Royal Court will go to appeal. In a difficult and developing area such as the rule in Hastings-Bass, it may be desirable for a higher court to have the opportunity to consider the important issues of principle raised. Of course, any appeal or appeals will add to the costs, but they will also ensure that the decision receives full and proper scrutiny.
40. The submissions of an amicus curiae would obviously go some way towards restoring the balance, even without HMRC being joined, but we feel that it would nonetheless be helpful if HMRC were joined.
41. In this regard, we have noted that, in two cases in England, the courts have commented on the Revenue authority (albeit the domestic one) appearing in similar situations:-
- (1) In Vandervell's Trusts *supra*, Lord Reid expressed the view at page 929H-930A that a rule of court could be made allowing the Inland Revenue to join in to proceedings so as to prevent the same issues being raised again before the special commissioners. Indeed, the effect of the Vandervell decision was to bring about a change in the English High Court rules relating to joinder, specifically to allow just such an application as this.
 - (2) In Sieff v. Fox [2005] 1 W.L.R. 3811, a case that also concerned the rule in Hastings-Bass, Lloyd LJ sitting at first instance held expressly at page 3838 that "*The court's task might be easier in some cases if the Inland Revenue did not always decline the invitation to take part in cases of this kind ...*"

42. In response to Lloyd LJ's dictum, we have been told that HMRC issued their tax bulletin number 83 dated June 2006 stating that they would give active consideration to intervening in future cases, particularly where there would otherwise be no party in whose interest it would be to argue against the application of the Hastings-Bass principle. We are told that HMRC has also recently been joined as a party to an English application concerning the rule in Hastings-Bass.
43. We have, therefore, to consider whether it is, in the unusual circumstances of this case, just and convenient to determine as between HMRC and Mr Gresh, as well as between RBC and Mr Gresh, the question of the validity of the Distribution. We think it would be. It would prevent the matter being re-litigated in England, and will enable the Guernsey courts to have the benefit of informed and experienced argument on both sides of the debate. We, therefore, hold that the Deputy Bailiff was wrong to conclude that it was not just and convenient to decide the issue between HMRC and Mr Gresh.

The overall exercise of discretion

44. As we have explained, the Court has an overall discretion as to whether to allow joinder under Rule 37. Since we have held that the Deputy Bailiff fell into error in his identification of the issues and the question of whether the three requirements of the rule were satisfied, we are entitled to exercise that discretion afresh.
45. In considering, then, the ultimate question of whether we should allow HMRC to be joined, it has been urged upon us that it would be an unusual, even radical, step, which may set a precedent for the future. It was argued that foreign revenue authorities may seek to join in other actions between private parties to advance propositions that will lead to tax revenues being levied overseas. We have considered these risks anxiously, but we think that the ramifications of our decision are very limited indeed.
46. First, the situation in this case is, as we have said, unusual. The Hastings Bass issue is one that is highly contentious and has been the subject of much academic debate. The Courts in England have positively encouraged HMRC to join in to proceedings so that its voice can be heard. The parties to the Sub-Scheme directly involved in the Hastings-Bass application are all on the same side. No Advocate before us was able to suggest any other situation in which such circumstances would be repeated.
47. Secondly, we doubt that HMRC or any other foreign revenue authority will wish to apply to join any normal proceedings between the parties to trusts or other disputes. There are several reasons for this. In most cases, the requirements would not be satisfied, and if they were, the discretion would be unlikely in a normal case to be exercised in favour of their joinder. We do not pre-judge any situation arising in the future, but we can say that we think that such applications will be few and far between.
48. Thirdly, Guernsey is a transparent, mature and respectable jurisdiction. It is well-equipped properly to consider and evaluate the arguments that HMRC will put forward in this case. Simply because HMRC is allowed, exceptionally, to appear before the Royal Court and argue for the validity of the Distribution will carry no more weight than the strength of the arguments themselves. We have every confidence that the Royal Court (and any courts on appeal) can and will decide these

proceedings according to law. There should be no fear that arguments advanced by any party, be they public or private, foreign or local, will not be dealt with fairly and justly. That is what the Courts of Guernsey have done for many years and can be confidently expected to do in the future.

Conclusion

49. For the reasons we have given, we have formed the view that the Deputy Bailiff fell into error. He ought to have held that all three requirements of joinder under Rule 37(1) were satisfied.
50. In these circumstances, we grant leave to appeal and allow HMRC to be joined as a party to these proceedings, in the capacity of an intervener. We have, therefore, exercised the court's discretion under Rule 37 in favour of joinder.
51. We would like to record our gratitude to Mr Nicol-Gent for his most helpful submissions as amicus curiae.

Costs

52. On 8th June 2009, the Deputy Bailiff granted HMRC leave to appeal from his costs decisions in RBC's application filed on 11th November 2008, in the event that leave to appeal his substantive order was obtained.
53. Accordingly, we now have to deal with the costs of HMRC's application to join in to RBC's application, the costs of HMRC's application to join in to Mr Gresh's application, and the costs of this appeal.
54. Mr Gresh argued that all these costs should be reserved to the trial of Mr Gresh's application in case it is shown that HMRC's presence in the proceedings is of no value or their submissions are rejected. We think that this would be unjust. RBC, and now Mr Gresh, have resisted HMRC's application to be joined both here and below, and they have lost. Costs should follow the event. In our judgment, HMRC's costs appeal should be allowed, and Mr Gresh should be ordered to pay HMRC's costs of both the joinder applications here and below.