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REVISITING TRUSTEES' DECISIONS: IS PITT V HOLT THE FINAL WORD ON THE RULE IN RE HASTINGS-BASS?

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INTRODUCTION

Not every decision we make is a good one. The power to make decisions includes the power to make bad choices as well as good ones. Unless there is some other factor, such as the exercise of undue influence, the overbearing of will through duress, or a mistake, good and bad decisions are equally enforceable in law.[1] It might be thought that the same rule applies to decisions made by trustees, even though their decisions generally relate to the interests of the beneficiaries, rather than to their own interests. Of course, if the decision is so bad that it amounts to a breach of trust, and loss is thereby caused to the trust fund, then the breach might expose the trustees to liability to the beneficiaries.

It was against this background that what became known as the rule in *Re Hastings-Bass* achieved prominence. A series of first instance decisions permitted trustees in some instances to backtrack on a decision which had unintended effects or consequences. The rule became subject to criticism, and was reviewed by the Supreme Court in *Futter v HMRC* on appeal from *Pitt v Holt* in the Court of Appeal.[2] The decision of the Supreme Court substantially limits the scope of the rule, and identifies three circumstances where the

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[1] See for instance *Mulitiservice Bookbinding Ltd v Marden* [1979] Ch 84 where a businessman made the financially very expensive decision to take out a loan at a high rate of interest with repayments linked to the value of the Swiss Franc, in effect accepting a "double whammy" of two different ways of reflecting the relatively weak position of sterling. Even though the bargain was manifestly disadvantageous to the businessman, the court enforced it because there were no vitiating factors.

[2] The Court of Appeal in *Pitt v Holt* [2011] EWCA Civ 197 heard conjoined appeals from *Pitt v Holt* [2010] EWHC 45 (Ch) and *Futter v Futter* [2010] EWHC 449 (Ch). The trustees in both cases appealed to the Supreme Court which heard a conjoined appeal. Although the whole litigation is often cited as *Pitt v Holt,* for convenience this article refers to the Court of Appeal decision as *Pitt v Holt* [2011] EWCA Civ 197 and the Supreme Court decision as *Futter v HMRC* [2013] UKSC 26 .

decisions of trustees can be reversed: namely where there has been an operative mistake; excessive execution; or inadequate deliberation.

This article explores the three dimensions to the rule in *Re Hastings-Bass* and identifies a number of difficulties with the decision in *Futter v HMRC.*

BACKGROUND

The Hastings-Bass rule

The rule in *Re Hastings-Bass* was heavily used and was described as a "get out of jail free card" or a "magic morning-after pill" because of its utility in reversing the effect of a decision by trustees which had an unintended and undesirable consequence, frequently unforeseen tax liability.[3] The rule was most authoritatively described by Lloyd LJ in *Sieff v Fox*[4], the last case he heard as a High Court judge, with judgment delivered only after his elevation to the Court of Appeal:

"Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account."

Although *Re Hastings-Bass*[5] was first reported in 1974, it was not until the early 21st century that the rule carrying the name of that case achieved attention. As Longmore LJ observed in *Pitt v Holt*, *Snell on Equity* did not contain any substantial discussion of *Re Hastings-Bass* until a supplement issued between the 30th and 31st editions in 2000 and 2005, and other textbooks show a similar pattern.[6] Until the conjoined appeals in *Pitt v Holt*

[3] See Lord Neuberger, "Aspects of the law of mistake: *Re Hastings-Bass*," Lecture to the Chancery Bar Association Conference in London on 16 January 2009, (2009) 15(4) Trusts & Trustees 189–99.

[4] *Sieff v Fox*[2005] 1 WLR 3811.

[5] *Re Hastings Bass*[1975] Ch 25.

[6] For instance, there is no reference to *Re Hastings-Bass* in Hudson's *Equity and Trusts* second edition in 2001, nor in Delany's *Equity and the Law of Trusts in Ireland* in 1996. There is no reference to *Re Hastings-Bass* in the first edition of Pearce and Stevens, *The Law of Trusts and Equitable Obligations* in 1995. It was only in the second edition in 1998 that *Re Hastings-Bass* made its first appearance. That appearance was driven by a reference to the then very recently reported case of *Scott v National Trust*, the case in which the National Trust's decision to ban stag hunting

and *Futter v Futter* all of the cases considering the rule had been at first instance, and there were some problems concerning the scope and effect of the rule. There was some uncertainty as to whether there had to be a breach of trust before the rule could be invoked. It was also unclear whether, when the rule applied, the impugned decision of the trustees was void or merely voidable. Lloyd LJ was therefore not alone in suggesting in *Sieff v Fox* that a review by the Court of Appeal was desirable. As it happened, he was able to undertake the review himself in *Pitt v Holt.* The decision of the Court of Appeal was appealed to the Supreme Court, which has given what is widely perceived as putting the rule in *Re Hastings-Bass* on a short leash. As will be seen, it is too early to say that the rule has been fully brought to heel.

The history of the cases

The decision of the Supreme Court in *Futter v HMRC* has been explained and analysed by Miguel Colebrook in last year's Denning Law Journal,[7] so only a brief resumé of the case is needed. In one of the two conjoined appeals, *Pitt v Holt,* a settlement by way of a discretionary trust had been established with the funds received by a seriously injured road accident victim. Owing to incorrect tax advice, inheritance tax charges would absorb a significant proportion of the funds on his death; if differently structured, the settlement could have avoided those charges. In *Futter v Futter* advancements to beneficiaries had been made by the trustees which it was thought, on the basis of incorrect advice, would not incur a capital gains tax charge because they could be set off against other losses. The trustees in both cases sought to have the transactions set aside using the rule in *Re Hastings-Bass.* The trustees in *Pitt v Holt* also argued that the settlement could be set aside on the grounds of mistake.

The trustees' applications were successful in the High Court, but were rejected by the Court of Appeal. The Supreme Court, in a judgment given by Lord Walker with which the other Supreme Court Justices agreed, affirmed the decisions of the Court of Appeal on the interpretation and application of the rule in *Re Hastings-Bass*, although it differed from the Court of Appeal in relation to the issue of mistake in *Pitt v Holt,* and on this ground only, allowed the appeal.

The Supreme Court identified three routes by which discretionary decisions of trustees can be challenged. The first is what the court described

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was challenged. The third edition of Moffat, *Trusts Law Text and Materials*, published in 1999, contains a very short reference, but no discussion.

[7] Miguel Colebrook, *"Get out of jail free" card: the courts' offer of assistance to errant trustees*" [2013] Denning LJ 211-223.

as excessive execution, the second inadequate deliberation,[8] and the third mistake. The first two are branches of the new rule in *Re Hastings-Bass*. The third is a separate rule. It is convenient to begin with mistake.

MISTAKE

The statement of the rule

In many cases where it is desired to set aside a decision of trustees, a mistake will have been made. In both *Pitt v Holt* and in *Futter v Futter* the trustees were acting under a mistake about the tax consequences of their decision, but it was only in the former case that the mistake had been pleaded as a basis for reversing the decision. The Court of Appeal had rejected the claim on the basis that rescission was possible only where a mistake related to the legal effects of a decision or as to an existing fact basic to the transaction, and not where the mistake related to the consequences of a decision. The view of the Supreme Court was that voluntary dispositions could be set aside whenever a mistake made it objectively unconscionable or unjust to leave the mistake uncorrected having regard to "its degree of centrality to the transaction in question and the seriousness of its consequences".[9] This test was satisfied in the circumstances of *Pitt v Holt*, but since the point had not been raised in the claim there was no need to consider the test in *Futter v Futter*. The decision of the Supreme Court on the issue of mistake is applicable not only to decisions of trustees, but also to other gratuitous dispositions.

The relevance of taxation

The Supreme Court took the view that a mistake about the tax consequences of a decision could be a relevant consideration, and this is demonstrated by the view it took of the quality of the mistake in *Pitt v Holt*. However, the Court indicated that:

> "Had mistake been raised in *Futter* there would have been an issue of some importance as to whether the Court should assist in extricating claimants from a tax-avoidance scheme which had gone wrong.... In

[8] *Futter v HMRC* [2013] UKSC 26 at [60]. These labels for the two branches of the rule were not used by the Court of Appeal.

[9] Ibid at [128]. The Jersey courts have independently reached a similar conclusion about the test for mistake: *Re Representation R, re S Trust* [2011] JRC 117; *CC Ltd v Apex Trust Ltd* [2012] JRC 071; *Re B* [2012] JRC 229.

> some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy. Since the seminal decision of the House of Lords in *WT Ramsay Ltd v IRC* [10] there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures."[11]

These remarks about tax avoidance are revealing. It may be true that there is some resentment amongst most taxpayers that the rich are able to adopt tax avoidance measures, which reduce the incidence of taxation, which they would otherwise incur (a resentment which almost certainly predated the *Ramsay* decision). What is more important is that the Court has signalled a reluctance to assist in the implementation of these schemes. A light touch on the tiller can be enough to change the direction of even the largest vessel. This was evident in the impact of Lord Neuberger's report on superinjunctions.[12] In the same way Lord Walker's remarks may have been intended to, and are likely to have, the effect of discouraging applications to escape from tax avoidance schemes, which have gone wrong.

Uncertainty about the criteria

The clear statement of principle in relation to mistake is welcome since it resolves some of the problems in making sense of the old authorities.[13] However, there is only very limited guidance on how the principle should be applied. The emphasis on ascertaining what is unjust, unfair or unconscionable[14] in all the circumstances is uncomfortably reminiscent of the discredited notion of the "new model constructive trust" articulated by Lord Denning in *Hussey v Palmer*[15] where he suggested that a constructive trust could arise to give a spouse an interest in the family home owned by the other spouse "whenever justice and good conscience require it." However, the assertion of a broad discretion chimes with the approach of the Supreme Court

[10] *WT Ramsay Ltd v IRC* [1982] AC 300.
[11] *Futter v HMRC* [2013] UKSC 26 at [135].
[12] Robert Pearce. *"Privacy, Superinjunctions and Anonymity, 'Selling my story will sort my life out'"* (2011) 23 Denning LJ 92-130
[13] See *Futter v HMRC* [2013] UKSC 26at [4].
[14] Ibid at [126]
[15] *Hussey v Palmer* [1972] 1 WLR 1286.

in the Fen Tigers case[16] to the use of injunctions to restrain a nuisance and it also echoes the language used in the different context of *Stack v Dowden*[17] and *Jones v Kernott*[18] for ascertaining shares in a family home purchased in joint names. Richard Nolan, writing in the Law Quarterly Review,[19] argues that the uncertainty implicit in the use of the open-ended criterion of unconscionability should not be overstated, and that the concept should not be inherently more difficult to implement than the widely used criterion of reasonableness.

One of the questions which will arise is how far the courts can provide guidance on what factors are relevant to ascertaining when an injustice would arise from leaving a mistaken decision uncorrected. Lord Walker believed that "the court cannot decide the issue of what is unconscionable by an elaborate set of rules"[20] but by contrast, Lord Neuberger, in the Fen Tigers case, said that the existence of a broad discretion "does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion".[21] Lord Clarke in the same case also referred to the development of a set of principles to be developed on a case-by-case basis.[22]

Unjust or unfair to whom?

Lloyd LJ in the Court of Appeal concluded, on his review of the authorities, that a dispositive decision of trustees could only be set aside on the basis of mistake where it would be unconscionable *for the recipient*[23] to retain the benefit. The problem with making the recipient the focus is that, although on occasions the recipient will be aware of the mistake, it is possible for the recipient to be completely ignorant of the misapprehension under which the donor was acting.[24] The more general focus of the Supreme Court on whether it would be objectively unconscionable to leave a mistake uncorrected, and the explicit recognition that the mistake jurisdiction applies

[16] *Coventry v Lawrence* [2014] UKSC 13 at [117]-[123]
[17] *Stack v Dowden* [2007] UKHL 17
[18] [2011] UKSC 53
[19] Nolan, "*Fiduciaries and their flawed decisions*" LQR 2013, 129(Oct), 469-473
[20] *Futter v HMRC* [2013] UKSC 26 at [128].
[21] *Coventry v Lawrence* [2014] UKSC 13 at [121].
[22] Ibid at [171].
[23] *Pitt v Holt* [2011] EWCA Civ 197 at [203] and [210].
[24] In *Day v Day* [2013] EWCA Civ 280, decided by the Court of Appeal between the Court of Appeal and Supreme Court decisions in *Pitt v Holt* a voluntary conveyance was set aside on the footing of unilateral mistake, but there was strong evidence that the recipient at the very least knew of the mistake and might have contributed to it.

to unilateral mistakes, is therefore appropriate. The effect may be that the protection of the recipient is less explicit, but any prejudice to the recipient must surely be a factor in deciding whether justice requires a mistake to be corrected, and also for deciding the terms upon which any relief can be given. Similar account can be taken of the impact upon third parties.

Operative mistake

Lord Walker was very clear that the jurisdiction to reverse a decision made on the basis of a mistake applied only where there had been an operative mistake as opposed to disappointed expectations or total ignorance. It was therefore important in *Pitt v Holt* that the tax implications of the settlement had been considered; had no consideration to taxation been given at all, it could not have been argued that the decision to create the settlement was mistaken even if the tax consequences might have proved disastrous. This may seem harsh, but where such a decision is made by trustees in ignorance the rule(s) in *Re Hastings-Bass* might offer an alternative route to a remedy.

The remarks which Lord Walker made about the acceptance of a known risk not constituting a mistake are illustrated, although not in the context of tax avoidance, by *HSH Nordbank AG v Intesa Sanpaolo SpA.*[25] An Italian local authority had entered into an interest rate swap agreement with the defendant bank which was later replaced by another interest rate swap agreement with the claimant bank. The claimant bank's agreement was held by the Italian Court of Auditors to be beyond the local authority's powers. The claimant bank sought to recover its position by claiming that the earlier interest rate swap agreement between the local authority and the defendant bank was also beyond the local authority's powers, that the claimant bank had entered into the novation agreement to replace it under the influence of an operative mistake, and that it was therefore entitled to restitution from the defendant bank. The claimant bank failed to establish that the earlier interest rate swap agreement was void as beyond the local authority's powers, but Burton J held that, even if it had succeeded on this point, there was no mistake. The claimant bank's official was aware that not all interest rate swap agreements made by Italian local authorities were permitted by law,[26] and "he was not troubled by any such risk and accepted it."[27]

The lack of an operative mistake was also fatal in *Spaul v Spaul,*[28] a case decided by the Court of Appeal after *Futter v HMRC.* A company director in

[25] *HSN Nordbank AG v Intesa Sanpaolo SPA*[2014] EWHC 142 (Comm).
[26] Ibid at [50].
[27] Ibid n 25 at [51].
[28] [2014] EWCA Civ 679.

breach of duty appropriated property owned by the company in what the court considered amounted to theft. He subsequently transferred his shares in the company to his brother (the only other shareholder). When the director was required to make restitution to the company for his misappropriation, he claimed that the share transfer should be set aside on grounds of mistake. The Court of Appeal decided that there was no basis for holding that there had been any mistake: the share transfer had been intended by the director to make good his wrongdoing at a time when the shares were practically worthless, and that intention was not invalidated by the shares subsequently becoming more valuable.

A similar decision is *Pagel v Farman.*[29] This case involved former business partners in an investment business. Farman was responsible for choosing the investments, and Pagel for marketing. The business was initially successful, but later generated losses. In order to meet a tax bill, Pagel asked Farman for a substantial gift as a goodwill gesture, and Farman gave him shares worth £3.8 million. When Pagel later sued to recover the losses, which he believed he had suffered through Farman's poor investment strategy, Farman counterclaimed for the return of the gift. The judge rejected the claim that the gift had been made because Farman mistakenly thought that Pagel was in financial difficulties. Farman was likely to know that this was not the case. Instead, the gift had more likely been made by Farman to acknowledge his responsibility for the losses which the partnership had suffered. No operative mistake was therefore proved.

Can oversight be a mistake?

Trustees who fail to take account of a material consideration are likely to be in breach of trust, and beneficiaries may be able to invoke the inadequate consideration branch of the rule in *Re Hastings-Bass*, discussed below. But would this situation also constitute a mistake? In *Re Strathmullan Trust*[30] an offshore trust was established in 1997 with the objective of reducing liability to inheritance tax. Unfortunately no consideration was given to the UK's deemed domicile provisions, which meant that the trust would not avoid inheritance tax. This problem was identified in 2010. The Jersey Royal Court, finding that the decision in *Futter v HMRC* "seems to us broadly to align the approach to be taken by the English courts in the future with that adopted by the Royal Court"[31] held that there was an operative mistake on the part of the settlor which justified setting the trust aside. The basis of the mistake was that

[29] *Pagel v Farman* [2013] EWHC 2210 (Comm).
[30] *Re Strathmullan Trust* [2014] JRC 056.
[31] Ibid at [20].

"that one material factor was overlooked".[32] By contrast, Lord Walker in *Futter v HMRC* held that "causative ignorance" would be insufficient to justify relief for mistake. In his view, "If someone does not apply his mind to a point at all, it is difficult to say that there has been some real mistake about it."[33] This view makes it critically important as to how an oversight is viewed. In the *Strathmullan* case, the facts could be interpreted either as a failure to consider deemed domicile (which was not thought about at all), or as a mistake about the incidence of inheritance tax (which was very much in mind). Similarly, Mrs Pitt either failed to consider inheritance tax or was mistaken in her view that there would be no adverse tax consequences of setting up the trust in the form adopted (the Supreme Court accepted the latter interpretation). Lord Walker dismissed the suggestion that drawing the boundary between these different categorisations of the same actions would be subject to judicial manipulation (a description he thought a bit harsh),[34] but it is hard to avoid the conclusion that this dimension adds additional uncertainty to the application of the criteria for relief.

THE (NEW) RULE(S) IN *RE HASTINGS-BASS*

The main issue in *Pitt v Holt* was the rule in *Re Hastings-Bass.* The Supreme Court agreed with the Court of Appeal that the rule had been both misattributed and misunderstood. Although there were dicta in *Re Hastings-Bass* which supported the rule, the genesis of the rule could more fairly be attributed to *Mettoy Pension Trustees v Evans.*[35] The correct position was also that there were two rules. Lord Walker, delivering a judgment with which all the other members of the Supreme Court agreed, considered that Lloyd LJ had been correct to make "the very important distinction between an error by trustees in going beyond the scope of a power" ("excessive execution") and "an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power" ("inadequate deliberation").[36] Because there was no issue of excessive execution, he directed his subsequent remarks to situations involving inadequate deliberation. He agreed with Lloyd LJ that where trustees were in breach of fiduciary duty in exercising a dispositive power through failing to take into account a relevant matter, or through bringing into account an irrelevant

[32] Ibid n 30 at [40].
[33] *Futter v HMRC* [2013] UKSC 26 at [108].
[34] Ibid at [127].
[35] *Mettoy Pension Trustees v Evans*[1990] 1 WLR 1587.
[36] Ibid at [60].

matter, then their decision would be voidable "at the suit of a beneficiary, but this would be subject to equitable defences and to the court's discretion."

EXCESSIVE EXECUTION

The ambit of the rule

Although the Supreme Court described one branch of the redefined rule in *Re Hastings-Bass* as "excessive execution", this description does not fully capture its potential ambit. Whenever trustees do something which is beyond their powers their action cannot be effective precisely because they have no power to do it. Lloyd LJ in the Court of Appeal helpfully identified a number of ways in which an action can be beyond the powers of trustees and will therefore be void.[37]

(i) Procedural defects

Trustees may act beyond their powers through "the use of the wrong kind of document or the failure to obtain a necessary prior consent." *Re Gleeds Retirement Benefits Scheme,*[38] decided after *Futter v HMRC,* is a perfect example. Pension trustees had purported to make a number of decisions about pension increases, the appointment of new trustees and other matters. The decisions were not actioned by deed as required by the terms of the trust, but by documents which did not constitute deeds through a failure to have them properly witnessed. Newey J held that the documents were wholly ineffective.[39]

(ii) Substantive defects

Lloyd LJ said that "There may be a substantive defect, such as an unauthorised delegation or an appointment to someone who is not within the class of objects." This again is illustrated by *Re Gleeds Retirement Benefits*

[37] *Pitt v Holt* [2011] EWCA Civ 197 at [96].
[38] *Briggs v Gleeds* (Head Office) [2014] EWHC 1178 (Ch).
[39] A different result would probably have been reached under Jersey law, since it has been held by the Jersey Royal Court in *Re the Shinorvic Trust* [2012] JRC 081 that, subject to a number of conditions which would have been satisfied in the *Gleeds* case, equity will correct a formal defect in the execution of a power. See also *Marley v Rawlings* [2014] UKSC 2 for a more benign approach to a defect in the execution of a will.

Scheme.[40] The pension trust was restricted to qualified chartered surveyors, but the trustees purported to allow other employees to join the scheme following an ineffective attempt to widen eligibility for membership by an invalidly executed document. Newey J held that "anyone purportedly admitted to membership on or after that date who was not a chartered quantity surveyor will not have accrued any benefits under the Scheme as a member."[41]

(iii) Fraud on a power

Lloyd LJ considered that "cases of a fraud on the power are similar to the latter [appointment to someone who is not within the class of object], since the true intended beneficiary, who is not an object of the power, is someone other than the nominal appointee."

(iv) Powers of advancement

Statutory and express powers of appointment can be used only to confer a benefit on the appointee. If no benefit is conferred, then the purported exercise of the power will be void.

(v) Other legal defects

Lloyd LJ indicated that "There may also be a defect under the general law, such as the rule against perpetuities, whose impact and significance will depend on the extent of the invalidity." In making this remark he had in mind cases where the effect of the rule against perpetuities might be to deprive the object of a power of appointment of the benefit intended to be conferred by a decision. "In that case the advancement will be void, since the power can only be used for the benefit of the relevant person and the purported exercise was not for his or her benefit."

A grouping of disparate situations

The grouping together of this range of situations in which trustees can be considered to have acted beyond their powers has some implications which have yet to be explored or explained. First, Lloyd LJ has conflated a number of different situations in a way which may not have been sufficiently discriminating. This is demonstrated by the label attached by Lord Walker. It

[40] *Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch).
[41] *Re Gleeds Retirement Benefits Scheme* [2014] EWHC 1178 (Ch) at [189].

is somewhat strange to describe the defective execution of a deed or the breach of some other general provision of the law such as a failure to comply with the rule against perpetuities as "excessive execution". There is a danger that the grouping means that every situation in the list will be treated similarly. This should not be the case.

Is there always a breach of trust?

The consequences which flow from the different types of acting beyond the scope of a power enumerated by Lloyd LJ are not always identical. There may be a difference between the treatment of a trustee who acts outside the terms of the trust and a trustee who fails to comply with some provisions of the general law. A trustee who acts outside the scope of his powers (for instance by making a disposition in favour of a person who is not within the class of potential beneficiaries) commits a breach of trust. There is an absolute obligation on trustees to act within their powers[42], such that taking all due care does not avoid liability[43], although it may be a factor in justifying a court in granting relief on the basis that the trustee had acted "honestly and reasonably and ought fairly to be excused."[44] Lord Walker thought that there might be cases where trustees are in breach of trust without exceeding their powers "even if they have obtained apparently competent professional advice, if they act ... contrary to the general law".[45] The example he gave, however, was of an Australian case[46] in which the incorrect advice was as to the interpretation of the intestacy laws. That was not, therefore, a case of doing something which was in breach of the general law, but as Lloyd LJ in the Court of Appeal correctly recognised, of the trustees acting outside the scope of their powers by making a payment to a person who was not within the class of beneficiaries.[47]

By way of contrast, some of the situations in which trustees' actions are ineffective because of a failure to comply with the general law may not constitute a breach of trust. For instance, it may not be a breach of trust if

[42] As is explicitly recognised in *Pitt v Holt* by Mummery LJ at [237].
[43] See *Pitt v Holt* [2011] EWCA Civ 197 at [122] where Lloyd LJ draws a distinction between making the advancement in *Re Abrahams' Will Trust* [1969] 1 Ch 463 (which he said would not be a breach of trust because the trustees acted reasonably in the light of the state of knowledge at the time they made their decision) and acting on the decision by paying the wrong beneficiary, which would be a breach of trust.
[44] Trustee Act 1925 s. 61.
[45] *Futter v HMRC* [2013] UKSC 26 at [80].
[46] *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [1905] AC 373.
[47] *Pitt v Holt* [2011] EWCA Civ 197 at [121].

unremunerated lay trustees who have properly made a decision which is within their powers then fail to execute it correctly in accordance with the general law because they reasonably follow[48] inadequate or incorrect advice from their properly qualified, properly selected and properly appointed advisers.[49] Such action is not beyond their powers, it is merely ineffective.

Consent of beneficiaries

Another difference is that in those cases where the general law (rather than the terms of the trust) prohibit an act by the trustees, the consent of the beneficiaries affected will normally be irrelevant to the prohibition. Conversely, in those instances where there is an act which is outside the scope of the power because it is not authorised by the terms of the trust, the consent of all of the beneficiaries affected is capable of exonerating the trustees from liability for breach of trust[50] or even of authorising an act which would otherwise be unauthorised.[51]

Is the invalidity automatic?

The main factor which unites the categories enumerated by Lloyd LJ is that they are instances where the action or decision of the trustees is void. One of the characteristics of a void decision is that it does not in principle require a declaratory decision of the court to make or confirm its invalidity: an order of the court simply serves to declare the position as it already is. A failure properly to execute a document will be ineffective even without a judgment to that effect by a court: for instance it does not require a decision of the court to permit the Land Registry to reject a transfer of land by trustees which has not been made by deed. However, there are some instances in the list set out by Lloyd LJ where an evaluative consideration may be required. This can be true both as to whether an advancement confers sufficient benefit on an advancee (category *(iv)* above) and as to whether the exercise of a power constitutes a

[48] In *Dunn v Flood* (1885) 28 Ch D 586, an example given by Lord Walker of trustees not being protected by following professional advice from breach of trust for excessive execution, the trustees were in breach for two reasons: the imposition of depreciatory conditions on a sale of trust property was beyond their powers, and they unreasonably decided to follow the advice they received, so they were also in breach of trust for their failure to act with reasonable care.

[49] This was not discussed in *Briggs v Gleeds (Head Office)* [2014] EWHC 1178 (Ch).

[50] *Re Pauling's Settlement Trusts* [1964] Ch 303.

[51] *Saunders v Vautier* (1841) Cr & Ph 240; Peter Luxton, '*Variation of Trusts: Settlors' Intentions and the Consent Principle in Saunders v Vautier*' (1997) 60 MLR 719.

fraud in the sense that it confers benefits on parties who are not within the scope of the power (category *(iii)* above). In such cases it may be much less apparent to a third party that a decision has been made in excess of trustees' powers than it is with (say) an invalidly executed deed (where the invalidity may be obvious on the face), and there may be scope for argument about whether the decision has properly been made. The difficulty of establishing whether an advancement has been properly made is compounded by the recognition in cases in which the court has approved advancements that the benefit does not require financial gain to the beneficiary concerned: making a gift to charity will confer a benefit on the beneficiary if it meets a moral obligation.[52] Regard to cases involving variations of trust make the decision even more difficult, for in this context the chance of benefit has been treated as sufficient to justify the court giving consent, even if there may be circumstances in which the benefit may be lost entirely. A court order may therefore be necessary to resolve the issue of whether an advancement has properly been made. In such circumstances there is less logic in concluding that the action of the trustees in making what purports to be an advancement is void, and the same applies to dispositions, on their face within the powers of trustees, which are challenged as having been made in fraud of the power. Both the Court of Appeal and the Supreme Court had some reservations about holding that a decision of trustees which was in fraud of a power is void, rather than merely voidable, although there is Court of Appeal authority to this effect. Lloyd LJ made the case for this issue being revisited, and the need for this was endorsed in the Supreme Court.[53]

Ambulatory invalidity

Another question affecting decisions outside the scope of trustees' powers relates to what may be termed "ambulatory invalidity". Lloyd LJ in *Pitt v Holt*[54] appears to contemplate that where an advancement has been made which is believed to confer a benefit on a beneficiary as the law is then understood, but the beneficiary is later shorn of that benefit because of a change in the interpretation of the relevant law, the advancement will be void because of the absence of benefit, which is a precondition of a valid advancement. This is illustrated by *Re Abrahams' Will Trusts* which involved a trust established in 1948. Advancements purported to be made in 1957 were held to be void. We understand from the analysis in *Pitt v Holt and Re Hastings-Bass* that this was because the advancements did not in fact confer

[52] *Re Clore's Settlement Trusts* [1966] 1 WLR 955.
[53] *Futter v HMRC* [2013] UKSC 26 at [62].
[54] *Pitt v Holt* [2011] EWCA Civ 197 at [122].

any benefit on the advancee. But why was this? It was because, although the trustees honestly and reasonably believed that a new perpetuity period would apply to the advancements, they were wrong. In 1962, several years after the purported advancement, the House of Lords held in *Pilkington v IRC* that in circumstances like these, the advancement had to be written back into the original settlement. Now, of course, the common law fiction is that the House of Lords declares the law as it always has been, so it could be argued that even in 1957 the advancement did not in fact confer the benefits it was thought that it did. However, if you had asked the trustees in 1957, the received opinion then was that the arrangement they had made did constitute a valid advancement, and it would have needed unusual powers of prescience to forecast that the House of Lords would decide otherwise.[55] Similarly, in *Re Hastings-Bass* legal advice was taken before making the advancement, yet Buckley LJ in that case was still prepared to analyse whether there was a benefit in the light of the "change" made by *Pilkington.* During the interval between the purported advancement and the decision in *Pilkington*, everyone concerned would have believed that the advancement conferred a benefit (and they may have had advice to this effect); it was only following *Pilkington* that there can have been an appreciation that the position had changed. It is hard to reach any conclusion other than that a change in the interpretation of the rule against perpetuities can invalidate what was previously thought to be a valid exercise of discretion by taking the decision of trustees beyond their powers. If that is so, then why would not a change in the interpretation of the tax laws, or even a legislative change to the tax laws have the capacity to strip the anticipated benefit from an advancee and thereby invalidate the decision?

INADEQUATE DELIBERATION

The elements of the rule

The key points which Lord Walker identified in relation to inadequate deliberation are that the failure by the trustees must be sufficiently grave to amount to a breach of fiduciary duty;[56] and that it would be wrong to hold trustees responsible for inadequate deliberation where they have sought and relied upon apparently competent professional advice.[57] Importantly, Lord Walker made it clear that trustees are not under a duty to be right on every

[55] See *Pitt v Holt* [2011] EWCA Civ 197 at [51].
[56] Ibid at [68] and [73] (Lord Walker repeats the same phrase).
[57] Ibid n 55 at [80].

occasion.[58] The effect of inadequate deliberation is that a decision is only voidable, not void.

Breach of trust the basis?

Both the Court of Appeal and the Supreme Court place considerable emphasis on inadequate deliberation justifying undoing a decision because it constitutes a breach of fiduciary duty, and therefore a breach of trust. A key part of the reasoning is that unless there is a breach of trust, and in the absence of an operative mistake, there is no justification for setting aside a decision of the trustees. Since there is invariably a breach of trust in cases of excessive execution where trustees genuinely act beyond the powers conferred by the trust (rather than failing to comply with a requirement of the general law), it might therefore appear that breach of trust is the general justification for invalidating the decisions of trustees. If this is the case, then there is a very real issue as to where and why the dividing line between void and voidable decisions should be drawn. The Supreme Court did not consider it necessary to consider the justification for the point at which it drew the line between void and voidable acts, given a concession by counsel on both sides.[59] The Court of Appeal gave little consideration to the issue despite the difference of opinion in earlier cases. The reasoning appears to be that the situations in which a decision will be void should be kept to a minimum[60] and that by analogy with the self-dealing rule, transactions in breach of fiduciary duty are voidable not void.[61] If the basis for the jurisdiction is breach of fiduciary duty rather than simply breach of trust, then we will see that there is a serious problem.

Categorisation of breaches of trust

The duties of trustees fall into three broad groups. First, there are absolute duties, principally the duty to act within the terms of the trust. Secondly, there are situations in which trustees have obligations of diligence, prudence, or reasonable care. Finally, trustees have fiduciary duties. Lord Walker, following Lloyd LJ in the Court of Appeal, ostensibly confines the inadequate deliberation rule to the final category.

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[58] Ibid n 55 at [88].
[59] *Futter v HMRC* [2013] UKSC 26at [93].
[60] See *Pitt v Holt* [2011] EWCA Civ 197 at [101].
[61] See Lloyd LJ in *Pitt v Holt* [2011] EWCA Civ 197 at [100] citing *Gwembe Valley Development Co Ltd v Koshy* [2003] EWCA Civ 1048.

The first category corresponds with the "scope of the power" or the "four corners of the trust" test. There is a breach if the trustee acts beyond the scope of authority conferred by the trust, for instance by failing to follow binding instructions, by paying the wrong beneficiary, by disposing of inalienable property, by acting without a necessary consent, and the like. Even where a trustee seeks advice and acts upon it, the duty can be broken, for it is not dependent upon fault in the sense of negligence or lack of care. This is why, in *National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd* [62] trustees who followed advice about who were their beneficiaries were liable when their advisers "by some extraordinary slip" misinterpreted the statutory intestacy rules.

The second category of duty applies where by statute or the rules of equity, trustees are required to act with reasonable care, or the old equitable equivalent, the duty to act as a prudent man of business would in dealing with the affairs of others. A list of circumstances in which there is a duty to take reasonable care is set out in the Trustee Act 2000, Schedule 1. This includes a number of activities including the exercise of investment powers, and the selection and supervision of agents. A similar common law duty under the rule in *Speight v Gaunt* applies to most aspects of trustees' other responsibilities.

The final category comprises those duties which are fiduciary in nature. As is frequently pointed out, the essence of a fiduciary duty is that it is a duty to demonstrate loyalty, and this is why it applies not just to trustees but also to others such as agents or company directors who have assumed roles in which this kind of responsibility is inherent. The duties of loyalty applied to fiduciaries include:

i. The duty to act in good faith;
ii. The duty not to make a personal profit;
iii. The duty to avoid any conflict of interest;
iv. The duty not to act for one's own benefit or for the benefit of a third party without informed consent.

In addition, it is apt to describe as fiduciary duties the obligation of trustees to ascertain the true wishes of the settlor in order to give effect to the

[62] *National Trustees Co of Australasia Ltd. v General Finance Co of Australasia Ltd.*[1905] AC 373.

settlor's instructions,[63] and the obligation of trustees to hold a fair balance between beneficiaries.[64]

Common slips concerning fiduciary duties

It is easy to make one of several slips when considering fiduciary duties. The first is to think that all the duties owed by a fiduciary fall into the same category. Mummery LJ in the Court of Appeal probably made this mistake when he suggested that acting "outside the four corners" of a power is a breach of fiduciary duty.[65] It should be remembered that not all duties owed by a trustee or other fiduciary are fiduciary duties.[66] Secondly, because the way in which a beneficial power of appointment is now distinguished from what was described by the House of Lords in *McPhail v Doulton as* a "trust power" is by describing it as a fiduciary power[67], it can easily be assumed that all duties to which the donee of the power is subject are fiduciary duties. That is no more the case than that all duties owed by trustees are fiduciary duties. Finally, a person in a fiduciary position may act in more than one capacity, eg both as custodian of funds and as a financial or tax adviser. It would surely be ludicrous to suggest that advice given by a trustee on financial or tax matters was subject to a fiduciary duty, whilst the same advice given by an independent (ie separate from the trustee) adviser is subject only to a duty to take reasonable care.

Do the categories have sharp or soft edges?

The three categories of breach of trust are relatively sharply distinguished. It would take a considerable stretch of language to describe the duties of a trustee to take reasonable care in the selection of investments as an obligation deriving from the duty of loyalty, and therefore a fiduciary duty. That does not mean that there can never be disagreement as to exactly where the boundaries between the categories lie. Lloyd LJ in *Pitt v Holt* indicates a degree of discomfort in including fraud on a power in the first category, but

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[63] See *Re Barr's Settlement Trusts* [2003] Ch 409 at [27]; *Futter v HMRC* at [66].

[64] A duty most obviously reflected in the rule in *Howe v Lord Dartmouth* (1802) 7 Ves Jr 137. See also *Re Earl of Chesterfield's Trusts* (1883) LR 24 Ch D 643.

[65] See Mummery LJ in *Pitt v Holt* at [237]: "if the disposition is a misapplication of property outside the scope of the power (e.g. a fraud on the power) that will be a breach of fiduciary duty and the disposition would be void".

[66] *Bristol and West BS v Mothew* [1998] Ch 1. See Pearce, Stevens and Barr, *The Law of Trusts and Equitable Obligations* (5th edn, Oxford University Press 2010 pp 914-915).

[67] See *Mettoy Pension Trustees v Evans* [1991] 2 All ER 513.

feels constrained to do so because of previous Court of Appeal authority holding cases of fraud on a power to be void[68]; Mummery LJ justifies this inclusion on the basis that there is "a misapplication of property outside the scope of the power"[69]

The problem relating to breach of fiduciary duty

The problem which is presented by *Futter v HMRC* is that the Supreme Court is emphatic that the jurisdiction to reverse a decision of trustees for inadequate consideration is based upon breach of fiduciary duty. However, the label "inadequate consideration" appears to relate to the duties of trustees to act with reasonable care or prudence rather than duties of loyalty. Richard Nolan, commenting on *Futter v HMRC* in the Law Quarterly Review,[70] observes that the concept of fiduciary duty in this context must mean something more than the rules governing conflicts of duty and interest. "Clearly, what is meant in *Futter* is wider than that: the conflicts rules already provide for a transaction that was made in conflict of duty and interest to be prima facie voidable, so the rule in *Futter* would be redundant if limited to breaches of fiduciary duty in that narrow sense. Context also makes it plain that a wider meaning of "fiduciary duty" is intended."

What constitutes breach of fiduciary duty?

There is a very real question as to what the wider meaning of breach of fiduciary duty in this context can be. Whilst the Court of Appeal places considerable emphasis upon the need for a breach of fiduciary duty, it is less clear about what will constitute such a breach. Longmore LJ makes no observations on the matter, beyond concurring in the judgment of Lloyd LJ. Mummery LJ suggests that the breach of fiduciary duty in relation to inadequate deliberation consists of "a flaw in the manner in which the discretion has been exercised"[71] having earlier cited as examples "that the fiduciary has left a relevant consideration out of account or has taken an irrelevant consideration into account".[72] Those factors, of course, are considerations which are more relevant to deciding whether there has been a failure to act with reasonable care than to whether there has been a breach of a

[68] *Pitt v Holt* [2011] EWCA Civ 197 at [97] - [98].
[69] Ibid at [237]; see also Lloyd LJ at [96].
[70] Richard Nolan, *'Fiduciaries and their flawed decisions'* (2013) 129 LQR 2013, 469-473.
[71] *Pitt v Holt* [2011] EWCA Civ 197 at [233].
[72] Ibid at [231].

duty of loyalty. Lloyd LJ equally appears to take the view that a failure to take reasonable care will be sufficient to allow a decision to be set aside, while at the same time insisting that there should be a breach of fiduciary duty. In one of his statements about when a trustee decision can be overturned, Lloyd LJ does not explicitly require a breach of fiduciary duty at all, but merely that "the trustees have in some way breached their duties in respect of that exercise" of a discretionary power.[73] This could be taken as an isolated and incautious observation were it not that his subsequent remarks similarly suggest that any breach of trust, including a breach of the statutory or common law duty of reasonable care[74] would be sufficient to ground intervention by the court at the instance of an affected beneficiary. In those instances where he refers to breach of fiduciary duty he appears to use the term interchangeably with breach of trust[75] and he gives three examples of breach of fiduciary duty: failing to consider a discretion which trustees are under a duty to consider,[76] failing to take into account a relevant factor, and taking into account some irrelevant matter.[77]The first of these will be considered later; the other two were the examples picked up in Mummery LJ's concurring judgment.

In the Supreme Court similar emphasis is given to the need for breach of fiduciary duty. Lord Walker agrees "that for the rule to apply the inadequate deliberation on the part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty."[78] The nearest he gets, however, to describing what would constitute a breach of fiduciary duty is that he says that, in addition to strict liability for acting outside the scope of their powers, "Trustees may also be in breach of duty in failing to give proper consideration to the exercise of their discretionary powers, and a failure to take professional advice may amount to, or contribute to, a flawed decision-making process."[79]

The conclusion therefore seems to be that a breach of fiduciary duty in this context can consist of a failure to take reasonable care.[80] On the surface

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[73] Ibid n 71 at [99].

[74] Ibid n 71 at [107] and [162]-[163].

[75] See *Pitt v Holt* [2011] EWCA Civ 197 at [99] and [136].

[76] Ibid at [110].

[77] Ibid n 75 at [127] He also said at [127] "The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable." This identical phrase is repeated at [222].

[78] *Futter v HMRC* [2013] UKSC 26 at [73]. Lord Walker's agreement was with Lightman J in *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409 although it also reflects agreement with the Court of Appeal in *Pitt v Holt.*

[79] Ibid at [80].

[80] This is the normal civil law standard of reasonable care. Lloyd LJ explicitly rejected the test used in public law set out in *Associated Provincial Picture Houses*

this looks like requiring one kind of breach of duty, but defining the obligation in the terms of another kind of breach of duty.[81]

Why is the test expressed as breach of fiduciary duty?

The question then arises as to why what may be simply a failure to consider all relevant factors – a failure to take reasonable care – is described as a breach of fiduciary duty. No explicit answer is given in either *Pitt v Holt* or *Futter v HMRC.* However, there is an implicit answer. One of Lloyd LJ's examples of a breach of fiduciary duty is a failure to consider a discretion which trustees are under a duty to consider.[82] Such a power is, of course, a fiduciary power rather than a beneficial power: it is a power which the donee (often a trustee) holds under an obligation at least to consider its exercise, and which the donee is obliged to exercise in a way which takes heed of those whom it is intended to benefit. In relation to such powers the duties of the fiduciary are not merely to act with loyalty in the sense of acting selflessly and in a way which presents no conflict of personal interest. There is also a duty to have regard to the best interests of the potential beneficiaries. Within this duty can be found the obligation of trustees to act in an even handed way between those beneficiaries entitled to income, and those entitled to capital. The reference to fiduciary duty in this context may therefore simply be a convenient shorthand for duties to take reasonable care or to act prudently which arise because a power is held subject to obligations to others.

Does the rule apply only to dispositive powers?

Many of the cases in which the rule in *Re Hastings-Bass* has been considered have involved discretionary dispositive powers, and both Lloyd LJ and Mummery LJ in *Pitt v Holt* refer several times to the court determining the validity of this type of power. This could be taken to suggest that the rule is limited to discretionary dispositive powers. There is much less in the judgment of Lord Walker in *Futter v HMRC* to suggest such a limitation, and it is hard to see why it would be justified. The first limb of the rule in *Re Hastings-Bass* cannot be confined to discretionary dispositive powers: any

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Ltd v Wednesbury Corporation [1948] 1 KB 223: *Pitt v Holt* [2011] EWCA Civ 197 at [77].

[81] Miguel Colebrook, *"Get out of jail free" card: the courts' offer of assistance to errant trustees*, [2013] Denning LJ 211-223 at 220 also makes the point that 'we typically do not unwind transactions for negligence. Negligent conduct typically results in a claim for loss.'

[82] See above text to footnote 76.

purported action by trustees which falls outside the four corners of the trust or which is prohibited by general law will be void. A failure to use the appropriate mode of transfer will be just as ineffective in transferring funds to a new custodian trustee as it will be to a beneficiary.

There also appears to be no reason of principle why the inadequate consideration rule should be limited to dispositive powers. In one of the cases for decision in *Pitt v Holt* and *Futter v HMRC* the question involved the terms of a trust established by Mrs Pitt, acting as a receiver appointed by the Court of Protection, to receive damages to which Mr Pitt was entitled for injuries sustained in a road accident. This was not a typical example of the exercise of a discretionary power. If this situation could fall within the rule, then surely other decisions relating to the allocation of funds should also be within the rule. For instance, a decision of trustees to distribute to a member of a class without considering the claims of the other class members would be voidable. Why not also a decision of trustees to invest in a way which unduly favours one class of beneficiary (perhaps by prioritising capital growth over income and thus prejudicing an income beneficiary)? This would truly be a breach of fiduciary duty (the duty to act even-handedly between beneficiaries), and in so far as third parties might be affected, this could be dealt with by the usual safeguards for voidable transactions (including the bona fide purchaser defence).

The English High Court decision in *Donaldson v Smith,*[83] which could be taken to suggest that the rule in *Re Hastings-Bass* is confined to dispositive powers, decided only that the (old) rule could not apply to powers which were wholly unqualified. In that case the judge held that the power of trustees as legal owners in land was an unqualified power, and that even if the exercise of that power was subject to the rule in *Re Hastings-Bass,* the effect of the rule would have been to make its flawed exercise voidable rather than void. In the Jersey case of *Seaton Trustees Limited* v *Morgan, Re the Winton Trust*[84] Commissioner Clyde-Smith said that he could not "see any reason in principle to distinguish between dispositive and administrative discretions" in applying the old rule.[85] That is the better view, and it should surely also apply to the redefined rule.

[83] *Donaldson v Smith* [2006] EWHC B9 (Ch).

[84] *Seaton Trustees Limited v Morgan* [2007] JRC 206.

[85] Other cases where the rule has been applied to administrative powers are *Leumi Overseas Trust Corporation v Howe* [2007] JRC 248 (borrowing by trustees) and *Re L,Re Representation of Mrs P, Re the R Trust* [2011] JRC 085 (appointment of new trustee). Contrast *Re Duxbury's Settlement Trusts* [1995] 1 WLR 425 (decision of Rattee J that the rule in *Re Hastings-Bass* did not apply to the appointment of a trustee under Trustee Act 1925 s36 not challenged on appeal).

Foundations of sand?

Lloyd LJ in the Court of Appeal and Lord Walker in the Supreme Court both concluded following an analysis of precedent that the rule in *Re Hastings-Bass* had been developed beyond the bounds justified by authority. That was not a foregone conclusion. Deputy Bailiff Birt, in the Jersey case of *In the Matter of the Green GLG Trust*[86] considered that the old rule in *Re Hastings-Bass* was "entirely consistent with precedent and principle." It would have been open to the English courts to find a similar basis for the unreformed rule. The cases on the exercise of a power for an improper purpose (the doctrine known as fraud on a power), including *Cloutte v Storey*[87] (in which the Court of Appeal held that such an exercise was void), fit inconveniently into the new analysis. *Cloutte v Storey* in particular "may have to be revisited one day."[88] Other cases, the most well-known of which is *Klug v Klug,*[89] could have supported a broader rule. In that case the court overrode a decision by a mother not to make an advancement to her daughter because she disapproved of her daughter's choice of husband. Lord Walker sidestepped this by observing that:

> "The old cases as to the maintenance of children are rather exceptional ... Some judicial pronouncements in these cases should not be taken out of context."[90]

Were it not for the hostility of the senior judiciary to the rule, a different outcome to the case would have been possible, and it is therefore a shame that the Court of Appeal and the Supreme Court based their decisions almost exclusively on an analysis of precedent rather than on policy considerations. There is, after all, a logic to limiting the extent to which the courts can interfere with the decisions of trustees. Firstly, the life of trustees would be made impossible if their decisions could be set aside whenever the courts considered that they would have reached a different decision if the relevant considerations had been balanced differently. There is also an arguable perversity if there is a wider jurisdiction to set aside decisions made by

[86] *In the Matter of the Green GLG Trust* [2002] JLR 571 at [25] to [28].
[87] *Cloutte v Storey* [1911] 1 Ch 18.
[88] *Futter v HMRC* [2013] UKSC 26 at [62]; [2011] EWCA Civ 197 at [98].
[89] *Klug v Klug* [1918] 2 Ch 67.
[90] *Futter v HMRC* [2013] UKSC 26 at [64].

trustees compared with decisions made by individuals,[91] and there is therefore merit in increasing the role of mistake in correcting flawed decisions.[92]

WHITHER THE RULE IN *RE HASTINGS-BASS?*

The end of the story?

Longmore LJ in *Pitt v Holt* expressed the view that "these appeals provide examples of that comparatively rare instance of the law taking a seriously wrong turn, of that wrong turn being not infrequently acted on over a twenty year period but this court being able to reverse that error and put the law back on the right course".[93] He expressed the hope, although without great optimism, that the rule in *Re Hastings-Bass* would feature much less prominently in the future. His hope, but also his lack of pessimism, have some foundation.

How much has really changed?

There has been less of a change in the formal rules than the Court of Appeal in *Pitt v Holt* and the Supreme Court in *Futter v HMRC* may have believed. Probably the most significant change is the decision that trustees who reasonably rely upon professional advice in relation to a matter within their powers do not act in breach of trust if that advice proved to be inaccurate. Setting aside this crucially important change, there has been more of a clarification of points of doubt than a sea change in the law. What is left of the *Hastings-Bass* rule is not in most respects materially different from what preceded it. Admittedly, the rule has been broken into two, the excessive execution and the inadequate deliberation rules, but the main effect of this distinction is to differentiate those decisions which are void from those which are voidable. For the second of the two rules, there is also a requirement of breach of trust, but this breach can consist of "the failure of the trustees to take into account a relevant factor to which they should have had regard ...or by their taking into account some irrelevant matter"[94]. This is almost exactly how Lloyd LJ characterised the old *Hastings-Bass* rule in *Sieff v Fox*: he said that the rule applied where trustees "would not have acted as they did had they

[91] The amendment to the Jersey Trusts Law referred to below applies to decisions by individuals transferring assets to a trust as well as to decisions by trustees.
[92] See Natalie Lee, '*Futter v HMRC; Pitt v HMRC*: the rule in *Hastings-Bass* and of mistake reviewed' [2014] Conv. 175-185 at 181-182.
[93] *Pitt v Holt* [2011] EWCA Civ 197 at [227].
[94] *Pitt v Holt* [2011] EWCA Civ 197 at [127].

not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account"[95]. There are, however, some other factors in play.

The hostile approach

Lloyd LJ was critical of the way in which trustees had been able themselves to invoke the rule in *Re Hastings-Bass* to unpick the exercise of a discretion that had produced unfortunate results. He believed that it would only rarely be appropriate for trustees to initiate proceedings, and 'if in future it is desired to challenge an exercise by trustees of a discretionary power on this basis, it will be necessary for one or more beneficiaries to grasp the nettle of alleging and proving a breach of fiduciary duty on the part of the trustees.'[96] It is thus ironic that one of the first cases to invoke the new rule in *Re Hastings-Bass* in a substantial way was a case initiated by trustees. In *Roadchef (Employee Benefits Trustees) Ltd v Hill*[97] a Roadchef director who was in a dominant position secured the appointment of another company of which he was also a director as a trustee of the Roadchef employee benefits scheme. Through the director's influence, the scheme was amended in such a way as to divert significant benefits to the director. Proudman J, applying *Futter v HMRC*, held that the amendments were void. She thought that there might have been inadequate deliberation, but more importantly, the amendments to the scheme fell outside the trustees' powers of amendment.[98] In addition, the changes had been made for an improper purpose, so that the amendments were void on the basis that they were a fraud on the power.[99] For good measure, Proudman J also held that the amendments could be set aside on the grounds of mistake.[100] The action in this case had been brought by the trustees of the employee benefits scheme, who were, of course, the trustees who had made the impugned decisions. Proudman J considered that this was not relevant in so far as the impugned decisions were void, and that this was in any event an appropriate case for the trustees to bring an action since the trust was no longer under the control of the director who had orchestrated the improper decisions, the trustees were able to bring claims for breach of duty that were not available to the beneficiaries, and the trustees in the

[95] *Sieff v Fox* [2005] 1 WLR 3811 at [119]. See above text to footnote 4.
[96] *Pitt v Holt* [2011] EWCA Civ 197 at [130].
[97] *Roadchef (Employee Benefits Trustees) Ltd. v Hill* [2014] EWHC 109 (Ch).
[98] *Roadchef (Employee Benefits Trustees) Ltd. v Hill* [2014] EWHC 109 (Ch) at [122]-[123].
[99] Ibid at [131].
[100] Ibid n 98 at [136].

circumstances were able to act as representatives of the beneficiaries who had brought several actions which were being stayed pending the outcome of the trustees' proceedings. The case therefore illustrates that there may be a range of circumstances which would justify the trustees continuing to invoke the rule in *Re Hastings-Bass* in partnership with the beneficiaries rather than in conflict with them.

There is also an interesting paradox about the requirement that there be a breach of trust in order to justify the operation of the rule in *Re Hastings-Bass.* Whilst trustees may normally be reluctant to be found in breach because of the potential liability to which it exposes them, since the rule in *Re Hastings-Bass* can reverse the effect of their flawed decision, a finding that they are in breach could also invoke a mechanism which exonerates them from liability. The trustees may therefore perversely be incentivised to assist the beneficiaries in playing a card which can still get the trustees out of jail free. There is, however, an element of jeopardy: since the trustees' decision is only voidable, and relief is at the discretion of the court,[101] a judge, in the exercise of discretion, may decide that a flawed decision should stand and that the beneficiaries should be left with their remedies for breach of trust. The trustees might also be expected to pay their own costs.[102]

Finally, the newly broadened concept of mistake may prove to be as frequently invoked a tool as the rule in *Re Hastings-Bass* used to be. The majority of cases in which judgments are available since *Futter v HMRC* have pursued this route, albeit mostly with limited success.

Judicial hostility

What is probably a more important factor in discouraging applications to invoke the rule in *Re Hastings-Bass* is the evident judicial hostility to the use of the rule to extract trustees from a poor decision. The solidarity of the judiciary in the higher courts in seeking to constrain the rule in *Re Hastings-Bass* was striking. The Supreme Court bench of seven judges was unanimous, with only a single judgment. Before this, the Court of Appeal had been unanimous, with no indication of any difference of opinion between the Court's members. Lloyd LJ referred to critical lectures by Lord Walker in 2002[103] and by Lord Neuberger in 2009[104] and in the Judicial Studies Board

[101] *Pitt v Holt* [2011] EWCA Civ 197 at [101] and [127]; Futter at [93].
[102] *Futter v HMRC* [2013] UKSC 26 at [69].
[103] Lord Walker, 'The Limits of the Principle in Re Hastings-Bass', Lecture at Kings College London, [2002] PCB 226.

Annual Lecture,[105] given shortly after the Court of Appeal delivered its decision, Lord Neuberger (who was later appointed President of the Supreme Court and was a member of the bench for the appeal), repeated his criticism, described the judgment of Lloyd LJ as "magisterial", and said that the development was based upon 'a cornerstone placed on sand'.[106] This background suggests that applications to use the rule in *Re Hastings-Bass* are likely to be less warmly received than was the case before the appeals. Since it is necessary to find a breach of trust, and trustees are not required always to be right, it is possible for judges to find that a decision of trustees – unless manifestly misdirected or misinformed – is within the margin of trustees' appreciation and not a breach. A case decided between *Pitt v Holt* and *Futter v HMRC* illustrates the point. In *Prudential Staff Pensions Ltd v The Prudential Assurance Company Ltd* [107] one of the matters addressed was whether the trustees had acted properly in making annual discretionary increases to pensions in payment rather than establishing a scheme under which pensions were increased automatically in line with increases in the Retail Prices Index. The trustees had failed to take advice on whether such an action was within their powers. Newey J approached this question by asking himself whether the trustees had been in breach of trust in failing to take advice (they seem to have given this question no thought at all). Having concluded that they had acted reasonably in not taking advice, he held that the trustees' decision relating to indexation was valid.

The role of HMRC

Pitt v Holt and *Futter v Futter* were the first prominent domestic cases involving the rule in *Re Hastings-Bass* in which Her Majesty's Revenue and Customs chose to become involved.[108] In earlier cases there was what some

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[104] Lord Neuberger, "Aspects of the law of mistake: Re Hastings-Bass," Lecture to the Chancery Bar Association Conference in London on 16 January 2009, (2009) 15(4) Trusts & Trustees 189–99.

[105] Lord Neuberger, "Open Justice Unbound", The Judicial Studies Board Annual Lecture 2011, 16 March 2011 at [17].

[106] Lord Neuberger, "Open Justice Unbound" , para [18]

[107] *Prudential Staff pensions Ltd v The Prudential Assurance Company Ltd.* [2011] EWHC 960 (Ch) (14 April 2011).

[108] HMRC has also intervened in cases outside the jurisdiction. In *HMRC v Gresch and RBC Trust Company Limited* [2009] GLR 239 HMRC successfully sought the right to be represented in a *Hastings-Bass* application in Guernsey. The Privy Council denied leave to appeal from the decisions of the Guernsey Court of Apppeal. HMRC made written representations in a Jersey case which were considered as a matter of courtesy *In the Matter of Seaton Trustees Limited* [2009] JRC 050.

judges suggested was a rather cosy conspiracy between trustees and beneficiaries to overturn a decision which has proved, with the advantage of hindsight, to be less advantageous than it was thought to be when the decision was made. Lloyd LJ indicated that the absence of HMRC from the cases in which the *Hastings-Bass* rule had been considered might have led to an absence of strong forensic debate and testing of the limits of the rule. The more recent cases demonstrate that HMRC has changed its policy and is now seeking representation in similar cases, a change in policy driven in part, no doubt, by a desire to increase the bite of existing taxes at a time when the Government is seeking to increase tax revenue but the scope for new taxes is limited. HMRC involvement is likely to make it more difficult for trustees or beneficiaries to establish a case for reversing a decision. That task would be made even more difficult were the courts to endorse the suggestion of Natalie Lee, writing in the Conveyancer, who argues that (presumably only where a decision is voidable), HMRC should be treated as an innocent third party and that where a transaction is set aside it should be "subject to a term that HMRC (and thus the public purse) should not be prejudiced." [109] Most chancery lawyers would be surprised at this suggestion which appears to equate the interest of HMRC with a party who would have a beneficial interest in the funds if a flawed decision remained uncorrected.[110]

Incorrect advice

It is, as Lord Walker recognised[111] no defence to trustees who have acted outside their powers that they have done so on the basis of incorrect advice. However, where inadequate consideration is concerned, fault on the part of the trustees is a precondition for invoking the new rule in *Re Hasting-Bass.* Whilst trustees may normally be able to rely upon professional advice they have commissioned, it would still be a breach of trust to follow it if to do so was unreasonable, for instance if the advice contains a recital of facts which is clearly wrong.[112] Where reliance on incorrect advice is reasonable, but in consequence a decision of trustees cannot be reversed, there may notionally

[109] Natalie Lee, *'Futter v HMRC; Pitt v HMRC: the rule in Hastings-Bass and of mistake reviewed'* [2014] Conv. 175-185 at 182. Lee draws on Bhandari, *'Pitt v Holt, Futter v Futter: at last, Hastings-Bass limited, but is it enough?'* [2011] B.T.R. 288.
[110] Compare the view expressed by Sir Philip Bailhache, Commissioner of the Royal Court of Jersey in *Re R* [2011] JRC 117 at [39].
[111] *Futter v HMRC* [2013] UKSC 26 at [80].
[112] An example given by Richard Wilson, 'The rule in *Re Hastings-Bass: Futter v HMRC; Pitt v HMRC* - further thoughts' [2014] Private Client Business 20 at 22-23.

be a remedy against the advisers, but this is not as straightforward as it may seem. Where trustees seek professional advice, the primary duty to provide competent advice is owed to the trustees. However, the liability to the trustees may be meaningless, for if the trustees are not in breach of trust because they have sought and followed professional advice, the trustees will bear no loss for which they can seek to be indemnified. It would therefore be necessary to establish that the duty was owed not just to the trustees, but to the trust. Actions by the beneficiaries may also be subject to a range of difficulties. It may be hard to identify who are appropriate claimants, particularly in the case of discretionary trusts, those where there are unborn beneficiaries, or where there is a power to add beneficiaries. The beneficiaries, unless the trustees are joined on the basis that there is a duty to the trust which constitutes trust property, will have to show that there is a special relationship giving rise to a tortious duty of care under *Hedley Byrne v Heller*. Lord Nicholls explained in *Royal Brunei Airlines v Tan*[113] that "it is difficult to identify a compelling reason why, in addition to the duty of skill and care vis-a-vis the trustees which the third parties have accepted, or which the law has imposed upon them, third parties should also owe a duty of care directly to the beneficiaries."

Further difficulties which may affect the remedies of the beneficiaries are that incorrect advice is not necessarily negligent, and even if it is negligent, the advisers may be protected by an exemption clause. There may also be issues about whether the brief to the advisers required them to provide advice on the issue concerned. Where more than one adviser has been consulted it may not be obvious who is responsible. Lloyd LJ (perhaps unwittingly) demonstrates the problem that Mrs Pitt faced in identifying the right defendant if she chose to pursue a negligence claim:

> "Frenkel Topping deny that they were under a duty to advise her about IHT [Inheritance Tax]. However that may be, it seems to me that, as between the various advisers which acted for and advised her, it must have been the duty of one or other of them, at least, either to advise her about any risk as to IHT, or to point out that she might need such advice and see that she got it."[114]

A different problem is illustrated by the trust of which Mr Futter was a trustee. It was held that he was not in breach of trust because he relied upon advice given by the firm of which his co-trustee was a partner. The co-trustee was also absolved from liability for breach of trust because the advice came

[113] *Rotal Brunei Airlines v Tan* [1995] 2 AC 378 at 391.
[114] *Pitt v Holt* [2011] EWCA Civ 197 at [162].

from a different solicitor in the firm, and the Supreme Court agreed with the Court of Appeal "that it would be artificial to distinguish between the two trustees, who acted together in making and effectuating their decisions."[115] It would not be hard to envisage circumstances, however, where the professional trustee is at fault for giving or following incorrect advice when a lay trustee is not. Is it sufficient to ground relief that only one trustee, perhaps only one trustee of several, is in breach?

Lastly, different limitation periods apply to claims against trustees (6 years from act complained of or beneficiary acquiring interest) and advisers (6 years from negligent advice). Given the number of potential difficulties it is hardly surprising that the Jersey courts have indicated a reluctance to oblige beneficiaries to seek a remedy against financial advisers.[116]

Defences to breach of trust

Lord Walker "would not treat that clause [an exoneration clause in conventional terms] as ousting the application of the *Hastings-Bass* rule, if it were otherwise applicable."[117] The clause to which he was referring was a clause stating that "no trustee shall be liable for a breach of trust arising from a mistake or omission made by him in good faith." This form of wording acknowledges that there has been a breach of trust whilst relieving the trustee of liable. However, it is possible for clauses to be drafted in a way which defines the standard of care rather than providing relief from liability for carelessness. It would be rather odd if the rule in *Re Hastings-Bass* might or might not apply, depending upon the way in which a limitation of liability clause is drafted. It is highly likely that, however an exoneration or limitation of liability clause is drafted, the courts will use as a test the standard of care which would need to be demonstrated by a trustee who is not protected by any such clause.

Similarly, the effect of the consent of the beneficiaries may also be an issue which needs to be addressed in the future. It is not uncommon for trustees to consult the beneficiaries about the exercise of discretions. If the beneficiaries consent to a particular transaction, this can constitute a defence to a claim of breach of trust.[118] If the inadequate consideration rule requires a breach of trust, does the consent of the beneficiaries preclude relief? It is

[115] *Futter v HMRC* [2013] UKSC 26 at [96].
[116] *In the Matter of the Green GLG Trust* [2002] JLR 571at [29]; *In the Matter of the Howe Family Number 1 Trust* at [32]; *In the Matter of Seaton Trustees Limited* [2009] JRC 050 at [26].
[117] *Futter v HMRC* [2013] UKSC 26 at [89].
[118] *Re Pauling's Settlement Trusts [*1964] Ch 303.

surely relevant in that it may preclude the hostile claim which appears to be a normal prerequisite for success; it may also operate to estop the beneficiary from later claiming that there has been inadequate consideration, although it is much less likely to be an obstacle for relief for mistake. It should not be relevant to some forms of excessive execution, although it is possible that the consent of beneficiaries could be interpreted as altering the "four corners" or scope of what is permitted by the trust. The beneficiary's consent must be informed consent to operate as a defence to a claim for breach of trust[119]: if consent does preclude *Hastings-Bass* relief, it will also be interesting to see how far consent can be considered to be fully informed where it is based on honestly held but inaccurate advice.

The impact offshore

The law in offshore jurisdictions such as Guernsey and Jersey is not identical to the law of England. Whilst as a matter of comity the decisions of the English courts are treated with respect and careful consideration, it cannot be assumed that they will be followed[120] (although a slightly worrying example of the Privy Council applying English rules despite the different context of Guernsey trust law is found in *Spread Trustee Company Ltd v Hutcheson.*[121] The old rule in *Re Hastings-Bass* has been applied or discussed in a number of cases in Jersey,[122] and it was established by the Royal Court that proof of breach of trust was not a prerequisite to the application of the rule.[123] The Court of Appeal decision in *Pitt v Holt* represented a dilemma for

[119] *Holder v Holder* [1968] Ch 383.
[120] *Re B* [2012] JRC 229.
[121] [2011] UKPC 13. See Jennifer Shearman and Robert Pearce, *"Exempting a trustee for gross negligence"* [2011] Denning LJ 181-191.
[122] *In the Matter of the Green GLG Trust* [2002] JLR 571; *In the Matter of Friedman and Asiatrust Limited* [2006] JRC 187; *In the Matter of the Winton Investment Trust* [2007] JRC 206; *Leumi Overseas Trust Corporation* v *Howe* [2007] JRC 248; *In the Matter of the Howe Family Number 1 Trust* [2007] JLR 660; *In the Matter of the Representation of Vistra Trust Company (Jersey) Limited* [2008] JRC 111; *In the Matter of Seaton Trustees Limited* [2009] JRC 050; *Re B and C* [2009] JRC 245 and *In the Matter of the V Settlement* [2011] JRC 046. For a commentary on these cases see Brown, *"The development of Hastings-Bass in Jersey,"* STEP Journal May 2010 and Wakeham, *"The end of 'the rule in Re Hastings-Bass'?"* STEP Journal May 2011.
[123] In the Matter of the Green GLG Trust [2002] JLR 571 applied *in Leumi Overseas Trust Corporation v Howe* [2007] JRC 248 and *Re Representation Vistra Trust Company (Jersey) Ltd* [2008] JRC 111.

the Royal Court. In *Re B*[124] the Royal Court suggested that it would have followed *Pitt v Holt* had it been necessary to the decision in that case.

Most uncertainty in relation to Jersey law has now been removed by an amendment to the Jersey Trust Law 1984,[125] introducing articles 47B to 47J. This gives the courts power to declare voidable or of no effect dispositions to a trust or the exercise of powers in relation to a trust which are the result of mistake or of failing to take into account any relevant considerations or of taking into account irrelevant considerations. There is explicitly no requirement of 'any lack of care or other fault'.[126] It is possible that the law does not extend to situations where trustees have acted in excess of their powers, but it is at least arguable in such a case that the trustees have failed to take into account a relevant consideration. It is widely believed that Guernsey and the Isle of Man will introduce similar laws. This reflects the desire in both jurisdictions to develop a trusts system which offers a benign environment for both trustees and beneficiaries.

CONCLUSION

Futter v HMRC has provided some welcome clarification in an area of the law which was overdue for review by the higher courts. However, the decision leaves a number of important questions unresolved, the most important of which is the meaning in this context of breach of fiduciary duty as it relates to decisions which are flawed because of a failure to consider relevant considerations or because they were influenced by irrelevant considerations. The one thing of which there can be little doubt is that, despite the judicial aversion which has been demonstrated to allowing trustees to continue playing the "get out of jail free" card, there will continue to be occasions where decisions with unwelcome and unanticipated outcomes have been made which trustees and beneficiaries alike will seek to avoid. Murphy's law – what can go wrong will go wrong – applies in most areas of endeavour, and trusts are by no means exempt. The courts will have to continue to grapple with the rule in *Re Hastings-Bass*, and their task has been made only marginally easier by *Futter v HMRC.*

[124] [2012] JRC 229. A similar conclusion was reached in *In the matter of the Onorati Settlement* [2013] JRC 182.

[125] The Trusts (Amendment No.6) (Jersey) Law 2013 came into force on October 25, 2013. See

[126] For a discussion see William Redgrave, *"Leviathan can look after itself: Jersey legislated on mistake and Hastings-Bass"* [2014] Private Client Business 92.