Party politics

Giles Richardson explores the courts' approach to HMRC's standing to intervene, and the role of mistake

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This article follows that of Matthew Morrison (see p3) concerning *Pitt & anr v Holt & anr* [2010] and *Futter & anr v Futter & ors* [2010], and considers two further issues that arise from those cases: the standing of HMRC to intervene in proceedings to set aside decisions on the basis of the *Re Hastings-Bass* principle, and the mistake argument, run alongside the *Re Hastings-Bass* argument, in *Pitt*.

HMRC's standing as a party

HMRC appeared by counsel in both *Pitt* and *Futter*. It had been joined as a party from the outset in both cases and, as Matthew Morrison's article sets out, since its Tax Bulletin 83 in the summer of 2006, it has made clear both its belief in its standing to appear and its potential interest in doing so, as well as its hostility to the *Hastings-Bass* line of authorities as they have developed in relation to tax-driven applications.

HMRC's *locus standi* to appear as a party in such applications is, however, unclear, although things may be moving in its direction with the decision of the Guernsey Court of Appeal (delivered by Geoffrey Vos QC before his elevation to the High Court bench) in *Gresh v RBC Trust Company Ltd & anor* [2009].

Gresh was concerned directly with the issue of the standing of HMRC to appear before the Guernsey Royal Court on a *Hastings-Bass* application. The application sought to set aside decisions taken by RBC's Guernsey trust arm in its capacity as trustee of a pension trust to distribute trust assets to Mr Gresh. That distribution turned out to have unfortunate tax consequences. RBC and Mr Gresh sought to have the decisions set aside on the basis of the trustee's failure to take into account the (disadvantageous) tax consequences of the distributions.

The procedural history of the application was that, at an initial directions hearing, the deputy bailiff of Guernsey directed (at paragraph 9) that notice of the application be given to HMRC:

> ... in accordance with what [RBC's advocate] 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.

This notification led to HMRC applying to intervene in the proceedings. Mr Gresh, who had, it seems, taken over carriage of the application from the trustee, resisted HMRC's attempt to intervene. Hence the deputy bailiff found himself dealing with the issue of HMRC's standing. He noted both that Mr Gresh's application appeared to be the first such application before the Guernsey courts and that HMRC's application to intervene in it appeared to be the first such application outside the UK it had made in a *Hastings-Bass* application. Having heard submissions on behalf of Mr Gresh, RBC, HMRC and an *amicus* whose assistance the court had previously sought, he found, among other things, that HMRC did not have a sufficient interest in the issue of Guernsey law raised before him on the *Hastings-Bass* application to insist on joinder as a respondent (see paragraphs 67-69). He also noted, however, that, as was HMRC's more usual practice until recently, it was open to it to send in written submissions on the law, which the court would take into account (see paragraph 78).

HMRC appealed, and the Guernsey Court of Appeal allowed that appeal, holding that HMRC did have standing

to appear as a party in a *Hasting-Bass* application.

What one thinks of the standing issue probably depends on what one thinks of the Court of Appeal's approach (at paragraphs 25-26 in *Gresh*) to the rule described by Kerr LJ in *Sanders Lead Co Inc v Entores Metal Brokers Ltd* [1984]. This is that a would-be party must have some interest 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... the interest of the intervener must raise an existing issue and not a merely contingent one.

The reasoning in *Gresh* is brief and, notwithstanding HMRC's strenuous assertions of a relevant interest, it is still open to question whether it has one. What the cases seem to show is that, although a party does not necessarily have to possess a cause of action against one of the parties, they do need to have a personal legal right which has been (arguably) infringed in some way, to which the proceedings are relevant. HMRC's duty and right is to collect tax due if it is due. But it does not have a right to receive tax which is not due, and it has no obvious personal interest, in a relevant sense, in the question of whether a transaction which would otherwise give rise to tax ought to be set aside. Its position is, perhaps, no different to a commercial third party due to receive a sum from party A if and when party A receives a greater sum from party B. The third party may be (commercially) very interested in an attempt by party B to escape from its transaction with party A on the grounds of mistake, fraud on a power, or any other basis. But it has no interest or right which has been infringed which would entitle it to intervene in proceedings.

Taxpayers and trustees may, nonetheless, feel compelled to invite HMRC into their applications, not only because of the *Gresh* decision, but also in light of HMRC's threat, made explicit in *Gresh*, that it would not regard itself as 'bound' by any judicial determination on an application designed to remedy a course of conduct which would, unless undone, result in a disadvantageous tax consequence unless it had been made (or, presumably, invited to elect whether or not to be made) a party to such an application (see paragraphs 27 and 72 of the first instance judgment). The propriety, as well as legal efficacy, of such an approach by the UK state is open to question.

HMRC's attack on Mrs Pitt's application: mistake

Having decided in Mrs Pitt's favour on a *Hastings-Bass* approach, the judge's decision in *Pitt* on the mistake contention was not strictly necessary, and he went on to deal with it briefly. Unsurprisingly, HMRC sought to support the approach to mistake set out by Millett J in *Gibbon v Mitchell & ors* [1990]; that is, that a mistake about the effects of a transaction will suffice in an application to set it aside, but a mistake about its consequences will not. Equally unsurprisingly, Mrs Pitt advanced the merits of the partly submerged House of Lords decision in *Ogilvie v Littleboy* (1893) that a mistake would suffice if it was:

> ... of so serious a character as to render it unjust on the part of the donee to retain the property now given to him.

Which approach is preferable was left open both in *Sieff & ors v Fox & ors* [2005] and more recently by Lewison J in *Ogden & anr v Trustees of the RHS Griffiths 2003 Settlement & ors* [2008], where, however, the judge noted that the effect versus consequence distinction has 'proved a difficult one to grasp'.

In *Pitt* the judge noted that he was 'not persuaded that there is in truth any real divergence' between the two lines of authority. Yet it is perhaps these cases about fiscal consequences that show up the divergence most acutely, since it appears now largely to be accepted that mistakes about the fiscal results of a transaction fall on the wrong side of the line: they are, apparently, mistakes about consequences and not effects. Yet they may also very obviously be mistakes 'of a very serious character' which would make it unjust to leave a mere donee in receipt of what was

transferred. This is perhaps especially so where a donor unintentionally makes itself subject to a large inheritance tax (IHT) charge.

After the close of oral argument, counsel for Mrs Pitt drew the judge's attention to the Isle of Man decision in *Re Betsam Trust* [2009], which adopted the approach in *Ogilvie* and which the judge briefly considered and dismissed at paragraph 52. Since then, however, the Royal Court in Jersey has also considered the correct approach in *Re the A Trust* [2009]. It too has preferred the 'serious character' formulation to the effect and consequences one. It is, perhaps, difficult to see the objection to this formulation. It focuses directly on the seriousness of the error and its resultant injustice. That seems appropriate for a form of equitable relief. Over time, as with other equitable principles, most commonly occurring situations will be found to fall on one side of the line or the other. It would seem more obviously directed at proper equitable considerations than the arbitrariness of an effects and consequences test, even if one thinks such a test is intelligible.

The second argument advanced by HMRC in *Pitt*, accepted by the judge at paragraph 50, is that Mrs Pitt had never made a mistake at all:

> It is not as if Mrs Pitt ever wrongly thought, for whatever reason, that inheritance tax would not be payable. She simply never thought about it at all.

The justice of this distinction is also hard to see. Mrs Pitt had obtained tax advice. She was told there were no adverse consequences. Had she been told, expressly but wrongly, there were no inheritance tax consequences, an operative mistake would exist on the judge's reasoning. In fact, she was told nothing at all about inheritance tax. But what she plainly would have said, had she been asked if the settlement would have bad tax consequences, was no, she was told it would not. She would not have been fussed about, and there seems no reason to judge her case as though she ought to have been fussed about, any particular form of tax descending on her husband and her. What she wanted to achieve was a tax-efficient settlement. She was mistaken in her belief that the scheme she set up would do that.

The judge rejected the analogy, put to him by Mrs Pitt's counsel, with *Lady Hood of Avalon v Mackinnon* [1909]. There a deed of appointment was set aside because Lady Hood had forgotten she had made an earlier appointment: had she remembered, her second appointment would have given less to the daughter favoured by the earlier appointment, such that (at paragraph 50):

> Her mistake was to think, erroneously, that the second appointment was required to produce, and would produce, equality between her children.

But this shows how one can almost always find a mistake, even in the judge's and HMRC's sense, if one draws back far enough from a situation to look at what it was intended to achieve. Lady Hood had not thought about her earlier appointment at all when making her second one. Mrs Pitt had not thought of the UK inheritance tax regime at all when making her appointment into the settlement. Lady Hood would not have done what she did had she thought about her earlier appointment, because she wanted to achieve equality between her children (and she could do so by a different appointment). Mrs Pitt would not have done what she did had she (or her advisers) thought about the UK inheritance tax regime, because she wanted a tax-efficient structure (and she could achieve one with a differently worded settlement).

Most people would, surely, say that Mrs Pitt had been mistaken in this case when she acted as she did and, moreover, that her claim to relief was just as meritorious for such a mistake as the claim of someone whose advisers had told her she had no issues with IHT but who had got that wrong. Indeed, given that one of HMRC's frequent contentions is that the appropriate remedy for such mistakes lies against negligent professional advisers, and given that the case against an adviser who advises on a specific issue and gets its wrong is generally clearer than that against an adviser who does not advise on a specific issue and then (inevitably) claims that its retainer never extended to it, the justification for relief in cases like Mrs Pitt's seems more pressing.

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Court of Appeal

Perhaps the most important feature of *Pitt* and of *Futter* is that in both cases the judge gave HMRC permission to appeal against his determination on the *Hastings-Bass* application. It seems plain that HMRC will redouble its attack on the existence and extent of the principle in the Court of Appeal, whose decision is accordingly likely to be definitive in England and Wales and highly influential offshore.

At the time of writing it is unclear whether or not Mrs Pitt will seek to take her mistake contentions to the Court of Appeal. As desirable as a resolution at appellate level about the parameters of that jurisdiction would be, we may have to wait for it some time longer. ■

Re Betsam Trust
[2009] WTLR 1489
Futter & anr v Futter & ors
[2010] WTLR 609
Gibbon v Mitchell & ors
[1990] 1 WLR 1304
Gresh v RBC Trust Company Ltd & anor
[2009-10] GLR 239
Lady Hood of Avalon v Mackinnon
[1909] 1 Ch 476
Ogden & anor v Trustees of the RHS Griffiths 2003 Settlement & ors
[2008] WTLR 685
Ogilvie v Littleboy
(1893) 13 TLR 399
Pitt & anr v Holt & anr
[2010] WTLR 269
Sanders Lead Co Inc v Entores Metal Brokers Ltd
[1984] 1 WLR 452
Sieff & ors v Fox & ors
[2005] WTLR 891
Re the A Trust
[2009] JRC 245