

The rule in  
*Re Hastings-Bass*

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## ABSTRACT

The rule in *Re Hastings-Bass* is an equitable control on the exercise of powers by trustees. It has developed without satisfactory explanation of its doctrinal basis, resulting in uncertainty as to its scope and application. In *Pitt v Holt* [2011] EWCA Civ 197 the Court of Appeal began to remedy these defects by deciding that the rule is founded on a trustee's duty properly to consider the exercise of a power.

This thesis argues, first, that *Pitt* is right to understand the *Re Hastings-Bass* rule as premised on the duties of trustees, and not on the exercise of a power producing an unintended result. This accords with the reasoning of earlier cases on the rule, and is also consistent with House of Lords authority on fiduciary powers and judicial non-interference in trustees' decision-making. This duty is not a 'fiduciary' duty, or an aspect of the trustee's duty of care, but is an independent incident of the office of trustee.

Secondly, this analysis of the *Re Hastings-Bass* rule facilitates exposition of its important features: the concept of 'relevant consideration' must be carefully circumscribed; the purported exercise of a power in breach of the rule is voidable, not void; the rule does not apply to purely personal powers, or to administrative powers; there are no special rules for pension trusts or the use of the rule to mitigate liability to taxation; trustees can usually avoid a breach of duty by taking professional advice; and in some circumstances, those professional advisers can incur liability to the trust beneficiaries.

Finally, the relationship between the *Re Hastings-Bass* rule and fraud on a power is examined. It is argued that the analogy between the two doctrines is not sound, and that there is reason to doubt aspects of the orthodox account of fraud on a power.

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## ABBREVIATIONS

Ala L Rev	Alabama Law Review
Alta L Rev	Alberta Law Review
Amb	Ambler's Chancery Reports
App Cas	Law Reports, Appeal Cases (Second Series)
ASIC	Australian Securities and Investments Commission
Aust Bar Rev	Australian Bar Review
BCLC	Butterworths Company Law Cases
Beav	Beavan's Rolls Court Reports
BUL Rev	Boston University Law Review
Bus Law	Business Lawyer
C&SLJ	Company and Securities Law Journal
CL & PR	Charity Law and Practice Review
CLR	Commonwealth Law Reports
Col L Rev	Columbia Law Review
Cov LJ	Coventry Law Journal
De G F & J	De Gex, Fisher & Jones' Chancery Reports
De G J & S	De Gex, Jones & Smith's Chancery Reports
Drew	Drewry's Vice Chancellor's Reports Tempore Kindersley
Drew & Sm	Drewry & Smale's Chancery Reports Tempore Kindersley
Eden	Eden's Chancery Reports tempore Northington
FCAFC	Federal Court of Australia: Full Court
Giff	Giffard's Chancery Reports
GLR	Guernsey Law Reports
Harv L Rev	Harvard Law Review
HCA	High Court of Australia
HLC	Clark & Finnelly's House of Lords Reports New Series

I Eq R	Irish Equity Reports (1st Series)
Insolv L	Insolvency Lawyer
IR Eq	Irish Reports, Equity (3rd Series)
IRLR	Industrial Relations Law Reports
Israel L Rev	Israel Law Review
ITELR	International Trust & Estate Law Reports
J Eq	Journal of Equity
J Phil	Journal of Philosophy
JCL	Journal of Contract Law
JGLR	Jersey and Guernsey Law Review
JIBLR	Journal of International Banking Law and Regulation
JLR	Jersey Law Reports
JTCP	Journal of International Trust and Corporate Planning
Jur	Jurist Reports
Justinian Inst	The Institutes of Justinian
K & J	Kay & Johnson's Vice Chancellor's Reports
KCLJ	King's College Law Journal
KLJ	King's Law Journal
Liverpool LR	Liverpool Law Review
LJ Ch	Law Journal Reports, Chancery New Series
LR Eq	Law Reports, Equity Cases
LT	Law Times Reports
Mac & G	Macnaghten & Gordon's Chancery Reports
Madd	Maddock's Chancery Reports
Mer	Merivale's Chancery Reports
Mich L Rev	Michigan Law Review
NWULR	Northwestern University Law Review
NZCA	New Zealand Court of Appeal

NZLR	New Zealand Law Reports
NZULR	New Zealand Universities Law Review
OPLR	Occupational Pensions Law Reports
PCB	Private Client Business
Pens LR	Pensions Law Reports
Pick	Pickering's Massachusetts Reports
SA Merc LJ	South African Mercantile Law Journal
SC (HL)	Session Cases, House of lords
Sch & Lef	Schoales & Lefroy's Irish Chancery Reports
Sm & G	Smale & Giffard's Chancery Reports
STI	Simon's Weekly Tax Intelligence
Swans	Swanston's Chancery Reports
T & T	Trusts & Trustees
TEL & TJ	Trusts and Estates Law & Tax Journal
Theo Inq L	Theoretical Inquiries in Law
TLI	Trust Law International
TLR	Times Law Reports
Trusts & Est	Trusts and Estates
U Chi L Rev	University of Chicago Law Review
UTLJ	University of Toronto Law Journal
UWAL Rev	University of Western Australia Law Review
Va L Reg	Virginia Law Register
Vern	Vernon's Chancery Reports
Ves Jun	Vesey Junior's Chancery Reports
WTLR	Wills & Trusts Law Reports
Y & C Ch Cas	Younge & Collyer's Chancery Reports
Yale LJ	Yale Law Journal

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## 1. INTRODUCTION

In 1958 the trustees of a settlement, established in 1947 by Sir William Bass for the benefit of Captain Hastings-Bass and his issue, exercised the statutory power of advancement<sup>1</sup> to transfer £50,000 from that settlement to the trustees of another trust fund created in 1957 for the benefit of Captain Hasting-Bass's son, William,<sup>2</sup> and his issue. The trustees failed to appreciate that following the decision of the House of Lords in *Re Pilkington's Will Trusts*<sup>3</sup> some of the 1957 trusts were perpetual and therefore void. The Commissioners of Inland Revenue argued that this oversight rendered the purported exercise of the power of advancement void, and that in consequence they were entitled to claim estate duty on the £50,000 when Captain Hastings-Bass died in 1964. The Court of Appeal rejected this view, holding that the 1957 trusts created a life interest vested in William Hastings-Bass, and that this life interest survived even though the remoter interests were void for perpetuity.<sup>4</sup>

In 2001, the trustees of a fund comprising Woburn Abbey, the ancestral home of the Dukes of Bedford, and a great many valuable chattels, became concerned to limit their exposure to inheritance tax. They took advice from reputable London solicitors, who themselves took the advice of counsel. The lawyers advised the trustees to exercise a power of appointment in favour of the Duke's grandson, Lord Howland. The trustees followed their lawyers' advice to the very letter, and in

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<sup>1</sup> Trustee Act 1925, s 32.

<sup>2</sup> William Edward Robin Hood Hastings-Bass, 17<sup>th</sup> Earl of Huntingdon.

<sup>3</sup> *Re Pilkington's Will Trusts* [1964] AC 612 (HL).

<sup>4</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

consequence incurred a liability to capital gains tax of around one million pounds, their lawyers having overlooked one crucial technicality among the many complexities of tax law. In *Sieff v Fox*<sup>5</sup> the trustees successfully relied on what was referred to as ‘the rule in *In re Hastings-Bass*’<sup>6</sup> to persuade Lloyd LJ that the purported exercise of the power of appointment was void – and therefore not chargeable for tax purposes – because the trustees would not have exercised the power had they appreciated what the tax consequences would be.

Taken individually, *Re Hastings-Bass* and *Sieff v Fox* appear to have little in common. Certainly the judges of the Court of Appeal in *Re Hastings-Bass*,<sup>7</sup> a case primarily about perpetuity and the severance of void interests from valid ones, would surely have been very surprised to be told that they were establishing a principle which would allow trustees some thirty years later to avoid a tax charge by claiming that in spite of outward appearances, they had not done what they appeared to have done, at least as a matter of law. The explanation is that since *Re Hastings-Bass* was decided, that case and its progeny<sup>8</sup> have been analysed and re-analysed, both in the courts and in the academic literature, as the foundation of a rule which in truth bears

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<sup>5</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>6</sup> *ibid* [28].

<sup>7</sup> Megaw, Buckley and Roskill LJJ.

<sup>8</sup> Predominantly in England, but increasingly also in ‘offshore’ jurisdictions: Jersey (*Re Green GLG Trust* [2002] JLR 571 (Royal Court of Jersey)); Guernsey (*HMRC v Gresh* [2009-10] GLR 239 (CA of Guernsey)); and the Cayman Islands (*Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* (2006-07) 9 ITEL 302 (Grand Court of the Cayman Islands)). Other common law jurisdictions have been more cautious: see JC Campbell, ‘Should the ‘Rule in *Hastings-Bass*’ Be Followed in Australia? — Trustees’ Duty to Enquire and Trustees’ Mistakes’ (2011) 34 Aust Bar Rev 259.

little resemblance to the case which gave it its name.<sup>9</sup> Both the juridical basis of this rule, and the details of its proper application and extent have proven to be peculiarly elusive.

What is clear is that the '*Re Hastings-Bass* rule' allows trustees to treat as legally ineffective certain decisions that they have made but which they wish they had not – or which the beneficiaries wish that they had not. What has long been unclear is whether this is because of some flaw in the trustees' decision-making process, or because the outcome of the decision is not what the trustees intended. It has not been clear whether the flawed decision is wholly void, or merely voidable, and therefore liable to be set aside by the court on an appropriate application – a distinction with important consequences for third parties. It has not been clear whether those invoking the rule<sup>10</sup> must prove that had the trustees appreciated the true situation they would not have acted as they did, or merely that they might not. It has not been clear whether the exercise of administrative and dispositive powers are to be treated in the same way, whether pension trusts have special rules of their own, and whether it makes a difference if the underlying issue is liability to pay tax. Perhaps most unfortunate of all, it has not even been clear what kind of flaw in the decision-making process, or what kind of mismatch between intentions and results, is needed to invoke the *Re Hastings-Bass* rule.

This uncertainty has naturally generated a great deal of debate among academics and practitioners, and a great deal of uncertainty in the courts. Finally in

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<sup>9</sup> See Lord Neuberger, 'Aspects of the Law of Mistake: *Re Hastings-Bass*' (2009) 15 T & T 189, 198.

<sup>10</sup> In the cases the claimants are normally the trustees, but in principle could be the beneficiaries.

2011 two *Re Hastings-Bass* cases made their way to the Court of Appeal, in the form of the appeals in *Pitt v Holt* and *Futter v Futter*, which were heard together.<sup>11</sup> Lloyd LJ seized the opportunity there to seek to resolve many of the central questions about the doctrine. Most importantly, the Court decided that the *Re Hastings-Bass* rule is concerned with the duty of trustees to give proper consideration to the exercise of powers and discretions vested in them, by taking relevant matters into account when making their decision, and excluding irrelevant matters. The Court also settled the void or voidable debate, holding that the exercise of a power or discretion in breach of the duty of consideration is voidable, not void. This, then, is the present state of the law. Yet for the moment *Pitt v Holt* stands alone, a single appellate decision re-shaping and re-interpreting some 20 years of first instance case law, and one which, quite properly, does not attempt to answer all of the questions about the *Re Hastings-Bass* rule which have arisen in the earlier cases. *Pitt v Holt* will in consequence form the centrepiece of this thesis, much of which will be devoted to arguing that it is rightly decided, although it must be carefully understood, and to working out the consequences of adopting that position. But given the fragility of the current law, it would be insufficient to start at *Pitt v Holt* and to assume that its sensible policy outcome is the product of sound legal reasoning based on a just view of precedents and principle.

Chapter two therefore looks to shore up the Court of Appeal's decision by starting from *Re Hastings-Bass* itself and showing that the duty of consideration

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<sup>11</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132. Except where the context indicates otherwise, '*Pitt v Holt*' is used throughout this thesis to refer to the decisions of the Court of Appeal in relation to both cases.

approach adopted in *Pitt v Holt* is the right one: first, because it provides the best explanation for the *Re Hastings-Bass* case law; and secondly, because it is justifiable by reference to long-established principles of equity drawn from the important decisions of the House of Lords in *McPhail v Doulton*<sup>12</sup> and *Gisborne v Gisborne*.<sup>13</sup>

Chapter three then takes as its focus the Court of Appeal's decision in *Pitt v Holt*, and provides a detailed examination of what is now the leading case in this field. It considers first the merits of the reasoning adopted there, and then moves on to look more closely at the duty-oriented version of the rule put forward by Lloyd LJ, with a view to ascertaining the precise source and nature of this duty. Whilst it has been suggested that the *Re Hastings-Bass* duty is 'fiduciary', or simply an aspect of the trustee's duty of care, this chapter will demonstrate that in fact the *Re Hastings-Bass* duty is best understood as an independent duty arising from the office of trusteeship.

Chapter four takes the account of the *Re Hastings-Bass* rule developed in chapters two and three and uses it to try to answer the questions of detail which have arisen in the case law, or are likely to in future. In particular, matters such as: what will count as a 'relevant consideration'; the liability of trustees and their professional advisers for breaches of the *Re Hastings-Bass* duty, and the defences available to them; the application of the rule to different species of power and power-holder, including administrative powers and powers vested in non-fiduciaries; and perhaps

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<sup>12</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>13</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

most importantly, the question of why the successful invocation of the *Re Hastings-Bass* rule renders the purported exercise of a power voidable, and not void.

Having looked exhaustively at the *Re Hastings-Bass* rule itself, chapter five takes a somewhat broader view of the control of trustees' powers by looking at aspects of the fraud on a power doctrine. This has often been invoked as an analogue to the *Re Hastings-Bass* rule, but they appear uneasy companions: where *Re Hastings-Bass* looks to proper decision-making, fraud on a power is concerned with the purpose for which a power is exercised; whilst the purported exercise of a power impugned on *Re Hastings-Bass* grounds is voidable, it is established orthodoxy that fraud on a power renders a purported exercise wholly void. Chapter five seeks to shed light both on the extent to which the *Re Hastings-Bass* and fraud on a power doctrines interact, and on how far the detailed rules which have been developed in the fraud on a power context can be used as a basis for criticising the different approaches taken in relation to *Re Hastings-Bass*.

Finally, chapter six looks at the wider trust law picture as the context in which the *Re Hastings-Bass* doctrine has developed. This leads to the identification of some important issues which remain unaddressed in relation to *Re Hastings-Bass* and its place in the system of controls on trustees, and to a glance forward to the Supreme Court's forthcoming consideration of *Pitt v Holt* in early 2013.

## 2. RE HASTINGS-BASS AND THE DUTIES OF TRUSTEES

So long as *Pitt v Holt*<sup>14</sup> remains the only appellate authority on the *Re Hastings-Bass* doctrine since *Re Hastings-Bass*<sup>15</sup> itself was decided in 1974, the law in this field remains vulnerable to change. Permission to appeal to the Supreme Court in *Pitt* has been granted.<sup>16</sup> It is very much possible, therefore, that the Supreme Court could return the law to its pre-*Pitt* state, could eliminate the doctrine entirely,<sup>17</sup> or indeed could analyse the *Re Hastings-Bass* case law in an entirely novel way. *Pitt* itself, whilst most important for its conclusion that the *Re Hastings-Bass* rule is premised on breach of duty, does not in fact deal at any length with justifying that analysis, being concerned more with the consequences of such an approach than its doctrinal legitimacy. Furthermore, Lloyd LJ did not there consider very much of the case law between *Re Hastings-Bass* itself and *Pitt v Holt*,<sup>18</sup> and such cases as were considered attracted for the most part only brief attention. The purpose of this chapter, therefore, is not to seek to sustain the *Pitt* approach by showing that its reasoning is sound,<sup>19</sup> but rather to support it by showing that in fact there are very good reasons to prefer an approach based on the trustee's decision-making duties to any other basis for the rule,

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<sup>14</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>15</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>16</sup> See text to n 1233 and following.

<sup>17</sup> See text to n 328 and following on alternative approaches to the *Re Hastings-Bass* rule, none of which is consistent with the cases decided thus far, but each of which is potentially open to the Supreme Court.

<sup>18</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [68].

<sup>19</sup> This will be addressed in chapter three.

and to show that support for this analysis can be derived from several of the *Re Hastings-Bass* cases prior to *Pitt v Holt*. It seeks to shore up the foundations of *Pitt v Holt*, but in doing so it cannot depend upon *Pitt* itself, for such circuitry of reasoning would defeat the purpose to be achieved. This chapter therefore starts at the beginning of the *Re Hastings-Bass* story, looking at the law prior to *Pitt* – which is to say, at what was then a rapidly growing collection of contradictory first-instance judgments, tinged with an uneasy sense that the unrestrained development of such a rule may not have been entirely beneficial to the law.

This chapter therefore takes as its first premise the assumption that there was some sound judicial instinct at work in the *Re Hastings-Bass* cases,<sup>20</sup> but that prior to *Pitt v Holt* the doctrine was under-analysed and, as a result, widely misunderstood. Accordingly it seeks to establish the proper basis of the rule. After a brief advertence to the methodology to be employed, it will set out the two basic forms the rule could take:<sup>21</sup> one based on flawed decision-making, the other on unexpected outcomes. The case for preferring the flawed decision-making model will then occupy the remainder of the chapter. This will be established, first, by a detailed examination of the *Re Hastings-Bass* line of cases, secondly by reference to the duties of trustees of discretionary trusts and donees of fiduciary powers of appointment as exemplified in *McPhail v Doulton*<sup>22</sup> and thirdly by consideration of the well-established doctrine of

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<sup>20</sup> See text to n 1252.

<sup>21</sup> The *Re Hastings-Bass* rule could of course take many forms, but the two addressed in this chapter (and their variations) are those suggested by, and to some degree consistent with, the pre-*Pitt v Holt* case law.

<sup>22</sup> *McPhail v Doulton* [1971] AC 424 (HL).

judicial non-intervention in trustee decision-making, the apotheosis of which is found in *Gisborne v Gisborne*.<sup>23</sup> This will be followed by an analysis of the arguments in favour of the unexpected results model, based primarily on certain of the *Re Hastings-Bass* cases, and the reasons for rejecting these arguments. Finally this chapter will examine three alternative views of the doctrine – that the *Re Hastings-Bass* rule is an equitable *non est factum*; that only capricious and absurd decisions are liable to be impugned; and that decisions not taken honestly and fairly are invalid – and demonstrate that, whatever may be said for such alternatives as a matter of pure policy, they are unsustainable as accounts of the case law. In consequence the general approach adopted in *Pitt v Holt*, based on flawed decision-making and breach of duty, will be shown to be sound, thereby providing a firm foundation for a detailed examination of *Pitt* itself in chapter three.

### **Methodology**

This chapter does not seek to show that the *Re Hastings-Bass*<sup>24</sup> case law leads ineluctably to particular conclusions about the nature of the doctrine, nor that there is only a single legitimate way to read the cases. The first-instance case law itself renders this impossible. In consequence of the lack of guidance from the appellate courts before *Pitt v Holt*<sup>25</sup> it is now possible to find first instance authority for almost any proposition on the rule. Before *Pitt* a first instance judge making a new decision

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<sup>23</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

<sup>24</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>25</sup> The only case apart from *Pitt* directly concerning the *Re Hastings-Bass* rule to be decided by an appellate court is *Re Hastings-Bass* itself. There are Court of Appeal decisions on analogous principles: *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27 (CA); *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).

could go more or less where he pleased – the binding authority was almost non-existent, and the persuasive authority extremely mixed and contradictory.

What is attempted, therefore, is the ‘top down’<sup>26</sup> imposition of a particular model of how the rule in *Re Hastings-Bass* could, and should, function. The aim is to develop a model of the *Re Hastings-Bass* rule which is based soundly in elementary principles of equity, and so far as possible, on the *Re Hastings-Bass* case law. But inevitably the model does not fit all of the cases. Thus it is argued here that some of the cases are simply wrongly decided, or reach a correct result on the basis of dubious reasoning. Inconsistency with the case law is normally a good reason to doubt the validity of a model, at least as a statement of what the law is, rather than merely what it ought to be. However, in this case the legitimacy of the model is confirmed by two countervailing factors. First, that given the divergence of the cases, any model which reflects some of the cases will conflict with others. If the above premise, that the rule in *Re Hastings-Bass* is doctrinally well-founded, is accepted, then the incidents of the rule must themselves be rule-based and not arbitrarily or capriciously determined in individual cases. Any model meeting these criteria will necessarily contradict *some* of the cases. Secondly, the model put forward does not depend solely on a selective approach to the *Re Hastings-Bass* cases. It also draws on two lines of case law supported by the highest authority, in the decisions of the House of Lords in *McPhail v Doulton*<sup>27</sup> and *Gisborne v Gisborne*,<sup>28</sup> quite apart from the Court of Appeal’s

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<sup>26</sup> See RA Posner, 'Legal Reasoning From the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 U Chi L Rev 433, 433-36.

<sup>27</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>28</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

decision in *Pitt v Holt*. To the extent that the reasoning in these cases mandates certain limits on the *Re Hastings-Bass* rule, they provide a sound basis for the rejection of contradictory *Re Hastings-Bass* cases and for supporting the model based upon them. Finally, there is an extent to which, if the law is simply and indefensibly wrong as matter of principle, then it is the duty of the courts to correct it. As Edward Nugee QC has said:

It should not need legislation to put the law back into a reasonable state and to restore the true effect of the judgment of the Court of Appeal in *Re Hastings-Bass*. *Mettoy*<sup>29</sup> has been in the books for less than a quarter of the time that *Solle v Butcher* was,<sup>30</sup> and some of its less desirable younger siblings for much less time than that.<sup>31</sup>

It will be shown that some aspects of the *Re Hastings-Bass* rule as understood in some of the pre-*Pitt* cases are in desperate need of such correction, and the means of such correction is readily available, and soundly founded in orthodox equity doctrine.

### **Models of the *Re Hastings-Bass* rule**

Given this model-based approach, the starting point must be the models themselves. The first, which will be referred to as the ‘weak’ rule,<sup>32</sup> says that the rule in *Re Hastings-Bass* is a rule governing decision-making by trustees. When trustees decide to exercise a power or discretion vested in them, or decide in what manner to exercise

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<sup>29</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch). This was the first reported case after *Re Hastings-Bass* itself to attempt to explain the scope and effect of the *Re Hastings-Bass* rule.

<sup>30</sup> Referring to the Court of Appeal’s rejection in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679 of the doctrine of ‘mistake in equity’ put forward in *Solle v Butcher* [1950] 1 KB 671 (CA), which had stood for half a century in spite of vehement criticism throughout that period.

<sup>31</sup> E Nugee, ‘*Re Hastings-Bass* Again - Void or Voidable? And Further Reflections’ [2003] PCB 173, 187 (footnotes added).

<sup>32</sup> ‘Weak’ and ‘strong’ are convenient labels to identify the models of the *Re Hastings-Bass* rule specified here, but no additional meaning is intended to be conveyed by the choice of this terminology.

it, they have an obligation to consider the appropriateness of the exercise. To satisfy this obligation they must take into account matters relevant to their decision, and must exclude from consideration irrelevant matters. In determining what matters are relevant, and what weight to attribute to each such matter, the trustees must act reasonably and responsibly. Accordingly, a matter is only treated as legally ‘relevant’ if, in general terms, a responsible trustee would have taken it into account.<sup>33</sup> A breach of this duty to consider is a breach of trust which will invalidate the purported exercise of the power. As Green says:

A breach of the duty to consider is a breach of fiduciary duty, and a platform from which the court may intervene. It is the existence of, and breach of, this fiduciary duty which justifies the existence of the Hastings-Bass principle as a distinct device for dealing with a trustee's errors.<sup>34</sup>

We must be careful as well to distinguish a variant of the ‘weak’ rule, which will be called the ‘unlimited weak’ rule. This is simply the ‘weak’ rule without the limit on relevance imposed by the ‘responsible trustee’ requirement. That is, it would allow the *Re Hastings-Bass* rule to vitiate any exercise of a power where the trustee failed to take a factually relevant matter into account, no matter the reason for that failure.

The second will be referred to as the ‘strong’ rule. This version of the rule is concerned with whether the trustees’ actions achieve their intended outcome. So according to the ‘strong’ rule, if trustees purport to exercise a power with a view to achieving a particular outcome, and that outcome is not achieved, the purported

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<sup>33</sup> See text to n 576 and following.

<sup>34</sup> B Green, 'The Law Relating to Trustees' Mistakes - Where Are We Now?' (2003) 17 TLI 114, 116. Contrary to Green’s view, though, this duty ought not be characterised as fiduciary: see text to n 456 and following.

exercise of the power is invalid. No breach of duty on the part of the trustee is necessary or sufficient to invoke the rule. A ‘variant strong’ rule is to put the rule in terms of an obligation to take into account relevant considerations, whilst mandating the true effect of the exercise of the power as a relevant consideration.<sup>35</sup> This produces exactly the same effect as the strong rule; if the outcome was unforeseen then it was not considered, and the purported exercise of the power is invalid.

### **Reasons to accept the ‘weak’ rule**

With at least two competing models of the *Re Hastings-Bass* rule available, the principal function of this chapter is to set out the reasons why the ‘weak’ rule should be preferred to the ‘strong’ rule. There are three such reasons. First, the weak rule is mandated by some of the *Re Hastings-Bass* cases, and is consistent with many more. Secondly, the understanding of trustees’ duties in relation to discretions and powers, and of the courts’ supervision of trustees, derived from *McPhail v Doulton*<sup>36</sup> is consistent with the ‘weak’ rule, but not the ‘strong’ rule. Thirdly, the same can be said for the courts’ approach to non-interference in trustee decision-making exemplified by *Gisborne v Gisborne*.<sup>37</sup>

A few preliminary considerations also point us in the direction of the ‘weak’ rule, although they are not conclusive. As Park J stated in *Breadner v Granville-Grossman* ‘It cannot be right that whenever trustees do something which they later

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<sup>35</sup> Counsel for the Commissioners of Inland Revenue argued for this understanding in *Re Hastings-Bass* itself: *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 37.

<sup>36</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>37</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

regret and think that they ought not to have done, they can say that they never did it in the first place.’<sup>38</sup> A ‘strong’ rule would allow the setting aside of decisions made by trustees purely because of hindsight. Even though the trustee acted entirely within the scope of the power or discretion granted to him, the mere failure to achieve what he set out to achieve would vitiate his decision. And yet in everyday life people often fail to achieve exactly what they set out to achieve, because unforeseen factors intervene. If the settlor has chosen to give the trustees a broad power or a wide area of discretion, then it is not wholly clear why transactions which fail to achieve their intended result ought to be set aside, when the settlor himself could not generally have such transactions with his own property set aside.<sup>39</sup> The ‘weak’ rule does not suffer from this defect, since its focus is not on whether, with the benefit of hindsight, the trustees achieved their aims, but on whether, in the circumstances prevailing at the time, the trustees conducted themselves properly. It therefore ought simply to be seen as an aspect of the beneficiaries’ entitlement to proper performance of the trusts.<sup>40</sup> Beneficiaries are often peculiarly vulnerable in their relationship with their trustees<sup>41</sup> – but not always.<sup>42</sup> As such, it is proper for the law to require trustees to act

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<sup>38</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [61].

<sup>39</sup> There may be other doctrines, such as mistake, which the settlor can rely on in relation to dealing with his own property, but these are also available to trustees (see *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [164]-[220]). The crucial distinction is that the *Re Hastings-Bass* rule applies only to action taken by trustees (*Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [82]) and those in analogous positions (see text to n 904 and following).

<sup>40</sup> Lightman J has called it ‘only one of the protections afforded to beneficiaries in respect of the due administration of the trust by the trustees’: *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [13].

<sup>41</sup> *Hospital Products Ltd v United States Surgical Corporation* 156 CLR 41, 96-97.

with integrity and responsibility. The beneficiaries have no entitlement to a particular outcome, but they are entitled to proper conduct on the part of their trustees.<sup>43</sup>

### *The Re Hastings-Bass cases*

The ‘weak’ rule can be seen most clearly in the language of many of the *Re Hastings-Bass* cases. However since many do not expressly consider the distinction between the ‘weak’ and ‘strong’ formulations, it is not sufficient simply to draw general conclusions. Of the two dozen or so reported cases in which *Re Hastings-Bass* is mentioned in at least one judgment, six in particular provide the basis for the ‘weak’ approach<sup>44</sup> and these must be closely examined.

### RE HASTINGS-BASS

In *Re Hastings-Bass*<sup>45</sup> itself the Court of Appeal had to consider the purported exercise by trustees of the statutory power of advancement<sup>46</sup> in circumstances in which the interests created by the exercise of the power were, except for an immediate life interest, void for perpetuity.<sup>47</sup> The Commissioners of Inland Revenue

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<sup>42</sup> L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 61 notes the example (in relation to fiduciaries generally) of a company not being ‘vulnerable’ in relation to a single non-executive director.

<sup>43</sup> A trustee’s performance of his trusts ‘is to be judged not so much by success as by absence of proven default.’ *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA) 1285 (Legatt LJ).

<sup>44</sup> The six are: *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA); *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch); *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523; *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453.

<sup>45</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>46</sup> Trustee Act 1925, s 32.

<sup>47</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 34.

argued that to exercise the power of advancement validly, the trustees must have ‘a proper understanding’<sup>48</sup> of the effect of the exercise, and that since the trustees did not foresee the voidness for perpetuity of most of the interests they purported to create by exercising the power, there was in truth no valid exercise.<sup>49</sup> The Court of Appeal concluded that the trustees did exercise the power of advancement, that they asked themselves the right questions and that there was ‘no reason to suppose that, in the light of their own understanding or advice as to the law, they failed to ask themselves the right questions or to arrive in good faith at a reasonable conclusion.’<sup>50</sup> Whilst it was undoubtedly true that the perpetuity rule meant that the trustees did not achieve what they intended to achieve, their exercise of the power of advancement was valid because they acted in good faith and asked themselves the right questions. In *Re Hastings-Bass* itself it strongly appears that the Court of Appeal preferred to approach the issue as one of proper trustee decision-making, rather than simply looking to the results achieved.

#### METTOY PENSION TRUSTEES LTD V EVANS

The next important case was the judgment of Warner J in *Mettoy Pension Trustees Ltd v Evans*.<sup>51</sup> *Mettoy* concerned the purported exercise by the trustees of a pension scheme of an express power of amendment contained in the scheme rules. The exercise of that power in 1983 changed, among other things, the rules governing the

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<sup>48</sup> *ibid* 35.

<sup>49</sup> *ibid* 35.

<sup>50</sup> *ibid* 40.

<sup>51</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

winding up of the scheme. When the scheme was in fact wound up, an issue arose as to whether the exercise of the power of amendment was valid, and therefore whether the scheme's assets were to be dealt with according to the old rules or the new rules.<sup>52</sup> The difficulty arose because none of the trustees who agreed to the 1983 amendment had in fact read, and understood the effects of, the deed of amendment. They had relied instead on a summary provided by the scheme's solicitor.<sup>53</sup> Warner J expressed the rule here in purely 'weak' rule terms, stating that *Re Hastings-Bass* mandates that:

where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account.<sup>54</sup>

He consequently put the test for applying the rule in 'weak' terms too: '(1) What were the trustees under a duty to consider? (2) Did they fail to consider it? (3) If so, what would they have done if they had considered it?'<sup>55</sup> Applying this test, Warner J held that the trustees were under a duty, in deciding to exercise the power of amendment to implement new scheme rules, to consider what those new rules were,<sup>56</sup> and that they had failed in this duty.<sup>57</sup> However, Warner J also held under the third limb of his test that the trustees, had they fully understood the new rules, would have

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<sup>52</sup> *ibid* 1607-08.

<sup>53</sup> *ibid* 1606-07.

<sup>54</sup> *ibid* 1621.

<sup>55</sup> *ibid* 1625.

<sup>56</sup> *ibid* 1625-26.

<sup>57</sup> *ibid* 1626.

exercised the power of amendment to implement them nevertheless.<sup>58</sup> *Mettoy* works perfectly well as a ‘weak’ rule case. A responsible trustee would not exercise a power of amendment without at least reading the proposed amendments, and seeking clarification where they were not straightforward to understand. Accordingly the trustees breached their duty, and the exercise of the power was saved from invalidity only by the exception in (3), which might be characterised as primarily pragmatic – the court will not intervene when in spite of the deficiency in decision-making, no negative consequences for the beneficiaries have ensued.<sup>59</sup> To make this work as a ‘strong’ rule case, we would have to say that the trustees did not achieve the result they intended. But since it is absolutely clear that they intended to amend the scheme rules in accordance with the deed of amendment, it is difficult to find any mismatch between intention and outcome. Accordingly, if the ‘strong’ rule were correct, Warner J should have held that the *Re Hastings-Bass* rule to be simply inapplicable, with no need to rely on the pragmatic exception. To apply the ‘variant strong’ rule would require saying that the trustees failed to take into account the true legal effect of their action. But unlike in *Re Hastings-Bass*, where the effect of the rule against perpetuity meant that the outcome of the exercise of the power was not precisely what the trustees had anticipated, in this case the true legal effect of the deed of amendment was simply its ordinary legal effect. Had the trustees read it and sought advice they would have understood it. The ‘strong’ rule thereby collapses in this context into the ‘weak’ rule. That Warner J put the *Re Hastings-Bass* rule in ‘weak’

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<sup>58</sup> *ibid* 1629-30.

<sup>59</sup> See text to n 608 and following.

terms, that the ‘strong’ rule would produce a different result on these facts<sup>60</sup> and that the ‘variant strong’ rule does not work at all should all be taken as powerful indicators that *Mettoy* stands for the correctness of the ‘weak’ rule. But caution is also due: the very fact that the ‘variant strong’ rule collapses into the ‘weak’ rule means that Warner J did not have to consider any distinction between them, and it would consequently be inappropriate to place too much weight on this reasoning.

#### BREADNER V GRANVILLE-GROSSMAN

More than a decade after Warner J’s judgment in *Mettoy*, during which time no attempt was made to exploit the full scope of the *Re Hastings-Bass* rule as expounded in that case,<sup>61</sup> two cases were heard in the High Court. *Green v Cobham*<sup>62</sup> is considered later in this chapter as a case supporting the ‘strong’ rule approach to *Re Hastings-Bass*.<sup>63</sup> The other was *Breadner v Granville-Grossman*<sup>64</sup> in which Park J had to consider the *Re Hastings-Bass* rule in the context of a challenge to the validity of the purported exercise of a special power of appointment in 1976. Park J stated his understanding of the rule in entirely ‘weak’ form:

If trustees, in exercise of one of their express powers, take an action which on the face of it falls within the letter of the power, the action may nevertheless be held to have been ineffective if (1) the trustees fail to take into account something which they ought to have taken into

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<sup>60</sup> Apart from the application of the pragmatic exception.

<sup>61</sup> There are no reported cases concerning the *Re Hastings-Bass* rule between 1989 and 2000.

<sup>62</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>63</sup> See text to n 233 and following.

<sup>64</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523.

account; or (2) the trustees take into account something which they ought not to have taken into account...<sup>65</sup>

More important were his reasons for rejecting the challenge to the 1976 appointment. An issue arose as to whether the 1976 appointment fell within the scope of paragraph 15 of schedule 5 to the 1975 Finance Act, which conferred privileged treatment for capital transfer tax purposes<sup>66</sup>. It had always been assumed that the 1976 appointment was within the scope of paragraph 15, and in light of the new argument that in fact it was not, it was further argued that the appointment was invalid on *Re Hastings-Bass* grounds, since had the trustees realised that the appointment would not be within paragraph 15, they would not have so exercised the power.<sup>67</sup> Park J rejected this on the basis that whilst this argument ‘might be seen now to have had some technical force ... it had no merits of a more general nature. It was certainly abstruse and recondite.’<sup>68</sup> Neither the trustees’ advisers nor the Revenue appreciated the problem, and 22 years had passed without the issue being raised, during which time all had relied on the validity of the appointment.<sup>69</sup> This must be an application of the ‘weak’ rule. A responsible trustee cannot be criticised for failing to appreciate the relevance of ‘abstruse and recondite’ matters and consequently for failing to take them into account. There is no breach of the duty to consider, and no application for the *Re Hastings-Bass* rule. Whereas applying the ‘strong rule, there is no real doubt that the

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<sup>65</sup> *ibid* [58].

<sup>66</sup> *ibid* [88]-[92].

<sup>67</sup> *ibid* [93].

<sup>68</sup> *ibid* [94].

<sup>69</sup> *ibid* [94].

trustees failed to understand the true legal consequences of their actions when they executed the 1976 appointment; they intended to make an appointment which would attract the privileged treatment of paragraph 15, and failed to do so. Calling the argument ‘abstruse and recondite’ does not affect the conclusion that the legal effect of their decision was not what they expected or intended it to be. On the ‘strong’ approach the *Re Hastings-Bass* rule would invalidate this decision, unless the pragmatic exception could be relied upon to show that the trustees would have acted in the same way had they known of the true consequences. But it is inherently improbable that the trustees would ever have knowingly risked a well-founded Revenue challenge to their claim to paragraph 15 treatment, with the attendant capital transfer tax consequences. So for the ‘strong’ rule to be correct, this aspect of *Breadner* would have to be seen as wrongly decided. However, the strength of *Breadner* as support for the weak approach could potentially be seen as weakened by the fact that Park J impliedly distinguishes *Green v Cobham*, so it could be suggested that Park J is accepting the results-oriented ‘strong’ rule approach in *Green*<sup>70</sup> whilst not following it on the very different facts of this case. But when we consider how *Green* is distinguished, it appears fairly weak. There were two apparent grounds. First, that in *Green* the problem was realised very soon. Here the trust had been administered from 1976 until 1999 on the basis that the 1976 appointment was valid. But in the absence of a limitation rule, if the problem is that the original decision-

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<sup>70</sup> See text to n 235 and following.

making process was invalid then the passage of time cannot validate it.<sup>71</sup> Secondly, because in *Green* the consequences of the trustees' decision were 'catastrophic',<sup>72</sup> whereas in *Breadner* there would have been no serious consequences.<sup>73</sup> If the 'strong' rule in *Green* is right in principle then neither the passage of time nor the severity of the consequences is a reason not to adopt that approach. So perhaps this represents simply a nod by Park J to his judicial duty to consider a relevant but non-binding judgment at the same level of the judicial hierarchy. Park J may not have felt entitled simply to ignore *Green*, but equally managed by this weak distinguishing to avoid having to engage with precisely why he thought *Green* was wrong and should not be followed.<sup>74</sup> If *Green* cannot in substance be distinguished on these grounds, then this supports the view that Park J in *Breadner* adopted the weak approach, which simply contradicts *Green*.

#### ABACUS TRUST CO (ISLE OF MAN) LTD V BARR

*Breadner* was followed by *Abacus Trust Co (Isle of Man) Ltd v Barr*,<sup>75</sup> perhaps the leading case on the 'weak' rule. An agent acting for the trustee misunderstood the settlor's wishes as regards the exercise of an overriding power of appointment by the trustee, with the result that the trustee received incorrect information about those

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<sup>71</sup> There was no discussion of laches as a possible defence to a *Re Hastings-Bass* claim, and this would in any case usually require more than simply the lapse of time: see D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [24.14]-[24.21].

<sup>72</sup> *Green v Cobham* [2002] STC 820 (Ch) 824 (Parker J).

<sup>73</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [95].

<sup>74</sup> As he probably did: see [60]-[61] and [95].

<sup>75</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409.

wishes. This caused the trustee to exercise the power so that 60% of the fund was appointed on trusts for the settlor's sons, rather than 40% as the settlor wished.<sup>76</sup> The mistake was discovered within a few months, but no action was taken until almost a decade later.<sup>77</sup> In analysing the *Re Hastings-Bass* rule, Lightman J considered what it is that trustees have to do when they exercise a power. He considered in particular three cases on decision-making by trustees, *Scott v National Trust*,<sup>78</sup> *Edge v Pensions Ombudsman*<sup>79</sup> and *Hearn v Younger*,<sup>80</sup> and concluded that trustees must 'inform themselves of the matters which are relevant to the decision',<sup>81</sup> must 'take into account all relevant but no irrelevant factors',<sup>82</sup> and must 'follow a correct procedure in the decision-making process'.<sup>83</sup> According to the judge: 'This duty lies at the heart of the rule, which is directed at ensuring for the protection of the beneficiaries under the trust that they are not prejudiced by any breach of such duty.'<sup>84</sup> Furthermore, Lightman J held that the trustee must have, in Warner J's words in *Mettoy*, 'failed to

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<sup>76</sup> *ibid* [6]-[7].

<sup>77</sup> *ibid* [8]-[12].

<sup>78</sup> *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch).

<sup>79</sup> *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).

<sup>80</sup> *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317.

<sup>81</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [16].

<sup>82</sup> *ibid*.

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid*.

consider what he was under a duty to consider.<sup>85</sup> and thereby have committed a breach of duty.<sup>86</sup> Summarising, Lightman J concluded that

... the rule affords to the beneficiaries the protection of a requirement that the trustee performs its duty in exercising of its discretion, and a remedy in case of a default. In the absence of any such breach of duty the rule does not afford the right to the trustee or any beneficiary to have a decision declared invalid because the trustee's decision was in some way mistaken or has unforeseen and unpalatable consequences.<sup>87</sup>

This makes clear both the desirability and the mechanism of the weak approach. One must first establish what the trustee's duty to consider requires, then whether the trustee has breached that duty. It is clear from Lightman J's approach that the 'true consequences' of an action are not necessarily matters falling within the duty to consider. He says that where the trustee has used 'all proper care and diligence in obtaining the relevant information and advice relating to those considerations'<sup>88</sup> then there is no breach of duty simply because the information is incorrect, as it was in this case. This has been construed by some as an unwarranted intrusion of the duty of care<sup>89</sup> which prevailing authority treats as a trustee duty independent of the trustee's fiduciary duties<sup>90</sup> and which arguably ought to apply only in respect of administrative

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<sup>85</sup> *ibid* [23], quoting *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1625 (Warner J).

<sup>86</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [23].

<sup>87</sup> *ibid* [24].

<sup>88</sup> *ibid* [23].

<sup>89</sup> See C Mitchell, 'Reining in the Rule in *Re Hastings-Bass*' (2006) 122 LQR 35, 38.

<sup>90</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18 (Millett LJ); see also R Austin, 'Moulding the Content of Fiduciary Duties' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 168-74 and text to n 455. For the view that the duty of care can be fiduciary, see: J Getzler, 'Equitable Compensation and the Regulation of Fiduciary Relationships' in P Birks and FD Rose (eds), *Restitution and Equity Volume One: Resulting Trusts and Equitable Compensation* (Mansfield Press 2000); J Getzler, 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002); J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary

duties.<sup>91</sup> It should rather be seen as emphasising an approach to trustees' duties founded on what was practically possible and desirable for the trustees to do in the circumstances in which they acted. That is to say, if the trustees, in ascertaining what matters they ought to take into account, and in determining what weight to give to such matters, have acted reasonably and responsibly, then they have done their duty, and their decision therefore cannot be impugned on *Re Hastings-Bass* grounds.

#### GALLAHER LTD V GALLAHER PENSIONS LTD

The lead given by Lightman J in *Barr* was followed by Etherton J in *Gallaher Ltd v Gallaher Pensions Ltd*.<sup>92</sup> The case concerned a pension scheme of which Gallaher Pensions Ltd ('GPL') was trustee. GPL exercised an express power of amendment contained in the scheme rules to change the scheme to augment pensions. GPL meant to increase by 2% (or the Retail Price Index (RPI) at that time, if lower) only that part of the pensions in excess of the guaranteed minimum pension,<sup>93</sup> but the words used in the deed of amendment were wide enough to increase the whole pension by 2% or RPI, which would be a much more significant burden for the fund to bear.<sup>94</sup> Gallaher Ltd, as principal employer,<sup>95</sup> sued for rectification of the deed of amendment, and

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Remedies' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); JD Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005). On the relationship between fiduciary duty and the *Re Hastings-Bass* rule, see text to n 456 and following.

<sup>91</sup> See text to n 498.

<sup>92</sup> *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57.

<sup>93</sup> See Pension Schemes Act 1993, part III.

<sup>94</sup> *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [1]-[10].

<sup>95</sup> *ibid* [2].

succeeded in this claim.<sup>96</sup> Etherton J therefore considered the *Re Hastings-Bass* arguments only because they had been extensively argued before him, this consideration being strictly obiter.<sup>97</sup> Nonetheless, there was extensive argument on the *Re Hastings-Bass* issue<sup>98</sup> between (unusually) parties with a real interest in the outcome. Although GPL adopted a neutral approach, both the principal employer (who would have to fund the increase in pension benefits) and various classes of scheme member were represented.<sup>99</sup> *Gallaher* was analysed by Etherton J very much in terms of the model established by Lightman J in *Barr*.<sup>100</sup> The judge held that the trustee did not take steps to establish the cost of the increase in pension benefits under the proposed amendment, because the trustee did not appreciate the effect that the proposed amendment would have.<sup>101</sup> He found that there was ‘plainly’ a breach of duty committed by the trustee in ‘failing to obtain proper costings’.<sup>102</sup> At first glance there would appear to be a difficulty with the ‘weak’ approach in this case, since the trustee’s failure seems to be based on the failure of its directors to understand the true legal effect of the deed of amendment, which would seem to be indicative of a ‘strong’ approach with a focus on the mismatch of the results of the trustee’s action with its intention, rather than the appropriateness of the manner in which it acted. But

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<sup>96</sup> *ibid* [149].

<sup>97</sup> *ibid* [150].

<sup>98</sup> *ibid*.

<sup>99</sup> *ibid* [2]-[10].

<sup>100</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409.

<sup>101</sup> *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [173].

<sup>102</sup> *ibid* [176].

Etherton J found that none of the relevant documents (the board resolutions and the deeds) were ‘difficult to understand’<sup>103</sup> He concluded that there was ‘culpability, amounting to breach of duty, on the part of ... GPL as a trustee body, in failing to ensure that the resolutions gave proper effect to the intention not to change the previous policy’.<sup>104</sup> So the trustee did not simply fail to understand the true legal consequences of its action. Rather, it failed to take adequate steps to inform itself of what the documents said.<sup>105</sup> On the ‘strong’ view this would not matter – it would be enough to show that the result intended by the trustee was not achieved by its action. A ‘strong’ rule analysis would lead directly to the amendment being invalidated by the rule. The consideration of the trustee’s failure to inform itself adequately as to the content of the relevant documents shows the weak rule in action. The distinction here may be a fine one. Under the weak rule, a trustee who acts responsibly to ensure that he understands the action he is proposing to take does not commit a breach of duty if the consequences of the action are unexpected, and that action is therefore not invalidated on *Re Hastings-Bass* grounds. There is no relevant matter that he has failed to take into account. He has taken into account the meaning of the document he is to sign, even if he has misunderstood it. Whereas a trustee who simply fails to inform himself of the content of the document before signing has failed to take into

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<sup>103</sup> *ibid* [177].

<sup>104</sup> *ibid*.

<sup>105</sup> cf the duty of a trustee holding a special power of appointment to survey the possible objects of the power before exercise: see text to n 123 and following.

account the content of the document, which is manifestly a relevant consideration.<sup>106</sup> His action may therefore be set aside under the ‘weak’ *Re Hastings-Bass* rule. This distinction fits perfectly with the underlying principle that the ‘weak’ *Re Hastings-Bass* rule is about the beneficiaries’ entitlement to responsible behaviour by their trustees.<sup>107</sup> If a trustee misunderstands a legal document, he does not necessarily thereby act irresponsibly. But if he fails to take simple steps to ensure that the document matches his intentions, then he does act irresponsibly, and the beneficiaries are in that case entitled to the protection of the rule.

#### SMITHSON V HAMILTON

Finally, the case of *Smithson v Hamilton*<sup>108</sup> provides yet another indication that the courts will adopt the ‘weak’ rule. *Smithson* is not a conventional *Re Hastings-Bass* case, in that it turns not on the usual detailed questions how the rule is to be applied, but on the scope of the rule’s application. The case concerned a pension scheme which was established by interim deed in 1990. The trustees and the principal employer jointly executed a ‘definitive deed’ in 1992. This ‘definitive deed’ contained an error, the consequence of which was that deferred members<sup>109</sup> were able to retire early without actuarial deduction.<sup>110</sup> The trustees did not seek rectification of

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<sup>106</sup> As was also the case in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch). See text to n 51 and following on *Mettoy*.

<sup>107</sup> See text to n 40 and following.

<sup>108</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453.

<sup>109</sup> Scheme member, usually former employees of the principal employer, who have not yet reached the pensionable age but who are no longer active members ie no longer making financial contributions to the scheme.

<sup>110</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [24]-[26], [54]-[55].

the deed<sup>111</sup> but sought to rely on the rule in *Re Hastings-Bass* to have the mistaken rule in the definitive deed declared void.<sup>112</sup> Park J rejected this claim for several reasons. Most importantly for present purposes, Park J held that the rule applies only to the actions of trustees, not settlors or, in the pensions context, employers,<sup>113</sup> and furthermore only to actions of trustees ‘as respects which they have a fiduciary duty or responsibility to the beneficiaries’<sup>114</sup> such that an element of that duty was to take into account relevant considerations or to exclude irrelevant considerations.<sup>115</sup> In this case the trustees did owe fiduciary duties to the scheme members, but nothing in the deed was disadvantageous to scheme members – only to the employer, who would have to provide all the extra funding needed to facilitate early retirement without actuarial deduction.<sup>116</sup> Put in terms of ‘weak’ and ‘strong’ approaches to the rule, this

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<sup>111</sup> *ibid* [48]. On the relationship between the *Re Hastings-Bass* rule and rectification, in *Smithson* and generally, see: B Häcker, 'Mistakes in the Execution of Documents: Recent Cases on Rectification and Related Doctrines' (2008) 19 KLJ 293, 325-33.

<sup>112</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [56].

<sup>113</sup> *ibid* [82].

<sup>114</sup> Whilst pension scheme trustees will ordinarily owe duties to all members and pensioners in respect of any decisions made concerning the scheme, such duties may be impliedly modified by ‘the customary practices of pension management’: J Getzler 'The Consequences of Fiduciary Accountability: *Vires* and *Virtue*' (Chancery Bar Association seminar, London, 2010) [3-5]. See also: *Hospital Products Ltd v United States Surgical Corporation* 156 CLR 41, 97; *Kelly v Cooper* [1993] AC 205 (PC) 214-15; R Austin, 'Moulding the Content of Fiduciary Duties' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 162-63; J Edelman, 'Four Fiduciary Puzzles' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 302ff.

<sup>115</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [97].

<sup>116</sup> *ibid* [99]-[102]. Though cf *Edge v Pensions Ombudsman* [2000] Ch 602 (CA) 634-35, where the Court of Appeal held that the scheme trustees’ duties to members and pensioners did not require them to make proposals which they did not consider fair to the employer, implying that the trustees of such a scheme do owe duties to the employer. See also J Hilliard, 'The Flexibility of Fiduciary Doctrine in Trust Law: How Far Does it Stretch in Practice?' (2009) 23 TLI 119 122-24. Hilliard argues that this approach could be seen as justified by the employer’s continuing duty to fund the scheme, and by the ‘pragmatic factor’ (at 123) that setting up a scheme would be less attractive if the employer’s interests were wholly excluded from consideration by the trustees.

was a case where the trustees did not achieve the result they intended – the 1992 ‘definitive deed’ did not have the intended effects. So on the strong view the trustees should have succeeded. But it is clear that the reason that they did not is that, in spite of the effect of the 1992 deed being otherwise than what was intended, nevertheless the trustees had not breached any duty owed to the beneficiaries, the scheme members. The scheme members suffered no disadvantage – there was not even any question of the employer being unable to afford the increased contributions it would have to make to fund the early retirement pensions<sup>117</sup> – and were entitled to say, as against the trustees, that they were happy with the scheme as it was. Park J can therefore be seen to make a firm choice of the ‘weak’ rule, which, in the light of his judgment in *Breadner*<sup>118</sup> and his concern there to keep the *Re Hastings-Bass* rule within reasonable bounds,<sup>119</sup> is perhaps unsurprising.

***McPhail v Doulton: the duties of trustees exercising powers and discretions***

From this review of the principal ‘weak’ rule cases it is apparent that the ‘weak’ rule is a good fit with much of the case law, and that some of the cases are explicable *only* on the ‘weak’ rule basis.<sup>120</sup> But there are important arguments in favour of the ‘weak’ rule to be found outside of the *Re Hastings-Bass* cases too. In the 1970s and 1980s it fell to the courts, and especially the House of Lords, to determine the tests which govern the validity of discretionary trusts and powers of appointment vested in

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<sup>117</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [59].

<sup>118</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523.

<sup>119</sup> *ibid* [61], [63] (Park J).

<sup>120</sup> Perhaps especially *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 and *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523.

trustees. From this body of case law, not traditionally associated with the rule in *Re Hastings-Bass*, can be discerned three principles which provide support for the ‘weak’ approach. First, the courts’ analyses of the duties of a trustee holding a power of appointment expressly identify a duty to consider when and how to exercise the power. This duty to consider forms the true doctrinal basis of the *Re Hastings-Bass* rule, and mandates a ‘weak’ approach focused on responsible consideration. Secondly, the scope of the duty to consider must be limited to responsible consideration, rather than consideration of all factually relevant matters,<sup>121</sup> since it would otherwise conflict with authoritative statements as to the limits of the trustees’ duties. Thirdly, only the ‘weak’ *Re Hastings-Bass* rule is compatible with the courts’ view of the nature of the ‘control’ that the court must be able to exercise over trustees.

The case law is replete with statements of the duties of trustees who hold powers of appointment.<sup>122</sup> In *McPhail v Doulton*<sup>123</sup> Lord Wilberforce stated that where a trustee holds a power of appointment it is not the case that the court can only intervene if he acts ultra vires or capriciously,<sup>124</sup> but rather the trustee:

would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.<sup>125</sup>

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<sup>121</sup> Ie the ‘unlimited weak’ rule. See text to n 34 and following .

<sup>122</sup> See PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 270-73.

<sup>123</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>124</sup> *ibid* 449.

<sup>125</sup> *ibid*.

In *Re Hay's Settlement Trusts*<sup>126</sup> Sir Robert Megarry V-C held that a trustee holding a power must exercise it 'in a responsible manner'.<sup>127</sup> This means that 'the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments.'<sup>128</sup> This statement was adopted by Mervyn Davies J in *Turner v Turner*,<sup>129</sup> where the trustees exercised a power of appointment without directing their minds to consider at all the nature of what they were doing. They simply signed the documents put in front of them by the settlor.<sup>130</sup> The judge noted that whilst the trustees were 'persons of intelligence'<sup>131</sup> and there might be good reasons in terms of certainty not to treat the appointments as invalid simply because they did not properly consider them, nevertheless proper account must be taken of the fact that the trustees were fiduciaries, and exercised their powers as such.<sup>132</sup> He followed Sir Robert Megarry V-C's tripartite division of the duties of the donee of a fiduciary power<sup>133</sup> to hold that the trustees were obliged to 'consider the appropriateness of individual appointments' and did not, and that accordingly the

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<sup>126</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch).

<sup>127</sup> *ibid* 209.

<sup>128</sup> *ibid* 210.

<sup>129</sup> *Turner v Turner* [1984] Ch 100 (Ch).

<sup>130</sup> *ibid* 107.

<sup>131</sup> *ibid* 109.

<sup>132</sup> *ibid* 109.

<sup>133</sup> *ibid* 109-110, citing *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 210 (Megarry V-C).

appointments would be set aside.<sup>134</sup> In essence, the case law requires a trustee holding a power of appointment to consider responsibly both whether and how to exercise it. This is a perfect fit for the ‘weak’ conception of the *Re Hastings-Bass* rule, which requires trustees to act responsibly in exercising powers by taking into account matters which would appear to a responsible trustee to be relevant. The natural doctrinal home of the ‘weak’ *Re Hastings-Bass* rule is in the trustee’s duty responsibly to consider exercising, and how to exercise, the power. This duty to consider exercising the power is at the heart of the case law on the validity of discretionary trusts and powers. In *McPhail* Lord Wilberforce implicitly took the view that it was the nature of the trustees’ duties which determined the correct certainty of objects test:<sup>135</sup> a trust can only be valid if it is capable of execution by its trustees<sup>136</sup> and the court.<sup>137</sup> Accordingly, some degree of meaningful effect must be able to be given to this duty; there should be consequences if the trustees fail to comply with this duty, and the beneficiaries should be able to enforce the duty against a recalcitrant trustee.<sup>138</sup> It does not *necessarily* follow that this should result in the

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<sup>134</sup> *Turner v Turner* [1984] Ch 100 (Ch) 111.

<sup>135</sup> ‘But just as, in the case of a power, it is possible to underestimate the fiduciary obligation of the trustee to whom it is given, so, in the case of a trust (trust power), the danger lies in overstating what the trustee requires to know or to inquire into before he can properly execute his trust.’ *McPhail v Doulton* [1971] AC 424 (HL) 449 (Lord Wilberforce).

<sup>136</sup> This view was also expressed by Lord Reid in *Re Gulbenkian's Settlement Trusts (No 1)* [1970] AC 508 (HL) 518.

<sup>137</sup> The dispute in *McPhail* focused in part on whether it was necessary for the court to be able to order equal division of the fund in discretionary trust cases. But the view that the court should be able to control the operation of the trust was not challenged: *McPhail v Doulton* [1971] AC 424 (HL) 451 (Lord Wilberforce).

<sup>138</sup> This chapter adopts an avowedly Hohfeldian analysis of trustees’ duties. See: WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 Yale LJ 710. For an approach which does not accept that all duties of trustees are Hohfeldian see: JW Harris, ‘Trust, Power

validity of the appointment being called into question rather than mere personal liability attaching, although, as Nolan demonstrates, it is commonly the case that decisions by trustees made in breach of duty are invalid; the precise meaning of ‘invalid’ varies according to the circumstances and the nature of the breach.<sup>139</sup> But if the *Re Hastings-Bass* rule is not grounded in the breach by a trustee of the duty to consider, then it does not appear that the duty to consider has any practical effect; or at any rate, there are no reported decisions (other than *Re Hastings-Bass* cases and closely related cases) in which the duty to consider is put in issue. And if the *Re Hastings-Bass* rule were truly oriented around results rather than proper decision-making, it would be a very poor fit with the duty to consider, since trustees could consider all matters responsibly but nevertheless fail to achieve a particular result; or could fail to consider any relevant matter but still achieve the intended result. If the *Re Hastings-Bass* rule is grounded in the duty to consider exposed in *McPhail, Re Hay’s Settlement Trusts* and *Turner v Turner* then both the obligation responsibly to consider the circumstances, and the need for a breach of duty by the trustees are correctly seen as inevitable features of the doctrine. The invalidity of the exercise of

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and Duty’ (1971) 87 LQR 31, 47-63. Harris argues that the trustee’s ‘duty’ to consider objects of a power is a duty only in the sense that it is intended by the settlor, and that whilst this is a legitimate meaning of ‘duty’, it does not confer on any object a correlative right of enforcement (at 51-52). Finn appears to concur in this view, stating that, in general, this is a duty ‘the breach of which carries no immediate sanction’: PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 35. Cutts has argued convincingly that the jural relationship fundamental to a trust is not a right-duty relationship at all but rather a power-liability relationship, viz the beneficiary’s power (when absolutely entitled) to impose on the trustee a duty to transfer the trust property to the beneficiary: T Cutts, ‘The Nature of ‘Equitable Property’: A Functional Analysis’ (2012) 6 J Eq 44, 57-61. However, Cutts does not deny that a trustee’s active duties of management *are* duties in the Hohfeldian sense, correlating to rights in the beneficiary (at 57).

<sup>139</sup> R Nolan, ‘Controlling Fiduciary Power’ (2009) 68 CLJ 293, 316-23. On the possible meanings of ‘invalid’ as void or voidable, see text to n 725 and following.

the power arises from its exercise in breach of the duty to consider, and is dependent upon it.

The restriction of the weak view to a duty of ‘responsible consideration’, rather than consideration of every conceivably relevant matter, is also mandated by this line of cases. In *McPhail* Lord Wilberforce makes clear that the trustee of a discretionary trust would not be required to consider every possible object of the discretion.<sup>140</sup> Given the effective assimilation of discretionary trusts and powers held by trustees in *McPhail* it would be surprising if this were not also true of the duty to consider in relation to a power of appointment held by a trustee. If the weak view of *Re Hastings-Bass* were adopted without any limitation on the obligation to take relevant matters into account, it would be possible for a beneficiary to have the exercise of a power of appointment by a trustee set aside on the basis that some characteristic of a particular object was factually relevant. For example, a beneficiary might argue that the trustees acted on the basis that no object of the power was in particular financial need, having considered the circumstances of those objects close to hand. If they could show that some remoter object did have such need, and that the policy or practice of the trustees was such that this would have been likely to affect their decision, then the exercise of the power could be set aside under the *Re Hastings-Bass* rule. But the consequences of such an approach to the weak rule prove to be impermissible. On the view adopted here, that the duty to consider the exercise

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<sup>140</sup> Given the decision in *McPhail* that there is no requirement that the trustees should be able to make a ‘complete list’ of beneficiaries (at 456) it would not in any case be practically possible in a case where the trust was valid on the ‘is or is not’ test but no complete list could be made – without a complete list, the trustee could never be sure that he had considered every object.

of the power is the basis of the *Re Hastings-Bass* rule, and that it requires a breach of that duty, to allow the *Re Hastings-Bass* rule to be invoked in the circumstances described would be to imply that the trustees had breached their duty to consider the exercise of the power. The breach would consist in failing to take into account the financial situation of the remote object. But it is clear from *McPhail* that the trustees do *not* have a duty to consider every object,<sup>141</sup> and that this may not even be possible.<sup>142</sup> This conundrum is avoided when the ‘weak’ rule is put in the terms argued for here, of the responsible consideration mentioned in *McPhail* itself<sup>143</sup> on the basis of which the trustees are under a duty to consider those matters which a responsible trustee would consider. On the authority of *McPhail* such matters would not necessarily include the identity and interests of all objects of the power.<sup>144</sup>

Finally, the rejection of the ‘strong’ approach can be seen in the importance attached in these cases to the ability of the court to supervise trustees. In *McPhail* Lord Wilberforce assumes that ‘the test of validity is whether the trust can be executed by the court’<sup>145</sup> in order to consider whether it is necessary that the court be able to order equal division of the trust fund if the trustees refuse to act. Lord Hodson

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<sup>141</sup> And the settlor would in all likelihood not expect that the trustees would consider every object: Y Grbich, ‘*Baden: Awakening the Conceptually Moribund Trust*’ (1974) 37 MLR 643, 647. Harris takes this further by arguing that the very existence of the duty to consider is based on the settlor’s intention that the trustee should consider whether and how to exercise a power granted to him: JW Harris, ‘Trust, Power and Duty’ (1971) 87 LQR 31, 51-52.

<sup>142</sup> See n 140.

<sup>143</sup> *McPhail v Doulton* [1971] AC 424 (HL) 449.

<sup>144</sup> The precise scope of the duty would depend upon the circumstances. It is likely that if the class of potential objects were small, then a responsible trustee would consider all of them (although there may still be factually relevant characteristics of these objects of which the responsible trustee would be unaware).

<sup>145</sup> *McPhail v Doulton* [1971] AC 424 (HL) 451.

and Lord Guest's dissents are firmly grounded<sup>146</sup> in Lord Eldon's statement in *Morice v Bishop of Durham* that 'As it is a maxim, that the execution of a trust shall be under the control of the court, it must be of such a nature, that is can be under that control; so that the administration of it can be renewed by the court...'.<sup>147</sup> Whilst the precise implications of this view are in dispute in *McPhail*<sup>148</sup> the elementary principle that the court must be able to control the trust and trustees is not.<sup>149</sup> In *Re Hay* it is made clear that fiduciary holders of powers are also subject to this requirement of control, although the extent of the control is necessarily more limited, since the court cannot order the exercise of the power, although it can replace the trustee, or order him to do his duty.<sup>150</sup> If the 'strong' approach to the *Re Hastings-Bass* rule were to be adopted, such that the exercise of a power could be invalidated by its unforeseen outcome, this would create serious difficulties for the court in exercising its supervision and control over the trustees. In particular, the trustees may wish to seek the court's approval for the exercise of a power of appointment in a particular fashion.<sup>151</sup> If the court approves

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<sup>146</sup> *ibid* 440, 443, 446.

<sup>147</sup> *Morice v Bishop of Durham* (1805) 10 Ves Jun 522, 539; 32 ER 947, 954.

<sup>148</sup> Lord Wilberforce, Lord Reid and Viscount Dilhorne took the view that the trust could be sufficiently controlled without there being any possibility of ordering equal division of the fund, since the court can replace the trustees, or have a scheme of distribution drawn up by the beneficiaries: *McPhail v Doulton* [1971] AC 424 (HL) 457. Lord Hodson and Lord Guest (dissenting) argued that there could only be proper control if a complete list of beneficiaries could be drawn up (at 440, 443, 446).

<sup>149</sup> See: *Re Gulbenkian's Settlement Trusts (No 1)* [1970] AC 508 (HL) 524; *Re Manisty's Settlement* [1974] Ch 17 (Ch) 27-28; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 208.

<sup>150</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 208. See also *Re Manisty's Settlement* [1974] Ch 17 (Ch) 27-28.

<sup>151</sup> As the trustees did in *Re Pilkington* in relation to a proposed exercise of the statutory power of advancement: *Re Pilkington's Will Trusts* [1964] AC 612 (HL).

the exercise of the power, then the trustee is protected from any challenge to his action in accordance with the court's approval,<sup>152</sup> and can be sure that he will be indemnified by the trust fund for any costs he incurs, pursuant to section 31 of the Trustee Act 2000.<sup>153</sup> But if the exercise of the power produced an unintended result, unforeseen by trustee or court, then on the 'strong' view of *Re Hastings-Bass* it is invalid. There is no authority on this precise situation, but the logical alternatives are either that the appointment is invalid, and therefore the court's approval (and therefore also the value of the process of trustees seeking the court's approval) is undermined; or, more likely, the appointment is valid because approved by the court, but the court is then in the position of having rendered valid an appointment which in the natural course of things ought to have been invalid. This outcome may satisfy the trustees in the instant case, but it distorts entirely the process of seeking the court's approval. The court cannot generally consent on behalf of beneficiaries to trustees acting outside of their powers or in breach of their duties<sup>154</sup> and it will not knowingly permit the trustees to make an invalid exercise of a power.<sup>155</sup> Rather, it determines

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<sup>152</sup> *Halsbury's Laws of England* 2007 reissue, vol 48 [1057] and cases cited at n 7 thereto: *Underwood v Hatton* (1842) 5 Beav 36, 49 ER 490; *Foster v M'Mahon* (1847) 11 I Eq R 287; *Rowland v Morgan* (1848) 13 Jur 23; *Smith v Smith* (1861) 1 Drew & Sm 384, 62 ER 426; *Re Earl of Radnor's Will Trusts* (1890) LR 45 Ch D 402 (CA). See also: *Macedonian Orthodox Community Church St Petka Inc v Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42, (2008) 237 CLR 66 [45], [71]–[72].

<sup>153</sup> Section 31 provides for reimbursement to the trustee of 'expenses properly incurred by him when acting on behalf of the trust'. Prior judicial approval of the action proposed would put the question of whether necessary associated expenses were 'properly incurred' beyond doubt. See: *ibid* [69]–[71].

<sup>154</sup> Except where authorised to do so by statute eg Variation of Trusts Act 1958.

<sup>155</sup> *Re Pilkington's Will Trusts* [1964] AC 612 (HL). Discussing *Re Pilkington* in *Re Hastings-Bass*, Buckley LJ stated that 'in *In re Pilkington's Will Trusts* the trustees were seeking the directions of the court before taking action. The court would of course not authorise trustees to set up a sub-settlement many of the trusts of which would be void.' *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 38. cf JW Harris, *Variation of Trusts* (Modern Legal Studies, Sweet & Maxwell 1975) 71-76.

how the trustees ought to act in order to comply with their duties. The difficulty therefore is that the ‘strong’ approach leaves the court with no way of properly exercising this jurisdiction to approve trustees’ actions. Since there is no way to determine conclusively in advance of exercising a power whether it will produce the intended result, there is no way in which the court can rule out the possibility of invalidity based on matters which only become known afterwards. A similar approach can be taken to the ‘unlimited weak’ view, of requiring all factually relevant matters to be taken into account. If this were the case, it would be impossible for the court to know whether all such matters had been taken into account and accordingly whether approval ought to be denied. If the court is not able to give or withhold approval to the proposed exercise of a power by a trustee, because the *Re Hastings-Bass* rule makes the validity of the exercise highly unpredictable, then the court is not able adequately to supervise and control the performance by the trustee of his duties. The court cannot order the trustee to do his duty<sup>156</sup> if it cannot identify with certainty what his duty is. The ‘weak’ approach, on the other hand, causes no such difficulties of supervision and control. The court is able to ascertain whether the trustees have acted responsibly in taking matters which appear to be relevant into account, and can verify that the trustee has omitted consideration of no matter which a responsible trustee would, in the circumstances, have considered. It can accordingly give its approval to the exercise of the power in the certain knowledge that no doubt will be cast upon it in consequence of the rule in *Re Hastings-Bass*.

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<sup>156</sup> As envisaged by Templeman J in *Re Manisty's Settlement* [1974] Ch 17 (Ch) 27-28.

***Gisborne v Gisborne: judicial non-interference in trustee decision-making***

Having established that the weak conception of the rule in *Re Hastings-Bass* is compatible with the approach adopted to the validity of powers and discretionary trusts in *McPhail v Doulton*<sup>157</sup> and subsequent cases, and that the strong conception and the ‘unlimited weak’ conception of the rule are not, and indeed that the doctrinal basis for the ‘weak’ *Re Hastings-Bass* rule is located in the duties of trustees exercising powers identified in these cases, some firm boundaries have been set for the rule. But just as the important connections between the *McPhail v Doulton* case law and the nature of the *Re Hastings-Bass*<sup>158</sup> rule have not been identified or explored in the *Re Hastings-Bass* cases, so too has been largely omitted any consideration of another important decision of the House of Lords, in *Gisborne v Gisborne*.<sup>159</sup> The doctrine which has developed from *Gisborne* imposes important limits on the courts’ ability to interfere with the exercise of powers and discretions by trustees. Whilst the ‘weak’ approach to *Re Hastings-Bass* is consistent with those limits, the strong approach must be rejected as fundamentally incompatible with the *Gisborne* principle.

In *Gisborne v Gisborne* a testator left his personal property on trust, and granted to his trustees an ‘uncontrollable authority’<sup>160</sup> to decide what proportion of the trust income should be paid to the testator’s wife for her maintenance.<sup>161</sup> A

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<sup>157</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>158</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>159</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

<sup>160</sup> *ibid* 302.

<sup>161</sup> *ibid* 302.

dispute arose as to the amount to be paid to the wife, and the House of Lords held unanimously that the court should not interfere with the decision of the trustees. Lord Cairns LC said that ‘Their discretion and authority, always supposing that there is no *mala fides* with regard to its exercise, is to be without any check or control from any superior tribunal.’<sup>162</sup> Lord Penzance noted that whilst the trustees were required to support the testator’s wife, it was for the trustees, and not the court, to decide how to achieve the prescribed end.<sup>163</sup> The conclusion that the courts will not interfere with the exercise of powers or discretions by trustees unless there is a problem with the decision-making process itself is confirmed by a long line of cases. In *Re Beloved Wilkes’s Charity*<sup>164</sup> Lord Truro LC held that since the settlor has put the execution of the trust in the hands of the trustees, not the court, the court will limit its supervision to ‘the question of the honesty, integrity and fairness with which the deliberation has been conducted’.<sup>165</sup> In *Tabor v Brooks*,<sup>166</sup> Sir Richard Malins V-C held that the court would intervene only in cases of *mala fides*; a discretion fairly and honestly exercised would not be impugned by the court.<sup>167</sup> This was a particularly strong case for the application of the *Gisborne* rule, since the trustees appeared to be acting unfairly and unreasonably by paying the available sum of £300 per annum to Mr Tabor, rather than splitting it between Mr and Mrs Tabor, apparently in order to pressure her to

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<sup>162</sup> *ibid* 305.

<sup>163</sup> *ibid* 309.

<sup>164</sup> *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 42 ER 330.

<sup>165</sup> *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 334.

<sup>166</sup> *Tabor v Brooks* (1878-79) LR 10 Ch D 273 (Ch).

<sup>167</sup> *ibid* 278.

resume living with him,<sup>168</sup> even though the judge found that he was ‘of such confirmed drunken habits as to justify his wife in not continuing to live with him’.<sup>169</sup> In spite of this, the judge considered himself bound by *Gisborne* to allow the trustees’ decision to stand.

There are many more recent statements of the *Gisborne* doctrine.<sup>170</sup> What all have in common is the clear underlying principle that where a power or discretion has been conferred upon a trustee, the court will not interfere with its exercise in good faith by the trustees. As Cullity has convincingly argued, the *Gisborne* doctrine is not limited to powers expressed to be ‘uncontrollable’<sup>171</sup> but rather is concerned with the express conferral of a discretion which permits the trustees to act without reference to rules or standards which would otherwise govern the exercise of the discretion.<sup>172</sup> In the context of a dispositive power, its very conferral upon trustees gives them a discretion to prefer the interests of the objects of the power to those of the default beneficiaries, and to prefer the interests of some objects to others.<sup>173</sup> This reflects an important distinction between allowing trustees to make a judgment and to make a

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<sup>168</sup> *ibid* 277.

<sup>169</sup> *ibid* 277.

<sup>170</sup> See *inter alia*: *Tempest v Lord Camoys* (1882) LR 21 Ch D 571 (CA) 578; *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78, 92 (Lord Reid) 94 (Lord Tucker); *Re Allen-Meyrick's Will Trusts* [1966] 1 WLR 499 (Ch) 503; *Re Londonderry's Settlement* [1965] Ch 918 (CA) 936; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [37].

<sup>171</sup> M Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25 UTLJ 99, 113.

<sup>172</sup> *ibid* 114.

<sup>173</sup> In the context of an administrative power expressly granted, no such implication is possible, so a secondary issue arises as to the extent to which the terms of the grant of the power exclude duties to exercise the power in a particular manner or according to prescribed rules. See: *ibid* 107-12; Law Commission, *Trustee Exemption Clauses* (Law Com No 301, 2006) [5.81].

choice.<sup>174</sup> Where the settlor confers on his trustees the authority to make choices, it is not for the court to deny the trustees' decisions.

This conclusion is of enormous importance in analysing the legitimacy of the various approaches to *Re Hastings-Bass*. In *Green GLG Trust* Birt, Deputy Bailiff, applying in Jersey the English law on *Re Hastings-Bass* concluded that the rule is 'but a manifestation of the general principle that a trustee must act in good faith, responsibly and reasonably.'<sup>175</sup> This was premised on Lord Reid's view in the Scottish case of *Board of Management for Dundee General Hospitals v Bell's Trustees* that the court will only interfere in trustee decision-making where the trustees 'considered the wrong question... did not really apply their minds to it ... [or] ... did not act honestly or in good faith'.<sup>176</sup> The same approach was taken by Lord Normand, who held that trustees' decisions could only be challenged where they acted unreasonably – and if they perform their duty 'carefully, seriously and impartially' then they do not act unreasonably.<sup>177</sup>

The statement of the Deputy Bailiff in *Re Green GLG Trust* may overestimate the significance of the *Gisborne* principle, since it has already been shown how the *Re Hastings-Bass* rule depends upon the trustees' duty to consider. But it also shows

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<sup>174</sup> M Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25 UTLJ 99, 112. There are some cases in which the courts have adopted the 'judgment' approach: *Re Hodges* (1877-78) LR 7 Ch D 754 (Ch); *Re Lofthouse* (1885) LR 29 Ch D 921 (Ch). Though in relation to *Re Hodges*, Gardner points out that this is a case involving an orphaned child who was a ward of court, and that the wardship jurisdiction 'has always been a proactive one.': S Gardner, 'Fiduciary Powers in Toytown' (1991) 107 LQR 214, 219. *Re Lofthouse* is also a wardship case, and this may explain the judges' willingness to interfere in these cases.

<sup>175</sup> *Re Green GLG Trust* [2002] JLR 571 (Royal Court of Jersey) [25].

<sup>176</sup> *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78, 92.

<sup>177</sup> *ibid* 87-88.

that it is easy to underestimate the importance of the *Gisborne* doctrine in the *Re Hastings-Bass* context. It follows from the foregoing discussion of *Gisborne* that the exercise by trustees of a power is only challengeable where the trustees ‘did not act honestly or in good faith’<sup>178</sup> or where the ‘honesty, integrity and fairness’<sup>179</sup> of the decision-making is impugned. As such, it is difficult to see how many *Re Hastings-Bass* challenges could succeed, since in none of the cases are the trustees alleged to have acted in bad faith or dishonestly in making the challenged decision. The answer is that *mala fides* in this context has a wider meaning than simply dishonesty. Whilst dishonesty includes deliberately acting otherwise than in the beneficiaries’ interests,<sup>180</sup> in the context of a dispositive power the trustees are entitled to prefer some beneficiaries over others. Accordingly their duty is to carry out the purpose for which the settlor conferred the power upon them<sup>181</sup> and they act ‘dishonestly’ if they deliberately act in a way that is contrary to this purpose.<sup>182</sup> But Cullity has argued for a still wider approach, which brings not only improper purposes, but also unreasonable decision-making and failure properly to consider within the scope of the *mala fides* exception;<sup>183</sup> in consequence Cullity’s *mala fides* is best understood as

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<sup>178</sup> *ibid* 92 (Lord Reid).

<sup>179</sup> *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 334 (Lord Truro LC).

<sup>180</sup> *Armitage v Nurse* [1998] Ch 241 (CA) 251.

<sup>181</sup> L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 69-70. See also n 1042.

<sup>182</sup> And commit a fraud on the power: *Vatcher v Paull* [1915] AC 372 (PC) 378. See also: PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 39-40. Fraud on a power is traditionally regarded as rendering the purported exercise of the power void: *Cloutte v Storey* [1911] 1 Ch 18 (CA). But see text to n 1147 and following, where it is argued that the doctrine is more complex, and in some cases the exercise is voidable only.

<sup>183</sup> M Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25 UTLJ 99, 114-17.

being concerned not with actual fraud,<sup>184</sup> but simply with failure to comply with a duty or meet a standard imposed by law.

Most important, given the explanation of the *Re Hastings-Bass* rule as premised on the duty of consideration, is the extent to which ‘failure to consider’ can constitute *mala fides* for this purpose. Cullity argues that where the donee of a power is a trustee, he must ‘take into account all relevant matters which the donor might reasonably have expected the trustee to consider.’<sup>185</sup> However, Cullity further notes the limitation previously described, that in the case of a discretionary trust or power with a large class of objects, the trustee will not be required to consider all of them.<sup>186</sup> The conclusion for the rule in *Re Hastings-Bass* is therefore that as long the trustee acts as described by Lord Normand and Lord Reid in *Board of Management for Dundee General Hospitals*<sup>187</sup> and responsibly considers whether and how to exercise a power, the exercise should be immune from challenge. A simple mistake, for instance, does not invalidate their decision-making.<sup>188</sup>

What then of the various models of the *Re Hastings-Bass* rule? The ‘weak’ model, which requires trustees to consider responsibly when and how to exercise a power conferred on them, and which permits the exercise of a power to be invalidated only when such responsible consideration is lacking, is partly premised upon the

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<sup>184</sup> As understood in *Derry v Peek* (1889) LR 14 App Cas 337 (HL).

<sup>185</sup> M Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25 UTLJ 99116. This statement is based on the Canadian case of *Re Sayers and Philip* (1973) 38 DLR (3d) 602 (Sask CA) 606 (Hall JA); and the Australian case of *Cock v Smith* (1909) 9 CLR 773, 798 (Griffith CJ).

<sup>186</sup> *ibid* 116 n 80. See text to n 141.

<sup>187</sup> *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78.

<sup>188</sup> *ibid* 87-88 (Lord Normand).

*Gisborne* doctrine, and is a perfect fit with its concerns. Since the *mala fides* exception to *Gisborne* extends to failure to consider only in so far as the trustees fail to consider matters which the settlor could reasonably have expected them to consider<sup>189</sup> it is clear that the ‘unlimited weak’ approach is impermissible. It would allow the court to interfere with the exercise of a power on the basis that the trustees failed to take into account factually relevant matters even though the trustees acted honestly and fairly, and that on the view proposed by Cullity and adopted here, this failure would not amount to *mala fides*. Thus to invalidate the exercise of a power on this basis would be contrary to the doctrine in *Gisborne* and *Dundee Hospitals*. The same analysis applies *a fortiori* to the ‘strong’ approach. If the trustees’ decision can be retrospectively invalidated because, although it was made with all possible propriety and responsibility and with no failure to consider relevant matters, it produced an unintended result, then the *Gisborne* doctrine is wholly denied, since no question of *mala fides* arises. Accordingly, the *Gisborne* doctrine provides yet another reason to prefer the weak approach to the *Re Hastings-Bass* rule, and as a decision of the House of Lords gives a degree of legitimacy to the necessary rejection of some first instance decisions on *Re Hastings-Bass* which simply cannot be reconciled with the weak approach.<sup>190</sup>

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<sup>189</sup> See text to n 185.

<sup>190</sup> The arguments made in the following section show that even those cases which appear to conflict with the ‘weak’ rule can largely be reconciled with it. The cases which are most difficult to reconcile, and therefore most likely to be overruled if the Supreme Court were to endorse the ‘weak’ approach, are: *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch); *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

### **Judicial support for the ‘strong’ rule**

It would, however, be a mistake to see the cases as speaking with one voice. Whilst many of the most significant cases<sup>191</sup> on the *Re Hastings-Bass* rule do undoubtedly point to the ‘weak’ approach<sup>192</sup> there are also significant judicial decisions which point in the opposite direction<sup>193</sup> and due respect must be accorded to these. Whilst, in the light of the arguments made here on the consequences of the doctrines in *McPhail v Doulton*<sup>194</sup> and *Gisborne v Gisborne*<sup>195</sup> it might be legitimate simply to treat these cases as wrongly decided, it is more useful to understand why they were decided as they were and whether, in spite of their apparent support for the ‘strong’ rule, they can properly be analysed as ‘weak’ rule decisions.

### ***Re Hastings-Bass and Re Abrahams’ Will Trusts***

Perhaps the most apparent support for the ‘strong’ rule comes from *Re Hastings-Bass*<sup>196</sup> itself, and from its precursor, *Re Abrahams’ Will Trusts*.<sup>197</sup> In *Re Hastings-Bass* the argument used to establish the validity of the exercise of the power of advancement as far as William Hastings-Bass’s life interest was concerned is based

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<sup>191</sup> ‘Significant’ in that there was both argument and reasoned judicial consideration of *Re Hastings-Bass* issues.

<sup>192</sup> See n 44.

<sup>193</sup> Particularly *Green v Cobham* [2002] STC 820 (Ch); *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch); *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>194</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>195</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

<sup>196</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>197</sup> *Re Abrahams’ Will Trusts* [1969] 1 Ch 463 (Ch).

on the fact that the trustees would have made the same decision even if they had known of the effect of the rule against perpetuities, implying that if they would not have made the same decision then the failure to consider the true (perpetuity impaired) outcome would have been significant.<sup>198</sup>

Like *Re Hastings-Bass*, *Re Abrahams' Will Trusts* was concerned with an exercise of the statutory power of advancement contained in section 32 of the Trustee Act 1925. It was exercised by the trustees in favour of two beneficiaries, Carole and Linda, with interests in remainder, in order to transfer sums to trustees on new trusts for their benefit.<sup>199</sup> As in *Re Hastings-Bass*, some of the new trusts were void for perpetuity, following the decision of the House of Lords in *Re Pilkington's Will Trusts*.<sup>200</sup> The question was whether the new trusts which were not void for perpetuity remained valid and effective.<sup>201</sup> The support for the strong rule in this case comes from the approach adopted by Cross J to ascertain the effect of the new trusts being partially void. The judge took the view that the effect of the rule against perpetuities was 'wholly to alter the character of the settlement.'<sup>202</sup> such that 'there never was a valid exercise by the trustees of the power of advancement.'<sup>203</sup> but noted also that:

if the invalidity caused by the operation of the rule against perpetuities is quite small as compared with the parts of the settlement which are

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<sup>198</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 39-40.

<sup>199</sup> *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch) 467-68.

<sup>200</sup> *ibid* 468, citing *Re Pilkington's Will Trusts* [1964] AC 612 (HL).

<sup>201</sup> *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch) 478.

<sup>202</sup> *ibid* 485.

<sup>203</sup> *ibid* 485.

unaffected by the rule, the court might be prepared to say that the valid parts of the settlement would survive intact.<sup>204</sup>

This reasoning does not address at all the concerns of the ‘weak’ rule.<sup>205</sup> Rather, it focuses, as the ‘strong’ version of the rule mandates, on the outcome achieved by the trustees. The trustees set out to benefit Carole and Linda and failed to do so. For the validity of the exercise of the power of advancement to turn, as Cross J suggests that it does, on the extent of the difference between the intended and actual outcomes, shows that this case is firmly grounded in the ‘strong’ rule. On the ‘weak’ approach the crucial considerations would be what matters the trustees had a duty to take into account, and whether they performed that duty. The difference in outcome would be relevant only to an argument that even if the trustees had considered every matter they were duty bound to consider, and no others, they would nevertheless have exercised the power in the same way.

There is, however, an alternative, narrower, way of looking at *Re Abrahams’ Will Trusts* and *Re Hastings-Bass*. On this view, which it is argued here ought to be preferred, these cases are not really cases on the *Re Hastings-Bass* rule at all – which is therefore entirely inaptly named. Rather, *Re Hastings-Bass* simply decided: first, that an exercise of the power of advancement is ultra vires section 32 of the Trustee Act 1925 if the trustees do not consider the exercise of the power to be for the benefit of the beneficiary;<sup>206</sup> secondly, that where some of the trusts purported to be created

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<sup>204</sup> *ibid* 485.

<sup>205</sup> *Ie* the responsible consideration of relevant matters before exercising a power.

<sup>206</sup> See A Molloy, ‘*Hastings-Bass: The True and the Spurious*’ (2008) 14 T & T 26, 48; A Molloy, ‘*What Really is the Rule in Hastings-Bass?*’ (2009) 15 T & T 200, 203.

by the exercise of the power are void for perpetuity, this raises the question of whether the trustees consider the remaining, putatively valid, trusts to be beneficial; thirdly, that in *Re Hastings-Bass* there is no doubt that either the trustees did consider the modified exercise of the power<sup>207</sup> to be for the beneficiary's benefit, or that if they did not consider it they could not, had they considered it, reasonably have reached any other conclusion.

In *Re Hastings-Bass* Buckley LJ analysed *Re Abrahams' Will Trusts* in the following terms:

Cross J. might well have been justified in that case in considering that the intended sub-settlement in its attenuated form could not reasonably be regarded as beneficial to the daughter intended to be advanced and so could not be treated as an exercise of discretion falling within the terms of section 32. If so, we think he reached the right conclusion.<sup>208</sup>

The power of advancement is statutory<sup>209</sup> and contains its own test for the validity of its exercise: an advancement must be 'for the advancement or benefit' of a capital beneficiary 'in such manner as [the trustees] may ... think fit'. According to *Re Pauling's Settlement Trusts (No 1)*,<sup>210</sup> the power of advancement<sup>211</sup> can only be exercised if the trustees weigh up the benefit of the exercise of the power and the

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<sup>207</sup> It is the true effect of the exercise of the power of advancement, taking into account the invalidity of some of the trusts for perpetuity.

<sup>208</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 41.

<sup>209</sup> Trustee Act 1925, s 32.

<sup>210</sup> *Re Pauling's Settlement Trusts (No 1)* [1964] Ch 303 (CA), quoted in *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 37 (Buckley LJ).

<sup>211</sup> *Re Pauling's Settlement Trusts (No 1)* was concerned with an express power of advancement similar to the statutory power in s 32.

detriment to those who will lose out from it.<sup>212</sup> This process would be vitiated by failure to consider relevant considerations, or consideration of irrelevant considerations and such factors would render the purported exercise of the statutory power improper according to its own test: the consideration of ‘benefit’ is a condition precedent for the exercise of the statutory power. According to Willmer LJ ‘the power can be exercised only if it is for the benefit of the child or remoter issue to be advanced’.<sup>213</sup> Essentially the same point was made by Upjohn LJ in *Re Pilkington’s Will Trusts* who said that because the perpetuity rule ‘entirely alters the settlement’<sup>214</sup> there could not be a valid exercise of the statutory power of advancement, because the trustees had not considered whether the modified settlement was for the benefit of the capital beneficiary.<sup>215</sup>

As such, the validity of the exercise of the power of advancement in *Re Hastings-Bass* is based on the fact that the real substance of the ‘benefit’ for William Hastings-Bass was first, the very substantial saving of estate duty, and secondly, the acceleration of his interest. Everything else was ‘mere make weights’.<sup>216</sup> Both were unaffected by the operation of the rule against perpetuities, and had undoubtedly been considered by the trustees.<sup>217</sup> According to the first limb of the ‘rule’ as stated in *Re*

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<sup>212</sup> *Re Pauling’s Settlement Trusts (No 1)* [1964] Ch 303 (CA) 333.

<sup>213</sup> *ibid* 333.

<sup>214</sup> *Re Pilkington’s Will Trusts* [1961] Ch 466 (CA) 489. Quoted at *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 38.

<sup>215</sup> *Re Pilkington’s Will Trusts* [1961] Ch 466 (CA) 489-90.

<sup>216</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 39.

<sup>217</sup> *ibid* 39.

*Hastings-Bass*, the court can interfere with the exercise of a power if ‘what [the trustee] has achieved is unauthorised by the power conferred upon him’<sup>218</sup> This must be the case where the purported advancement is not ‘for the advancement or benefit’ of the person supposedly advanced.<sup>219</sup> All the discussion of whether the trustees would have so acted had they known the true legal consequences of the exercise of the power (ie had they appreciated the effect of the rule against perpetuity)<sup>220</sup> is directed to the section 32 issue, because it goes to whether the ‘benefit’ requirement is satisfied. If it is not, the trustees’ actions are not within the section 32 power.<sup>221</sup> The correct understanding of *Re Hastings-Bass* is therefore not as a case concerned with a rule of equity which invalidates trustees’ decisions where they do not produce the anticipated result, but rather as a case on the interpretation and application of the ‘benefit’ requirement in section 32 of the Trustee Act 1925 to a complex factual situation.

*Re Abrahams’ Will Trusts* is very similar. In *Re Hastings-Bass* it was not viewed as authority for anything other than the consequences for the section 32 issue of the rule against perpetuity causing the effects of the exercise of the power to have been so drastically altered that ‘the trustees cannot reasonably be supposed to have addressed their minds to the questions relevant to the true effect of the transaction.’<sup>222</sup>

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<sup>218</sup> *ibid* 41.

<sup>219</sup> See GW Thomas, 'Challenging the Exercise of a Trustee's Discretion' (2005) 12 JTCP 139, 142-43.

<sup>220</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 40.

<sup>221</sup> E Nugee, '*Re Hastings-Bass* Again - Void or Voidable? And Further Reflections' [2003] PCB 173, 183.

<sup>222</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 41.

The effect of the perpetuity problem was ‘wholly to alter the character of the sub-settlement’<sup>223</sup> and the modified advancement was simply not beneficial to the supposed beneficiaries, and so was not within the section 32 power.<sup>224</sup> On this analysis, *Re Abrahams’ Will Trusts* is not a *Re Hastings-Bass* rule case for the same reason that *Re Hastings-Bass* itself is not. It also sheds light on the dictum of Cross J that had the invalidity been ‘quite small’ it may not have invalidated the exercise of the power.<sup>225</sup> In that situation it would be more likely that the court would simply conclude, as in effect it did in *Re Hastings-Bass*, that even though the trustees had not specifically considered whether the valid trusts were for the beneficiary’s benefit, they could not conceivably have concluded that they were not. Since the court would not make the ‘absurd assumption’<sup>226</sup> that the trustees would have reached an ‘unreasonable conclusion’<sup>227</sup> on this question, it would conclude that the exercise of the power was for the benefit of the person advanced, and therefore valid under the section 32 test.

The analysis of these two cases also raises a secondary and related issue of severance. In *Re Hastings-Bass* Buckley LJ referred to the trusts intended by the trustees to be created by the exercise of the power of advancement as ‘a bundle of benefits of distinct characters’<sup>228</sup> and noted that ‘If by operation of law one or more

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<sup>223</sup> *Re Abrahams’ Will Trusts* [1969] 1 Ch 463 (Ch) 485.

<sup>224</sup> *ibid* 484-85.

<sup>225</sup> *ibid* 485.

<sup>226</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>227</sup> *ibid* 40.

<sup>228</sup> *ibid* 40-41.

of those benefits cannot take effect, it does not seem to us to follow that those which survive should not be regarded as having been brought into being by an exercise of the discretion.<sup>229</sup> That is to say, the partial invalidity of the intended sub-settlement does not mean that the surviving aspects should be treated as not beneficial for section 32 purposes, unless they could ‘not reasonably be regarded as being beneficial to the person intended to be advanced’.<sup>230</sup> From this perspective, both *Re Hastings-Bass* and *Re Abrahams’ Will Trusts* can be seen simply as cases which give effect to what Lord Neuberger has (extra-judicially) called the ‘general principle that, where possible, the law severs the good from the bad’.<sup>231</sup>

The references in both *Re Hastings-Bass* and *Re Abrahams’ Will Trusts* to the results intended to be achieved, and in fact achieved, by the respective trustees in exercising the power of advancement in each case should not therefore be taken as supporting the ‘strong’ *Re Hastings-Bass* rule. Rather, both cases should be seen simply as applications of the terms of section 32<sup>232</sup> and of the principle of severance. Neither casts any light at all on the proper scope of the rule which has, rather unfortunately in the light of this conclusion, become known as ‘the rule in *Re Hastings-Bass*’.

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<sup>229</sup> *ibid* 41.

<sup>230</sup> *ibid* 41.

<sup>231</sup> Lord Neuberger, 'Aspects of the Law of Mistake: *Re Hastings-Bass*' (2009) 15 T & T 189, 191. On severance in relation to the *Re Hastings-Bass* rule as now understood in the light of *Pitt v Holt*, see text to n 1015 and following.

<sup>232</sup> Trustee Act 1925, s 32.

### ***Green v Cobham***

Even without the support of *Re Hastings-Bass*<sup>233</sup> and *Re Abrahams' Will Trusts*<sup>234</sup> there is some apparently significant support in the case law for the 'strong' *Re Hastings-Bass* rule. The first such case is *Green v Cobham*<sup>235</sup> in which the claimant trustees sought a declaration that their exercise of a power to appoint funds to the testator's granddaughter, Camilla, on accumulation and maintenance trusts was void, on the basis that the appointment gave rise to an entirely unforeseen liability to capital gains tax, that the trustees would not have exercised the power had they appreciated the tax consequences of doing so, and that in these circumstances the *Re Hastings-Bass* rule applied to render void the purported exercise of the power.<sup>236</sup> Jonathan Parker J concluded that this was a case where capital gains tax was not considered at all, rather than one where the trustees received incorrect advice<sup>237</sup> and noted that 'everyone concerned proceeded throughout on the footing that the two accumulation and maintenance settlements would fall to be treated as separate settlements for capital gains tax purposes'.<sup>238</sup> That in fact the two settlements in issue would be treated as a single settlement for tax purposes was the cause of the unforeseen tax liability.<sup>239</sup> However, on the evidence before the court it appears in

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<sup>233</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>234</sup> *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch).

<sup>235</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>236</sup> *ibid* 822-26.

<sup>237</sup> *ibid* 824.

<sup>238</sup> *ibid* 824.

<sup>239</sup> *ibid* 824.

substance more likely that capital gains tax was a matter always under consideration, but that the trustees simply failed to appreciate the legal possibility of Camilla's appointment having capital gains tax consequences for the fund.<sup>240</sup> So in substance there was no failure to consider capital gains tax at all, but rather a mere failure to appreciate the legal consequences of the appointment from a capital gains tax perspective. Counsel for the trustees made the then novel claim that the rule in *Re Hastings-Bass* applied to cases where the trustees failed to understand the legal consequences of their actions, even though they understood what they were doing. That is, they knew that they were appointing funds on an accumulation and maintenance trust for Camilla, and this was what they wanted to do, and they had good reason for doing it. To bring this argument within the 'weak' rule would require saying that the trustees failed to take into account a specific relevant consideration – that is, that the trustees were required to take into account, in deciding whether to appoint, the true capital gains tax consequences of making the appointment. This would collapse the supposed 'weak' rule into the 'strong' rule, since it would invalidate the transaction on the basis that its outcome was not what the trustees intended, the supposed obligation to take into account the true legal outcome being simply a semantic variation on this. Hence *Green v Cobham* looks at first glance very much like a 'strong' rule case.

There are serious difficulties, however, with *Green v Cobham* as convincing authority for the 'strong' rule. First, the argument put before the court to oppose the trustees' claim was very weak. Counsel for the trustees of the trusts purportedly

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<sup>240</sup> *ibid* 825.

created by the exercise of the power of appointment played ‘devil’s advocate’<sup>241</sup> arguing against the claimants to assist the court, but regardless of his exertions in this regard, it must be doubted that this would be as effective a procedure for testing the trustees’ arguments as the representation of a party genuinely opposed to the claim.<sup>242</sup> The Commissioners of Inland Revenue, the only potential party with a real stake in treating the impugned appointment as valid, were not represented. Furthermore, the reasoning of the judgment proceeded on the foundation of an unwise concession by counsel, that ‘before executing the 1990 deed the trustees of the will trust ought to have taken into account the possible capital gains tax consequences of the contemplated appointment for the benefit of Camilla.’<sup>243</sup> But once it is accepted that the trustees had a duty to take into account the capital gains tax consequences of the appointment and that they did not, then the case is all but concluded, without proper argument on the crucial issue. The case was then argued on the issue of whether it could be shown that the trustees would have acted differently had they taken the tax consequences into account.<sup>244</sup> But this argument was surely doomed to failure, since it was virtually certain that the trustees would have acted differently. No trustee would knowingly incur such a tax liability where it is avoidable. The real counter-argument would of course have been that the *Re Hastings-Bass* rule did not bite on these facts, because it had not been shown that the trustees had failed to take into

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<sup>241</sup> *ibid* 825.

<sup>242</sup> Indeed Molloy identifies as a major problem in the whole line of *Re Hastings-Bass* cases ‘a routine lack of critical opposing submissions’: A Molloy, ‘What Really is the Rule in *Hastings-Bass*?’ (2009) 15 T & T 200, 218.

<sup>243</sup> *Green v Cobham* [2002] STC 820 (Ch) 827.

<sup>244</sup> *ibid* 827.

account a relevant consideration, judging ‘relevant consideration’ by the standard of the ‘weak’ rule. But this was not put to the court.

Even on the assumption that the court was properly able to choose between ‘weak’ and ‘strong’ approaches, there are difficulties with seeing *Green* as support for the conventional ‘strong’ model of the rule. The problem stems from the fact that the trustees did not, unlike in *Re Hastings-Bass*, fail to achieve a particular intended result. Rather they achieved what they intended to achieve, in that they made the intended appointment and established the intended trusts, but this success had unforeseen consequences. If *Green* is authority for a ‘strong’ rule it is for a species of ‘strong’ rule which goes beyond the model described, and beyond the description of the rule in *Re Hastings-Bass*<sup>245</sup> to encompass any trustee decision with an unanticipated and unwanted outcome. This is completely novel in *Green*, but in spite of that (and largely for the reasons previously discussed<sup>246</sup>) is not examined in Jonathan Parker J’s judgment. Whilst the ‘strong’ rule as understood otherwise than in *Green*<sup>247</sup> has a possible principled basis in that the basis on which the trustees have acted is undermined by the failure of the intended result to materialise, this extended ‘strong’ rule seems tantamount to permitting trustees to act with impunity since they can simply wait and see what results their actions bring, and if necessary deny afterwards that they were was intended. As authority for the orthodox ‘strong’ rule,

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<sup>245</sup> ‘the court should not interfere with [the trustee’s] action notwithstanding that it does not have the full effect which he intended, unless...’ *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 41 (Buckley LJ).

<sup>246</sup> See text to n 241 and following.

<sup>247</sup> See p 11.

*Green* is therefore notably unpersuasive. Of course, if Jonathan Parker J's doubtful finding of fact, that the trustees totally failed to consider the possibility of capital gains tax,<sup>248</sup> is accepted, then *Green* can be explained simply as a 'weak' rule case. A responsible trustee might be unaware of some of the subtleties of tax law<sup>249</sup> but even the least capable and diligent would surely appreciate that the exercise of a power to transfer assets out of the trust fund might give rise to tax consequences, and that such consequences should be ascertained and considered in the decision-making process. Thus the failure to consider even the possibility of capital gains tax issues would be a breach of duty which would invalidate the appointment on a purely 'weak' rule basis.

***Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children***

Eighteen months after Parker J's decision in *Green* it fell to Patten J to apply that decision in the context of a *Re Hastings-Bass* claim by trustees who exercised a power of appointment during the 1997-98 fiscal year, after receiving clear and correct legal advice that under no circumstances should they make the appointment until the 1998-99 fiscal year had begun. The consequence of this failure was a capital gains tax liability of £1.2 million.<sup>250</sup> Patten J held that the trustees had failed to take into account the fiscal consequences of making the appointment before the new fiscal year began<sup>251</sup> and that *Green v Cobham* is authority that when trustees decide to exercise a

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<sup>248</sup> *Green v Cobham* [2002] STC 820 (Ch) 824.

<sup>249</sup> See text to n 66 and following.

<sup>250</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch) [1]-[8].

<sup>251</sup> *ibid* [15].

power, they must have regard to the fiscal consequences of the exercise. If they do not, and would not have made the appointment if they had, the purported exercise of the power is void.<sup>252</sup> The judge further held that whilst there might in future be limits imposed on the *Re Hastings-Bass* rule, he could see no reason not to follow *Green*.<sup>253</sup> This simply does not work as a ‘weak’ rule case. The trustees acted responsibly and properly, in that when they executed the deed of appointment on 3<sup>rd</sup> April 1998, they did so in reliance on their solicitor’s advice to execute the deed of appointment then. This advice was erroneous, but the trustees acted on it believing that they were doing what was necessary to make the tax saving scheme work. They undoubtedly took fiscal matters into account in making their decision, since they were the basis for making the appointment. The outcome of the decision was unintended, because the information they relied upon in making their decision was incorrect. But there was no flaw in the decision-making process. On the ‘weak’ rule, the appointment should be unimpeachable. Yet the trustees’ *Re Hastings-Bass* claim succeeded, and the appointment was held to be invalid.<sup>254</sup> The ‘strong’ rule explains the outcome simply. The trustees acted on the basis that they were engaged in successful tax mitigation, whereas the true consequence of the trustees’ decision to execute the deed of appointment on 3<sup>rd</sup> April was to bring about a liability to capital gains tax of £1.2

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<sup>252</sup> *Green v Cobham* [2002] STC 820 (Ch) [16].

<sup>253</sup> *ibid*

<sup>254</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch) [19].

million.<sup>255</sup> On the ‘strong’ rule approach, the appointment should be invalid, as Patten J found it to be.

It may therefore be that that to support the ‘weak’ rule requires this case to be treated as wrongly decided.<sup>256</sup> But it is possible to make some criticisms of the case as authority. First, it seems to follow *Green v Cobham*<sup>257</sup> without detailed consideration<sup>258</sup> and without reference to any argument that *Green* went well beyond both *Re Hastings-Bass*<sup>259</sup> and *Mettoy Pension Trustees Ltd v Evans*<sup>260</sup> without proper consideration. This would seem to weaken this case as independent authority for the ‘strong’ approach - it would essentially have to stand or fall with *Green*, which has already been shown to be problematic.<sup>261</sup> Secondly, Patten J takes the view that once it is established that a matter is ‘relevant’, then the *Re Hastings-Bass* rule is engaged by a failure to consider it.<sup>262</sup> This inevitably leads to the conclusion in the case, without mandating the ‘weak’ or ‘strong’ view, since neither approach necessarily requires *every* factually relevant issue to be taken into account. By overlooking the need for reasoned analysis of what the trustees are obliged to take into account,

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<sup>255</sup> *ibid* [2].

<sup>256</sup> On the legitimacy of this approach to analysing the true nature of the *Re Hastings-Bass* rule, see text to n 26 and following.

<sup>257</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>258</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch) [16].

<sup>259</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>260</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>261</sup> See p 57 and following.

<sup>262</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch) [16].

Patten J renders the outcome a foregone conclusion. Thirdly, this is a troubling case because it simply does not look like a typical *Re Hastings-Bass* case. The trustees had considered the tax issue, and the attendant legal issues, in some detail, with the benefit of advice from Nicholas Warren QC.<sup>263</sup> To some degree therefore the trustees had considered all relevant matters and formed an entirely proper conclusion – that they should not make the appointment to the NSPCC before 6<sup>th</sup> April 1998. Yet they went ahead with it anyway. So there is no factual matter which they ought to have considered but did not, to invoke the weak rule, nor did their action produced an unintended, or even unanticipated, outcome, to invoke the strong rule. Rather this looks more like either a straightforward mistake, based on having forgotten what they had previously known (as was the case in *Lady Hood of Avalon v McKinnon*<sup>264</sup>) or a *Turner v Turner* case of executing the deed simply on the instructions of another (in this case the solicitor, Mr Jenkins) without giving independent consideration to what they were doing.<sup>265</sup> Either could potentially justify setting aside the appointment,<sup>266</sup> so the outcome may not necessarily be in doubt. But it makes it difficult to argue that *Abacus Trust v NSPCC* is necessarily authority for the strong approach, when that so ill fits the circumstances of the case.

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<sup>263</sup> *ibid* [8].

<sup>264</sup> *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 (Ch) 484.

<sup>265</sup> *Turner v Turner* [1984] Ch 100 (Ch) 110.

<sup>266</sup> *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 (Ch) 484; *Turner v Turner* [1984] Ch 100 (Ch) 111.

### ***Burrell v Burrell***

In *Burrell v Burrell*<sup>267</sup> shares in a family company, MBE, were held on accumulation and maintenance trusts for Dennis Burrell's son, Charles. Concerned that Charles would receive too much wealth on his 18<sup>th</sup> birthday, the trustees (of which Dennis was one) took legal advice on the possibility of exercising an overriding power of appointment to settle the fund on discretionary trusts until Charles was 35 (at which time he had to become absolutely entitled under the terms of the original trust).<sup>268</sup> Both Dennis Burrell as trustee, and Mrs Gardner and Miss Shaw, solicitors of Allen & Overy consulted on this matter, addressed their minds to the question of inheritance tax liability and whether the MBE shares qualified for business property relief under sections 105 and 122 of the Inheritance Tax Act 1984.<sup>269</sup> But the solicitors and trustees were in error about the availability of business property relief; they overlooked the requirement in section 106 of the Act that the transferred property be held by the transferor for 2 years prior to the transfer.<sup>270</sup> So this is not a case, like *Green v Cobham*,<sup>271</sup> where tax implications were wholly overlooked. Rather it is a case where both the trustees and their advisers were aware that there was a risk of inheritance tax in the transaction, and their attempt to avoid it failed.

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<sup>267</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569.

<sup>268</sup> *ibid* [1]-[4].

<sup>269</sup> *ibid* [3]-[5].

<sup>270</sup> *ibid* [9].

<sup>271</sup> *Green v Cobham* [2002] STC 820 (Ch).

The trustees brought a *Re Hastings-Bass* claim to have the exercise of the power of appointment set aside.<sup>272</sup> Mann J granted the relief sought on the basis of the trustees' evidence that they would not have exercised the power of appointment as they did had they known of the tax consequences.<sup>273</sup> Mann J considered *Green v Cobham*<sup>274</sup> and *Abacus Trust v NSPCC*<sup>275</sup> and held that they decided that a failure to take account of tax consequences could lead to the application of the *Re Hastings-Bass* principle.<sup>276</sup> This appears to work only as an application of the 'strong' rule. On the weak approach one might say that Mr Burrell and his co-trustee Mrs Sharman did what they were supposed to do. Mr Burrell was aware that there might be tax implications, so he took the advice of a reputable firm of solicitors. He followed their advice. This advice turned out to be mistaken; Mann J called it negligent.<sup>277</sup> But there was no identifiable matter which the trustees ought to have taken into account but did not – unless the true legal consequences of the transaction as they subsequently emerged count, which as has been shown in relation to *Green v Cobham* simply collapses the 'weak' rule into the 'strong' rule in any case.<sup>278</sup>

However, there are two reasons for rejecting *Burrell* as persuasive authority for the 'strong' rule. First, it relies on an inaccurate understanding of *Green v*

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<sup>272</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [13].

<sup>273</sup> *ibid* [12].

<sup>274</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>275</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch).

<sup>276</sup> *ibid* [18]-[19].

<sup>277</sup> *ibid* [11].

<sup>278</sup> See text to n 240 and following.

*Cobham*<sup>279</sup> and *Abacus Trust v NSPCC*.<sup>280</sup> Mann J said that *Green* was a case ‘which, like the case before me, was one in which the trustees were said to have failed to take proper account of the tax consequences of their acts.’<sup>281</sup> The vagueness of the words ‘failed to take proper account of the tax consequences’ conceals an important distinction. In *Green* the trustees failed to have any regard to tax issues at all – they were wholly overlooked.<sup>282</sup> Whereas in *Burrell* the tax issues were recognised and considered<sup>283</sup> but a mistake was made as to the technicalities of inheritance tax law.<sup>284</sup> From the perspective of the ‘weak’ rule, this is an important distinction, since a total failure to consider tax issues looks like a failure on the part of the trustees to take into matters which a responsible trustee would have considered, whereas considering the tax issues and then relying on legal advice which turns out to have been erroneous may have been a perfectly proper course of action for the trustees to take. Furthermore, Mann J held that *Abacus Trust v NSPCC* was ‘clear authority ... for the proposition that trustees must consider the fiscal consequences of their acts’.<sup>285</sup> But once again, *Abacus Trust v NSPCC* was a very different case to *Burrell*. The trustees did consider the fiscal consequences. They acted as they did following legal advice, in the belief that they were acting as required to make the tax saving scheme work.

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<sup>279</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>280</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch).

<sup>281</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [18].

<sup>282</sup> *Green v Cobham* [2002] STC 820 (Ch) 824.

<sup>283</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [5], [11].

<sup>284</sup> *ibid* [9], [11].

<sup>285</sup> *ibid* [19].

As already seen, this was a case which looked much more like the trustees making a mistake than failing to consider some relevant matter or the consequences of their action.<sup>286</sup> Certainly the result in *Abacus Trust v NSPCC* does not mandate an approach in *Burrell* based on treating the true legal and fiscal outcome as a necessarily relevant consideration.

Secondly, it may be that *Burrell* can in any event be analysed as a weak rule case. Mann J held that Mr Burrell knew that there was a tax issue here but ‘failed to give clear instructions to his solicitors (or anyone else) to consider the matter, and failed to appreciate that he had not asked for, and was not in possession of, a full picture of the tax consequences of what was proposed.’<sup>287</sup> Mrs Sharman ‘never really addressed fiscal matters; she relied on others to do so.’<sup>288</sup> In the context of trustees who have sought legal advice on the tax consequences of their proposed action, where the advisers, as Mann J said, ‘had no reason to suppose that the trustees were in possession of proper tax advice, and probably had good reason to suppose that they were not.’<sup>289</sup> these findings of fact are somewhat ambiguous; it is not wholly clear whether Mann J is asserting a genuine breach of duty on the part of the trustees, or is simply looking to justify attributing the solicitors’ breach of duty to the trustees, so as to satisfy the breach of duty requirement set down by Lightman J in *Abacus Trust Co*

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<sup>286</sup> See p 62 and following.

<sup>287</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [23].

<sup>288</sup> *ibid* [23].

<sup>289</sup> *ibid* [23].

*(Isle of Man) Ltd v Barr*.<sup>290</sup> But on the former view, that both the trustees and the solicitors were guilty of breaches of duty, there is no real difficulty with analysing this as a weak rule case. Trustees who are aware that their actions may give rise to adverse tax consequences, and that it may be possible to mitigate those consequences, ought, simply as a matter of acting responsibly as a trustee, to take appropriate advice. If the trustees failed to do this – Mrs Sharman simply leaving the matter to Mr Burrell, and Mr Burrell not asking the solicitors for appropriate advice – then it may be legitimate to conclude that they failed to take into account the tax issues relevant to their exercise of the power. Although they recognised that inheritance tax was a relevant matter, they failed to do what a responsible trustee would have done to ensure that they made an adequately informed decision.

### ***Sieff v Fox***

The final case is *Sieff v Fox*<sup>291</sup> in which Lloyd LJ<sup>292</sup> reviewed the *Re Hastings-Bass* case law and decided that the ‘strong’ approach represented the current law. Under the terms of what were known as the 1971 trusts, trustees held Woburn Abbey, the ancestral home of the Dukes of Bedford, and various valuable chattels. The trustees had a discretionary power of appointment under these trusts<sup>293</sup> with the consequence

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<sup>290</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409. Mann J concluded that he did not have to decide on the validity of the breach of duty requirement in *Abacus Trust Co (Isle of Man) Ltd v Barr* as an element of the *Re Hastings-Bass* rule, because it was met in any case: *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [22].

<sup>291</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>292</sup> Sitting at first instance as a judge of the Chancery Division, but after his elevation to the Court of Appeal.

<sup>293</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [4].

that the assets held on trust were subject to 10 yearly inheritance tax charges.<sup>294</sup> Such a charge was due in 2001.<sup>295</sup> Despite coming to the problem too late to do anything about the 2001 charge, the trustees decided to consider how they might mitigate the future tax liabilities of the 1971 trust assets.<sup>296</sup> They took legal advice from Miss Kate Howe, a solicitor in the firm of Boodle Hatfield. Miss Howe advised, among other possible courses of action open to the trustees, that they could exercise the power of appointment in favour of the Duke's grandson, Lord Howland, on the understanding that Lord Howland would settle the appointed property on the trusts of the already existing 1987 accumulation and maintenance trusts. Crucially, Miss Howe further advised, having sought the advice of counsel,<sup>297</sup> that 'hold-over relief' under section 260 of the Taxation of Chargeable Gains Act 1992 would be available, so that no capital gains tax would be payable, and there would be no inheritance tax liability either.<sup>298</sup> On the basis of this advice, the appointment was made to Lord Howland in 2001, who then assigned his interest to the 1987 trustees on the existing trusts.<sup>299</sup> The tax advice proved to be erroneous. An interaction between section 65(4) of the Inheritance Tax Act 1984 and section 260 had been overlooked, with the result that 'hold-over relief' was unavailable and a capital gains tax liability of around one

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<sup>294</sup> Under the 'relevant property' regime: Inheritance Tax Act 1984, pt 3 ch 3.

<sup>295</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [14].

<sup>296</sup> *ibid* [14].

<sup>297</sup> *ibid* [18].

<sup>298</sup> *ibid* [16].

<sup>299</sup> *ibid* [20].

million pounds accrued.<sup>300</sup> Unsurprisingly in the circumstances, the trustees brought a claim relying on the *Re Hastings-Bass* principle, asserting that had they been aware that the 2001 appointment would give rise to this tax liability, they would not have made the appointment.<sup>301</sup>

Lloyd LJ carried out an extensive review of the case law, much of which was not strictly necessary for his decision in *Sieff* itself. He noted that the *Re Hastings-Bass* formulation based on ‘whether the trustees took into account matters which they ought not to have done, or failed to take into account matters which they ought to have ... respects the traditional view, that it is for the trustees to exercise the power, and to decide whether or not to do so’.<sup>302</sup> However, in spite of this apparent nod to the weak formulation of the rule, he went on to hold that trustees must, in exercising a power, take into account the true fiscal consequences of their action.<sup>303</sup> Acknowledging that the trustees ‘did in fact consider’<sup>304</sup> the fiscal consequences of the appointment, Lloyd LJ nonetheless held that ‘they failed to give proper consideration’<sup>305</sup> because their legal advice was wrong.<sup>306</sup> This necessarily leads to

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<sup>300</sup> *ibid* [23]-[24].

<sup>301</sup> *ibid* [27].

<sup>302</sup> *ibid* [76].

<sup>303</sup> *ibid* [86].

<sup>304</sup> *ibid* [114].

<sup>305</sup> *ibid* [114].

<sup>306</sup> *ibid* [114].

Lloyd LJ's conclusion, that had the trustees had accurate advice, they would not have made the appointment. The appointment was therefore invalid.<sup>307</sup>

This is simply unsupportable except as a 'strong' rule case. The trustees did in fact, as Lloyd LJ acknowledged,<sup>308</sup> carefully consider the tax consequences of the appointment. There was no criticism in the case of their choice of legal advisers, nor any suggestion that the trustees ought to have sought the directions of the court. This was simply a case of trustees acting in good faith on the strength of erroneous legal advice, in circumstances where they had no way of knowing that the advice was erroneous, and in which any reasonable and responsible trustee would likely have acted in the same manner. On the 'weak' rule approach, this was not an appointment which could be set aside. Furthermore, although Lloyd LJ made repeated reference to the 'relevant considerations' basis for the rule,<sup>309</sup> he also reintroduced what the judge claimed was an element of *Re Hastings-Bass* itself which was discarded in *Mettoy Pension Trustees Ltd v Evans*,<sup>310</sup> being the requirement that when the trustee exercises a power 'the effect of the exercise is different from that which he intended'.<sup>311</sup> On the 'weak' approach this would simply be irrelevant. If the beneficiaries are entitled to challenge an improper decision-making process on the basis of failure to take into account relevant matters, then the effect intended by the trustees would not be important, except in so far as that it might show the trustees

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<sup>307</sup> *ibid* [114].

<sup>308</sup> *ibid* [114].

<sup>309</sup> *ibid* [38], [76], [86], [114], [119].

<sup>310</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>311</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [49].

would have acted in the same way had they appreciated the omitted consideration. This latter possibility is already addressed by the need to show that the trustees might<sup>312</sup> have acted differently. On the ‘weak’ view, therefore, this restriction would not exist. This added requirement of an unintended effect was not decisive in *Sieff*, since there was no doubt that what the trustees achieved – a huge capital gains tax liability – was unintended. But it provides additional support for the view that *Sieff* is firmly grounded in the strong approach.

As a matter of authority, *Sieff v Fox* presents a significant stumbling block for the argument for the ‘weak’ approach. After very full argument and lengthy consideration, a judge of some nine years’ experience on the bench of the Chancery division of the High Court drew conclusions which provide powerful support for the ‘strong’ rule and which cannot stand with the ‘weak’ rule approach. However, with the greatest of respect for the detailed consideration given to the many issues arising in this case by Lloyd LJ, it is possible to criticise the approach he took to the two issues crucial to the use of *Sieff* to reject the ‘weak’ approach, being the relevance of fiscal consequences and failure to consider them, and the need for the trustees to have brought about a result different from what they intended.

First, in relation to the obligation of the trustees to take into account the true fiscal consequences of their decision, there is no doubt that Lloyd LJ decided that they are so obliged.<sup>313</sup> However, the only reason given for this is that ‘trustees do

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<sup>312</sup> On the ‘weak’ rule, ‘might’ is to be preferred to ‘would’. See text to n 608 and following.

<sup>313</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [86].

have regard to the fiscal treatment of the trust property'.<sup>314</sup> This is undoubtedly true, and it is undoubtedly proper that trustees should do this, and that in cases where tax matters arise, the trustees should be obliged to do this. But as Lloyd LJ himself notes 'It does not follow that they need to know every detail of the tax consequences of acting as they propose'.<sup>315</sup> In essence, Lloyd LJ tries to chart a very difficult course, by arguing that whilst trustees are in general obliged to take into account the true fiscal consequences of their actions, they might not be obliged to fully take account of tax matters where they are 'too subtle and arcane'<sup>316</sup> for it to be reasonable to expect that of the trustees. If this means that trustees' decisions can be impugned for failure to consider 'simple' tax matters, but not 'complex' ones, then it is not only unprincipled, but impossible to give meaningful effect to in practice, since trustees are likely to take expert advice on tax matters and to rely on such advice, as they did in *Sieff*. Except perhaps in a truly exceptional case where the advice given to the trustees was patently incorrect, it is very difficult to see how a distinction between 'simple' and 'complex' tax matters could be relevant. If the judge meant simply that trustees must act responsibly in regard to tax matters, but do not necessarily have to get it right (albeit that getting it wrong in a simple case *might* suggest that the trustees acted irresponsibly) then he is in accordance with the 'weak' approach, and should have decided this case differently.

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<sup>314</sup> *ibid* [86].

<sup>315</sup> *ibid* [86].

<sup>316</sup> *ibid* [86].

Secondly, in relation to the requirement that ‘the effect of the exercise [of the power] is different from that which [the trustees] intended’,<sup>317</sup> it is notable that again, Lloyd LJ puts great weight on the inclusion of this test in *Re Hastings-Bass*<sup>318</sup> itself, rather than in any of the subsequent cases. It has already been seen that *Re Hastings-Bass* is not in fact a decision on the *Re Hastings-Bass* rule at all, being firmly grounded instead in the question of severing the perpetuitous aspects of an exercise of the power of advancement from valid aspects, and the requirement of benefit for a valid exercise of that power.<sup>319</sup> Not only is *Re Hastings-Bass* therefore not authority for requiring this test, but even if it were properly considered a *Re Hastings-Bass* case, its context is peculiar. *Re Hastings-Bass* was a case in which the central issue was whether the trustees had achieved what they intended to achieve by their actions, that is, conferring a benefit on William Hastings-Bass. But even there the Court of Appeal did not require the test to be satisfied. Rather, the *Re Hastings-Bass* rule was expressed negatively, as the proposition that ‘the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless’.<sup>320</sup> It does not logically follow that the court may not interfere unless the effect of the trustees’ action does not have the effect intended; rather the Court of Appeal was concerned to make it clear that a failure to achieve an intended effect is not sufficient to vitiate the trustees’ action. There is no comment on whether it is ever

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<sup>317</sup> *ibid* [49].

<sup>318</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>319</sup> See text to n 196 and following.

<sup>320</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 41.

necessary. Given that *Re Hastings-Bass* does not mandate this requirement, that Warner J in *Mettoy Pension Trustees Ltd v Evans*<sup>321</sup> did not include it in his formulation of the *Re Hastings-Bass* rule, and that none of the cases after *Mettoy* until *Sieff*,<sup>322</sup> reintroduced it, it must be questionable whether it was legitimate for Lloyd LJ to assert a requirement of unintended consequences. As such, it might be thought that the analysis in *Sieff v Fox* is less compelling than it might at first glance appear.

We can therefore see that none of these cases, each of which if taken at face value provides powerful support for the ‘strong’ rule, is unambiguous. All have defects in their reasoning, and none is well founded in the law that came before it. *Green v Cobham*<sup>323</sup> and *Burrell v Burrell*<sup>324</sup> may be explicable as ‘weak’ rule cases. To the extent that *Abacus Trust v NSPCC*<sup>325</sup> and *Sieff v Fox*<sup>326</sup> are not, they should nevertheless not be followed. Both are insufficiently reasoned to support the sweeping claims they make about the scope of the *Re Hastings-Bass* rule, and both should be treated as justifiably overruled by the Court of Appeal in *Pitt v Holt*.<sup>327</sup>

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<sup>321</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>322</sup> The assertion of this supposed element of the rule in *Sieff v Fox* appears to have been instrumental in the concession made in *Re IMG Pension Plan* that the rule could not be invoked in that case. Whether that concession was correctly made in the context of the *Re Hastings-Bass* case law was not considered: *Re IMG Pension Plan* [2009] EWHC 2785 (Ch), [2010] Pens LR 23 [221].

<sup>323</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>324</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569.

<sup>325</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch).

<sup>326</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>327</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

### **Alternative models**

Having shown both from the *Re Hastings-Bass* case law and from important principles of the law of trusts derived from *McPhail v Doulton*<sup>328</sup> and *Gisborne v Gisborne*<sup>329</sup> that the ‘weak’ rule is to be preferred to the ‘strong’ rule, the principal task is now to work out the consequences of preferring the ‘weak’ rule. This will be the business of chapters three and four. But before moving on, it is important also to note that apart from the ‘weak’ and ‘strong’ models derived directly from the case law, several alternative models of the *Re Hastings-Bass* rule have been put forward. Examination of each will show that none is satisfactory as an explanation of the law as it stands. None is therefore to be considered as a serious challenge to the ‘weak’ rule interpretation of the case law.

### ***Non est factum***

The first alternative is based on the submissions of Edward Nugee QC as counsel in *Mettoy Pension Trustees Ltd v Evans*<sup>330</sup> which Warner J summarised:

Mr. Nugee, as I understood his submissions, accepted that there was such a principle as the rule in *Hastings-Bass* (though he did not use that label) but said that its scope was very narrow. He submitted that law and equity alike required, as public policy demanded, that written instruments, deliberately brought into existence, should have effect according to their true construction (determined in case of dispute by the court) without inquiry being made in every case into the state of mind of the persons executing them. Leaving aside fraud and undue influence, the stringent requirements that had to be satisfied before the court would refuse to give effect to a written instrument were

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<sup>328</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>329</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

<sup>330</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

emphasised in a number of different areas of the law. He instanced the law about non est factum and the law about rectification.<sup>331</sup>

This is a view essentially founded on the idea that subject to the defence of *non est factum* a document which is not liable to rectification should be effective according to its construction. This rightly leads to seeing *Re Hastings-Bass*<sup>332</sup> and *Re Abrahams' Will Trusts*<sup>333</sup> as cases of 'excessive execution';<sup>334</sup> that is, where the purported exercise of the power of advancement went beyond the true scope of the power. Lord Walker has adopted the same view, arguing on this basis that whilst *Turner v Turner*<sup>335</sup> is doctrinally sound, *Green v Cobham*<sup>336</sup> and *Abacus Trust v NSPCC*<sup>337</sup> are not.<sup>338</sup>

To some extent, the merits of this approach speak for themselves. It is an approach premised on the absolute importance of legal certainty. In the context of potentially complex commercial transactions, there is a great deal to recommend in any theory which allows parties to rely on the documents before them. But there are also difficulties with this theory, at the level of principle. First, it is unduly simplistic to assert that written documents should always be effective according to their terms.

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<sup>331</sup> *ibid* 1622.

<sup>332</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>333</sup> *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch).

<sup>334</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1622-23.

<sup>335</sup> *Turner v Turner* [1984] Ch 100 (Ch).

<sup>336</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>337</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch).

<sup>338</sup> R Walker, 'The Limits of the Principle in *Re Hastings Bass*' [2002] PCB 226, 239.

A document might be ultra vires the body creating it, for example.<sup>339</sup> It is established law, independent of the scope of the *Re Hastings-Bass* rule, that unilateral documents can be set aside more readily than contracts.<sup>340</sup> In so far as this view of *Re Hastings-Bass* is necessary to protect third parties, its work can be done just as well by treating invalidated trustee decisions as ‘voidable’ rather than ‘void’.<sup>341</sup> And this view does not accord with the beneficiaries’ right to due performance of the trustees’ duties, including the duty to consider. It would leave beneficiaries without an effective remedy for breach of that duty.<sup>342</sup>

More importantly, though, this theory, whatever merits it may have in policy terms, does not explain the law as it stands. In *Abacus Trust v Barr*<sup>343</sup> Lightman J considered the common law approach to *non est factum* and concluded that it requires that the transaction in question be ‘essentially different in substance or in kind from the transaction intended’<sup>344</sup> and agreed with Lord Walker<sup>345</sup> that a similar test would have to be satisfied to justify treating an apparent decision of the trustee as no

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<sup>339</sup> As was notoriously found to be the case in relation to local authorities’ interest-rate swap agreements in *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1 (HL), and more prosaically in many cases concerned with the scope of a company’s objects before the enactment of section 39 of the Companies Act 2006: see *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA) 295.

<sup>340</sup> cf *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) and *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679. See also text to n 776 and following.

<sup>341</sup> See text to n 725 and following.

<sup>342</sup> See text to n 138 and following.

<sup>343</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409.

<sup>344</sup> *Gallie v Lee* [1971] AC 1004 (HL) 1026 (Lord Wilberforce), quoted at *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [32].

<sup>345</sup> R Walker, ‘The Limits of the Principle in *Re Hastings Bass*’ [2002] PCB 226, 233, 239.

decision at all. As Lightman J notes, the *Re Hastings-Bass* cases simply do not impose such a test.<sup>346</sup> So Lightman J effectively rejects *non est factum* as a statement of what the law is doing in *Re Hastings-Bass* cases. There is already a species of *non est factum* in equity, seen in *Turner v Turner*,<sup>347</sup> referred to by Park J in *Smithson v Hamilton* as ‘an extreme and highly exceptional case’.<sup>348</sup> It is clear from all of the cases considered in which *Re Hastings-Bass* claims did in fact succeed – ‘weak’ and ‘strong’ rule cases alike – that in none of them would a *non est factum* claim have been successful. *Abacus Trust v NSPCC*<sup>349</sup> perhaps comes closest<sup>350</sup> but even in that case it would be hard to establish ‘essential difference’ to the standard indicated by *Gallie v Lee*.<sup>351</sup> When *Mettoy* was being argued before Warner J, some twenty years ago, there may still have been the opportunity to confine the *Re Hastings-Bass* rule in the way this theory requires. But that opportunity is long since missed. In principle the Supreme Court could overrule all of the *Re Hastings-Bass* cases since *Re Hastings-Bass* itself,<sup>352</sup> as Nugee has pointed out: ‘*Mettoy* has been in the books for less than a quarter of the time that *Solle v Butcher* was, and some of its less desirable

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<sup>346</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [32].

<sup>347</sup> *Turner v Turner* [1984] Ch 100 (Ch).

<sup>348</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [131].

<sup>349</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch).

<sup>350</sup> See text to n 264 and following.

<sup>351</sup> *Gallie v Lee* [1971] AC 1004 (HL).

<sup>352</sup> See text to n 1233 and following.

younger siblings for much less time than that.<sup>353</sup> Whether such dramatic reshaping of the extant law would be an advantageous course to chart is open to doubt. But on any view such a decision in the Supreme Court would be radically to change the existing law, rather than to clarify it.

### *Capricious and absurd decisions*

The second alternative theory is that put forward by Thomas, who has argued for an alternative *Re Hastings-Bass* test which fits neither the ‘weak’ nor the ‘strong’ approach precisely. He states that ‘The court should intervene so as to reverse only that which, had it been done with full knowledge and understanding of the significantly relevant consideration, would have been capricious, absurd or such that no reasonable trustee with such knowledge and understanding would ever have done.’<sup>354</sup> In its favour, he claims that it would confine the *Re Hastings-Bass* rule to ‘narrow and sensible limits’<sup>355</sup> and prevent it from undermining ‘the finality and non-reviewability of trustees’ decisions.’<sup>356</sup>

There is certainly much to be said for restricting the scope of the *Re Hastings-Bass* rule and curbing its worst excesses (and this is a good reason to adopt the ‘weak’ rather than the ‘strong’ rule). But Thomas’s approach is flawed as a mechanism for achieving this. First, it is not reconcilable with the *Re Hastings-Bass*

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<sup>353</sup> E Nugee, ‘*Re Hastings-Bass* Again - Void or Voidable? And Further Reflections’ [2003] PCB 173, 187. The decision of the Court of Appeal in *Solle v Butcher* [1950] 1 KB 671 (CA) on mistake in equity stood until *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679.

<sup>354</sup> GW Thomas, ‘Challenging the Exercise of a Trustee’s Discretion’ (2005) 12 JTCP 139, 152.

<sup>355</sup> *ibid* 153.

<sup>356</sup> *ibid* 153.

case law. Whilst it may well be the case that the capricious<sup>357</sup> or excessively unreasonable exercise of a power is invalid, this is not the basis upon which the *Re Hastings-Bass* cases have been decided. Whilst there is some difference between the cases which emphasise breach of the trustees' duty to consider,<sup>358</sup> and others which focus on the results achieved by the trustees,<sup>359</sup> there is none which considers the counter-factual possibility of the capriciousness or unreasonableness of the trustees' actions as judged against a putative full understanding of the relevant considerations. Secondly, even if put as a statement of what the law here ought to be, rather than what it is, there is a serious difficulty with the backward-looking nature of the test. Whilst not obviously cast in the same terms as the strong *Re Hastings-Bass* rule rejected in this chapter, it in fact shares many of the same defects. For example, by looking at capriciousness, absurdity and unreasonableness with the benefit of hindsight, rather than on the basis of the trustees' conduct in the circumstances prevailing at the time, it makes it impossible to know with certainty how trustees should behave (and consequently impossible for the court to direct them<sup>360</sup>) and is incompatible with the case law on non-interference with trustee decision-making.<sup>361</sup>

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<sup>357</sup> *Re Manisty's Settlement* [1974] Ch 17 (Ch) 26; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 209.

<sup>358</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch); *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523; *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453.

<sup>359</sup> *Green v Cobham* [2002] STC 820 (Ch); *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch); *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>360</sup> See text to n 151 and following.

<sup>361</sup> See p 40 and following.

For the same reasons it would also be very problematic for third parties dealing with objects of powers, who would never be able to ascertain at the time of transacting that their entitlements to the purchased property would be secure. Thomas's conception of the rule must fundamentally be a 'strong' rule, since it is concerned not with judging the trustees' behaviour in a way which could guide a trustee as to his conduct, but in a way which allows the setting aside of proper exercises of a power for reasons ascertainable only retrospectively. It must accordingly be rejected for exactly the same reasons that the more usual formulation of the 'strong' rule has been rejected here.

### ***Duty to act on proper bases***

The third and final alternative theory has been put forward by Dr Tang Hang Wu, who argues that trustees are obliged to act 'on proper bases'.<sup>362</sup> He argues that this requires trustees to act honestly, fairly, and not capriciously,<sup>363</sup> and that this is distinct from the duty of trustees to act with reasonable care and skill.<sup>364</sup> This division harks back to *Gisborne v Gisborne*,<sup>365</sup> and gives great weight to the view that when a trustee has exercised a power or discretion in good faith, the court should not interfere<sup>366</sup> unless the trustee acted in bad faith.<sup>367</sup> For wrongdoing short of bad faith,

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<sup>362</sup>HW Tang, 'Rationalising *Re Hastings-Bass*: A Duty to Act on Proper Bases' (2007) 21 TLI 62, 73.

<sup>363</sup> *ibid* 74-75.

<sup>364</sup> *ibid* 76.

<sup>365</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

<sup>366</sup> *ibid* 305 (Lord Cairns LC), 309 (Lord Penzance).

<sup>367</sup> *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78, 92; *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 334.

the beneficiaries' remedy is a personal claim against the trustees. If *Re Hastings-Bass*,<sup>368</sup> *Mettoy Pension Trustees Ltd v Evans*<sup>369</sup>, *Abacus Trust v Barr*,<sup>370</sup> *Sieff v Fox*<sup>371</sup>, *Smithson v Hamilton*<sup>372</sup> and all the other cases discussed above had never been decided, then this approach might be considered both desirable and consistent with the existing law. As a plea to the Supreme Court to undo much of what has been done in this field, at least since *Mettoy* was decided some two decades ago, it may have merit. It would certainly simplify and rationalise the law, protecting third parties and avoiding the unnecessary unsettling of property rights, whilst giving beneficiaries some remedy for trustee misconduct. But it is simply unable to stand with the law as it has developed. Dr Tang Hang Wu admits that on his approach to *Re Hastings-Bass*, *Abacus Trust v NSPCC*<sup>373</sup>, *Green v Cobham*,<sup>374</sup> *Hearn v Younger*,<sup>375</sup> *Burrell v Burrell*<sup>376</sup> and *Sieff v Fox* are all wrongly decided as regards *Re Hastings-Bass* issues.<sup>377</sup> Whatever else may be said for this theory, it simply does not reflect the law as it stands.

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<sup>368</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>369</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>370</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409.

<sup>371</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>372</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453.

<sup>373</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409.

<sup>374</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>375</sup> *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317.

<sup>376</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569.

<sup>377</sup> HW Tang, 'Rationalising *Re Hastings-Bass*: A Duty to Act on Proper Bases' (2007) 21 TLI 62, 77-78.

### **Conclusions on the *Re Hastings-Bass* rule**

The ‘weak’ model of the *Re Hastings-Bass* rule should now be considered to be the correct one. Not only is it consistent with most of the *Re Hastings-Bass* case law (including some of the cases which at first sight appear to support the ‘strong’ rule<sup>378</sup>) but it is consistent with important principles of trust law of much greater longevity, exemplified in *McPhail v Doulton*<sup>379</sup> and *Gisborne v Gisborne*.<sup>380</sup> The alternative theories may have much to commend them in pure policy terms, but do not provide a doctrinal explanation of the present state of the case law. It is the ‘weak’ duty-oriented approach which has – for the time being at least – prevailed in *Pitt v Holt*.<sup>381</sup> But that such a conclusion can be drawn solely from the law as it stood *prior* to Lloyd LJ’s landmark judgment in that case is vitally important whilst the law is in its present state of flux, for it demonstrates the soundness of the basis upon which it proceeds. Whilst it doubtless remains open to the Supreme Court to reformulate the law here in some novel way, it is submitted that it should not, as a matter of principle, seek to return the law to its pre-*Pitt* state. And whatever criticism is made of *Pitt*, it cannot, in the light of this chapter, be said that it does not accord with our understanding of English equity, whether the *Re Hastings-Bass* case law, or the more long-standing principles here considered.

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<sup>378</sup> *Green v Cobham* [2002] STC 820 (Ch); *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569. See p 59 and following and p 66 and following.

<sup>379</sup> *McPhail v Doulton* [1971] AC 424 (HL). See text to n 120 and following.

<sup>380</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL). See text to n 157 and following.

<sup>381</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

### 3. *PITT V HOLT* AND THE NATURE OF THE RULE

The 2011 decision in *Pitt v Holt*<sup>382</sup> has now given the authority of the Court of Appeal, and Lloyd LJ particularly, to the ‘weak’<sup>383</sup> duty-oriented conception of the *Re Hastings-Bass* rule. This is doubtless a welcome development, for all the reasons explored in chapter two. Yet there remains much to be done in fully working out the juridical nature and practical consequences of the ‘new’ *Re Hastings-Bass* rule. After some twenty years of uncertain development<sup>384</sup> *Pitt v Holt* represents not the final crystallised form of this doctrine, but rather both the end of a first phase of progress, in which the very basis of the rule has been sought, and also the beginning of a second phase, in which the detail of its application must be established. The purpose of this chapter is therefore two-fold: first, to consider *Pitt v Holt* on the merits of its own reasoning as the culmination of the *Re Hastings-Bass* case law; secondly, to look more closely at the duty-oriented version of the rule put forward by Lloyd LJ, with a view to ascertaining the precise source and nature of this duty. This will lay the necessary foundations for chapter four, where the consequences of adopting this account of the *Re Hastings-Bass* rule will be fully worked out.

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<sup>382</sup> *ibid.*

<sup>383</sup> The ‘weak’ and ‘strong’ models are described from p 11ff.

<sup>384</sup> For example: *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) and *Green v Cobham* [2002] STC 820 (Ch) both notably went much further than previous expositions of the *Re Hastings-Bass* rule, without appearing to notice that they were doing so. See: text to n 206 and following on the narrowness of the *Re Hastings-Bass* decision itself; text to n 51 and following on *Mettoy*; text to n 233 and following on *Green*.

### **The first-instance cases**

*Pitt v Holt* concerned the consequences of a road accident in 1990 which left Mr Derek Pitt badly injured.<sup>385</sup> The claimant, Mrs Pitt, was Mr Pitt's wife, and also his receiver, appointed by the Court of Protection in consequence of Mr Pitt's inability to manage his own affairs after the accident. Mr Pitt sued for damages in relation to the accident and the claim was settled for £1.2 million. With the authority of the Court of Protection to do so,<sup>386</sup> and in accordance with the professional advice she had received, Mrs Pitt settled this money on discretionary trusts under which Mr Pitt, Mrs Pitt and their children were all beneficiaries. Had the inheritance tax consequences of this settlement been considered at the time, they could have been averted by inserting a clause in the trust instrument in accordance with section 89 of the Inheritance Tax Act 1984 providing that at least half the fund applied during Mr Pitt's life would be applied for his benefit. This would have made no practical difference to the operation of the trust in this case, but would have avoided a tax liability which by time of trial amounted to some £100,000.

At first instance Mrs Pitt argued that her case was within the scope of the *Re Hastings-Bass* rule as set out in *Sieff v Fox*.<sup>387</sup> had she appreciated the tax consequences of the discretionary trusts, she would never have executed the settlement in that form. Robert Englehart QC (sitting as a Deputy Judge of the

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<sup>385</sup> See *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] 1 WLR 1199 [5]-[15] and *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [8]-[14].

<sup>386</sup> Under the Mental Health Act 1983 it was open to the Court of Protection either to 'authorise' or 'direct' Mrs Pitt, as receiver, in the execution of the settlement. Had the Court directed Mrs Pitt, there could have been no subsequent issue as to the propriety of her execution of the settlement.

<sup>387</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

Chancery Division) agreed, regarding Lloyd LJ's judgment in *Sieff v Fox* as a 'comprehensive synthesis of the current state of the law'<sup>388</sup> and accordingly accepting the parties' agreement that there was no need to identify any breach of duty on Mrs Pitt's part, and that it would make no difference in this case whether the transaction was void or voidable, since if the latter there were no features which would point against it being avoided.<sup>389</sup> Further, although Mrs Pitt was not a trustee, the Deputy Judge was willing to accept the application of the *Re Hastings-Bass* rule outside trusteeship, on the basis that Mrs Pitt's power to dispose of Mr Pitt's property was a fiduciary power;<sup>390</sup> without wishing to decide whether the rule would apply to fiduciary powers generally, he was satisfied that it applied to Mental Health Act receivers.<sup>391</sup>

*Futter v Futter* was a more typical *Re Hastings-Bass* case concerning tax planning.<sup>392</sup> Two life-interest settlements each contained 'stockpiled gains' for capital gains tax purposes, and each was situated offshore. As soon as these gains were brought onshore, they would become liable to UK capital gains tax. To avoid this, the trustees of the two settlements exercised their powers of enlargement and advancement so that Mr Mark Futter became absolutely entitled to one fund, and appointments were made out of the other fund to Mr Futter's three children. It was

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<sup>388</sup> *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] 1 WLR 1199 [18].

<sup>389</sup> *ibid* [22].

<sup>390</sup> *ibid* [23].

<sup>391</sup> *ibid* [38]-[39].

<sup>392</sup> See *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [8]-[17] and *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [15]-[22].

thought that a combination of personal allowances and existing losses for capital gains tax purposes would negate any significant tax liability. However, the trustees' legal advisers overlooked section 2(4) of the Taxation of Chargeable Gains Act 1992, the effect of which was to preclude these losses being set off against the potentially chargeable gains.

As in *Pitt*, it was argued for Mr Futter and the trustees at first instance that had the trustees appreciated the capital gains tax consequences of their actions, they would never have exercised their powers as they did. Norris J considered himself bound by the exposition of the *Re Hastings-Bass* rule by Lloyd LJ in *Sieff v Fox*<sup>393</sup> and acceded to this submission, holding that the purported advancements and enlargement were void.<sup>394</sup>

### **In the Court of Appeal**

Her Majesty's Revenue and Customs (HMRC), who were defendants in both cases, appealed, and set the stage for the first evaluation of the 'rule in *Re Hastings-Bass*' in the Court of Appeal since *Re Hastings-Bass* itself was decided in 1974. Lloyd LJ's analysis of the case law<sup>395</sup> led to the conclusion, in the words of Longmore LJ, that this was a 'comparatively rare instance of the law taking a seriously wrong turn'<sup>396</sup> over a prolonged period of time, but it remaining nevertheless within the power of the

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<sup>393</sup> *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [3]-[5].

<sup>394</sup> *ibid* [30], [33].

<sup>395</sup> Albeit not of every case concerning *Re Hastings-Bass*: *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [68].

<sup>396</sup> *ibid* [227].

Court of Appeal to put it right. This was to be achieved by seeking to bring the rule in *Re Hastings-Bass* back into the theoretical mainstream of the law of trusts.

First, Lloyd LJ dispatched the fallacy that the line of cases from *Mettoy*<sup>397</sup> through to *Pitt v Holt* and *Futter v Futter* at first instance were applications of the *ratio decidendi* of *Re Hastings-Bass* itself.<sup>398</sup> Rather, the court accepted the argument put forward here and elsewhere<sup>399</sup> that both *Re Hastings-Bass* and *Re Abrahams' Will Trusts*<sup>400</sup> were concerned with construction of the statutory power of advancement, which permits trustees to pay capital 'for the advancement or benefit'<sup>401</sup> of beneficiaries.<sup>402</sup> Lloyd LJ treated Buckley LJ's rejection of the Revenue's submission in *Re Hastings-Bass*<sup>403</sup> that the power could only validly be exercised if the trustees understood the true legal effects of its exercise, so as to weigh the benefit of such effects against the interests of other beneficiaries, as an element of the *ratio* of that case.<sup>404</sup> Accordingly the question of whether an intended or purported advancement is of 'benefit' to the advancee is an objective one, the question being 'whether that which was done, with all its defects and consequent limitations, is capable of being

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<sup>397</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>398</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [72].

<sup>399</sup> See: text to n 206 and following; A Molloy, '*Hastings-Bass*: The True and the Spurious' (2008) 14 T & T 26, 47-48; A Molloy, '*What Really is the Rule in Hastings-Bass?*' (2009) 15 T & T 200, 203.

<sup>400</sup> *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch).

<sup>401</sup> Trustee Act 1925, s 32.

<sup>402</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [55]-[58], [64].

<sup>403</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 29.

<sup>404</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [62].

regarded as beneficial to the intended object'<sup>405</sup> and Buckley LJ's 'summary' in *Re Hastings-Bass*<sup>406</sup> has led to 'misunderstanding'<sup>407</sup> of the legal significance of that case.

Secondly, Lloyd LJ considered some of the subsequent *Re Hastings-Bass* cases. *Mettoy* was judged to bring into being a new rule, not to give effect to *Re Hastings-Bass* at all, since whereas *Re Hastings-Bass* was concerned with the allegation that the trustees had acted outside their powers (although the Court of Appeal concluded there that they had not done so), *Mettoy* was concerned with trustees who had clearly acted within the letter of their powers; it was 'the propriety of their exercise of the power' which was under scrutiny.<sup>408</sup> In Lloyd LJ's view this was 'an exercise of a power which might have been vitiated by a breach of duty on the part of the trustees in deciding whether or not to enter into the deed'<sup>409</sup> which 'would have rendered the deed, at most, voidable, and certainly not void.'<sup>410</sup> *Green v Cobham*<sup>411</sup> was given equally short shrift as being simply the application of the rule stated in *Mettoy*.<sup>412</sup>

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<sup>405</sup> *ibid* [66].

<sup>406</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 41.

<sup>407</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [65].

<sup>408</sup> *ibid* [72].

<sup>409</sup> *ibid* [72].

<sup>410</sup> *ibid* [72].

<sup>411</sup> *Green v Cobham* [2002] STC 820 (Ch).

<sup>412</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [80].

Thirdly, Lloyd LJ concluded from the foregoing that the *Re Hastings-Bass* type cases can be divided into two: those concerned with trustees acting outside their powers, such purported actions being void;<sup>413</sup> and those concerned with actions ‘within the scope of the relevant power’ but ‘vitiating by a failure on their part to comply with their duty to take all relevant matters into account’.<sup>414</sup> The former category comprises *Re Hastings-Bass* itself; the latter, all the post-*Mettoy* cases.<sup>415</sup> In relation to this latter category, Lloyd LJ accepts Lightman J’s analysis in *Abacus Trust Co (Isle of Man) Ltd v Barr*<sup>416</sup> that this type of case is fundamentally about breach of an antecedent duty on trustees to consider relevant considerations and exclude irrelevant considerations when exercising their powers,<sup>417</sup> quoting Lightman J’s statement that the trustee must use ‘all proper care and diligence in obtaining the relevant information and advice’.<sup>418</sup> Although the courts will not generally interfere with trustees’ decisions made in good faith<sup>419</sup> Lloyd LJ held that this would not apply to decisions made in breach of duty.<sup>420</sup>

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<sup>413</sup> *ibid* [92], [96].

<sup>414</sup> *ibid* [93].

<sup>415</sup> *ibid*.

<sup>416</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409.

<sup>417</sup> *ibid* [23]; *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [94].

<sup>418</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [23], quoted at *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [85].

<sup>419</sup> *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL); *Re Beloved Wilkes’s Charity* (1851) 3 Mac & G 440, 42 ER 330. See *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [110] and text to n 157 and following.

<sup>420</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [110]. This effectively treats any breach of duty by a trustee as within the wider definition of *mala fides* proposed by Cullity in connection with the *Gisborne* doctrine: see text to n 183 and following.

Finally, Lloyd LJ considered the content of the trustee's duty to consider, noting both Lord Wilberforce's exposition of this duty in the context of discretionary trusts<sup>421</sup> in *McPhail v Doulton*<sup>422</sup> and the trustee's duty of care<sup>423</sup> pursuant both to the equitable standard often attributed to the case of *Speight v Gaunt*<sup>424</sup> and to section 1 of the Trustee Act 2000. Conceding that there is as yet no general statement of what a trustee ought and ought not to take into account, Lloyd LJ held that it would not be possible to 'lay down any clear rule'<sup>425</sup> since the circumstances would be different in each case.<sup>426</sup> Nevertheless, tax considerations would almost invariably be relevant<sup>427</sup> as would the wishes of the settlor and the 'wishes, circumstances and needs of beneficiaries'.<sup>428</sup> Where the trustees take professional advice on matters such as tax (they being duty-bound to take such advice in appropriate situations<sup>429</sup>) and they follow it, they will not commit a breach of duty,<sup>430</sup> although their actions will still be ineffective if they purport to act beyond their powers.<sup>431</sup>

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<sup>421</sup> *ibid* [102]-[104].

<sup>422</sup> *McPhail v Doulton* [1971] AC 424 (HL) 449.

<sup>423</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [107].

<sup>424</sup> *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA).

<sup>425</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [118].

<sup>426</sup> *ibid* [117]-[118].

<sup>427</sup> *ibid* [115].

<sup>428</sup> *ibid* [114].

<sup>429</sup> *ibid* [119].

<sup>430</sup> *ibid* [124].

<sup>431</sup> *ibid* [122], [124].

The appeals in both cases were accordingly allowed.<sup>432</sup> In *Futter v Futter*, ‘the trustees acted entirely properly’ in relying on their solicitors for advice on the tax consequences of their proposed exercise of the powers of enlargement and advancement.<sup>433</sup> Therefore, although the tax consequences were a matter which the trustees were obliged to take into account,<sup>434</sup> their failure to do so in following this erroneous professional advice was not a breach of duty.<sup>435</sup> There was no suggestion that the trustees had acted outside the scope of their powers, and so in finding that they committed no breach of duty, the court found that the exercise of these powers was wholly valid.<sup>436</sup> In *Pitt v Holt*, Lloyd LJ was willing to assume that the reformulated *Re Hastings-Bass* rule<sup>437</sup> could apply to a receiver appointed pursuant to the Mental Health Act 1983<sup>438</sup> and that Mrs Pitt, in executing the settlement on Mr Pitt’s behalf acted within the scope of her powers.<sup>439</sup> In deciding to settle Mr Pitt’s damages on the proposed trusts, Mrs Pitt obtained professional legal and financial

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<sup>432</sup> *ibid* [145], [163].

<sup>433</sup> *ibid* [137]-[138].

<sup>434</sup> *ibid* [137].

<sup>435</sup> *ibid* [139].

<sup>436</sup> *ibid* [154].

<sup>437</sup> In this chapter, the term ‘reformulated *Re Hastings-Bass* rule’ will be used to describe the rule stated by Lloyd LJ in *Pitt v Holt* that a trustee commits a breach of duty if he fails to take into account a relevant consideration or takes into account an irrelevant consideration, and that such a breach of duty renders the exercise of a power voidable.

<sup>438</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [162].

<sup>439</sup> *ibid* [161].

advice, and acted in accordance with it.<sup>440</sup> Consequently she committed no breach of duty in relation to the exercise of her powers<sup>441</sup> and her actions were valid.<sup>442</sup>

### **The nature of the duty to consider**

Lloyd LJ's analysis in *Pitt v Holt* (with which Mummery and Longmore LJ concurred) manifestly accords in essentials with the arguments put forward in chapter two for a duty ('weak') rather than results-oriented ('strong') account of the *Re Hastings-Bass* rule. Yet it does not provide a wholly satisfactory basis for taking the law forward. There remain many loose ends, arising predominantly from issues not before the Court of Appeal in *Pitt*, but which have been matters of concern in earlier *Re Hastings-Bass* cases, including: what counts as a 'relevant consideration'; the significance of the 'would have acted differently' caveat; the specific problems arising from the use of professional advisers, and in cases concerning tax liability and pension trusts. These will be addressed in chapter four. But in order to do this, it is first necessary to be clarify the juridical nature of the 'duty of consideration' upon which Lloyd LJ's analysis depends. Professor Lionel Smith has proposed a three-fold division of trustees' duties:

- i) Fiduciary duty – the duty of loyalty;
- ii) Duty to act with care and diligence;
- iii) 'Positive duties on a trustee arising out of the terms of the trust'.<sup>443</sup>

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<sup>440</sup> *ibid* [150]–[153].

<sup>441</sup> *ibid* [162]–[163].

<sup>442</sup> In the case of *Pitt v Holt* a separate (and unsuccessful) challenge to the validity of Mrs Pitt's actions was made on the basis of mistake: see [164]–[220].

All of these can accurately be described as a trustee's duties and Lloyd LJ's judgment does not point definitively to any. In a single paragraph, Lloyd LJ refers to trustees who have 'breached their duties' and to 'breach of fiduciary duty'.<sup>444</sup> Elsewhere he concludes from the fact that Mrs Pitt 'fulfilled any duty of skill and care she was under' that she did not commit a 'breach of her fiduciary duties'.<sup>445</sup> It was not crucial to *Pitt* or *Futter* to ascertain the nature of the duty in issue, and no party appears to have argued for any distinction based on the source of the duty.<sup>446</sup> Given the scope of the task Lloyd LJ undertook in considering the *Re Hastings-Bass* case law, and the momentous nature of his reorientation of the rule around trustees' duties, it is no real criticism that such jurisprudential inquiry, which was not the subject of argument, and which did not obviously bear upon the practical consequences of the decision, was not examined.

Yet the question is an important one for future cases considering the reformulated *Re Hastings-Bass* rule. Each source of duty has its own incidents and consequences. For example, it is orthodox to see a breach of the trustee's duty of care and skill as generating only personal consequences for the trustee<sup>447</sup> whereas a violation of the fiduciary conflicts rules usually renders a transaction entered in

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<sup>443</sup> L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 62.

<sup>444</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99].

<sup>445</sup> *ibid* [163].

<sup>446</sup> *ibid* 142-45.

<sup>447</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 294, 309-10; DJ Hayton, 'Unique Rules for the Unique Institution, the Trust' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co. 2005) 290; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [48.2], [87.2].

breach of them voidable at the instance of a beneficiary.<sup>448</sup> It may make a difference too to the content of the duty. The duty of care is rooted in a substantial case law, and whilst the precise demands of reasonable care and diligence may vary depending upon the circumstances, the core ideas of reasonableness and adherence to objective externally-imposed standards of behaviour does not, whether expressed by Sir George Jessel MR in *Speight v Gaunt* as the ‘ordinary prudent man of business’<sup>449</sup> or by the Trustee Act 2000 as ‘such care and skill as is reasonable in the circumstances’.<sup>450</sup> Fiduciary duty, on the other hand, has a somewhat different nature. In both scope and content it is controversial, yet competing accounts use similar terminology – a duty of ‘loyalty’<sup>451</sup> or altruism<sup>452</sup> or to ‘act exclusively in the beneficiary’s interest’<sup>453</sup> – which is clearly distinct from the ‘reasonableness’ or ‘prudence’ language of the duty of care. Whilst it has been argued that the duty of care is an aspect of a trustee’s fiduciary obligation<sup>454</sup> the prevailing legal orthodoxy

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<sup>448</sup> A Molloy, ‘Court of Appeal in *Pitt and Futtter* Puts the So-Called Rule in *Hastings-Bass* Out of its Misery, but Leaves a Loose End That is Bound to Cause Bother Unless the Supreme Court Ties it Off’ (2011) 17 T & T 415, 424; R Nolan, ‘Controlling Fiduciary Power’ (2009) 68 CLJ 293, 305-06; M Conaglen, ‘Remedial Ramifications of Conflicts Between a Fiduciary’s Duties’ (2010) 126 LQR 72, 73-76; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [55.41]–[55.47a]. See also: M Conaglen, ‘Reviewing the Review of Fiduciary Discretions’ (2011) 70 CLJ 301.

<sup>449</sup> *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA) 740.

<sup>450</sup> Trustee Act 2000, s 1.

<sup>451</sup> M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010); L Smith, ‘The Motive, Not the Deed’ in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003).

<sup>452</sup> P Birks, ‘Lionel Cohen Lecture: The Content of Fiduciary Obligation’ (2000) 34 Israel L Rev 3.

<sup>453</sup> J Getzler, ‘Rumford Market and the Genesis of Fiduciary Obligations’ in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 581.

<sup>454</sup> See, *inter alia*: J Getzler, ‘Equitable Compensation and the Regulation of Fiduciary Relationships’ in P Birks and FD Rose (eds), *Restitution and Equity Volume One: Resulting Trusts and Equitable*

insists that they are independent duties.<sup>455</sup> It is consequently of great importance to ascertain, so far as the present state of the law permits, the nature of the duty onto which Lloyd LJ has loaded the whole weight of the reformulated *Re Hastings-Bass* rule.

### **Fiduciary duty**

The law's unsettled understanding of what it means to be a 'fiduciary' or to be the subject of a 'fiduciary duty' necessarily renders somewhat vexed the question of whether a trustee's duty to take relevant considerations into account should attract the fiduciary label. We must take as a starting point Lloyd LJ's analysis in *Pitt v Holt* itself, in which he repeatedly attached the term 'fiduciary' to the duty of consideration and its breach.<sup>456</sup> The most direct passage occurs when Lloyd LJ is concerned with the consequences of breach of the duty of consideration, stating that '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.'<sup>457</sup> Yet in itself this is hardly conclusive. Earlier in his judgment, Lloyd LJ segues without discussion from the

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*Compensation* (Mansfield Press 2000); J Getzler, 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002); J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); JD Heydon, 'Are the Duties of Company Directors to Exercise Care and Skill Fiduciary?' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005).

<sup>455</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18 (Millett LJ). See also: *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 WLR 1360 [61]; R Austin, 'Moulding the Content of Fiduciary Duties' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 168-74; S Worthington, 'Fiduciaries: When is Self-Denial Obligatory?' (1999) 58 CLJ 500; WM Heath, 'The Director's "Fiduciary" Duty of Care and Skill: A Misnomer' (2007) 25 C&SLJ 370.

<sup>456</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99], [124], [127], [130], [135], [136], [139], [144], [162], [222], [224].

<sup>457</sup> *ibid* [127].

terminology of breach of duty to breach of *fiduciary* duty<sup>458</sup> and later appears to defy the duty of care orthodoxy in *Bristol and West Building Society v Mothew*<sup>459</sup> by stating that Mrs Pitt did not act ‘in breach of her fiduciary duties’ because she ‘fulfilled any duty of skill and care she was under by looking for advice to her solicitors’.<sup>460</sup> What is perhaps most apparent from these examples is that the label ‘fiduciary’ appears here to be being used as little more than an indication that the duties with which the court is concerned are the duties of a trustee (or, in Mrs Pitt’s case, a person with duties analogous to those of a trustee). Whilst it is not impossible that Lloyd LJ was intending to cast doubt on the strict separation of fiduciary duty and the duty of care in *Mothew*, it seems implausible that an experienced chancery judge, undoubtedly fully appraised of the controversies over *Mothew*, would seek to make so significant a change simply by scattering the word ‘fiduciary’ liberally through his judgment.

Yet it is equally the case that it would for the very same reasons be wholly inappropriate to ascribe inadvertence to the Court of Appeal, and therefore entirely unsatisfactory simply to overlook the repeated use of the word ‘fiduciary’. It is not possible, within the scope of an analysis of *Pitt v Holt*, to seek to resolve the many

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<sup>458</sup> *ibid* [99].

<sup>459</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA). See also text to n 90. It is notable that although *Mothew* has been widely treated as authoritative on this question, it is not clear that in either *Mothew* itself, or cases which endorse its approach such as *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 WLR 567, the rejection of a fiduciary duty of care is *ratio*. See further: J Getzler, ‘Inconsistent Fiduciary Duties and Implied Consent’ (2006) 122 LQR 1, 7.

<sup>460</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [163]. This has led Edelman to wonder whether ‘[t]he approach of Millett LJ [in *Mothew*] may not yet be the last word.’: J Edelman, ‘*Nocton v Lord Ashburton* (1914)’ in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 497.

outstanding debates on the scope and nature of fiduciary duty. But the ascendant view in the post-*Mothew* world is that described in that case by Millett LJ:

The expression ‘fiduciary duty’ is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.<sup>461</sup>

The duty of a trustee to take relevant considerations into account is not peculiar to fiduciaries, turning as it does on the logically prior duty of the trustee to ascertain what such considerations are. This latter aspect of the duty can only be expressed consistently with *Pitt v Holt* in terms of a duty to act reasonably and responsibly. An absolute duty to take factually or logically relevant matters into consideration would return the law to its pre-*Pitt* state, by treating a trustee who acts reasonably and diligently but nevertheless omits to consider a relevant consideration as committing a breach of duty. This would obviously be inconsistent with the decisions in both *Pitt* and *Futter*, where the consequences of the exercise of the powers were not unknowable, and yet the trustees had acted reasonably in spite of acting in ignorance of them. Hence, on the *Pitt* analysis, some semblance of a duty of care and diligence must intrude.<sup>462</sup> It would thus be entirely possible to commit a breach of duty by acting with insufficient care or diligence, such as by failing to take legal or financial advice where such was obviously called for, or by failing to scrutinise effectively the

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<sup>461</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 16.

<sup>462</sup> Edelman notes that ‘[the] distinction, if it exists, between such a breach of fiduciary duty [breach of the duty to take relevant matters into account] and negligence is remarkably fine.’: J Edelman, ‘*Nocton v Lord Ashburton* (1914)’ in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 497 n 122.

claims of competing objects of a power of appointment. Such ‘loyal carelessness’<sup>463</sup> does not amount, on the prevailing view, to a breach of fiduciary duty<sup>464</sup> and for this reason it might be concluded that on no account consistent with *Mothew* can the duty to consider be labelled ‘fiduciary’.<sup>465</sup>

However, another explanation for the use of the ‘fiduciary’ terminology in *Pitt* is possible. Nolan has argued that whilst the *Mothew* test is one way of determining when to use the term, another is ‘to treat as fiduciary those obligations which invariably attach to a particular person because he has undertaken, or because the law requires him, to act for the benefit of another.’<sup>466</sup> This fits with the conventional label of ‘fiduciary power’, used to describe a power conferred on a donee ‘as a trustee of the power itself’,<sup>467</sup> generally because the power is conferred upon a trustee acting as trustee.<sup>468</sup> Some duties and limitations are common to all powers, whether or not conferred on a trustee or other fiduciary office holder, such as

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<sup>463</sup> L Smith, ‘The Motive, Not the Deed’ in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 62.

<sup>464</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18; M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) 35.

<sup>465</sup> This is Molloy’s conclusion on the use of the term in *Pitt*: A Molloy, ‘Court of Appeal in *Pitt* and *Futter* Puts the So-Called Rule in *Hastings-Bass* Out of its Misery, but Leaves a Loose End That is Bound to Cause Bother Unless the Supreme Court Ties it Off’ (2011) 17 T & T 415, 421.

<sup>466</sup> R Nolan, ‘Controlling Fiduciary Power’ (2009) 68 CLJ 293, 312. See also: R Nolan and M Conaglen, ‘Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?’ in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 319-20. On duty arising from or coloured by concurrent office-holding, see also: *McPhail v Doulton* [1971] AC 424 (HL) 449; PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 3; C Harpum, ‘Fiduciary Obligations and Fiduciary Powers - Where are We Going?’ in P Birks (ed) *Privacy and Loyalty* (Clarendon Press 1997) 160-61; P Birks, ‘Lionel Cohen Lecture: The Content of Fiduciary Obligation’ (2000) 34 Israel L Rev 3, 30-37; J Getzler, ‘“As If”: Accountability and Counterfactual Trust’ (2011) 91 BUL Rev 973, 981-82.

<sup>467</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1614.

<sup>468</sup> PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 3; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [1.46], [10.05].

the duty not to commit a fraud on the power<sup>469</sup> or to delegate the exercise of the power.<sup>470</sup> Others are not; Lloyd LJ's discussion of the nature of the duty of consideration begins<sup>471</sup> with Lord Wilberforce's exposition in *McPhail v Doulton* of the discretionary trustee's duty to survey the field and to consider individual beneficiaries, and with the marginally less onerous consideration required of the donee of a power conferred on a trustee.<sup>472</sup> It continues with the Court of Appeal's account of a trustee's duty to consider whether the exercise of the power of advancement would be a 'good thing' in *Re Pauling's Settlement Trusts (No 1)*.<sup>473</sup> This is the very nature of a fiduciary power: whereas a non-fiduciary power can be released by its donee,<sup>474</sup> who has no obligation to consider its exercise,<sup>475</sup> a trustee donee of a power 'must, first, consider periodically whether or not he should exercise

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<sup>469</sup> It may not be correct to describe the avoidance of a fraud on a power as a duty; it may be better characterised, consistently with the orthodox understanding of its effect in rendering a purported exercise wholly void, as going to the scope of the power conferred: R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 297; *Cloutte v Storey* [1911] 1 Ch 18 (CA). The author's view is that the links between fraud on a power and ultra vires are complex, and the strength of those links depend on the precise species of fraud in issue. For a full discussion, see chapter five, and particularly text to n 1063 and following.

<sup>470</sup> GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [10.01].

<sup>471</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [102].

<sup>472</sup> *McPhail v Doulton* [1971] AC 424 (HL) 449. See also: *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1617-18; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [10.09].

<sup>473</sup> *Re Pauling's Settlement Trusts (No 1)* [1964] Ch 303 (CA) 333.

<sup>474</sup> Law of Property Act 1925, s 155 (donee of power entitled to release it by deed). See: GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [17.09]; A Hawkins, 'The Release of Powers' (1968) 84 LQR 64. See also text to n 1075.

<sup>475</sup> GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [10.05].

the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments.<sup>476</sup>

It might, therefore, be concluded that the duty to consider in the reformulated *Re Hastings-Bass* rule is ‘fiduciary’ in the sense Nolan describes,<sup>477</sup> in that it is a rule which ensures that trustees act for the benefit of their beneficiaries<sup>478</sup> by ensuring that they are as well informed as they reasonably can be<sup>479</sup> when making decisions which affect beneficiaries. This certainly provides a firmer and more orthodox explanation for Lloyd LJ’s widespread use of the term ‘fiduciary’ than either of the more unlikely suppositions already described.<sup>480</sup> Yet it does not in fact assist with the purpose of this investigation, being to categorise the duty of consideration such that useful conclusions as to its nature and consequences can be drawn. If a power is a ‘fiduciary power’ simply because it is vested in a trustee *qua* trustee then asserting that in consequence the duty to consider to which the donee of the power is subject in consequence of being the donee is ‘fiduciary’ is simply to assert that the duty arises because the power is held by a trustee. Or, put more simply, the duty is ‘fiduciary’ because it is a trustee’s duty. Whilst such a conclusion may be acceptable in terms of the conventional description of fiduciary powers, it is not helpful here, where the

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<sup>476</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 210 (Megarry V-C).

<sup>477</sup> See text to n 466.

<sup>478</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [128].

<sup>479</sup> Whilst accepting Robert Walker J’s analysis that ‘[i]n an imperfect world trustees (like other decision-makers) do often make decisions which are based on less than complete information and less than full analysis and discussion’ *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) 718, quoted by Lloyd LJ at *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [90].

<sup>480</sup> See text to n 460 and following.

object is to distinguish fiduciary duties, duties of care and other duties of trustees. Accordingly this designation must also be rejected whilst *Mothew* remains the law; whilst both *Mothew* and *Pitt* are decisions of the Court of Appeal, it is clear that unlike *Pitt*, *Mothew* was concerned to address this issue expressly and to reach a reasoned conclusion, albeit a controversial one. In this context it would be unsupportable to see *Pitt* as silently declining to follow *Mothew* and implicitly establishing a new appellate precedent on a key issue in fiduciary law. In consequence, the duty of consideration in *Pitt* ought not be labelled ‘fiduciary’ and still less should be treated as such.

### **Duty of care and diligence**

The next alternative characterisation of the trustee’s duty of consideration is that this is simply the trustee’s duty to act with care and diligence. The relevant duty cannot be an instance of the statutory duty,<sup>481</sup> since the exercise of powers does not appear in the statutory list of applications of that duty,<sup>482</sup> and must therefore be the equitable duty set out in *Speight v Gaunt*.<sup>483</sup> However, whilst there is some support for this account in *Pitt v Holt* itself, there are also serious difficulties which cannot obviously be overcome in relation to the scope, nature and effects of the duty.

Lloyd LJ uses the language of care and diligence almost as freely as the ‘fiduciary’ label.<sup>484</sup> It appears to originate in the *Re Hastings-Bass* case law in the

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<sup>481</sup> Trustee Act 2000, s 1.

<sup>482</sup> Trustee Act 2000, sch 1.

<sup>483</sup> *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA).

<sup>484</sup> Notably at [107], [119], [162], [163].

judgment of Lightman J in *Abacus Trust Co (Isle of Man) Ltd v Barr*, where the judge asserted that:

If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty...<sup>485</sup>

There is a clear appeal to this analysis. Lloyd LJ's reformulation posits a rule which demands that trustees act reasonably and responsibly in carrying out their duties and exercising (or considering the exercise of) any powers they hold, and yet does not treat them as acting outside their powers or in breach of duty when they overlook a factually relevant matter which they could reasonably have been expected to take into account.<sup>486</sup> A duty of care and diligence appears to encapsulate this idea, of the responsible trustee who is liable only if he falls short when tested against a standard which a reasonable person could meet. This was apparently accepted by Newey J in *Prudential Staff Pensions Ltd v The Prudential Assurance Co Ltd*<sup>487</sup> where the judge was willing to treat even the trustee's need for understanding of his own powers as limited by the duty of care.<sup>488</sup> Yet there are three serious objections: the application of the duty of care to dispositive powers; the characterisation of the duty of consideration as a duty of care without recognising the other elements of the duty of care; and the proprietary consequences of breach of the reformulated *Re Hastings-Bass* duty.

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<sup>485</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [23].

<sup>486</sup> *ibid* [222].

<sup>487</sup> *Prudential Staff Pensions Ltd v The Prudential Assurance Co Ltd* [2011] EWHC 960 (Ch), [2011] Pens LR 239.

<sup>488</sup> *ibid* [235].

### *Dispositive powers*

The *Re Hastings-Bass* rule has only been applied in the English case law in the context of dispositive powers. Some concern the power of advancement,<sup>489</sup> others concern powers of appointment.<sup>490</sup> Still others are concerned with powers to amend pension schemes,<sup>491</sup> which whilst a less obvious example of a dispositive power, is fundamentally of the same nature. A dispositive power permits beneficial interests to be determined or varied whereas an administrative power does not, so a power which entitles pension trustees to vary the entitlements, even if only prospectively,<sup>492</sup> of present and future pensioners, must be treated as dispositive. The duty of care, on the other hand, is a duty well-suited to the control of administrative powers. The well known applications of the trustee's duty of care are exclusively concerned with administrative matters. Schedule 1 of the Trustee Act 2000 applies the statutory duty of care<sup>493</sup> to, *inter alia*, the exercise of powers of investment, acquisition of land, arrangements concerned with nominees, custodians and agents, and insurance. The duty of care case law is replete with examples of alleged carelessness in the exercise

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<sup>489</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>490</sup> *Green v Cobham* [2002] STC 820 (Ch); *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523; *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch); *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409; *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>491</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch); *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch); *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57; *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), [2006] All ER (D) 91; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453.

<sup>492</sup> Pensions Act 1995, ss 67-72.

<sup>493</sup> Trustee Act 2000, s 1.

of administrative powers and duties, whether in connection with investment,<sup>494</sup> securing trust assets,<sup>495</sup> the collection of rents due on trust properties<sup>496</sup> and the conduct of a private company in which the trustees are the majority shareholders.<sup>497</sup> Yet there is no equivalent case law in respect of dispositive powers. Such as there is points tentatively instead to the view that the duty of care can only apply to administrative powers.<sup>498</sup>

The case law is clearly not compelling on this issue, but such conclusion as one might cautiously draw is supported by understanding the nature of the duty of care. The duty of care is about an ‘objective standard of reference’.<sup>499</sup> This is conveyed equally by the language of reasonableness in the statutory duty,<sup>500</sup> and of the ‘prudent man of business’.<sup>501</sup> In this crucial respect it is no different from the

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<sup>494</sup> *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA).

<sup>495</sup> *Re Brogden* (1888) LR 38 ChD 546 (CA).

<sup>496</sup> *Tebbs v Carpenter* (1816) 1 Madd 290, (1816) 56 ER 107.

<sup>497</sup> *Re Lucking's Will Trusts* [1968] 1 WLR 866 (Ch).

<sup>498</sup> The issue is not settled, but this view is supported by Millett J in *Richards v Mackay* (1997) 11 TLI (1) 22 (Ch), quoted and discussed in D Dennis, 'The Judicial Control of the Exercise of Discretionary Powers by Charitable Trustees' (2007) 9(3) CL & PR 1, 21. See also NDM Parry, 'Control of Trustee Discretions' [1989] Conv 244, 250-51, citing *Elder's Trustee and Executor Co Ltd v Higgins* (1963) 113 CLR 426. On the distinction between dispositive and administrative powers, see also text to n 836 and following.

<sup>499</sup> A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008) [14-004].

<sup>500</sup> The trustee ‘must exercise such care and skill as is reasonable in the circumstances’: Trustee Act 2000, s 1. Although this standard does not apply universally, being limited to those matters listed in sch 1 to the Act, it arguably codified the equitable duty of care which would otherwise apply: DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [48.2].

<sup>501</sup> *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA) 740.

what a Roman lawyer might describe<sup>502</sup> as *culpa levis in abstracto*:<sup>503</sup> falling below the standard of care expected of a careful Roman *paterfamilias*.<sup>504</sup> Such an objective standard can readily be applied in relation to an administrative power, since where the trustee is given a power in order to act for the benefit of the trust beneficiaries generally, such as by investing the fund, it is possible to measure both diligence and success in some meaningful way.<sup>505</sup> The exercise of a dispositive power, however, is quite different. The central purpose of a dispositive power is that it ‘denotes a measure of freedom of choice and not merely an exercise of reviewable judgment’,<sup>506</sup> and Gardner rightly sees in this the core distinction between dispositive and administrative power:

Discretions in which trustees are explicitly or implicitly asked to make choices [favouring one object over another] are thus inevitably classed

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<sup>502</sup> Albeit that the terminology is modern, not Roman.

<sup>503</sup> A mixed objective/subjective standard equivalent to *culpa levis in concreto*, or perhaps *culpa lata* bordering on *dolus* (see works cited at n 504) has been advocated in relation to the equitable duty of care. However, it is clear that whilst this might formerly have been the standard (see J Getzler, 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 59, 70-71 and n 113), the modern standard is properly an objective one: see n 521.

<sup>504</sup> Justinian Inst J.3.14.2; R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Clarendon Paperbacks, OUP 1996) 192-93; WW Buckland and P Stein, *A Text-Book of Roman Law: From Augustus to Justinian* (3rd edn, CUP 2007) 556-59; B Nicholas, *An Introduction to Roman Law* (Clarendon Law Series, OUP 2010) 169-71. See also: DJ Ibbetson, "'The Law of Business Rome": Foundations of the Anglo-American Tort of Negligence' (1999) 52 CLP 74, 87, 93-95; J Getzler, 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 70-73; DJ Ibbetson, '*Coggs v Barnard* (1703)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008).

<sup>505</sup> Eg in relation to investment in *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA), where the Court of Appeal reached distinct conclusions on the trustees' conduct – ‘incompetence or idleness’ (at 1276) – and on their success – ‘the investments retained or made by the trustees fell woefully short of maintaining the real value of the fund’ (at 1274-75).

<sup>506</sup> M Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25 UTLJ 99, 119. See also: FAR Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (OUP 2009) chs 13 and 14.

as dispositive. Discretions in which they are told not to make such choices can only be administrative.<sup>507</sup>

The exercise of a dispositive power can certainly be subjected to meaningful controls: for example, it must be exercised in good faith<sup>508</sup> and for the purpose for which the power was conferred.<sup>509</sup> But these are controls concerned solely with the manner in which the power is exercised by the trustee. A trustee holding a power to appoint among A, B or C could be said to act in bad faith if he chooses to appoint solely to A, if he was motivated by some dishonest motive in choosing to prefer A. If some purpose for the grant of the power is apparent, such as by reference to the intentions of the settlor,<sup>510</sup> then it may be ascertainable that in appointing solely to A, the trustee has defeated that purpose – for example, if the settlor intended the power to be exercised on the basis of financial need, and poverty-stricken B and C were

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<sup>507</sup> S Gardner, *An Introduction to the Law of Trusts* (Clarendon Law Series, 3rd edn, OUP 2011) 150-51.

<sup>508</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 295; R Nolan and M Conaglen, 'Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010). Nolan and Conaglen point out that the 'good faith' required of a trustee (or other fiduciary) requires more than merely refraining from using that position to injure the interests of the beneficiaries the trustee must 'act in a way that he subjectively believes will positively advance those interests' *ibid* 332. cf 'good faith' required of a mortgagee exercising a power of sale: *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 (CA), 966; *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409, [2004] 1 WLR 997 [10], [14].

<sup>509</sup> *Vatcher v Paull* [1915] AC 372 (PC) 378; *McPhail v Doulton* [1971] AC 424 (HL) 449; *Hayim v Citibank NA* [1987] AC 730 (PC) 746; G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 457-58; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.02]. See also: Y Grbich, 'Fraud on a Power: Judicial Control of Appointments by Discretionary Trustees' (1977) 3 Mon LR 210, 212; L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 69-70; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 297-304. For a fuller account of the exercise of a power for an improper purpose as a fraud on the power, see text to n 1042 and following.

<sup>510</sup> *Re Beatty* [1990] 1 WLR 1503 (Ch) 1506; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 301.

indisputably in greater need than wealthy A. But by no measure can a choice of A over B and C be called ‘careless’, or be characterised as lacking in prudence or diligence. The very purpose of such a power is to permit ‘uneven treatment’<sup>511</sup> between its objects. It may be possible to characterise as careless the processes the trustee undertakes in order to be able to make his choice<sup>512</sup> but the choice itself is not logically capable of being impugned on such a basis. The application of the duty of care and diligence to this choice aspect of a dispositive power consequently appears entirely inapposite.

### ***Elements of a duty of care***

The second objection to the duty of care analysis is that it adopts too narrow a view of what the duty of care entails. In *Pitt* the duty of the trustee is conceived by Lloyd LJ as comprising, first, taking care to ensure that one is sufficiently well informed to be able effectively and responsibly to consider how the power in question ought be exercised, and secondly, actually considering if, how and when to exercise the power.<sup>513</sup> No doubt it is true that a reasonable, responsible, prudent or diligent trustee who takes seriously the duty of care he owes to the trust beneficiaries would indeed behave in precisely this way, at least in so far as is practical.<sup>514</sup> But the duty of care is

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<sup>511</sup> L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 69.

<sup>512</sup> See text to n 528 and following.

<sup>513</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [85], [110].

<sup>514</sup> *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) 718.

not usually conceived of in so limited a way, as the examples given<sup>515</sup> demonstrate. Which is to say, that if the duty of care were to be conceived of as applying to the exercise of a dispositive power, it is unclear why that duty should be restricted to the two linked elements described by Lloyd LJ. Rather, there would appear to be no reason why the exercise of such a power should not be open to challenge on the basis of any failure to act reasonably or prudently. If it were accepted that the duty of care could apply to a dispositive power, then there would surely be as many ways to act carelessly or unreasonably as human conduct and imagination could conceive.<sup>516</sup> The history of the *Re Hastings-Bass* doctrine and its reformulation in *Pitt* is the history of a struggle to keep an unwieldy doctrine within legitimate bounds.<sup>517</sup> In *Pitt* Lloyd LJ achieves this objective by the imposition of strict limits based on the requirement of a breach of duty,<sup>518</sup> with a view to avoiding the ‘damaging uncertainty’<sup>519</sup> of a wider approach to treating trustees’ exercise of powers as invalid. It would be peculiar indeed if in doing so the Court of Appeal had opened the way to a much wider variety of challenge; whilst after *Pitt* the impugned exercise of a power would be voidable, not void,<sup>520</sup> if the exercise could be challenged simply as unreasonable, careless or imprudent then almost any such exercise would be open to potential attack. For whilst

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<sup>515</sup> See text to nn 493- 497.

<sup>516</sup> As Mitchell has noted in relation to the ways in which a dishonest assistant may ‘assist’: C Mitchell, ‘Assistance’ in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 171.

<sup>517</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811[82]; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [138].

<sup>518</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [101], [127]–[130].

<sup>519</sup> *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) 718 (Robert Walker J), quoted by Lloyd LJ at *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [90].

<sup>520</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [127].

an aggrieved beneficiary or potential object of a power might well struggle to establish even a *prima facie* case of bad faith or improper purpose, accusations of unreasonableness or imprudence, judged against an objective standard, are much easier to make on the slenderest of grounds.<sup>521</sup> That such allegations would not be concerned merely with the trustee's personal liability, but with the validity of the exercise of the power such that third parties could potentially be affected,<sup>522</sup> would serve to redouble the difficulties in this field. For this reason it is simply not plausible that Lloyd LJ intended all exercises of powers by trustees to be open to challenge as to their validity on such a wide basis, and it is not immediately apparent how such a consequence could be averted were the reformulated *Re Hastings-Bass* to be seen simply as the trustee's duty of care.

### ***Re-analysing dispositive powers***

In spite of the foregoing, it may be possible to go some way towards meeting the two objections outlined here. It requires, however, a novel re-analysis of trustees' dispositive powers. As already discussed,<sup>523</sup> the core distinction between administrative and dispositive power is two-fold: first, that administrative powers are

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<sup>521</sup> This could also be a powerful reason to prefer a duty of care standard based on recklessness and subjective culpability; see: J Getzler, 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002). Getzler argues (at 67) that whilst '*Speight v Gaunt* affirms an objective standard' there is nevertheless 'a subjective element in the implementation of the standard: what could reasonably be expected from this particular trustee' (referring to *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA)). It is clear, however (and acknowledged by Getzler at 72-73) that the present standard is objective: Trustee Act 2000, s 1 (see text to n 500); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) 205; *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 16-17.

<sup>522</sup> Unless they could bring themselves within an established ground for refusing to avoid a voidable transaction, the most likely being that they are bona fide purchasers for value of the legal title to trust property transferred under the impugned exercise of a dispositive power.

<sup>523</sup> See text to n 499 and following.

exercised subject to the trustees' duties to all the trust beneficiaries, and accordingly must be exercised fairly and impartially as between them,<sup>524</sup> whereas dispositive powers authorise the donee to treat objects differently,<sup>525</sup> as long as such 'apparent partiality results from the exercise of the power in question for the purpose for which it was given'.<sup>526</sup> Secondly, that in consequence administrative powers are concerned with 'reviewable judgment' where dispositive powers are concerned with 'choice'.<sup>527</sup>

This division of powers into administrative and dispositive is a formal categorisation rather than a functional one. For example, a special power of appointment is undoubtedly a dispositive power. It may be a term of the power that it be exercised by deed, and it is no less dispositive for that. Yet it surely cannot be said that the use, or not, of a deed is a choice? Regardless of the choice the trustee makes as to who should benefit from the exercise of the power, he must use a deed to effectuate that choice. Or put another way, before the trustee has decided in whose favour to exercise the power, it could properly be said of any potential object that it would be to their benefit that the trustee, in exercising the power, uses a deed. That the trustee should, in exercising a dispositive power, use a deed where one is required, is as much a duty owed to all beneficiaries as the duties of care and impartiality in respect of the exercise of administrative powers.

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<sup>524</sup> *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA) 1279.

<sup>525</sup> See text to n 511.

<sup>526</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [44.1].

<sup>527</sup> M Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25 UTLJ 99, 119.

This reasoning is not confined to formal requirements for the exercise of a dispositive power; it applies with equal force to the duty of a trustee to inform himself adequately before exercising the power.<sup>528</sup> Any potential object of the power would wish the trustee to inform himself before making a decision, and accordingly the trustee doing so performs an administrative rather than a dispositive function. The dispositive function is properly confined to the question (in the case of a power of appointment) of choosing the appointee. The exercise of the power is therefore divided into two stages: first, the process by which the trustee puts himself into a position to be able to make a choice, and to carry out whatever choice he makes; secondly, the trustee choosing. The truth of this insight can be seen if the trustee's duties in this regard are put in normative terms. Few would dissent from the proposition that, at least to be considered to have acted reasonably and responsibly, a trustee should undertake a sufficient enquiry to enable him to make informed decisions and he should do whatever is required to effectuate his decisions, just as he should invest carefully, or balance the interests of capital and income beneficiaries impartially. Yet few would claim that an outsider could legitimately say that the trustee should appoint trust property to A rather than to B or to C; even an omniscient observer would not be able to determine what factual matters and policies the trustee might choose to prioritise in making the choice.

The *Re Hastings-Bass* doctrine addresses the first of these two stages, the question of 'relevant considerations' being concerned with whether the trustee has sufficient and proper information to make an informed choice. And it is possible, in

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<sup>528</sup> *McPhail v Doulton* [1971] AC 424 (HL) 449.

relation to the *Re Hastings-Bass* type case, and with the benefit of this insight, to address to some degree the two objections raised thus far to the duty of care based analysis of the *Pitt* duty of consideration. In relation to the first objection, that the duty of care cannot logically apply to dispositive powers because of the element of choice involved, the answer is that this is true, but only in so far as the actual making of the choice is concerned ie the second of the two stages. The question of whether the trustee has conducted himself as he ought in informing himself prior to making that choice is susceptible to review on a duty of care basis, since it is possible to set an objective standard for how far a trustee must go in ascertaining and taking into account relevant considerations. In relation to the second objection, it was noted previously<sup>529</sup> that the *Re Hastings-Bass* cases are all concerned with formally dispositive powers, and further that the orthodox view is that the duty of care cannot be applied to dispositive powers.<sup>530</sup> It is therefore no surprise that the *Re Hastings-Bass* case law is not (with the exception of Lightman J's judgment in *Abacus Trust Co (Isle of Man) Ltd v Barr*<sup>531</sup>) explicitly concerned with the duty of care, but only with the duty to consider, which had been authoritatively described in the leading cases on the exercise of powers of appointment.<sup>532</sup> The duty of care was not relevant because the powers in question were dispositive, and the source of the duty of consideration was not closely questioned; the possibility that the latter duty might be

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<sup>529</sup> See text to n 489 and following.

<sup>530</sup> See text to n 498.

<sup>531</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [23].

<sup>532</sup> *McPhail v Doulton* [1971] AC 424 (HL) 449; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 209.

an element of the former was not explored. Once it is seen, however, that a formally dispositive power can comprise a core dispositive choice, and a number of functionally administrative elements, then the application of a full duty of care in respect of the functionally administrative elements is unsurprising. To the objection that this would widen the scope of challenge to dispositive powers, the answer must be that such challenge would not be novel. Few would doubt that a trustee who carelessly fails to use a deed where a power expressly requires it for its exercise to be effective breaches his duty of care. A full duty of care could therefore sensibly apply in respect of elements of a dispositive power apart from the dispositive choice, and there is no compelling need to read Lloyd LJ's judgment in *Pitt* as restricting the duty of care to the duty of consideration only. Rather the judge is simply addressing both the cases before him, and the previous *Re Hastings-Bass* cases, where only the consideration aspect of care was in issue. Properly understood, the possibility of a full duty of care applying is left open.

### ***Proprietary consequences***

There is, however, a more difficult objection to the duty of care analysis. If the consequence of a trustee's failure to take relevant considerations into account was simply the personal liability of the trustee for loss to the trust estate, and possibly to individual beneficiaries, there would be little difficulty. Such an approach to the *Re Hastings-Bass* rule has been argued for by others.<sup>533</sup> But a central aspect of Lloyd LJ's reasoning in *Pitt* is that where a power is exercised in breach of the duty of

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<sup>533</sup> See: HW Tang, 'Rationalising *Re Hastings-Bass*: A Duty to Act on Proper Bases' (2007) 21 TLI 62, 73, 76-77; A Molloy, '*Hastings-Bass*: The True and the Spurious' (2008) 14 T & T 26, 51-52.

consideration, the exercise of the power is voidable.<sup>534</sup> Equally clear is that the orthodox legal response to a breach of the duty of care is personal liability. As Nolan explains:

So long as the fiduciary stays within the scope of the power, his exercise of the power is still valid even though he acted carelessly. The incompetence merely exposes the fiduciary to various sanctions against him personally.<sup>535</sup>

The normal 'sanction' is that the trust account is surcharged by the amount of the additional value the trust fund would have had but for the trustee's breach of duty, and the outcome of the accounting process will be that the trustee will be required to meet this additional sum from his own resources.<sup>536</sup> There is simply no body of case law in which an exercise of a power by trustees has been treated as void or voidable solely because of a breach of a duty of care in relation to it.

Furthermore, there are sound reasons for the law to take this approach. First, the duty of care is by its nature very wide in scope.<sup>537</sup> This is particularly problematic

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<sup>534</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [127]. Though arguably this is not *ratio*, since Lloyd LJ decided that neither the trustee in *Futter* nor the receiver in *Pitt* committed a breach of duty, with the result that the question of voidability (as opposed to voidness or purely personal liability) did not strictly have to be decided: [139], [162]-[163].

<sup>535</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 294.

<sup>536</sup> In order to surcharge, the beneficiary must obtain the taking of the trust accounts on the basis of wilful default: see D Yale (ed) *Lord Nottingham's Chancery Cases* (Vol 2 Selden Society 1961) 141-42, citing *Palmer v Jones* (1682) 1 Vern 144, 23 ER 376. Unlike common account, this requires proof of wrongdoing by the trustee: *Re Stevens* [1898] 1 Ch 162 (CA) 170. See: SB Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16 30. A breach of the duty of care will suffice: *Armitage v Nurse* [1998] Ch 241 (CA) 252; *Iliffe v Trafford* [2001] All ER (D) 306 (Dec) (Ch) [9]. See also: R Walker, 'Some Trust Principles in the Pensions Context' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 125; R Chambers, 'Liability' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 16; SB Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16, 34; DJ Hayton, 'Unique Rules for the Unique Institution, the Trust' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co. 2005) 290; J Edelman, 'Nocton v Lord Ashburton (1914)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 490-91.

<sup>537</sup> Text to n 516 and following.

where proof of a breach renders the exercise of a power voidable, rather than simply generating personal liability, because of the uncertainty for third parties thereby created. Other controls on the exercise of powers are narrower, with the result that it is relatively rare for an exercise to be void or voidable in consequence. Straightforward ultra vires, bad faith<sup>538</sup> and improper purposes<sup>539</sup> cover only a very limited range of possible situations, as do the fiduciary dealing rules. It may be unrealistic to think that a third party would be able reliably to detect any of these problems in advance – although where the impropriety consists, for example, in exercising a power of appointment in favour of a person manifestly not within the defined class this may not be impossible – but at least their narrowness renders the invalidation of exercises of powers infrequent.

Secondly, equity must here strike an appropriate balance between the right of beneficiaries to the proper administration of their trusts and protection from incompetent trustees, and the ability of third parties to rely on the *prima facie* validity of trustees' actions. Where that balance ought to be struck depends on the interests in issue in each situation. That is to say, in the distinction between the narrow proprietary-effect rules and the wider personal liability rules we might see a distinction between situations where the case for intervention to protect trust beneficiaries and legitimate objects of powers is more compelling, and situations

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<sup>538</sup> On the requirement of exercise in good faith as going to the scope of the power conferred, see: *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78, 92; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 295-96; R Nolan and M Conaglen, 'Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 333-35.

<sup>539</sup> On the proprietary consequences of the exercise of a power for improper purposes see text to n 1147 and following.

where it is less so. Carelessness is an everyday occurrence, easily committed even by the honest and faithful<sup>540</sup> and every settlor, in deciding to use the trust mechanism, must accept (or must be taken to accept) the risk of such behaviour by his trustees; it is part of the price paid for whatever benefits the settlor perceives in using a trust<sup>541</sup> – whether tax planning, expert management, or the possibility of more complex ownership structures than are possible at common law. Against such a background, it would be improper to allow settlors and beneficiaries to shift much of the risk of so foreseeable an eventuality to innocent third parties.<sup>542</sup> For whilst bona fide purchase is of course a bar to the avoidance of a voidable exercise of power, innocent receipt is not.<sup>543</sup> It remains English legal orthodoxy that an innocent recipient who relies on the validity of the transaction has no change of position defence against a beneficiary seeking to ‘vindicate their property rights’.<sup>544</sup> This would affect, for example, the object of the careless exercise of a power of appointment, who in consequence of his windfall spends a significant sum from his own existing resources, and who is then required to return the sum appointed to him. The same objection would doubtless be

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<sup>540</sup> See text to n 463 and following.

<sup>541</sup> That settling a fund on trust invariably involves a degree of risk was put in stark terms by Putnam J: ‘Do what you will, the capital is at hazard’ *Harvard College v Amory* (1830) 9 Pick 446, 468.

<sup>542</sup> Although risk-bearing analysis has been criticised in other private law contexts (eg J Stapleton, ‘Tort, Insurance and Ideology’ (1995) 58 MLR 820; F Wilmot-Smith, ‘Replacing Risk-Taking Reasoning’ (2011) 127 LQR 610) the issue here is different and those criticisms are not applicable. It is not suggested here that the settlor should bear a loss because of the risk he has taken in an individual case, as would be analogous with the unjust enrichment analysis (see Wilmot-Smith at 610-13), but rather that risk-benefit analysis of the trust institution in general justifies the law adopting as a matter of policy the proposition that liability for breach of the duty of care is personal to the trustees.

<sup>543</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [20.28], [21.52] and following.

<sup>544</sup> *Foskett v McKeown* [2001] 1 AC 102 (HL) 129 (Lord Millett).

true if the exercise of the power were vitiated by bad faith or fraud on the power; from the third party perspective there is little difference. But it is not nearly so easy to see settlors and beneficiaries taking and accepting the risk of such conduct by their trustees. Of course a settlor is aware, or ought to be, that his trustees *could* be dishonest or act from improper motives. Yet as much as human experience tells us that these eventualities are possible, it also tells us that they are thankfully rare. In that context it is perhaps less unjust to see the risk of such conduct as not being one which the settlor and beneficiaries consciously take in return for some benefit, but rather as a remote eventuality which will be damaging both to beneficiaries and third parties if it should materialise. Whilst it is not obvious that equity should in such a case choose to prefer the trust beneficiaries (who are usually volunteers) over recipients in good faith who are not *bona fide* purchasers for value, it is at least defensible; there is no compelling case for the loss to fall on one rather than the other, and no obvious mechanism for sharing the burden. Against this background, it is quite right that the duty of care has not been admitted to the small class of controls on powers which affect the validity of their exercise, and equally clear that it should not be so admitted in future.

Finally, Nolan has argued that:

If a transaction could be undone by the principal of a fiduciary simply because the fiduciary's negligence meant that the transaction was unauthorised, the principal could escape bad bargains made on his behalf, or for his benefit, by the fiduciary. Yet if the principal had made the same bargain for himself, that would not be possible: regret over a bad bargain is not recognised in the case law as a reason to allow the bargain to be unpicked. It would be deeply unjust to allow

one but not the other, and so favour the use of a fiduciary in the formation of transactions over direct dealings by principals.<sup>545</sup>

The force in this view can be overstated, since clearly this objection could be taken to any control on the validity of the exercise of a power which does not apply to a principal acting on his own behalf, including good faith and proper purposes. This should therefore be seen as an aspect of the second reason given here; that is, that this is another example of the law privileging the beneficiaries at the expense of others, and that this is only defensible in compelling cases. The law has accepted, for the reasons given, that compelling case in relation to good faith and proper purposes, but has not and should not do so in respect of the duty of care.

### **Some other duty of a trustee**

If neither fiduciary duty nor the duty of care provides a satisfactory explanation for the genesis of the duty of consideration, then the remaining possibility is that this is simply a *sui generis* duty which the law imposes on trustees because of the nature of their office as such. Trustees are undoubtedly subject to such specific duties which cannot readily be characterised as loyalty or care and diligence: to obey the terms of the trust instrument,<sup>546</sup> to act impartially between beneficiaries,<sup>547</sup> not to delegate

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<sup>545</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 310.

<sup>546</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [43.1]–[43.3].

<sup>547</sup> *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA) 1279; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [44.1], [44.4]. cf JE Penner, 'Exemptions' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002), where it is argued that 'the duty of even-handedness is just a specification of the duty of loyalty and good faith where there is more than one beneficiary' (at 247-48). The difficulty with this view is that treating such a specific duty as a mere instance of an expansive duty of loyalty is to permit almost any duty imposed for the protection and benefit of the beneficiaries to be treated likewise, and thus to deprive the concept of loyalty of any distinctive meaning.

without authority,<sup>548</sup> to act jointly.<sup>549</sup> Although this would require the rejection of both the fiduciary and duty of care language in *Pitt*, it does explain Lloyd LJ's approach to whether Mrs Pitt, as a Mental Health Act receiver, was subject to the *Re Hastings-Bass* rule. The judge looked for an analogy with trusteeship, both in terms of what he described as 'a fiduciary duty ... to take all relevant matters into account' and in respect of the duty of care.<sup>550</sup> On the 'some other duty' analysis, the fact that trustees are subject to such a duty does not necessarily make it exportable to other fiduciaries. The questions must always be: for what reason is this duty imposed on trustees? Does the same reason apply to the type of power holder in question? The answer to both questions is given by Lloyd LJ, albeit that his language is that of fiduciaries:

It is not in doubt that, although her husband's property was not vested in her as such, her power to deal with it on his behalf put her in the category of fiduciaries...<sup>551</sup>

Or put another way, in the light of the rejection of the fiduciary analysis in this chapter: trustees holding powers are subject to the duty of consideration because those powers enable them unilaterally to alter the property rights of others; a Mental Health Act receiver has powers of the same nature, and therefore the same reason applies and consequently so too does the duty.

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<sup>548</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [51.1]. See Trustee Act 2000, ss 11 – 27.

<sup>549</sup> *Luke v South Kensington Hotel Co* (1879) 11 Ch D 121 (CA) 125-126; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [52.1] and following.

<sup>550</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [162].

<sup>551</sup> *ibid* [147].

This analysis also benefits from the exclusion of the legal baggage that both fiduciary duty and the duty of care import. A stand-alone duty can be moulded to serve the purpose for which it is imposed, to target precisely the matter in issue and no other. The difficulty is that the duty is consequently rootless. If the origin of the duty is the nature of trusteeship, then it is to that trusteeship that we must look to ascertain the correct operation of the rule. Such duties have traditionally been viewed primarily as disabilities<sup>552</sup> to which the trustee's inherent powers as owner of the trust property are subjected. Accordingly they can render the trustee's actions unauthorised, and entitle the beneficiaries to a remedy based on 'substitutive performance',<sup>553</sup> normally the falsification of the relevant entry in the trust account.<sup>554</sup> Such unauthorised actions do not alone generate personal liability on the part of the trustees to compensate beneficiaries beyond reconstitution of the trust fund in accordance with the account, for example in respect of losses suffered by individual

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<sup>552</sup> See J Getzler, "'As If': Accountability and Counterfactual Trust' (2011) 91 BUL Rev 973, 985-86.

<sup>553</sup> That is, a claim to enforce the trustees' obligation to perform their duties as trustees, not a claim for compensation for loss suffered. See: C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010) 122-26. See also: J Edelman, 'Money Awards of the Cost of Performance' (2010) 4 J Eq 122, 125; SB Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16, 24-28; L Smith, 'The Measurement of Compensation Claims Against Trustees and Fiduciaries' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 372; DJ Hayton, 'No Proprietary Liability for Bribes and Other Secret Profits?' (2011) 25 TLI 3, 14.

<sup>554</sup> *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2007] WTLR 835 [1513]. See also: R Chambers, 'Liability' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 16-17; DJ Hayton, 'Unique Rules for the Unique Institution, the Trust' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co. 2005) 290; C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010) 123; DJ Hayton, 'Proprietary Liability for Secret Profits' (2011) 127 LQR 487, 487; J Edelman, '*Nocton v Lord Ashburton* (1914)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 490. Whilst an individual entry in the trust accounts will only be falsified once it is established that it is improper, no breach of trust need be proved to secure the taking of the accounts in common form: *Partington v Reynolds* (1858) 4 Drew 253, 255-56; 62 ER 98, 99.

beneficiaries which are not losses to the trust fund.<sup>555</sup> Such a loss could only be recovered where the beneficiary could establish wrongdoing on the part of the trustee, such as a breach of the duty of care – it being possible, of course, that a single action may be both unauthorised and a breach of such duty.<sup>556</sup> The difficulty with adopting this approach to the stand-alone duty of consideration is that it ill fits the *Re Hastings-Bass* case law, including *Pitt v Holt*. First, because conceiving of such an action as ‘unauthorised’ is at odds with Lloyd LJ’s characterisation of the reformulated *Re Hastings-Bass* doctrine as concerning acts within the trustees’ powers but voidable in consequence of the breach of duty. Whilst this may not technically be *ratio*<sup>557</sup> it is a central feature of Lloyd LJ’s reasoning in the context of virtually all pre-*Pitt Re Hastings-Bass* cases having treated the exercised of a power vitiated on *Re Hastings-Bass* grounds as void.<sup>558</sup> Secondly, because in expressly using the language of a duty of care<sup>559</sup> it is at least implicit that Lloyd LJ is supposing that personal liability could attach to a trustee for breach of the reformulated *Re Hastings-Bass* duty, since personal liability is the ordinary, orthodox response to such breach of duty.<sup>560</sup> The *Re*

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<sup>555</sup> C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010) 124-25. On the extent of the beneficiaries’ personal claims, particularly in the light of *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86, see text to n 674, and to n 980 and following.

<sup>556</sup> *ibid* 125 n 53.

<sup>557</sup> See n 534 and text thereto.

<sup>558</sup> The most notable exception being *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409, albeit that the court did not, having held that the exercise of power was voidable, go on to consider whether it should be avoided (at [34]). Other *Re Hastings-Bass* cases which preferred voidable to void are listed at n 726.

<sup>559</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [107], [119], [162], [163].

<sup>560</sup> See text to n 533 and following.

*Hastings-Bass* cases have all concerned the validity of the purported exercise of a power, not the personal liability of the trustee, so it is not unquestionable that no such personal liability may arise from this duty. But a better explanation is simply that personal liability was not in issue, especially since where the purported exercise was treated as void, the possible financial consequences for the trust fund would be erased.<sup>561</sup>

### **Two duties instead of one**

Perhaps, though, this is a clue to the correct analysis: that there are two concurrent duties at work here. The reformulated *Re Hastings-Bass* doctrine is primarily concerned with the trustee's duty of consideration, a duty which although it may share some features with a duty of care, is in fact a stand-alone duty derived from the office of trusteeship, and the fact that the power is held by such a trustee. This is consistent with Lloyd LJ's approach to the duty as derived from the *McPhail v Doulton*<sup>562</sup> case law.<sup>563</sup> These cases<sup>564</sup> are concerned with the interaction of trusteeship with the holding of a power. Such a trustee is not free to exercise, or not exercise, the power as he wishes, because 'a trustee to whom, as such, a power is

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<sup>561</sup> Usually a tax liability which would not be due if the transaction were void, as in *Green v Cobham* [2002] STC 820 (Ch).

<sup>562</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>563</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [102].

<sup>564</sup> Most significant, apart from *McPhail v Doulton* itself, are *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch); *Re Manisty's Settlement* [1974] Ch 17 (Ch).

given is bound by the duties of his office'.<sup>565</sup> So far this is consistent with the account given above.<sup>566</sup> The difficulties are personal liability and voidness.

The first can be overcome by recalling the strength of the case for treating the reformulated *Re Hastings-Bass* rule as an aspect of the duty of care.<sup>567</sup> The problem with that analysis was not the scope or nature of the duty, but that a breach of the *Re Hastings-Bass* duty, unlike the duty of care, generates proprietary consequences. But if there is no question of proprietary consequences, only personal liability, then this objection is overcome. That is, the reformulated *Re Hastings-Bass* rule should be seen as two intertwined strands. The first is the trustee's duty of consideration, arising from the interaction of trusteeship with the holding of a power. The second is the existence in the background of the duty of care, which can apply fully to the exercise of a dispositive power, except in relation to the core element of dispositive choice.<sup>568</sup> A trustee who is careless in informing himself about matters relevant to the exercise of the power may breach both duties, and incur both consequences – the invalidity of the exercise of the power, with consequences for the taking of the trust account, and personal liability for loss caused to beneficiaries, including loss not reflected in diminution of the trust fund.<sup>569</sup>

The second objection is not straightforward to address. The crucial point for present purposes is the distinction between personal liability and the invalidity of the

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<sup>565</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 209 (Megarry V-C).

<sup>566</sup> See text to n 546 and following.

<sup>567</sup> See text to n 481 and following.

<sup>568</sup> See text to n 528 and following.

<sup>569</sup> See text to n 556.

purported exercise of the power. The conventional understanding of such trustees' duties is that they are concerned with authority and to act in breach of duty is to act without authority, rendering the purported action void. This is not consistent with the voidable conclusion drawn by Lloyd LJ. This in fact is a difficulty much wider than *Re Hastings-Bass* and *Pitt v Holt*, arising, for example, in relation to the doctrine of fraud on a power in much the same way.<sup>570</sup> It will be addressed in chapter four.<sup>571</sup>

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<sup>570</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31. See text to n 1147 and following.

<sup>571</sup> See text to n 725 and following.

#### 4. CONSEQUENCES OF ADOPTING A DUTY-ORIENTED RULE

Thus far it has been established that Lloyd LJ in *Pitt v Holt*<sup>572</sup> was right to adopt an approach to the *Re Hastings-Bass*<sup>573</sup> rule based on flawed decision making by the trustee,<sup>574</sup> premised on breach of the trustee's duty of consideration, sometimes also coupled with a breach of the duty of care.<sup>575</sup> There remain, however, many unresolved issues in relation to the reformulated *Re Hastings-Bass* rule, largely arising from the pre-*Pitt v Holt* case law. The purpose of this chapter is to address each of these in turn, in order accurately to describe the functioning of the *Re Hastings-Bass* rule as it stands today, and to do this by drawing not only on the cases in which these issues arise, but also, and perhaps most importantly, on the model of the rule put forward in chapters two and three and implicitly endorsed in *Pitt*. It is that understanding of how and why the *Re Hastings-Bass* rule functions which makes possible this sketch of its detailed working.

##### **Application of the rule**

##### ***Relevant considerations***

Since the reformulated *Re Hastings-Bass*<sup>576</sup> rule is now firmly based on the duty of the trustees to give proper consideration to the exercise of their powers, the effective

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<sup>572</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>573</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>574</sup> See ch 2.

<sup>575</sup> See p 123 and following.

<sup>576</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

scope of the rule will fall to be determined largely by reference to exactly what matters trustees must take into account. A broad approach would be demanding of trustees and would necessarily result in many inadvertent breaches of trust; a narrow approach would make trustee decisions difficult to challenge on this basis, permitting trustee misconduct to escape without remedy. *Pitt v Holt* itself does not provide any firm indication as to how the question of what a trustee ought to take into account should be resolved, with Lloyd LJ stating simply:

It is not possible to lay down any clear rule as to the matters which trustees ought to take into account when considering the exercise of a power of advancement or some other dispositive discretionary power. Circumstances will differ a great deal from one trust to another, and even within one trust they may change from time to time or according to the nature of the particular exercise which is under consideration.<sup>577</sup>

What is clear is that pure factual relevance, in the sense of there being some nexus between the power to be exercised and some factual matter, is not, on its own, sufficient. If it were, the scope for invalidating trustees' exercise of powers would be very wide; the claimant would have to point only to single factually relevant matter which the trustees had not considered, and the exercise of the power would be voidable.<sup>578</sup> This would amount almost to a reversal of *Pitt v Holt*, since in many, perhaps most, cases it would be possible for the trustees' decision to be reversed simply because it is now regretted.<sup>579</sup> There must, therefore, be a legal sense to 'relevance' as well as a factual one. Or put in similar terms to those employed by

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<sup>577</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [118].

<sup>578</sup> An approach which has also been deprecated in administrative law: P Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) 544.

<sup>579</sup> Contrary to Park J's warning at *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [61].

Lloyd LJ in *Pitt v Holt*, the question is not just ‘what is relevant?’ but ‘what ought the trustees take into account’?<sup>580</sup>

First, the trustees must of course take into account any factor which the trust instrument requires them to take into account. To go further than this requires an understanding of the trustees’ duty of consideration. Whilst it is not an aspect of the duty of care,<sup>581</sup> it behaves very similarly, at least so far as its sensitivity to circumstances is concerned.<sup>582</sup> The question must be ‘what would a reasonable and responsible trustee have taken into account, in order to be able effectively to consider whether and how to exercise the power?’ In some cases this may require ‘extensive fact-finding’,<sup>583</sup> and in others the burden may be less; as Walker J observed in *Scott v National Trust for Places of Historic Interest or Natural Beauty* ‘In an imperfect world trustees ... do often make decisions which are based on less than complete information and less than full analysis and discussion’.<sup>584</sup> It has even been said that ‘trustees often make perfectly good decisions without taking account of all possibly relevant factors’.<sup>585</sup> This does not of course provide much in the way of guidance to a trustee as to what he should consider: he should consider those matters which a

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<sup>580</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [114], [118].

<sup>581</sup> See text to n 481 and following.

<sup>582</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [118]; JC Campbell, ‘Should the ‘Rule in *Hastings-Bass*’ Be Followed in Australia? — Trustees’ Duty to Enquire and Trustees’ Mistakes’ (2011) 34 Aust Bar Rev 259, 275-77.

<sup>583</sup> JC Campbell, ‘Should the ‘Rule in *Hastings-Bass*’ Be Followed in Australia? — Trustees’ Duty to Enquire and Trustees’ Mistakes’ (2011) 34 Aust Bar Rev 259, 275.

<sup>584</sup> *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) 718.

<sup>585</sup> M Herbert, ‘Attacking Trustee Decisions - Grounds for Complaint’ [2005] PCB 219, 226.

reasonable and responsible trustee would consider. It is worth considering too, though, the roots of this duty in the discretionary trust and fiduciary power case law.<sup>586</sup> There is no requirement that the donee of such a power considers the merits of every possible object of the power, as long as he makes an adequate survey of the class.<sup>587</sup> Gardner has argued that the extent of the survey is based on the presumed intentions of the settlor; where the class is small, the settlor would likely expect a much more comprehensive survey than where it comprises many thousands of individuals.<sup>588</sup> It is already well-established that a power must be exercised only for the purpose for which it was conferred.<sup>589</sup> It may therefore be of great importance, depending on the power, for the trustee to take into account both the settlor's intentions and any apparent purpose, not only as relevant considerations in their own right, but as indicators to other factors. The settlor's intentions and purposes provide a pointer to matters of particularly close or important connection to the exercise of the power, and so provide some basis for treating a consideration as one that the trustees ought to take into account. Having identified a consideration as relevant, the trustees must then inform themselves as to the 'content of the relevant consideration'.<sup>590</sup> So where trustees had identified the settlor's expressed wishes as relevant to their decision, they were obliged to ascertain what those wishes were, in order to take them

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<sup>586</sup> See text to n 120 and following.

<sup>587</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 209.

<sup>588</sup> S Gardner, *An Introduction to the Law of Trusts* (Clarendon Law Series, 3rd edn, OUP 2011) 169.

<sup>589</sup> *Vatcher v Paull* [1915] AC 372 (PC) 378; *McPhail v Doulton* [1971] AC 424 (HL) 449; *Hayim v Citibank NA* [1987] AC 730 (PC) 746; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 297-304; L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 69-70.

<sup>590</sup> B Green, 'The Law Relating to Trustees' Mistakes - Where Are We Now?' (2003) 17 TLI 114, 119.

into account.<sup>591</sup> Furthermore, the courts have been careful not to adopt an ‘over-exigent view of what it is that the trustees ought to have taken into account’.<sup>592</sup> Sometimes certain matters, although undoubtedly relevant, will simply be ‘too remote’,<sup>593</sup> ‘too subtle and arcane’,<sup>594</sup> or too ‘abstruse and recondite’,<sup>595</sup> or it would be ‘grossly over-exigent’<sup>596</sup> to require them to be taken into account. Highly complex aspects of the fiscal treatment of trusts have been particularly so regarded.<sup>597</sup>

Whilst factual relevance alone may not suffice, failure to take into account a consideration which is not factually relevant in the particular circumstances will never be enough to impugn the exercise of a power on *Re Hastings-Bass* grounds. First, factual relevance must be a prerequisite to legal relevance. It would not be reasonable for a trustee to take an irrelevant matter into account. Further, there must logically be a *de minimis* threshold; which is to say, it must be possible to draw a line between relevance and irrelevance, such that purely tangential matters are treated as irrelevant. That a skilled advocate could make a case for treating a matter as relevant should not suffice if on any straightforward consideration it would not be seen as relevant. Such appears to be the thinking behind Park J’s remark in *Breadner v*

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<sup>591</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [23].

<sup>592</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [82].

<sup>593</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [129].

<sup>594</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [86].

<sup>595</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [94].

<sup>596</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [103].

<sup>597</sup> Text to nn 593-595 all refer to complex fiscal matters. See also: E Palser, ‘Turning Back the Clock’ (2005) 155 NLJ 1592.

*Granville-Grossman*.<sup>598</sup> Secondly, the matter in question must be relevant to those to whom the duty of consideration is owed. The reformulated *Re Hastings-Bass* rule is based wholly on this duty; when the trustees fail to consider a relevant matter, they breach their duty to the beneficiaries to whom the duty is owed.<sup>599</sup> This was a live issue in *Smithson v Hamilton*, a company pension scheme case in which the *Re Hastings-Bass* application was brought for the benefit of the employing company, rather than the scheme members.<sup>600</sup> Park J declined to invoke the *Re Hastings-Bass* rule as it stood at that time, on the basis that it applied only to ‘things done by trustees as respects which they have a fiduciary duty or responsibility to the beneficiaries’<sup>601</sup> and accordingly matters not relevant to the beneficiaries were not matters that the trustees were required to consider.<sup>602</sup> This reflects the purpose served by the rule: the protection of beneficiaries and their right to due administration of the trust.<sup>603</sup>

Finally, it is possible to see from the case law that certain matters have been treated as being matters which, in general, trustees ought to take into account. Examples include the settlor’s intentions,<sup>604</sup> and wishes,<sup>605</sup> and fiscal

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<sup>598</sup> See text to n 595.

<sup>599</sup> *Thorpe v Revenue and Customs Commissioners* [2008] STI 1479 (Special Commissioners) [52].

<sup>600</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [58].

<sup>601</sup> *ibid* [97].

<sup>602</sup> *ibid* [103].

<sup>603</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [13]; N Stallworthy, ‘Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*’ (2009) 23 TLI 51, 70.

<sup>604</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [25].

<sup>605</sup> *Re Abacus (CI) Ltd (trustee of the Esteem Settlement)* 2003 JLR 272 (Royal Court of Jersey) [166].

considerations.<sup>606</sup> As the post-*Pitt v Holt* case law develops, it is likely that further matters will be added to this list, as the concept of relevant considerations is explored and refined. For the moment it is possible only to state the principle in broad terms: that a trustee must take into account: first, any matter required by the trust instrument, expressly or impliedly; secondly, any matter which the existing case law requires, such as fiscal considerations, where applicable, and the intentions of the settlor; thirdly, the purpose for which the power was conferred; fourthly, any other factually relevant matter which has a substantial (ie not *de minimis*) nexus to the exercise of the power, and which a reasonable and responsible trustee would take into account, and which it would not be ‘over-exigent’<sup>607</sup> to require the trustee to consider.

### ***Might or would***

In the pre-*Pitt* case law a failure by trustees to consider some relevant matter was not itself sufficient to render the purported exercise of a power void. It was necessary to show further that had the trustees appreciated the relevant matter – usually the consequences of their actions – they would not have acted as they did.<sup>608</sup> This was the approach adopted in many of the cases subsequent to *Mettoy*, and confirmed by Lloyd LJ in *Sieff v Fox*.<sup>609</sup> The contrary view was that it was necessary only to show that the trustees *might* have acted differently, not that they *would* have. This received some

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<sup>606</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [115]; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [85]-[86].

<sup>607</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [82].

<sup>608</sup> Perhaps the first example of this restriction on the *Re Hastings-Bass* rule is in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1626.

<sup>609</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [77].

support in *Stannard v Fisons Pension Trust Ltd*,<sup>610</sup> *AMP (UK) Plc v Barker*<sup>611</sup> and *Hearn v Younger*.<sup>612</sup> Yet whilst this issue featured in almost every pre-*Pitt* case, and has attracted a great deal of academic and judicial interest,<sup>613</sup> it is notable in *Pitt v Holt* only by its absence. In the context of Lloyd LJ's attempt there to establish the *Re Hastings-Bass* rule on firmer grounds, this might be taken as a signal that on the new duty-oriented account of the rule, the would/might controversy is no longer relevant – although nowhere in his judgment does Lloyd LJ say anything directly to encourage this view. This would be a mistake. The view put forward here is that the would/might caveat – that is to say, the restriction of the application of the *Re Hastings-Bass* rule to cases where the trustees would or might have acted differently had they appreciated the relevant consideration or outcome – remains important, and that the 'might' view is to be preferred.

#### BEFORE PITT V HOLT

To understand the role to be played by the would/might caveat in the present law, it is necessary to appreciate its role before *Pitt v Holt*. It is difficult to draw any firm conclusions from the older case law, because in the vast majority of cases where the

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<sup>610</sup> *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27 (CA) 36.

<sup>611</sup> *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) [90].

<sup>612</sup> *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317 [86].

<sup>613</sup> R Walker, 'The Limits of the Principle in *Re Hastings Bass*' [2002] PCB 226, 238; J Hilliard, 'Limiting *Re Hastings-Bass*?' [2004] Conv 208, 222; GW Thomas, 'Challenging the Exercise of a Trustee's Discretion' (2005) 12 JTCP 139, 145-46; M Hutton, 'The *Hastings-Bass* Principle: HMRC's Interpretation' [2006] PCB 293, 295; C Mitchell, 'Reining in the Rule in *Re Hastings-Bass*' (2006) 122 LQR 35, 40; M Thomas and B Dowrick, 'The Odd Couple? *Hastings Bass* and Mistake' [2006] Conv 91, 95-97; N Chien, '*Hastings-Bass* and Beneficiaries of Family Trusts' (2007) 11 JGLR 331 [53]-[58]; HW Tang, 'Rationalising *Re Hastings-Bass*: A Duty to Act on Proper Bases' (2007) 21 TLI 62, 75-76; Lord Neuberger, 'Aspects of the Law of Mistake: *Re Hastings-Bass*' (2009) 15 T & T 189, 196; N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51, 70.

*Re Hastings-Bass* rule was applied, the stronger ‘would’ version of the caveat was sustainable on the facts, and the court was therefore not called upon to choose between the two possibilities.<sup>614</sup> This was particularly apparent in the typical *Re Hastings-Bass* tax planning scenario, where the unanticipated outcome was a significant charge to capital gains or inheritance tax.<sup>615</sup> That the trustees would not have pursued such a course had they appreciated the tax consequences could readily be accepted by both the parties and the court. Nevertheless, it is possible to trace the caveat back to *Mettoy Pension Trustees Ltd v Evans*<sup>616</sup> where Warner J took the view that *Re Hastings-Bass* itself required the ‘would’ form of the caveat,<sup>617</sup> this being consistent with the words used in Buckley LJ’s ‘summary’,<sup>618</sup> and described this as a ‘stringent’ requirement of the *Re Hastings-Bass* rule, as then understood.<sup>619</sup> Indeed *Mettoy* used the caveat as a means of extending the *Re Hastings-Bass* rule to situations of potential partial invalidity – if it could be shown of only part of the

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<sup>614</sup> *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) [90]; *Green v Cobham* [2002] STC 820 (Ch) 826; *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [20]; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [175]; *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [12]; *Seaton Trustees Ltd v Morgan* (2008-09) 11 ITEL 1 (Royal Court of Jersey) [18]; *Pierce v Wood* [2009] EWHC 3225 (Ch), [2010] WTLR 253 [49]; *Re Howe Family Number 1 Trust* [2009] WTLR 419 (Royal Court of Jersey) [13]; *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] 1 WLR 1199 [22]; *Jiggins v Low* [2010] EWHC 1566 (Ch), [2010] STC 1899 [15]; *Re Seaton Trustees Ltd* [2010] WTLR 105 (Royal Court of Jersey) [29].

<sup>615</sup> On the particular issues which arise in relation to claims for tax over-paid to a public authority, see text to n 988 and following.

<sup>616</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>617</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 1626.

<sup>618</sup> *ibid* 41.

<sup>619</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1626.

trustees' actions that they would not have so acted had they appreciated the relevant consideration in issue, then only that part would be invalid.<sup>620</sup>

Subsequent cases cast little light on the caveat's rationale<sup>621</sup> and it was only in *Sieff v Fox* that the matter was fully argued, with Lloyd LJ there preferring 'would' in relation to most *Re Hastings-Bass* cases, but also introducing a novel distinction between situations in which the trustees were under a duty to act, and those where they were not. In the former case, the 'might' version would instead apply.<sup>622</sup> This conveniently accommodated two decisions of the Court of Appeal. In *Kerr v British Leyland Staff Trustees Ltd*<sup>623</sup> the Court held that where pensions trustees were under a duty to 'to give properly informed consideration' to an application by a scheme member for an incapacity payment, the decision of the trustees to decline the application was ineffective when made without appreciation of a matter which 'might materially have affected their decision'.<sup>624</sup> In *Stannard v Fisons Pension Trust Ltd* the Court of Appeal applied the same 'might materially have affected' test in another pensions case.<sup>625</sup> In *AMP (UK) Plc v Barker* Lawrence Collins J held that these two Court of Appeal decisions bound him to prefer the 'might' version of the *Re Hastings-Bass* rule,<sup>626</sup> and this was followed by Etherton J in *Hearn v Younger*.<sup>627</sup>

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<sup>620</sup> *ibid* 1624-25. See text to n 1015 and following.

<sup>621</sup> See text to n 614.

<sup>622</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [77].

<sup>623</sup> *Kerr v British Leyland Staff Trustees Ltd* [2001] WTLR 1071 (CA).

<sup>624</sup> *ibid* 1079.

<sup>625</sup> *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27 (CA) 34-36.

<sup>626</sup> *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) [90].

Lloyd LJ was able to avoid the ‘might’ conclusion for *Re Hastings-Bass* cases generally by distinguishing both *Kerr* and *Stannard* as cases where the trustees had been under a duty to act, whereas in the *Re Hastings-Bass* cases, both the decision to act at all, and the action then taken were discretionary. Whilst this approach has garnered some support,<sup>628</sup> there is serious difficulty with it as a principled distinction. In terms of the duties of the trustee when deciding how to exercise a power conferred on him as trustee, there is no difference between a trustee who is obliged to act but with a discretion as to how, and a trustee with a discretion as to both whether and how to act, and who has decided to act; in both cases the trustee must now act, and must exercise his discretion as to how. There is no obvious reason why these scenarios should be differently treated. As Conaglen and Nolan note, this distinction ‘attributes importance to facts which did not figure prominently in those cases’.<sup>629</sup> In both cases the beneficiaries are entitled to have their trustees properly consider the decision they are to make.<sup>630</sup> The only difference as far as the *Re Hastings-Bass* rule is concerned is that where a trustee has discretion as to whether to act at all, the rule could potentially apply to the exercise of that discretion, which it could not where the trustee is under a duty to act. And as Lord Neuberger has noted extra-judicially, there can be no question of applying the *Re Hastings-Bass* rule where the trustees are

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<sup>627</sup> *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317 [86].

<sup>628</sup> C Mitchell, 'Reining in the Rule in *Re Hastings-Bass*' (2006) 122 LQR 35, 40.

<sup>629</sup> M Conaglen and R Nolan, 'Trustee (In)discretion' (2006) 65 CLJ 15, 17.

<sup>630</sup> N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51, 70.

obliged to act in a particular way.<sup>631</sup> But the distinction drawn in *Sieff* simply does not deal meaningfully with the distinction between ‘would’ and ‘might’, which is concerned with what a claimant must prove to invoke the rule, and not with whether there is an exercise of discretion at all on which the rule can bite.

Leaving this distinction to one side, therefore, it appears that there may be three purposes served by the caveat in the law before *Pitt v Holt*.<sup>632</sup> First, to act as a filter as to which factually relevant matters were sufficiently material that a failure to consider them would allow the rule to be invoked; secondly, in the context of the *Re Hastings-Bass* rule rendering impugned actions void, as a proxy for the alternative of voidability; thirdly, as a purely pragmatic mechanism to ensure that only those cases in which invalidation by the *Re Hastings-Bass* rule would make a practical difference would be subject to the rigours of the rule.

The question of factual relevance or materiality was not directly addressed in the pre-*Pitt* case law. It has been argued here<sup>633</sup> that not all factual matters that a trustee might possibly consider in deciding how to exercise a power are legally relevant considerations such that the rule in *Re Hastings-Bass* can be invoked when such a matter is not considered, and that it is possible to define in principle the subset of those factually relevant matters which are legally relevant. But the early *Re Hastings-Bass* cases do not draw such a distinction. In *Mettoy Warner J* held that

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<sup>631</sup> Lord Neuberger, 'Aspects of the Law of Mistake: *Re Hastings-Bass*' (2009) 15 T & T 189, 196.

<sup>632</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>633</sup> See text to n 576 and following.

trustees were under a duty ‘to take into account all material considerations’<sup>634</sup> and it does not appear from his judgment that there was any significant argument as to whether the relevant matters in that case qualified. Rather the key issue was whether the trustees would nevertheless have acted as they did,<sup>635</sup> with Warner J holding that it was possible that they would have – the exercise of the power could not therefore be impugned on *Re Hastings-Bass* grounds.<sup>636</sup> In *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children*<sup>637</sup> Patten J held that once a matter was treated as ‘relevant’, a failure by the trustees to take it into account would vitiate the exercise of the power unless ‘it is clear that on a proper consideration of all relevant matters the decision would still have been the same.’<sup>638</sup> With no test of legal relevance being applied to limit the application of the *Re Hastings-Bass* rule to genuinely material factors, the pre-*Pitt* rule could have been applied to invalidate almost any exercise of a power on the basis of some tangentially relevant matter, ascertained only subsequently by legal advisers seeking a basis for the invalidation of an inconvenient prior transaction. Applying the ‘would have acted differently’ version of the caveat prevented this from being a possibility. It was made clear in *Mettoy* that this was a ‘stringent’<sup>639</sup> condition for access to the *Re Hastings-*

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<sup>634</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1626.

<sup>635</sup> *ibid* 1626-30.

<sup>636</sup> *ibid* 1629-30.

<sup>637</sup> *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch).

<sup>638</sup> *ibid* [16].

<sup>639</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1626.

*Bass* rule, the effect of which was to judge materiality by reference to the counterfactual possibility of what the trustees would otherwise have done. Establishing by evidence that the trustees would have acted differently presents a challenge which can be met by the assertions of the trustees as to how they would have acted, and evidence as to how trustees could reasonably have been expected to have acted in the particular circumstances. The former is likely, by its very nature, to be less than convincing, since almost invariably in such cases the trustees have a strong interest in the success of a *Re Hastings-Bass* claim. Greater weight is therefore properly given to the objective circumstances: in the light of a relevant matter newly come to light, can it be said that it renders the factual matrix against which the trustees made their decision such that they would clearly not, in the light of that new matter, have made the same decision as they in fact did? Norris J has asked whether such a matter would have made a ‘real difference’<sup>640</sup> to the trustees’ decision. Where the matter in question is of undoubted relevance and importance, it can usually be readily concluded that it would have made a difference to the trustees’ decision (although *Re Hastings-Bass* itself is an example of a case where the obviously relevant and important failure of parts of the sub-settlement for perpetuity would *not* have made a difference<sup>641</sup>). The clearest example is an unconsidered and potentially avoidable tax liability.<sup>642</sup> In the case of a relevant but trivial matter, on the other hand, it would be

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<sup>640</sup> *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [26].

<sup>641</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 40.

<sup>642</sup> As in *Green v Cobham* [2002] STC 820 (Ch) where Jonathan Parker J thought that it would be ‘difficult to quarrel’ (at 825) with the claim that had the trustees appreciated the capital gains tax consequences of their actions, they would have acted differently.

potentially very difficult to persuade a court that in fact the consideration of such a matter would have made any difference to the trustees. Indeed, for this reason it might be thought that the pre-*Pitt* law had no need of any rule excluding ‘subtle or detailed’<sup>643</sup> matters, such as relating to the refined complexities of capital taxation,<sup>644</sup> since it would be very difficult to establish that the omission of such a matter had made any difference to the trustees’ decision.<sup>645</sup> As such, the would/might caveat performed a useful function as a proxy for a test of the legal materiality of factually relevant matters.

The would/might caveat could similarly act a crude proxy for voidability. The dominant pre-*Pitt* authority treats the exercise of a power vitiated by the *Re Hastings-Bass* rule as void, rather than voidable.<sup>646</sup> As Lloyd LJ recognised in *Pitt*, this can create serious difficulties since it excludes the operation of equitable defences and any discretion on the part of the court to treat long-standing and relied-upon transactions as valid.<sup>647</sup> The would/might caveat clearly does not resolve such difficulties in any direct way. But Conaglen has argued that the more restrictive ‘would’ version of the caveat is appropriate in the context of the ‘void’ outcome of

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<sup>643</sup> *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [26].

<sup>644</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [86].

<sup>645</sup> J Weale, 'Still Going Strong: The Irrepressible *Hastings-Bass* Principle' (2010) 16 T & T 340, 342.

<sup>646</sup> *Green v Cobham* [2002] STC 820 (Ch) 828; *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) [90]; *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch) [19]; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [114]; *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [33]-[34]; *Jiggins v Low* [2010] EWHC 1566 (Ch), [2010] STC 1899 [18]. The ‘voidable’ alternative is nevertheless asserted in some *Re Hastings-Bass* cases: *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [33]; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [170]; *Donaldson v Smith* [2007] WTLR 421 (Ch) [52]; *Wyatt v Tyrrell* [2010] EWHC 3633 (Ch) [26].

<sup>647</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [101].

the rule as a means of restricting the number of cases in which such an outcome will occur.<sup>648</sup> The would/might caveat does not respond to the same concerns that the equitable defences available in a case of voidability would address; it is concerned with the trustees' decision-making, rather than, for example, delay or third party reliance.<sup>649</sup> But at its root it is concerned with one crucial matter: the seriousness of the trustees' failure. Where it can be said to be so 'clear'<sup>650</sup> that the trustees would not have acted as they did as to meet this 'stringent'<sup>651</sup> test, it is likely to be a case in which the trustees' decision has resulted in some seriously adverse consequence; the severity of the consequence is what produces the counter-factual clarity that the trustees would have acted otherwise.<sup>652</sup> The application of this caveat therefore means that where third parties do suffer from the trustees' actions being treated as void, this is in the context of the trust beneficiaries having a weighty countervailing interest in the invalidity of those actions. This doubtless does not strike exactly the balance that a court might in deciding whether to permit rescission, but it does reduce the likelihood of injustice resulting from serious harm being caused to third parties by a trustee decision being treated as void where no serious harm has been suffered by the beneficiaries.

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<sup>648</sup> M Conaglen, 'Judicial Review of Trustees' Discretionary Decisions' (2004) 63 CLJ 283, 285.

<sup>649</sup> See D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) chs 20 and 24.

<sup>650</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1624.

<sup>651</sup> *ibid* 1626.

<sup>652</sup> See text to n 639 and following. In an unusual case it may be possible to satisfy the 'would' caveat without demonstrating significant harm to the trust beneficiaries, such as where the trustees have inadvertently departed from a long-standing practice.

Finally, the would/might caveat in the pre-*Pitt* cases behaved as a purely pragmatic mechanism to ensure that the *Re Hastings-Bass* rule would be engaged only in those cases in which it would make a practical difference. In the most clear cut case, where it is apparent that in spite of the trustees' failure to consider some relevant matter, they would clearly and demonstrably have nevertheless made the same decision, it would be unjust for equity to permit the decision to be impugned on *Re Hastings-Bass* grounds. First, because the consequences of treating trustees' actions as invalid can be far-reaching, and potentially damaging to third parties, and this prospect should not therefore be lightly entertained. Trust disputes – unlike administrative law claims for judicial review – often arise long after the facts in issue, and so the unsettling of established rights can be particularly difficult to unravel. Secondly, because one of two alternatives will usually obtain: either the trustees' decision is invalid, but the trustees can act again, in the manner familiar to administrative lawyers when a Government minister or other decision-maker is required to take again a decision which was previously taken improperly,<sup>653</sup> in which case if it is apparent that the trustee will act in the same manner, the whole costly exercise would be deprived of any utility; or the trustees cannot act again because, for example, some time limit on the exercise of the power has expired, in which case there is a windfall for whoever is entitled in default. The normally persuasive argument that such a windfall is not undeserved, since the entitlement to benefit in default can be divested only by the proper exercise of the power, appears much less meritorious when no objection can be taken to the substance of the decision. It would

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<sup>653</sup> P Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) [25-013].

further not be desirable for there to be an incentive for a default beneficiary in such a situation not to complain until after the expiry of such a time limit, for fear that an earlier complaint might lead to the proper re-exercise of the power.

It could perhaps be objected that subject to the equitable defences relevant to a decision treated as voidable rather than void, the improper exercise of a power in the manner envisaged by the *Re Hastings-Bass* rule should lead to its invalidation, and that the courts should not engage in such counter-factual imaginings; if a trustee claims that he would make the same decision again, having taken all relevant matters into account, then once the court has set aside the original flawed decision, he should be allowed to do so. But the objection to counter-factual reasoning is specious; such an approach is a commonplace in all courts required to assess ‘but for’ causation in the simplest of tort or contract claims.<sup>654</sup> For present purposes, however, it suffices to note that despite this objection, this is in fact how the courts have operated the would/might caveat prior to *Pitt*.<sup>655</sup>

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<sup>654</sup> See: R Stevens, *Torts and Rights* (OUP 2007) 129, and works cited at n 2, particularly D Lewis, 'Causation' (1973) 70 J Phil 556. See also: J Getzler, "‘As If.’:Accountability and Counterfactual Trust' (2011) 91 BUL Rev 973, 973-74, 977-79.

<sup>655</sup> Albeit that in the vast majority of *Re Hastings-Bass* cases the courts have accepted that the trustees would have acted differently had they appreciated the consideration in issue. The best examples of the pragmatic use of the caveat are: *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 40-41 (to save a life interest created alongside perpetual and therefore void remoter interests); *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1624-5, 1629-30 (to preclude the invalidation of the exercise of a power, and contemplating the possibility of partial validity: see text to n 1015 and following).

## THE PRESENT LAW

To establish whether such a caveat should be retained in the present law, and if so, what form it should take, these three identified functions must be considered in the light of *Pitt v Holt*.<sup>656</sup>

The first, acting as a proxy for a legal test of relevance, should no longer be necessary. Although *Pitt* does not set out such a test,<sup>657</sup> Lloyd LJ clearly envisages that the question of which factually relevant considerations can be relied upon to invoke the rule in *Re Hastings-Bass* is one to be answered by reference to legal rules.<sup>658</sup> It has been argued here that the residual category of legally relevant consideration is based on a sufficient factual nexus between the consideration and the exercise of the power, and on the question of whether it would be reasonable to expect a trustee to take that matter into account.<sup>659</sup> As a matter of evidence, demonstrating that had the trustees considered a particular matter, they would likely have made a different decision, may go a long way towards demonstrating that these criteria are fulfilled. But in the context of the law here having finally begun to establish an independent concept of legal relevance, it would be inappropriate to limit it by reference to the would/might caveat. For example, if in *Re Hastings-Bass* the trustees had been made aware before exercising the power that the remoter interests purportedly created would be void for perpetuity, then there could be little doubt that

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<sup>656</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>657</sup> See text to n 577 and following.

<sup>658</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [118].

<sup>659</sup> See text to n 607 and following.

both this invalidity, and the validity of and benefit to arise from the life interest also to be created, would be matters which the trustees ought to consider. They are necessarily and intimately connected to the exercise of the power. Yet there might be no difference between the course the trustees would adopt having considered the invalidity of the remoter interests, and the course they would adopt if they had not considered this.<sup>660</sup> It would be wrong to conclude from this that the trustees were not therefore obliged to consider the validity of the remoter interests in this situation. What trustees must take into account when exercising a power is a question of the scope of their duty. The would/might caveat is about the consequences of a breach of duty, and as such has no role to play now that the concept of legal relevance has been recognised in the *Re Hastings-Bass* rule.

The second, acting as a proxy for voidability, can be rejected even more straightforwardly. That the effect of the *Re Hastings-Bass* rule is to render an impugned action voidable, not void, is established by *Pitt v Holt*.<sup>661</sup> There is consequently no need for any crude proxy rule to prevent inappropriate cases of voidness; the matter can be addressed directly by the court in the exercise of its jurisdiction over equitable rescission, and in the application of established defences, particularly in relation to intervening third party rights.<sup>662</sup>

The third function, providing a pragmatic mechanism for avoiding unmeritorious *Re Hastings-Bass* claims, does not appear to have been substantially

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<sup>660</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA) 40.

<sup>661</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99]-[101], [222].

<sup>662</sup> See D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) ch 20.

affected by *Pitt*. Certainly the development of a requirement of legal relevance should preclude far-fetched claims based on trifling matters the trustees are alleged to have omitted to consider, and the triumph of voidability over voidness will allow the courts a measure of discretion in setting aside trustees' decisions.<sup>663</sup> But neither deals directly with the problem of the decision made in breach of the duty to consider but which has made no practical difference. The reasons given already for seeking to exclude this situation from the application of the *Re Hastings-Bass* rule remain. It may be that these concerns could now be addressed through the court not setting aside a decision even if made in breach of the duty of consideration.<sup>664</sup> But this would simply obscure the reality. If the arguments made here for not invalidating a decision made in breach of duty which would have been made if the trustees had properly performed their duty of consideration are accepted, then the court would always decline to set aside the decision in such circumstances, whatever the other merits of the claim in relation to the manner in which the decision was made. In the interests of transparency the application of such a straightforward principle should not be obscured by attempting to assimilate it with a wider discretion.

Once it is appreciated that the would/might caveat can and should continue to play a role in the post-*Pitt* law, and that that role is specifically a purely pragmatic one, as a practical exception to a well-founded general principle,<sup>665</sup> then it becomes much more straightforward to settle the question of whether the caveat should take

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<sup>663</sup> See n 751.

<sup>664</sup> On voidability and the setting aside of decisions under the *Re Hastings-Bass* rule, see text to n 725 and following.

<sup>665</sup> Ie that the exercise of a power by a trustee in breach of the duty of consideration is voidable.

the ‘would’ or the ‘might’ form, in favour of ‘might’. Essentially the choice is about how the court should treat a case where the evidence is equivocal. Where it can be shown that the trustees would have taken the same decision even if they had considered the omitted matter, then it cannot be said that they ‘would’ or even ‘might’ have acted differently; the contrary has been affirmatively proven. Likewise where it can be shown that they would not have taken the same decision, both versions of the test would be met. Where the evidence is equivocal – where it is not clear whether the omitted consideration would have made a difference – the ‘would’ test treats the challenged decision as valid, the ‘might’ test as invalid. Thus this becomes essentially a question of where the burden of proof lies, bearing in mind that even the ‘would’ test has to be satisfied only on the balance of probability.<sup>666</sup>

Once seen in this way it becomes relatively straightforward to reconcile the old with the new. In the pre-*Pitt* law, as has been seen already, the ‘would’ caveat performed a number of functions effective to restrict the scope of the *Re Hastings-Bass* rule. With no clear definition of what trustees ought to take into account and draconian consequences if the rule was successfully invoked, the narrower ‘would’ version was desirable in policy terms. Hayton has argued for the ‘would’ version on the similar basis that the settlor of a trust would not wish his beneficiaries to ‘whine from time to time that the trustees “might” have done this, that or the other’;<sup>667</sup> Thomas has argued that the ‘might’ test is so low that ‘any exercise of a discretion

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<sup>666</sup> See R Walker, 'The Limits of the Principle in *Re Hastings Bass*' [2002] PCB 226, 238.

<sup>667</sup> DJ Hayton, 'Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts' [2005] Conv 229, 238.

by a trustee becomes provisional'.<sup>668</sup> The crucial point, though, is that in the pre-*Pitt* conception of the *Re Hastings-Bass* rule, there is no wrongdoing by the trustee implicit in the invocation of the rule. The rule could be invoked even though the matter omitted became apparent only with hindsight. So the omission of consideration in itself did not confer any prima facie right to treat the decision as invalid. Rather, it is clear from *Mettoy* that the 'would' caveat was seen as a key element of the rule itself; the invalidity of the trustees' decision only becomes a possibility once the 'would' caveat is satisfied. This explains why Warner J in *Mettoy* treats the 'would' caveat as a 'stringent' rule;<sup>669</sup> the caveat is not an exception to a general rule, but a key element of the rule itself.

Against this background the *Pitt* analysis can be seen to present a sharp contrast. Lloyd LJ makes no mention of the caveat in either 'would' or 'might' form, and as chapter three has set out, re-analyses the rule in *Re Hastings-Bass* in terms of duty and breach of duty. The exercise of a power by trustees in breach of their duty of consideration is voidable.<sup>670</sup> This is not made contingent on satisfying any further test, and accords with the underlying principle that beneficiaries are entitled to the proper administration of their trusts. The exercise of a power in breach of duty is *prima facie* invalid, at least in the sense that the beneficiary is entitled to have it set aside, and should be treated as valid by way of an exception to that principle only where there is a strong case for making such an exception – in effect, reversing the

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<sup>668</sup> GW Thomas, 'Challenging the Exercise of a Trustee's Discretion' (2005) 12 JTCP 139, 146.

<sup>669</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1626.

<sup>670</sup> See n 661, above.

pre-*Pitt* position where a strong reason, in the form of satisfying the ‘would’ caveat, was needed to support invalidity.<sup>671</sup> Since beneficiaries will not generally have access to the trustees’ reasons for making decisions,<sup>672</sup> requiring them to prove that the trustees ‘would’ have acted differently had they appreciated the omitted consideration would likely have the practical effect of rendering unavailable the remedy of avoidance of the exercise of the power, even though the requisite breach of duty has been established, and would thus be contrary to the new approach established in *Pitt*. The ‘might’ version of the caveat, on the other hand, should readily be satisfied by *Re Hastings-Bass* claimants who reach this stage of proceedings. They will already have established the factual and legal relevance of the matter they claim the trustees omitted in breach of duty to consider. If the bounds of relevance are satisfactorily drawn then it will almost invariably be the case that the omission from consideration of a matter satisfying those tests will be such that the court can infer that it might have made a difference to the trustees’ decision – that they might have acted differently. The reality is therefore likely to be that once breach of duty has been established, the ‘might’ test will be satisfied by inference, and the caveat will thereafter operate in a manner more akin to a defence; the trustees can defeat the *Re Hastings-Bass* claim only if they can prove that the omission from consideration made no difference. If this can be proven (bearing in mind the court’s likely

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<sup>671</sup> See: N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51, 70; JC Campbell, 'Should the ‘Rule in *Hastings-Bass*’ Be Followed in Australia? — Trustees’ Duty to Enquire and Trustees’ Mistakes' (2011) 34 Aust Bar Rev 259, 282.

<sup>672</sup> *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 334; *Re Londonderry's Settlement* [1965] Ch 918 (CA) 933 (Harman LJ), 935-36 (Danckwerts LJ), 936-37 (Salmon LJ); *Breakspear v Ackland* [2008] EWHC 220 (Ch), [2009] Ch 32 [15].

scepticism of self-serving claims by trustees as to how they would have acted) then it is submitted that the reasons behind the pragmatic function of the caveat will outweigh the beneficiaries' *prima facie* right to avoidance, because such avoidance will at best be pointless, and at worst, unjust.<sup>673</sup>

The 'might' version of the caveat therefore provides a refinement to the basic reformulated *Re Hastings-Bass* rule. It ensures that trustees' decisions are not invalidated for no practical purpose, with all the consequences that would ensue. It respects the beneficiaries' right to the trustees' proper performance of their duties by limiting this exception to cases where it is clearly established that the omitted consideration would have made no appreciable difference.

### ***Personal liability of trustees***

Under the *Re Hastings-Bass* rule as understood before *Pitt v Holt*, the question of the personal liability of trustees in connection with their invalid exercise of powers did not arise; the possibility was only occasionally raised,<sup>674</sup> but never pursued. In the majority of cases the negative consequences of the purported exercise were eliminated by using the *Re Hastings-Bass* rule to treat the purported exercise as void; this is particularly apparent in the cases where the consequence was an apparent tax liability.<sup>675</sup> Such cases also almost invariably came before the court on the trustees' applications, often unopposed, with the result that no party to the litigation was

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<sup>673</sup> See text to n 653 and following.

<sup>674</sup> R Walker, 'Some Trust Principles in the Pensions Context' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 125.

<sup>675</sup> See in particular: *Green v Cobham* [2002] STC 820 (Ch); *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch); *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

looking to render the trustees personally liable for any losses suffered by the trust fund. Yet it appears also that the very nature of the *Re Hastings-Bass* rule as then understood must have contributed to this: it was concerned (at least in the reported cases) solely with the question of the validity of the exercise of a power. That a purported exercise was subsequently found to be invalid did not impute to the trustees any wrongdoing which might give rise to a personal claim against them.

As the *Re Hastings-Bass* rule is understood in the light of *Pitt*, however, it is intimately bound up with equity's understanding of a trustee's duties.<sup>676</sup> The rule can now be invoked only where the trustee breaches his duty to take relevant matters into account. The possibilities of both account and equitable compensation,<sup>677</sup> as mechanisms for attaching personal liability to a trustee, are briefly mentioned by Mummery LJ in *Pitt*,<sup>678</sup> and it is submitted that the suggestion that both may now be available is correct, and follows straightforwardly from the understanding of the *Re*

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<sup>676</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [93].

<sup>677</sup> The author's view is that equitable compensation and account are properly distinguishable in this context: account provides a remedy for losses suffered by the trust fund, whereas equitable compensation primarily compensates for loss caused by breach of duty but not reflected in a diminution of the fund. See: text to n 682 and n 691. See also: R Chambers, 'Liability' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 16-22; C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010) 120-27; J Edelman, '*Nocton v Lord Ashburton* (1914)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 492. But cf *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, [2011] 3 WLR 1153 [45], where Lord Neuberger MR asserts that 'the traditional way in which a non-proprietary claim is assessed in equity is through the medium of an equitable account, which in turn leads to equitable compensation'. See also: J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 254 for the suggestion that this is simply a question of nomenclature, not a distinction of substance. Equitable compensation is also a remedy for loss caused by breach of duty by a non-custodial fiduciary, where account is unavailable: see J Edelman, '*Nocton v Lord Ashburton* (1914)' in C Mitchell and P Mitchell (eds), *Landmark Cases in Equity* (Hart Publishing 2012) 491.

<sup>678</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [237].

*Hastings-Bass* rule established in *Pitt* and developed here. As set out in chapter three<sup>679</sup> the trustee is subject to two duties, conceptually distinct, but often overlapping in content: first, to take into account relevant considerations and exclude irrelevant considerations when deciding whether and how to exercise a power; secondly, to take reasonable care in the performance of all trustee functions, except in the making of a dispositive choice.

A breach of the first duty goes to the limits of how a trustee is permitted to exercise his powers and renders the purported exercise voidable at the instance of the beneficiaries.<sup>680</sup> It is clear from *Pitt* that this characterisation of the duty does not mean that the beneficiaries are limited to a personal reparation claim against the trustee.<sup>681</sup> That the exercise is treated as voidable, not void, protects innocent third parties from proprietary claims, not wrongdoing trustees from their obligation to reconstitute the trust fund on the taking of an account.<sup>682</sup> Since the exercise of the power in breach of this duty is improper, a beneficiary is entitled to falsify relevant

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<sup>679</sup> See text to n 546 and following, and n 562 and following.

<sup>680</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99]-[100]. See further text to n 725 and following.

<sup>681</sup> Adopting here the compelling distinction between reparation and substitutive performance drawn originally from SB Elliott 'Compensation Claims against Trustees' (DPhil thesis, University of Oxford 2002). See also: J Edelman and SB Elliott, 'Money Remedies Against Trustees' (2004) 18 TLI 116; SB Elliott and C Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 MLR 16, 24-25, 28-31; J Edelman, 'Money Awards of the Cost of Performance' (2010) 4 J Eq 122, 124; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) ch 22; C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010).

<sup>682</sup> See Mummery LJ's uncontradicted suggestion that a remedy based on account or equitable compensation is available where the court does not rescind the purported exercise of a power, and it is therefore treated as valid: *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [237].

entries in the trust accounts accordingly.<sup>683</sup> If the beneficiary has also successfully obtained the avoidance of the transaction, then it is possible that the reversion of title in the trustees to property disposed of pursuant to the impugned exercise of the power may result in there being no shortfall in the trust fund. But particularly in cases where avoidance is not obtained, the falsification of the account entries will produce a shortfall in the balance of the trust fund, and the obligation of the trustee will be to remedy that shortfall from his own resources.<sup>684</sup> Since this is a substitutive performance claim like any other, every usual rule applicable to such claims applies, including that a beneficiary cannot recover by this type of claim a loss which he suffers personally, but which is not a loss to the trust fund which can be identified in the trust accounting process.<sup>685</sup> This is particularly relevant to *Re Hastings-Bass* rule claims, because, first, the avoidance of the purported exercise of a power may preclude any shortfall to the trust fund. For example, in the typical *Re Hastings-Bass* tax liability case,<sup>686</sup> no tax will be due if the purported exercise is avoided. Section 150 of the Inheritance Tax Act 1984 makes specific provision in this regard for tax paid to be repaid and tax payable to cease to be payable once the relevant transaction has been avoided pursuant to ‘any enactment or rule of law’. Whilst there is no direct equivalent in the Taxation of Chargeable Gains Act 1992, it might properly be

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<sup>683</sup> *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2007] WTLR 835 [1513]. See n 554.

<sup>684</sup> *Head v Gould* [1898] 2 Ch 250 (Ch) 266. See n 554.

<sup>685</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (17th edn, LexisNexis Butterworths 2007) [87.11].

<sup>686</sup> Such as *Green v Cobham* [2002] STC 820 (Ch).

supposed that a ‘disposal of assets’<sup>687</sup> relevant to the computation of a chargeable gain would not encompass a disposal which is void, or one which is voidable and has been avoided. Secondly, the *Re Hastings-Bass* cases also include situations where the trustees’ default disadvantages a particular beneficiary, but does not affect the value of the trust fund. In *Breadner v Granville-Grossman*<sup>688</sup> the trustees resolved to exercise a power of appointment in favour of the settlor’s son, to the exclusion of the son’s cousins, who would otherwise have been entitled, alongside the son, in default of appointment. The trustees purported to exercise this power a day later than the terms of the trust permitted,<sup>689</sup> with the result that the purported appointment was invalid, and the default trusts remained effective.<sup>690</sup> The son was severely disadvantaged by the trustees’ failure to effectuate their decision in accordance with the terms of the trust, but the trust fund itself suffered no loss.

A breach of the second duty in issue in the *Re Hastings-Bass* rule, the duty of care, will however give a beneficiary access to exactly that type of claim. A claim that the trustee has breached this duty is a claim that the trustee is guilty of wrongdoing, in relation to which he is liable to pay for any loss he has caused,<sup>691</sup>

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<sup>687</sup> Taxation of Chargeable Gains Act 1992, s 15(1).

<sup>688</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523.

<sup>689</sup> *ibid* [2].

<sup>690</sup> *ibid* [43].

<sup>691</sup> On ordinary ‘but-for’ causation principles: *Target Holdings Ltd v Redferns* [1996] AC 421 (HL) 432, 434; SB Elliott and C Mitchell, ‘Remedies for Dishonest Assistance’ (2004) 67 MLR 16, 29; L Smith, ‘The Measurement of Compensation Claims Against Trustees and Fiduciaries’ in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 373. The role of counter-factual reasoning, deprecated in *London Loan & Savings Co of Canada v Brickenden* [1934] 3 DLR 465 (PC), and resurrected in *Target Holdings Ltd v Redferns* has been the subject of recent debate: M Conaglen, ‘Explaining *Target Holdings v Redferns*’ (2010) 4 J Eq 288; J Edelman, ‘Money Awards of the Cost of Performance’ (2010) 4 J Eq 122. See also text to n 536 and to n 681.

including loss suffered by an individual beneficiary.<sup>692</sup> A beneficiary, therefore, who can put his *Re Hastings-Bass* claim in duty of care terms – such as by demonstrating that the trustee, in considering the exercise of a power of appointment, failed to take reasonable steps to inform himself of relevant matters – can procure the surcharging of the trust account in relation to sums which, but for the breach of duty, would have been received into the trust fund,<sup>693</sup> and crucially can go further than this, obtaining equitable compensation in respect of his own individual losses which are not reflected in the value of the trust fund.<sup>694</sup> Since in *Pitt* the first duty, of proper consideration, is premised on what the trustee ought in the circumstances to have taken into account,<sup>695</sup> it is highly likely that a trustee who commits a breach of this duty will also commit a breach of the duty of care. Indeed, given the as yet undeveloped state of the post-*Pitt* *Re Hastings-Bass* rule, it would be highly undesirable if it should proceed such that a failure to take a relevant matter into account could be a breach of one duty but not the other, since it would imply a decoupling of what counts as a factually and legally relevant consideration from the taking of reasonable care and skill in the exercise of powers. A separation of the relevant standards here from each other, and from the concept of reasonableness, would significantly limit one of the undoubted benefits of the *Pitt* reanalysis, being the clear focus on what the trustee could reasonably have

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<sup>692</sup> *Elder's Trustee and Executor Co Ltd v Higgins* (1963) 113 CLR 426 453. See DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [87.29], [87.76].

<sup>693</sup> *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2007] WTLR 835 [1513]. See n 536.

<sup>694</sup> See n 692.

<sup>695</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [117]-[118], and see text to n 576 and following, above.

been expected to do, and not on matters identifiable only with hindsight.<sup>696</sup> Any distinction between these two duties is likely to be important only in the context, therefore, of the trustees' default duties and liabilities being modified by the terms of the trust.<sup>697</sup>

### *Defences*

A trustee who has incurred personal liability under either limb of the reformulated *Re Hastings-Bass* rule may nevertheless seek to avoid such liability by reference to the usual defences available to trustees. Now that it is understood from *Pitt v Holt* that what is in issue in *Re Hastings-Bass* cases is a straightforward breach of duty by a trustee, there is no reason to believe that the available defences would behave other than in the ordinary way. In the absence of any reported cases applying these defences to such claims, however, a few specific matters are worthy of note.

### CONSENT

First, if the trustee can establish that he acted with the consent of a beneficiary, he is not liable in respect of a claim from that beneficiary in respect of the conduct for which consent was given,<sup>698</sup> where it would not be 'fair and equitable'<sup>699</sup> to allow such a claim. It would doubtless be rather unusual for trustees to seek to obtain the consent of the beneficiaries as to the trustees' own decision-making processes, but it

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<sup>696</sup> See text to n 145 and following.

<sup>697</sup> See text to n 707 and following on the operation of exemption clauses in relation to the *Re Hastings-Bass* rule.

<sup>698</sup> *Walker v Symonds* (1818) 3 Swans 1, 64; 36 ER 751, 774; *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (Ch) 106-08.

<sup>699</sup> *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (Ch) 108.

is not inconceivable that they might seek to protect themselves by, for example, asking the beneficiaries to agree that the trust property will be distributed on the basis only of certain specified matters to be taken into account by the trustees, agreement to the list then being taken by the trustees as a bar to a claim that any such matter was improperly considered, or that any matter not listed ought to have been considered. There is nothing intrinsic to the *Re Hastings-Bass* rule to prevent this strategy from successfully protecting the trustees, save that the requirement that an apparently consenting beneficiary ‘fully understands what he is concurring in’<sup>700</sup> might be seen as requiring a degree of caution on the part of the trustees. In particular, where the trustees have failed to appreciate the need to consider some relevant matter, and have therefore excluded it from their list, it is wholly plausible that its absence would not be apparent to the beneficiary either. In relation to the analogous question of whether a beneficiary must understand the legal consequences of what he is agreeing to before that agreement will be valid, the best view appears to be that whilst a failure to appreciate legal consequences is not a bar to trustee reliance on consent<sup>701</sup> it is nevertheless a factor which might render it fair for such a beneficiary to be entitled to his claim against the trustees in spite of his consent, the question of fairness being one

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<sup>700</sup> *ibid* 108. The requirement of full understanding is a requirement of ‘informed consent’: see *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 WLR 567 [19], [30]-[31]; J Getzler, ‘Inconsistent Fiduciary Duties and Implied Consent’ (2006) 122 LQR 1, 4-7; J Getzler, ‘Excluding Fiduciary Duties: The Problems of Investment Banks’ (2008) 124 LQR 15, 17-19. The extent to which information must be provided and explained for consent to be truly informed may depend on the person to whom this disclosure is made: see *ASIC v Citigroup Global Markets Australia Pty Ltd* (2007) 160 FCR 35 (Federal Court of Australia) [296]; A Duggan, ‘Contracts, Fiduciaries and the Primacy of the Deal’ in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 295-96.

<sup>701</sup> *Re Pauling's Settlement Trusts* [1962] 1 WLR 86 (Ch) 108.

to be decided in the light of all the relevant facts.<sup>702</sup> Likewise it might be wholly plausible for a beneficiary to assert that in the light of the trustees' failure to indicate the nature of matters which would fall within the scope of their duty of consideration, but which were not included in their list, that it would not be 'fair and equitable' to hold him to the consent he gave to the trustees. This uncertainty is likely to render planned reliance on this defence unappealing to trustees.

#### SECTION 61 RELIEF

Secondly, it would doubtless be open to any trustee found personally liable in connection with breach of the *Re Hastings-Bass* rule to seek relief from the court pursuant to section 61 of the Trustee Act 1925, on the basis that he had 'acted honestly and reasonably, and ought fairly to be excused'. The difficulty with *Re Hastings-Bass* claims is likely to arise in connection with demonstrating reasonableness. In *Re Turner*, Byrne J refused relief to a trustee because he had failed to act in the matter 'as he would probably have acted had it been a transaction of his own'<sup>703</sup> and therefore had not acted reasonably. The apparent similarity to the well-known words of Sir George Jessel MR in *Speight v Gaunt* – that 'a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own'<sup>704</sup> – may very well be the drawing of a deliberate connection between reasonableness in relation to section 61 and the duty of care of

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<sup>702</sup> *Holder v Holder* [1968] Ch 353 (CA) 370; J Payne, 'Consent' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 305.

<sup>703</sup> *Re Turner* [1897] 1 Ch 536 (Ch) 542.

<sup>704</sup> *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA) 739.

trustees; for whilst it is easy to see how a trustee strictly liable for an innocent and technical breach of trust might say that he acted reasonably, notwithstanding the breach of trust, it is much harder to see how a trustee whose very liability arises from a failure to meet standards of reasonable conduct could claim excusal. Since the second limb of the reformulated *Re Hastings-Bass* rule is the ordinary duty of care of trustees, and since the duty of consideration under the first limb is very closely analogous<sup>705</sup> this restriction on the utility of section 61 relief will directly impact on *Re Hastings-Bass* claims. That in an exceptional case even a careless trustee might be treated indulgently remain a possibility, given the scope for the court to act ‘freely and fairly in the exercise of judicial discretion’<sup>706</sup> but this will provide scant comfort to trustees seeking to minimise exposure to potential liability.

#### EXEMPTION CLAUSE

More likely, therefore, than reliance on either beneficiary consent or section 61 relief is that the trustees will seek the protection of an exemption clause in the trust instrument.<sup>707</sup> In relation to clauses which straightforwardly exclude the trustees’ liability, English law permits such clauses to be drawn so widely as to preclude liability for all types of breach, except for the trustee’s own dishonest conduct.<sup>708</sup>

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<sup>705</sup> See text to n 481 and following (duty of care), text to n 562 and following (concurrent duties), and text to n 695 (liability for breach of both duties).

<sup>706</sup> *Re Turner* [1897] 1 Ch 536 (Ch) 542.

<sup>707</sup> See GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [10.129] n 495.

<sup>708</sup> *Armitage v Nurse* [1998] Ch 241 (CA) 253-54; *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 WLR 1360 [52], [55], [57].

Whether a particular clause, especially one drafted before *Pitt v Holt*,<sup>709</sup> is sufficient to exclude liability for breach of the *Re Hastings-Bass* duties will be a question of construction. The widest permissible clause would doubtless have such effect. A clause which purported to exclude liability for negligence or breach of the duty of care would probably also suffice. The second limb of the reformulated rule is simply an application of the ordinary duty of care itself and so clearly within the scope of such a clause. In relation to the first limb, the duty of consideration, the close relationship with the duty of care is apparent<sup>710</sup> such that unless the wording of the clause tied it very strictly to the duty of care, breach of the duty under this limb would also be within the scope of the clause.

Such clauses will not, however, affect the other consequences of breach of the duty under the first limb. They do not address the underlying breach of duty, merely the personal liability of the trustees, so the exercise of a power in breach of duty will be voidable even when the trustees are protected, and a trustee might be subject to removal from office in respect of such breach, despite the exemption from liability.<sup>711</sup> It would be possible to draft a clause to remove even this effect of the *Re Hastings-Bass* rule.<sup>712</sup> Such a clause would have to be of the kind endorsed by the Privy

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<sup>709</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>710</sup> See text to n 481 and following.

<sup>711</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [48.72]. See also: JE Penner, 'Exemptions' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 250-52; KCF Loi, 'Gross Negligence and Trustee Exemption Clauses in the Privy Council: *Spread Trustee v Hutcheson*' [2011] Conv 521, 528.

<sup>712</sup> On the variety of possible types of exemption clause see: P Matthews, 'The Efficacy of Trustee Exemption Clauses in English Law' [1989] Conv 42, 43; DJ Hayton, 'The Irreducible Core Content of Trusteeship' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 57-61; C Harpum, 'Fiduciary Obligations and Fiduciary Powers - Where are We Going?' in P Birks (ed) *Privacy*

Council in *Hayim v Citibank NA*<sup>713</sup> which removes the underlying duty rather than merely the liability for breach. A clause which stated ‘the trustees shall have no duty to take into account relevant matters in exercising any power or discretion’ would preclude not only personal liability but would also prevent a consequent decision from being avoided, since without a duty, there could be no breach of duty;<sup>714</sup> the central tenet of *Pitt* is that the voidability of the transaction depends upon the finding of such a breach.<sup>715</sup> Whilst it is clear that not all duties of trustees can validly be excluded<sup>716</sup> it is equally clear that some may be: an autonomous settlor ‘may do as he pleases’.<sup>717</sup> Whilst *Armitage v Nurse* does not directly concern the question of excluding duties rather than liability, Millett LJ in that case did express the view, consistent with his conclusion that liability for breach of the duty of care could

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*and Loyalty* (Clarendon Press 1997) 151; Law Commission, *Trustee Exemption Clauses* (Law Com No 301, 2006) [2.2], app D.

<sup>713</sup> *Hayim v Citibank NA* [1987] AC 730 (PC).

<sup>714</sup> *ibid* 746.

<sup>715</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [94]. See text to n 409 and n 416 and following.

<sup>716</sup> *Armitage v Nurse* [1998] Ch 241 (CA) 253-54; *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 WLR 1360 [55]. See: DJ Hayton, 'The Irreducible Core Content of Trusteeship' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996); L Ho, 'Trustees' Duties to Provide Information' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 355-58. Gardner points out that the too enthusiastic exclusion of duties may result in a merely ‘moral arrangement rather than a trust’: S Gardner, *An Introduction to the Law of Trusts* (Clarendon Law Series, 3rd edn, OUP 2011) 172. Similarly, Langbein: ‘although the various fiduciary rules are default rules, the settlor may not abrogate them in their entirety, because eliminating all fiduciary duties would make the trust illusory’ JH Langbein, 'Mandatory Rules in the Law of Trusts' (2004) 98 NWULR 1105, 1122. See also: C Harpum, 'Fiduciary Obligations and Fiduciary Powers - Where are We Going?' in P Birks (ed) *Privacy and Loyalty* (Clarendon Press 1997) 153-54; A Duggan, 'Contracts, Fiduciaries and the Primacy of the Deal' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 290-96.

<sup>717</sup> *Hayim v Citibank NA* [1987] AC 730 (PC) 744.

validly be excluded,<sup>718</sup> that ‘duties of skill and care, prudence and diligence’<sup>719</sup> do not form part of the ‘irreducible core of obligations’<sup>720</sup> and this has been widely accepted as correct.<sup>721</sup> Indeed, this is a corollary of accepting liability exclusion in respect of the duty of care, since that duty can have little significance<sup>722</sup> to the extent that there is no liability for breach.<sup>723</sup> As such, both limbs of the *Re Hastings-Bass* duty may be excluded for precisely the same reasons as liability for breach of each duty may be excluded.<sup>724</sup>

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<sup>718</sup> See text to n 708 and following.

<sup>719</sup> *Armitage v Nurse* [1998] Ch 241 (CA) 253.

<sup>720</sup> *ibid* 253.

<sup>721</sup> *Spread Trustee Company Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 WLR 1360 [60]. See also: *Barraclough v Mell* [2005] EWHC 3387 (Ch), [2006] WTLR 203 [90]; *Baker v JE Clark & Co (Transport) UK Ltd* [2006] EWCA Civ 464, [2006] PLR 131 [17]; Law Commission, *Trustee Exemption Clauses* (Law Com No 301, 2006) [2.14]-[2.16]; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010). [48.64]-[48.65]. See also: DJ Hayton, 'The Irreducible Core Content of Trusteeship' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 57; C Harpum, 'Fiduciary Obligations and Fiduciary Powers - Where are We Going?' in P Birks (ed) *Privacy and Loyalty* (Clarendon Press 1997) 151-54. For the contrary view, that duties of care are not always excludable by exemption clause, see: J Getzler, 'Duty of Care' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 71-73; J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 264-65. This is the view maintained in Scotland: Scottish Law Commission, *Breach of Trust* (Scot Law Com DP No 123, 2003) [3.13]-[3.17] For the speculative view that the *Armitage v Nurse* approach to exemption clauses is wholly misconceived, because it fails to take seriously the proprietary nature of the trust, see JE Penner, 'Exemptions' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002).

<sup>722</sup> It retains some significance to the extent that a trustee may be removed for breach of duty. See text to n 711.

<sup>723</sup> See, in the imprecisely analogous contractual context: *Firestone Tyre & Rubber Co Ltd v Vokins & Co Ltd* [1951] 1 Lloyd's Rep 32 (KB) 39. It is important to note that this is not true of trustees' duties generally: see JW Harris, 'Trust, Power and Duty' (1971) 87 LQR 31, 47-51; JE Penner, 'Exemptions' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 251-52). But it is true of the duty of care, since the presence or absence of this duty does not impact on the proprietary aspects of the trust.

<sup>724</sup> See text to n 709 and following.

### *Proprietary consequences*

For almost as long as the *Re Hastings-Bass* rule has been identified and disputed, questions have arisen as to the proprietary consequences of the rule's application to the purported exercise of a power. Three possibilities have been put forward: that the consequences are purely a matter of personal liability;<sup>725</sup> that the exercise of the power is voidable;<sup>726</sup> and that the purported exercise is void.<sup>727</sup> The first of these has attracted no judicial support, and as far as the reformulation of the *Re Hastings-Bass* rule is concerned, *Pitt v Holt* puts beyond doubt that proprietary consequences can follow from it.<sup>728</sup> The question of 'void' versus 'voidable', however, has been hard-fought, and whilst *Pitt* chooses 'voidable',<sup>729</sup> there remain some doubts, not least as to whether the rules and conceptual apparatus of purely equitable interests subject to a power admit of voidability as a possibility.<sup>730</sup> The reformulation of the *Re Hastings-Bass* rule in terms of breach of duty facilitated the Court of Appeal's 'voidable' conclusion, since it permitted a relatively well-accepted distinction to be drawn between exercise of a power outside its scope, and exercise affected by a breach of

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<sup>725</sup> A Molloy, 'Hastings-Bass: The True and the Spurious' (2008) 14 T & T 26, 51-52.

<sup>726</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [33]; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [170]; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [79]; *Wyatt v Tyrrell* [2010] EWHC 3633 (Ch) [26].

<sup>727</sup> *Green v Cobham* [2002] STC 820 (Ch) 828; *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) [90]; *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch) [19]; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [114]; *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [33]; *Jiggins v Low* [2010] EWHC 1566 (Ch), [2010] STC 1899 [18].

<sup>728</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99]-[101].

<sup>729</sup> *ibid.*

<sup>730</sup> See DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.22]. For the rebuttal of the argument made there, see text to n 738 and following.

duty in respect of it<sup>731</sup> and the clearly ‘void’ outcomes in *Re Abrahams’ Will Trusts*<sup>732</sup> and *Re Hastings-Bass*<sup>733</sup> can be wholly distinguished.<sup>734</sup> But the duty-oriented approach does not settle the matter entirely, since the doctrine of fraud on a power can arguably be understood as a duty not to act for improper purposes<sup>735</sup> and the invocation of that doctrine is conventionally understood to render the impugned exercise of a power void.<sup>736</sup> Indeed in the fraud on a power context, Farwell LJ decided in *Cloutte v Storey* that there was no relevant distinction in equity between voidness and voidability.<sup>737</sup> In this light it is necessary therefore to consider two issues: first, whether the ‘voidable’ approach can be understood in orthodox trust law terms, such that its very existence is doctrinally defensible; secondly, whether there are sound reasons to prefer ‘voidable’ to ‘void’ in the *Re Hastings-Bass* context.

#### VOIDABILITY IN EQUITY

On the first of these questions, the difficult conceptual work has mostly been done already, albeit in the slightly different context of working out the potential proprietary

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<sup>731</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99]. See also: M Conaglen and R Nolan, 'Trustee (In)discretion' (2006) 65 CLJ 15, 17; M Thomas and B Dowrick, 'The Odd Couple? *Hastings Bass* and Mistake' [2006] Conv 91, 98; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 318-19; R Nolan and A Cloherty, 'Taxing Times for *Re Hastings-Bass*' (2010) 126 LQR 513, 515.

<sup>732</sup> *Re Abrahams’ Will Trusts* [1969] 1 Ch 463 (Ch).

<sup>733</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>734</sup> See text to n 206 and following.

<sup>735</sup> *Vatcher v Paull* [1915] AC 372 (PC) 378. Though see text to n 1058, where it is argued that fraud on a power is primarily about the scope of the power conferred.

<sup>736</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA). This orthodox approach is not without difficulty: see text to n 1147 and following on why voidable may be preferable in the fraud on a power context.

<sup>737</sup> *ibid* 30. But see: P Reed, 'The Death of the So-Called Rule in *Hastings-Bass*' [2011] PCB 179, 182.

consequences of unjust enrichment.<sup>738</sup> In that field there is an analogous contest between competing views: that there should be no proprietary restitutionary remedies;<sup>739</sup> that an immediate trust is imposed by operation of law over property transferred and subject to an unjust enrichment claim;<sup>740</sup> or that the transferor has a power to re-vest in himself legal or equitable title to the transferred property, but has no title to the transferred property until he exercises that power.<sup>741</sup> The first of these is

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<sup>738</sup> This topic has proven to be one of the most controversial aspects on the developing law of unjust enrichment. It is addressed by each of the principal textbooks: P Birks, *Unjust Enrichment* (Clarendon Law Series, 2nd edn, OUP 2005) ch 8; G Virgo, *The Principles of the Law of Restitution* (2nd edn, OUP 2006) chs 20-22; AS Burrows, *The Law of Restitution* (3rd edn, OUP 2011) ch 8; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) chs 37-40. There is also an extensive body of literature, including: P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWAL Rev 1; R Chambers, *Resulting Trusts* (Clarendon Press 1997); PJ Millett, 'Proprietary Restitution' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005); W Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123; R Chambers, 'Resulting Trusts' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); B Häcker, 'Rescission of Contract and Revesting of Title: A Reply to Mr Swadling' [2006] 128 RLR 106; PJ Millett, 'Jones v Jones: Property or Unjust Enrichment?' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); W Swadling, 'Unjust Delivery' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006); W Swadling, 'Policy Arguments for Proprietary Restitution' (2008) 28 LS 506; W Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72; B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324; R Chambers, 'Is There a Presumption of Resulting Trust?' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010); C Mitchell and S Watterson, 'Remedies for Knowing Receipt' in C Mitchell (ed) *Constructive and Resulting Trusts* (Hart Publishing 2010); M Balen, 'Exploring Proprietary Restitution: The Relationship Between Rescission and Insolvency' (2011) 22 KLJ 228; W Swadling, 'The Fiction of the Constructive Trust' (2011) 64 CLP 399; T Cutts, 'The Nature of 'Equitable Property': A Functional Analysis' (2012) 6 J Eq 44.

<sup>739</sup> W Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123; W Swadling, 'Unjust Delivery' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006).

<sup>740</sup> P Birks, 'Restitution and Resulting Trusts' in SR Goldstein (ed) *Equity and Contemporary Legal Developments* (Harry and Michael Sacher Institute for Legislative Research and Comparative Law 1992); R Chambers, *Resulting Trusts* (Clarendon Press 1997); R Chambers, 'Resulting Trusts in Canada' (2000) 38 Alta L Rev 378; R Chambers, 'Resulting Trusts' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006). See also: R Chambers, 'Two Kinds of Enrichment' in R Chambers, C Mitchell and JE Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009) 252-53; B Häcker, 'Causality and Abstraction in the Common Law' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 213-215.

<sup>741</sup> B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324. See also: P Birks, 'Overview: Tracing, Claiming and Defences' in P Birks (ed)

the analogue of rejecting proprietary consequences for the *Re Hastings-Bass* rule, and the second corresponds to the void approach, according to which the beneficial interests which exist before the purported exercise of the power are undisturbed.<sup>742</sup> It is the third of these which is equivalent to voidability in equity; this is made clear by Lloyd LJ in *Pitt* when he says that ‘if there is no attempt ... to avoid the transaction, it remains valid and effective as regards all concerned’.<sup>743</sup> It is therefore this third model which requires a more detailed consideration. On this account,<sup>744</sup> which has its roots in the law of rescission,<sup>745</sup> where there is a transfer of property, and that transfer is affected by some factor which the common law or equity treats as impairing the transfer (such as duress, undue influence or mistake),<sup>746</sup> the transferor has the ‘option of pulling back title or bringing a trust into existence’.<sup>747</sup> The fact of title – legal or

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*Laundering and Tracing* (OUP 1995) 307-11; D Fox, 'Overreaching' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 101-04; B Häcker, 'Causality and Abstraction in the Common Law' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 215-17; E Bant and M Bryan, 'Constructive Trusts and Equitable Proprietary Relief: Rethinking the Essentials' (2011) 5 J Eq 171, 181-85. Though see also: T Cutts, 'The Nature of 'Equitable Property': A Functional Analysis' (2012) 6 J Eq 44. Cutts argues that the terminology used here is ‘liable to mislead’ (at 64) and that in substance the immediate resulting trust interest and the proprietary power to rescind are each ‘descriptive of something that at root is identifiable by the same basic characteristic’ (at 66).

<sup>742</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.22].

<sup>743</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [100].

<sup>744</sup> Drawn substantially here from B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324. See also B Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck 2009); T Cutts, 'The Nature of 'Equitable Property': A Functional Analysis' (2012) 6 J Eq 44, 63.

<sup>745</sup> B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 329.

<sup>746</sup> *ibid* 330. See also: E Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 469-70; EC Mujih, 'Undue Influence in Gift Cases Ten Years After *Royal Bank of Scotland Plc v Etridge (No.2)*: A Distinction Between Inter Vivos Gifts and Contracts' (2012) 27 JIBLR 325.

<sup>747</sup> B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 330.

equitable – having been successfully conveyed to the transferee does not mean that it was done ‘unimpeachably’.<sup>748</sup> The transferee has a title to the property transferred, and the transferor retains no vested interest in it.<sup>749</sup> But where the transfer is impaired in equity,<sup>750</sup> the transferor has an equitable power to vest equitable title to the property in himself – or, rather, to ask a court to do so.<sup>751</sup> If the transferee has legal title to the property, this creates a trust in favour of the transferor, and the transferor is entitled then to demand a conveyance of the legal title pursuant to *Saunders v Vautier*.<sup>752</sup> If the transferee has only an equitable interest, that interest is re-vested in the transferor. The transferor’s right of ‘pulling back’ is a power in rem, described as ‘embryonic or potential right *in rem*’<sup>753</sup> and when that power is equitable, conventionally as a ‘mere equity’.<sup>754</sup> Such a power can be enforced not only against

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<sup>748</sup> *ibid* 330.

<sup>749</sup> *ibid* 330; PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 416.

<sup>750</sup> As by undue influence or mistake. See: *Allcard v Skinner* (1887) LR 36 Ch D 145 (CA); B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 331; B Häcker, 'Causality and Abstraction in the Common Law' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 219-21.

<sup>751</sup> *Clark v Malpas* (1862) 4 De G F & J 401, 45 ER 1238. See: D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [11.55], [11.81]-[11.91]; M Balen, 'Exploring Proprietary Restitution: The Relationship Between Rescission and Insolvency' (2011) 22 KLJ 228, 233-37; E Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 478-79; T Cutts, 'The Nature of 'Equitable Property': A Functional Analysis' (2012) 6 J Eq 44, 63. See also: J O'Sullivan, 'Rescission as a Self-help Remedy: A Critical Analysis' (2000) 59 CLJ 509.

<sup>752</sup> *Saunders v Vautier* (1841) 4 Beav 115, 49 ER 282. Although now universally known under this name, the entitlement of absolutely entitled beneficiaries to a conveyance of the trust property, irrespective of the terms of the trust, is in fact of much older provenance: J Getzler, 'Transplantation and Mutation in Anglo-American Trust Law' (2009) 10 Theo Inq L 355, 367-73; T Cutts, 'The Nature of 'Equitable Property': A Functional Analysis' (2012) 6 J Eq 44, 58, and cases cited there at n 97.

<sup>753</sup> B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 325.

<sup>754</sup> *ibid* 351. Swadling notes that there is no such thing as a ‘mere common law’; rather a common law power to rescind is simply described as such: W Swadling, 'Rescission, Property, and the Common

the original transferee, but against third parties too, except for bona fide purchasers. A bona fide purchaser of a legal title without notice of the transferor's power to rescind will take free of it in the usual way, as such a purchaser is protected from mere equities as much as from fully-fledged equitable interests.<sup>755</sup> But also protected from an equity to rescind is the bona fide purchaser of a purely equitable estate<sup>756</sup> or interest.<sup>757</sup>

Clearly if this model of proprietary response were adopted in connection with the purported exercise of a power affected by a breach of the *Re Hastings-Bass* duty,

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Law' (2005) 121 LQR 123, 133. On the terminological confusion here see: T Cutts, 'The Nature of Equitable Property: A Functional Analysis' (2012) 6 J Eq 44, 66.

<sup>755</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>756</sup> Including a fixed or floating equitable charge, or an equitable mortgage. See: *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 (PC) 100-05; *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281; M Balen, 'Exploring Proprietary Restitution: The Relationship Between Rescission and Insolvency' (2011) 22 KLJ 228, 229.

<sup>757</sup> *Phillips v Phillips* (1861) 4 De G F & J 208, 218; 45 ER 1164, 1167. This is repeated in *Cave v Cave* (1880) 15 Ch D 639 (Ch); *Westminster Bank Ltd v Lee* [1956] Ch 7 (Ch); *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265. See also: R Chambers, *Resulting Trusts* (Clarendon Press 1997) 177-83; PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 LQR 399, 416; D Fox, 'Overreaching' in P Birks and A Pretto (eds), *Breach of Trust* (Hart Publishing 2002) 102 n 22; RP Meagher, JD Heydon and MJ Leeming, *Equity: Doctrines and Remedies* (4th edn, Butterworths LexisNexis 2002) [4-135]-[4-175]; C Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Hart Publishing 2002) 131; DJ Hayton and C Mitchell, *Hayton and Marshall: Commentary and Cases on the Law of Trusts and Equitable Remedies* (12th edn, Sweet and Maxwell 2005) [6-230]; W Swadling, 'Rescission, Property, and the Common Law' (2005) 121 LQR 123, 131; C Harpum, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (7th edn, Sweet & Maxwell 2008) [8-012]; D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [21.65]-[21.67]; B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 351; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [2.7]; S Gardner, *An Introduction to the Law of Trusts* (Clarendon Law Series, 3rd edn, OUP 2011) 307 n 17; E Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 483. But see also: D O'Sullivan, 'The Rule in *Phillips v Phillips*' (2002) 118 LQR 296 for the view that later cases reached this conclusion by misinterpreting Lord Westbury in *Phillips v Phillips* (1861) 4 De G F & J 208, 45 ER 1164. Although Cutts does not accept that equitable interests and powers to rescind should be distinguished in the orthodox manner, she nevertheless concludes that such a power, however described, is subject to defeasance by the bona fide purchase of an equitable interest (65) because the power-liability relationship (see n 138) is 'devoid of active obligation' and therefore 'presents a weaker claim for protection than the claim of the beneficiary under an active-duty trust' (at 67).

then it would facilitate the remedial flexibility sought in *Pitt v Holt* and elsewhere,<sup>758</sup> since it would enable the court to take account of ‘equitable defences and discretionary factors’<sup>759</sup> and most particularly of any bona fide purchase of the trust property without notice of the breach of duty.<sup>760</sup> It is submitted that whilst the point is essentially novel, there are good grounds for seeking to treat the exercise of a power by a trustee affected by breach of the *Re Hastings-Bass* rule in the same way as a transfer of property impaired in equity.

#### THE LANGUAGE OF *PITT V HOLT*

First, this model of proprietary response accords with the approach specifically adopted in both substantial judgments in *Pitt v Holt*. Lloyd LJ stated that:

If no relevant person takes any steps to have such an act by the trustees set aside, then it is as valid and effective as if there had been no vitiating factor. ... The aggrieved party may seek to avoid the transaction but, first, avoidance is not a matter of right but is subject to a discretion on the part of the court, and secondly if there is no attempt, or no successful attempt, to avoid the transaction, it remains valid and effective as regards all concerned.<sup>761</sup>

Mummery LJ took the point even more explicitly, stating:

If, however, the disposition is made within the scope of the power, but pursuant to an exercise of discretion infected by a flawed process of decision-making (e.g. failure to take relevant factors into account or to leave relevant factors out of account), that may be a breach of duty but it is of a different kind of duty. The *intra vires* disposition will be valid unless and until the court, in its discretion, decides to grant

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<sup>758</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [30].

<sup>759</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99].

<sup>760</sup> *ibid* [99].

<sup>761</sup> *ibid* [100].

rescission setting it aside or some other remedy, such as equitable compensation or an account.<sup>762</sup>

It is clear that neither judge envisaged the impaired disposition as wholly ineffective, but rather that the affected beneficiaries have the right to seek the court's order for the setting aside of what would otherwise be a valid exercise of a power.

## ESTABLISHED VOIDABILITY SITUATIONS

Secondly, voidability in equity is not a novel concept. Where the fiduciary self-dealing rule applies, it is well established that the result is that the transaction is voidable in equity.<sup>763</sup> More apposite still is the application of the power model in the context of equitable rescission of gifts made by mistake<sup>764</sup> or under undue influence.<sup>765</sup> In *Allcard v Skinner* the Court of Appeal accepted that undue influence could render the gift voidable in equity<sup>766</sup> but refused rescission on the basis that the claimant had failed 'to seek relief within a reasonable time after the removal of the

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<sup>762</sup> *ibid* [237].

<sup>763</sup> *Dover v Buck* (1865) 5 Giff 57, 63; 66 ER 921, 924; *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) 241; *Guinness plc v Saunders* [1990] 2 AC 663 (HL) 698; *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [100]; See also: A Oakley, *Constructive Trusts* (3rd edn, Sweet & Maxwell 1997) 138-44; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 321-22; M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) 76-79; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [55.4]; R Nolan and M Conaglen, 'Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 336-38. For the contrary view that a self-dealing transaction is void, not voidable, see: *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [33]; B McPherson, 'Self-Dealing Trustees' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996); D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [1.65]-[1.69].

<sup>764</sup> *Re Glubb* [1900] 1 Ch 354 (CA); *Ogden v Trustees of the RHS Griffiths 2003 Settlement* [2008] EWHC 118 (Ch), [2008] 2 All ER 655. The mistake jurisdiction in relation to gifts is much less stringent than in relation to contracts: see text to n 777 and following.

<sup>765</sup> *Allcard v Skinner* (1887) LR 36 Ch D 145 (CA). Häcker notes that there do not appear to be any cases of gifts induced by duress: B Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck 2009) 113 n 62.

<sup>766</sup> *Allcard v Skinner* (1887) LR 36 Ch D 145 (CA) 186-87.

influence under which the gift was made'.<sup>767</sup> This is consistent only with the claimant having a power to rescind, now lost, and not an immediate equitable interest vested in the claimant.<sup>768</sup> Even proponents of the vested immediate interest view accept that 'where the claimant must first rescind a contract or other transaction to recover ownership of an asset'<sup>769</sup> the power model is to be preferred. What is crucial for the analogy with the *Re Hastings-Bass* situation is to understand here that 'other transaction' can and should include gift transactions. In the unjust enrichment scholarship, gifts are often seen as 'one sided transactions which are relatively inconsequential' and hence 'relatively unimportant'.<sup>770</sup> The better view is that gifts, whilst not contracts in English law<sup>771</sup> may nevertheless deserve 'a similar degree of protection'.<sup>772</sup> Tang has argued that this reflects the need to protect the autonomy of the donee, who must be allowed to organise his affairs on the basis of an apparently valid gift without too great a risk of them being disturbed subsequently, as well as the autonomy of the donor in permitting the rescission of a gift vitiated by mistake, undue influence or the like.<sup>773</sup> It has similarly been argued that there can be

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<sup>767</sup> *ibid* 187.

<sup>768</sup> See B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 332-33.

<sup>769</sup> R Chambers, 'Resulting Trusts' in AS Burrows and A Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP 2006) 261.

<sup>770</sup> HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 JCL 1, 10.

<sup>771</sup> *Berry v Warnett (Inspector of Taxes)* [1981] 1 WLR 1 (CA) 18. See also S Meier, 'Unjust Factors and Legal Grounds' in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 44.

<sup>772</sup> B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 341 n 100.

<sup>773</sup> HW Tang, 'Restitution for Mistaken Gifts' (2004) 20 JCL 1, 17-22.

‘legitimate reliance’ on a completed gift, unlike in the liability mistake situation which is paradigmatic of the mistaken payment,<sup>774</sup> and that ‘the security of the defendant’s ... receipt’ should be protected from rescission ‘being available too readily’.<sup>775</sup> This intermediate status, between simple mistaken payments and contracts, is reflected in the case law. A mistaken payment can be reversed on proof of a merely causative mistake<sup>776</sup> whereas only in very restrictively defined circumstances will a mistake invalidate a contract.<sup>777</sup> The mistake required for the rescission of a gift must be more than simply causative: it must be a mistake ‘either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction’<sup>778</sup> and ‘must be of sufficient gravity as to satisfy the *Ogilvie v Littleboy* test’<sup>779</sup> which is to say that the mistake must be ‘of so serious a character as to render it unjust on the part of the donee to retain the property’.<sup>780</sup> This distinction appears to be rooted in the idea that, as in contract cases, there is something to be set aside in the

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<sup>774</sup> D O’Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [29.29]-[29.30]. See also: S Meier, ‘Unjust Factors and Legal Grounds’ in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (CUP 2002) 47-48, 52-53.

<sup>775</sup> E Bant, ‘Reconsidering the Role of Election in Rescission’ (2012) 32 OJLS 467, 470.

<sup>776</sup> *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677 (QB) 695; *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249 (Ch) 1273. This approach was subsequently approved by the House of Lords: *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 (HL) [143]. See AS Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 207-08.

<sup>777</sup> *Bell v Lever Brothers* [1932] AC 161 (HL). The consequences of establishing mistake are also more severe in relation to contract: the contract is void, with no jurisdiction to permit rescission on terms: *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679 [160]-[161].

<sup>778</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [210].

<sup>779</sup> *ibid* [210].

<sup>780</sup> *Ogilvie v Littleboy* (1897) 13 TLR 399 (CA) 400.

gift cases, namely the gift itself, and that there can be no restitution before rescission.<sup>781</sup>

## THE ANALOGY WITH POWERS

If it is accepted that the correct response to a gift impaired by mistake (of the relevant type) or undue influence is to be determined in accordance with the power model described<sup>782</sup> then the crucial question is whether this is a good analogue for the *Pitt v Holt* reformulation of the *Re Hastings-Bass* rule. The principal difference is that the mistaken or unduly influenced maker of a gift is usually the sole legal owner of the property transferred. The power to rescind is therefore a power to create a trust, vesting a new equitable title in the transferor.<sup>783</sup> A trustee exercising a dispositive power, on the other hand, is able to transfer a legal title to the appointee since he has a legal title vested in him as trustee, but he can only transfer an equitable interest pursuant to the equitable power.<sup>784</sup> This has led the authors of *Underhill and Hayton* to argue that the analogy is bad, because:

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<sup>781</sup> See *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 (HL) [87]; D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [29.17]-[29.23]; B Häcker, *Consequences of Impaired Consent Transfers: A Structural Comparison of English and German Law* (Mohr Siebeck 2009) 115-16; C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) [9-110]-[9-111]. However, Bant suggests a contrary view: that the rescission of a gift transaction (unlike a contract) is only a necessary preliminary to a proprietary claim, and that a personal unjust enrichment claim can be pursued without rescission: E Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 477, 484. The difficulty with this view is that once the gift transaction is understood as explaining the recipient's entitlement to keep the property transferred, this should operate to prevent a personal unjust enrichment claim just as a contract would: by demonstrating the entitlement of the recipient to the property received. But even if Bant's analysis were adopted, it would not affect the proprietary consequences of a voidable transfer.

<sup>782</sup> See text to n 739 and following.

<sup>783</sup> See text to n 747 and following.

<sup>784</sup> See: Law of Property Act 1925, s 1(7); GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [1.10]. That it is only the exercise of the power which can confer an equitable interest on the appointee

The appointor does not give away his own beneficial property. On the contrary, his requisite conduct constitutes the event stipulated for by the *settlor* upon the happening of which the equitable interest concerned passes to the appointee as a due gift from the settlor. It satisfies the relevant contingency, and works out the trusts.<sup>785</sup>

On this view the better analogy is with the orthodox void consequence of the fraud on a power doctrine;<sup>786</sup> the voidability ‘halfway house’<sup>787</sup> is ruled out because either whatever contingency is required by the terms of the trust to have occurred for the power to have been exercised has been satisfied, in which case the gift under the power is validly made, or it has not been satisfied, and there is no gift at all.<sup>788</sup> This suggestion is bolstered by the argument that if the *Re Hastings-Bass* rule were inserted into a trust instrument as an express term then ‘Plainly a failure to observe this requirement would be fatal, and the power would not have been exercised.’<sup>789</sup>

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also reinforces the conclusion that rescission of the appointment has proprietary effect. Once the purported exercise is set aside, there is no basis on which the purported appointee can be treated as having equitable title. This is entirely distinct from the superficially problem in relation to contract, in which context it is arguable that rescission of a contract of sale should not revert title to the sold goods in the transferor if the conveyance of that title quite apart from the contract eg by delivery, cannot be impugned: W Swadling, ‘Rescission, Property, and the Common Law’ (2005) 121 LQR 123. If an analogy is drawn between such a case and the exercise of a power of appointment, it is crucial to appreciate that the valid exercise of the power is a conveyance, akin to delivery of the goods, not to the contract of sale, since it is only by means of the power that the appointee acquires an equitable interest in the trust property from someone (the donee of the power) who has no such interest himself.

<sup>785</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.22].

<sup>786</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA); DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.22]. But see text to n 1147 and following, where it is argued that the doctrine is more complex, and in some cases the exercise is voidable only.

<sup>787</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.22].

<sup>788</sup> See also N Stallworthy, ‘Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*’ (2009) 23 TLI 51, 70.

<sup>789</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.22].

The first difficulty with this view, though, is that it relies on what it seeks to prove, since it assumes that the exercise of a power is all-or-nothing: that either the power has been exercised so as to be wholly valid or wholly void. The analogy with an express term demonstrates this. Clearly it is right that if the terms of the trust expressly required a particular condition to be fulfilled for the valid exercise of a power, then this would limit the scope of the power and a purported exercise without satisfying the condition would be void. But just as this technique can be used to make the *Re Hastings-Bass* rule a condition precedent to the valid exercise of a power, so too could it be used to make the trustee's duty of care and skill a similar condition.<sup>790</sup> But this tells us nothing about the correct remedial response to a breach of the duty of care and skill in the ordinary context where compliance with that duty has not been expressly made a condition of the valid exercise of the power.<sup>791</sup>

Secondly, the same all-or-nothing approach could in principle be adopted in relation to the transfer of a legal title: that either the requirements for the conveyance of such a title are met, and title vests in the intended transferee, or they are not, and it remains in the transferor. In the mistaken gift context it could be argued that where legal title has validly been conveyed, there should be no rescission since the conditions for a valid transfer have been satisfied.<sup>792</sup> Similarly here, the *Underhill and Hayton* argument assumes that matters which affect the exercise of the power in equity must either be conditions precedent to the valid exercise of the power, or are

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<sup>790</sup> See R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 308.

<sup>791</sup> Ie personal liability only: see text to n 533 and following.

<sup>792</sup> Swadling does make this argument: see text to n 739.

irrelevant to it and generate only personal liability. But just as in the mistaken gift cases it is entirely plausible, and consistent with authority, to understand the result of the transfer as an effective conveyance of full legal ownership, subject to the power to rescind,<sup>793</sup> it is similarly possible to see the exercise of the trustees' power to appoint an equitable interest as both *prima facie* valid, since it has been exercised within its scope and any relevant conditions have been met, and yet burdened by this 'mere equity' to set aside the exercise which arises from breach of the *Re Hastings-Bass* duty.

Thirdly, the *Underhill and Hayton* analysis fails to attribute any significance to the human agency involved in the conferral and exercise of a power of appointment. Its reasoning is essentially to treat the exercise of such a power as akin to a gift conditional on some factual condition, such as attaining a specified age. On this view, the decision of the donee as to which potential object should receive the settlor's bounty is not any kind of disposition of the property affected, but is simply the satisfaction of a condition which triggers a transfer of the property to the appointee under the terms of the trusts. It is submitted that whilst this is not implausible, it does not properly reflect the importance of the donee's role. Whilst the donee does not dispose of his own property, he has a degree of control over the destination of the property, subject only to controls regulating his decision-making, not the substance of his dispositive decision.<sup>794</sup> That essentially unconstrained choice is not factually analogous to the happening of some objectively ascertainable event.

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<sup>793</sup> See text to n 764 and following.

<sup>794</sup> See text to n 508 and following.

The crucial difference is that where a human has a decision-making role in this context, there is a risk of improper decision-making, and so equity imposes controls to reduce the risk of such impropriety, and to provide remedies if it does occur. This is simply not comparable to the satisfaction of a condition precedent by the occurrence of some objectively ascertainable fact: no one can attain the age of 25 without authority, in bad faith, or for an improper purpose.

The answer to *Underhill and Hayton's* criticism of the voidable analysis is therefore that the exercise of a dispositive power and its proprietary effect is a *sui generis* mechanism, which has no precise parallel. But when looking for analogues to guide the development of the law in this field, there is a choice between a gift subject to a condition precedent, and a disposition by an owner of his own property. Whilst either is possible, it is submitted that the latter is more convincing. In both situations equity is concerned to ensure proper decision-making by a human actor: in relation to a power of appointment, by invalidating the exercise of the power when tainted by the donee's impropriety; in relation to an owner dealing with his own property, by invalidating a disposition in which the owner's decision is impaired by a relevant factor such as mistake or undue influence.<sup>795</sup>

The analysis put forward here consequently recognises an intermediate class of impairments to the exercise of a power, just as in the gift cases equity provides for grounds of impairment which are wider than those available at law,<sup>796</sup> and accepts

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<sup>795</sup> See text to n 746.

<sup>796</sup> Ie fraud and duress. See D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [3.03]-[3.33], [6.01]-[6.03]; B Häcker, 'Proprietary Restitution After Impaired Consent Transfers: A Generalised Power Model' (2009) 68 CLJ 324, 330.

that there can be a difference between exceeding the scope of a power, and *intra vires* impropriety in its exercise.<sup>797</sup> It may be that, in relation to fraud on a power, *Cloutte v Storey* rules out this possibility, at least below the Supreme Court.<sup>798</sup> But *Cloutte* proceeds from the basis that void and voidable in equity cannot meaningfully be distinguished in any event, thus ensuring that the court in that case did not consider how such a distinction might operate.<sup>799</sup> Furthermore, it may not be right to see fraud on a power as the improper use of a power *intra vires* in the manner of the *Re Hastings-Bass* rule. It is arguable that the doctrine is in fact predominantly concerned with the proper scope of the power, viewing the purposes for which the power was conferred as implicitly limiting the trustees' freedom to exercise it.<sup>800</sup> In any case, *Cloutte* is premised on such shaky foundations<sup>801</sup> that it is unsurprising that neither Lightman J in *Abacus Trust Co (Isle of Man) Ltd v Barr* nor Lloyd LJ in *Pitt v Holt* was keen to apply its reasoning to the *Re Hastings-Bass* context.<sup>802</sup> In contrast *Pitt v Holt* seems to contemplate precisely such operation of the *Re Hastings-Bass* rule, since Lloyd LJ states that 'The interest of a beneficiary in the trust property continues until it is brought to an end by an act of the trustees done in accordance with the

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<sup>797</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 318-19. See n 731.

<sup>798</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [98].

<sup>799</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 30. See text to n 1172 and following.

<sup>800</sup> See text to n 1063 and following.

<sup>801</sup> See pp 254-267.

<sup>802</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [31]; *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [98].

terms of the trust (or the general law)',<sup>803</sup> thus accepting that the exercise of a power impaired by a breach of *Re Hastings-Bass* rule will have this effect – that is to say, will be treated in spite of the breach as 'an act of the trustees done in accordance with the terms of the trust', unless and until the exercise of the power is set aside.<sup>804</sup>

Just as in the gift cases there can be no remedy for the transferor without setting aside the gift,<sup>805</sup> likewise the exercise of the power; that exercise must be set aside, and the same weight should be given to it as to a gift, since as the authors of *Underhill and Hayton* correctly note, the valid exercise of the power operates as a gift to the appointee.<sup>806</sup> In consequence of adopting this model of voidability, it is possible to understand the proprietary consequences of a breach of the *Re Hastings-Bass* duty. Not only will a bona fide purchaser of any appointed property, whether legal or equitable, be protected,<sup>807</sup> but other equitable defences, such as laches, will be open to a donee.<sup>808</sup> Equitable rescission is discretionary and usually<sup>809</sup> takes

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<sup>803</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99].

<sup>804</sup> *ibid* [99].

<sup>805</sup> See n 781.

<sup>806</sup> See text to n 785.

<sup>807</sup> See text to n 755 and following. See generally D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) chs 20-22.

<sup>808</sup> *ibid* ch 24.

<sup>809</sup> The case law is not wholly clear, but it is at least arguable that no court order is needed to effect rescission in equity in cases of fraud: *ibid* [11.55]; E Bant, 'Reconsidering the Role of Election in Rescission' (2012) 32 OJLS 467, 478.

effect only on the grant of an order by a court.<sup>810</sup> As such, the court may refuse relief, or grant it only on terms.<sup>811</sup>

#### NO 'DISCRETIONARY VOID'

Once this is understood, it must be seen that can be no place for the 'discretionary void' heresy which has developed in response to the strictness of the void approach taken in some of the cases before *Pitt v Holt*. On this view, the exercise of a power vitiated by a breach of the *Re Hastings-Bass* rule is void, but since the grant of any equitable relief is discretionary, the court might decide, on equitable grounds, to refuse to declare the exercise to be void.<sup>812</sup> In practice this 'discretionary void' is

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<sup>810</sup> See n 751.

<sup>811</sup> M Conaglen and R Nolan, 'Trustee (In)discretion' (2006) 65 CLJ 15, 18; R Nolan and A Cloherty, 'Taxing Times for *Re Hastings-Bass*' (2010) 126 LQR 513, 516. But see D O'Sullivan, S Elliott and R Zakrzewski, *The Law of Rescission* (OUP 2008) [19.15]-[19.23], for the argument that only 'such terms as are necessary to ensure *restitutio in integrum*' (at [19.16]) are permissible, and that '[t]he power to put a party on terms is not be used to reform the transaction or otherwise to achieve a result that the court considers to be fair' (at [19.15]). But this analysis relies on *TSB Bank Plc v Camfield* [1995] 1 WLR 430 (CA) which was treated by the Court of Appeal as concerning common law rescission by a party to the transaction, such that rescission had taken place before the matter came before the court. Roch LJ's statement that '[t]he court is not being asked to grant equitable relief; nor is it, in my view, granting equitable relief to which terms may be attached' (at 439) follows from this approach (which Nolan and Cloherty criticise, at 516). It is notable, too, that *Camfield* has not been followed in Australia or New Zealand: *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102; *Scales Trading Company Ltd v Far Eastern Shipping Company Public Ltd* [1999] 3 NZLR 26 (NZCA). Dunn argues that the strict approach in *Camfield* is 'to be welcomed, both as a clear statement concerning informed consent, and because of the certainty it produces. There is always the danger that in utilising the flexibility of equity, courts will embark upon slippery slopes and obscure the justice they seek to find': A Dunn, 'Adjusting the Scales? Independent Advice and Partial Mortgage Enforcement' [1995] Conv 325, 330. But whatever the merits of this view in the mortgage guarantee context of *Camfield* itself, it does not provide a cogent reason to reject rescission on wider terms in the *Re Hastings-Bass* context where the award of rescission is discretionary in any case, and where it would therefore be open to the court, if it was restricted from fashioning suitable terms to do justice between the parties, to refuse rescission.

<sup>812</sup> See: *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [80]; *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [33]; M Conaglen and R Nolan, 'Trustee (In)discretion' (2006) 65 CLJ 15, 18; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 316; R Nolan and M Conaglen, 'Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 338.

simply voidability by another name, but with the incalculable disadvantage of being put in purely discretionary terms, and thereby severed from the case law and scholarship concerning when it is appropriate for a court to refuse to grant rescission in equity. The apparent certainty of the void response is wholly undermined by a discretionary uncertainty which goes far beyond that to be found in the voidable context, where both authority and principle have important predictive value in establishing whether a purported exercise of a power is likely to be avoided. It also leaves the status of the challenged exercise uncertain when a declaration of voidness has been refused but the location of equitable ownership remains important, such as in proceedings involving third parties. This was accepted by Christopher Nugee QC<sup>813</sup> in *Re Sutton* where he held that ‘while it is true that the granting of a declaration is discretionary, I am not sure that it would be appropriate, if the Court had found that a transaction was void, for it then to refuse to make a declaration on discretionary grounds’.<sup>814</sup>

#### PREFERRING VOIDABLE

It has not been argued here that the ‘voidable’ approach is the only possible understanding of the *Re Hastings-Bass* rule. It has been shown that a voidable approach is conceptually possible and not inconsistent with the law applicable to impaired transfers, such as mistaken gifts, which, it has been argued, is analogous to the law governing the improper exercise of a dispositive power. Certainly the

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<sup>813</sup> Sitting as a Deputy Judge of the Chancery Division of the High Court.

<sup>814</sup> *Re Sutton* [2009] EWHC 2576 (Ch), [2010] WTLR 115 [45].

voidable approach is mandated by *Pitt v Holt*<sup>815</sup> but this could be challenged in the Supreme Court appeal in that case. The second question is then necessarily: if it is open to the Supreme Court to choose between both void and voidable approaches as potentially doctrinally defensible in the development of the law in this field, what reasons are there to prefer the voidable approach adopted in *Pitt*?

For the most part these arguments of principle are familiar, arising predominantly from the concern of the courts to have the flexibility to be able to do justice between the parties, and not to unsettle property rights which have long been assumed to be fixed. In *Pitt* Lloyd LJ drew on several such arguments, suggesting that ‘void’ cases ought to be minimised<sup>816</sup> in order to reduce ‘damaging uncertainty as to what has and has not been validly decided’<sup>817</sup> and to facilitate reaching a ‘just outcome’<sup>818</sup> in individual cases. This reflects concerns expressed throughout the pre-*Pitt* case law, both in those cases which adopted the voidable approach, but also those that did not. Most notably in the latter camp, Lloyd LJ himself in *Sieff v Fox* noted the ‘dramatic and potentially unfair disruptive consequences’<sup>819</sup> of the void approach, and that there would be advantages to being able to consider factors such as delay in seeking relief.<sup>820</sup> In *Smithson v Hamilton* similarly Sir Andrew Park took the view

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<sup>815</sup> See text to n 761.

<sup>816</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [101].

<sup>817</sup> *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (Ch) 718.

<sup>818</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [101].

<sup>819</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [79].

<sup>820</sup> *ibid* [81], [83].

that there might be some ‘good reason in the particular circumstances’<sup>821</sup> not to set aside an exercise of a power. This followed unsurprisingly perhaps from the same judge’s expressed view in *Breadner v Granville-Grossman* that it would be ‘astonishing, and to my mind unacceptable’ if the *Re Hastings-Bass* rule could be used to ‘upset some action by trustees which may have been taken decades ago (as in this case), and on the basis of which many intervening decisions and actions have been taken.’<sup>822</sup>

The importance of the distinction between acting outside the scope of a power and misusing the power *intra vires*<sup>823</sup> is further demonstrated when the flawed exercise of a power is considered from the perspective of visibility to third parties. A careful purchaser from, for example, a non-object appointee does at least have some chance of discovering the voidness of the appointment from the terms of the trust; he may insist on seeing these terms as a condition of completing the purchase, and may demand such evidence as is needed to show that the appointee was a proper object of the power. Whilst it might be arguable that even this places too great a burden on the purchaser<sup>824</sup> it is at least *possible* for him to assess accurately the validity of the appointment to his vendor. But where the appointment is void, for breach of the *Re Hastings-Bass* rule or, similarly, as a fraud on the power, there may be no way for the

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<sup>821</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [79].

<sup>822</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [94].

<sup>823</sup> See n 731.

<sup>824</sup> It may indicate that a rule similar to the company law rule usually attributed to *Royal British Bank v Turquand* [1843-80] All ER Rep 435, 119 ER 886 is needed in relation to the terms of trust instruments. See: H Beukes, ‘Does the *Turquand* Rule Apply to Internal Requirements in a Trust Deed?’ (2004) 16 S Afr Mercantile LJ 264.

purchaser to discover this. An example from fraud on a power illustrates the difficulty here. In *Re Dick*<sup>825</sup> the appointor expressed a desire that the appointee, her sister, should deal with the appointed property for the benefit of two non-objects of the power. Although the appointor made it very plain that this was a ‘wish but without imposing any trust or legal obligation’,<sup>826</sup> and the appointee claimed not to consider herself to be bound by any obligation to give effect to this wish, legal or moral, the Court of Appeal held that the appointment was a fraud on the power.<sup>827</sup> Sir Raymond Evershed MR approved the statement of Lord Parker in *Vatcher v Paull*<sup>828</sup> that it suffices that ‘the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power’<sup>829</sup> leading Devonshire to note that ‘an improper motive by the appointor alone may suffice’.<sup>830</sup> The significance of this orientation of the doctrine around the appointor’s purpose or intention is that there is no requirement that even the appointee should be aware of the impropriety,<sup>831</sup> let alone the third party purchaser.<sup>832</sup> Accordingly even a cautious purchaser from an

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<sup>825</sup> *Re Dick* [1953] Ch 343 (CA).

<sup>826</sup> *ibid* 346.

<sup>827</sup> For a fuller account of the doctrine, see text to n 1058 and following.

<sup>828</sup> *Vatcher v Paull* [1915] AC 372 (PC).

<sup>829</sup> *ibid* 378.

<sup>830</sup> P Devonshire, 'Fraud on a Power: Patterns in the Mosaic' (2007) 22 NZULR 496, 505. Though on the distinction between motive and purpose, see text to n 1134.

<sup>831</sup> *Wellesley v Mornington* (1855) 2 K & J 143, 69 ER 728; *Re Marsden's Trusts* (1859) 4 Drew 594, 601; 62 ER 228, 230. See also: G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 479.

<sup>832</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA).

impecunious appointee<sup>833</sup> may nevertheless find that he is left with neither the property nor any effective remedy. His careful checks that he was purchasing from a genuine object of the power, and that the power had been correctly exercised (in the sense of complying with any requirements specified in the trust instrument) will not avail him if the appointor has some secret and improper purpose in mind. Exactly the same difficulty arises in connection with the *Re Hastings-Bass* rule, since it is likely to be impossible for a purchaser even to establish what matters the trustees ought to have considered, since the purchaser will not usually have all the information available to the trustees. Establishing whether or not the trustees did in fact consider such matters is likely to prove even more impenetrable. The purchaser's practical position is arguably worse even than the purchaser of stolen property, who gets no title at law.<sup>834</sup> There at least careful checks by the purchaser might reveal the defect in the vendor's title, because of the defective mode of acquisition of the property. The purchaser from the appointee can verify the trustee's power to appoint, and can see the formally valid documents appointing the beneficial interest to the appointee, but can still be defeated by the claim of the default beneficiaries. This difficulty does not arise if the exercise of the power is merely voidable, since a deserving third party can rely on the established bars to rescission.<sup>835</sup>

It is therefore apparent not only that a voidable approach is possible, but that to adopt such an approach would resolve many of the identified difficulties which

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<sup>833</sup> Ie one who would be unable to satisfy a personal claim brought by the purchaser for breach of the contract of sale.

<sup>834</sup> *Shalson v Russo* [2003] EWHC 1637 (Ch), [2005] Ch 281 [110].

<sup>835</sup> See text to n 807 and following.

arise from treating the exercise of a power as invalid such that there are proprietary consequences. As such, the decision of the Court of Appeal in *Pitt* should be welcomed particularly in relation to its choice of voidable over void. Whilst the full doctrinal basis for this is not stated there, it is submitted that it has been demonstrated here to be sound, such that both the decision and the essential reasoning on this point should be upheld in the Supreme Court.

## **Scope of the rule**

### ***Administrative and dispositive powers***

The *Re Hastings-Bass* cases, up to and including *Pitt v Holt*,<sup>836</sup> do not address the question of whether the *Re Hastings-Bass* rule applies to both dispositive and administrative powers held by trustees. As explained in chapter three<sup>837</sup> the *Re Hastings-Bass* case law is replete with examples of its application to dispositive powers, and particularly in connection with powers of advancement,<sup>838</sup> appointment<sup>839</sup> and amendment.<sup>840</sup> The difficulty here is whether the pure *Re Hastings-Bass* duty of consideration – the first duty – can apply to administrative

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<sup>836</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>837</sup> See text to n 489 and following.

<sup>838</sup> *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

<sup>839</sup> *Green v Cobham* [2002] STC 820 (Ch); *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523; *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch); *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409; *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

<sup>840</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch); *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch); *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57; *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), [2006] All ER (D) 91; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453

powers. It is contended here that it should not.<sup>841</sup> The scope of application of the second duty – the duty of care – was addressed in chapter three, concluding that this duty could apply to both administrative powers, and to dispositive powers in relation to their administrative aspects, but not in relation to the core dispositive choice.<sup>842</sup>

## RELEVANCE OF DISTINGUISHING DISPOSITIVE AND ADMINISTRATIVE POWERS

In many, perhaps most, situations which arise in practice, it will not be of great importance whether the first duty applies to administrative powers, since the exercise of such powers usually involves dealing with a third party, such as in dealing with investments to be sold or acquired for the trust fund,<sup>843</sup> or entering into a contract of insurance in relation to trust property.<sup>844</sup> Where there is a disposal of trust property to a third party pursuant to an administrative power, such as in the context of investment, the purchaser will receive good title to the trust property disposed of, because ‘the individual trustees ... have power or capacity as such to transfer title’.<sup>845</sup> Even if the *Re Hastings-Bass* rule applied to render the exercise of the power voidable in equity, the purchaser would take a clear title unless he had notice of the

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<sup>841</sup> This is also the view adopted by the authors of *Underhill and Hayton: DJ Hayton, P Matthews and C Mitchell, Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) at [57.24].

<sup>842</sup> See text to n 498 and following.

<sup>843</sup> Pursuant to the power now conferred by the Trustee Act 2000, s 3.

<sup>844</sup> Trustee Act 1925, s 19.

<sup>845</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [49.22] n 1. See also the cases cited there: *De Vigier v IRC* [1964] 1 WLR 1073 (HL) 1083; *Hammersmith and Fulham LBC v Monk* [1992] 1 AC 478 (HL) 493; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246 (CA) 303. See A Molloy, ‘What Really is the Rule in *Hastings-Bass*?’ (2009) 15 T & T 200, 208.

trustee's breach of duty.<sup>846</sup> A beneficiary's claim in respect of such a breach would generally therefore be a personal one only, either for breach of the duty of care, or, if the *Re Hastings-Bass* rule did apply, by falsification of the entry in the trust accounts representing the impugned disposition and consequent reconstitution of the fund.<sup>847</sup> Where the trustee contracts with a third party, the legal effect of the contract is based upon the trustee's personal capacity to contract, which does not depend upon, and is therefore not limited by, his occupation of the office of trustee.<sup>848</sup> The contract will bind the trustee, unless he can escape from it on ordinary contract law principles.<sup>849</sup>

In two situations, though, it may be important to ascertain whether the *Re Hastings-Bass* duty of consideration does apply to administrative powers. First, because when a trustee contracts in the capacity of trustee, he is generally entitled to be reimbursed from the trust fund for expenses thereby incurred. Section 31 of the Trustee Act 2000 provides for such reimbursement, but limited to 'expenses properly incurred by him'. Clearly the application of the *Re Hastings-Bass* rule could affect the question of whether an expense is 'proper', since expenditure in breach of duty is not within the scope of this provision.<sup>850</sup> However, it would usually be possible to

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<sup>846</sup> *Foskett v McKeown* [2001] 1 AC 102 (HL) 130; *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99]; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195, [2012] 3 All ER 210 [106]. See also R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 317.

<sup>847</sup> See text to n 554 and following.

<sup>848</sup> *Donaldson v Smith* [2007] WTLR 421 (Ch) [54]. See also R Nolan and M Conaglen, '*Hastings-Bass* and Third Parties' (2006) 65 CLJ 499, 500; N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51, 72-73.

<sup>849</sup> *Donaldson v Smith* [2007] WTLR 421 (Ch) [55].

<sup>850</sup> See: *Leedham v Chawner* (1858) 4 K & J 458, 70 ER 191; *Holding and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313 (CA), dealing with earlier provisions in similar terms; R Nolan and M Conaglen, '*Hastings-Bass* and Third Parties' (2006) 65 CLJ 499, 500.

answer the same question – which is really a matter of applying section 31 of the Act, rather than of the *Re Hastings-Bass* rule – by reference to the second duty, the duty of care, which undoubtedly does apply to administrative powers.<sup>851</sup> A trustee who acts unreasonably in failing to consider relevant matters does not act properly for this purpose.

The second situation is where property has been transferred to a third party pursuant to an administrative power, and there is some question over that third party's entitlement to rely on the bona fide purchase defence.<sup>852</sup> If the *Re Hastings-Bass* rule does not apply to administrative powers at all, the third party can be confident in the validity of their transaction; if it does, a beneficiary may seek to demonstrate constructive notice on the part of the third party and avoid the transfer.

#### CONFINING *RE HASTINGS-BASS* TO DISPOSITIVE POWERS

Unhelpfully neither the case law nor the model of the *Re Hastings-Bass* rule propounded in *Pitt v Holt* and developed here in chapter three provides a clear doctrinal answer to the question of whether the rule can apply to administrative powers. Both Jersey<sup>853</sup> and the Cayman Islands<sup>854</sup> have applied their (pre-*Pitt*) version of the *Re Hastings-Bass* rule to the exercise of administrative powers, even permitting thereby the avoidance of contracts with third parties, at least in some circumstances. In Jersey, the Royal Court has explicitly considered the question in

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<sup>851</sup> See text to n 493 and following.

<sup>852</sup> See text to n 867 and following.

<sup>853</sup> *Seaton Trustees Ltd v Morgan* (2008-09) 11 ITEL R 1 (Royal Court of Jersey).

<sup>854</sup> *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* (2006-07) 9 ITEL R 302 (Grand Court of the Cayman Islands).

*Seaton Trustees v Morgan*<sup>855</sup> and concluded that in spite of apparently contrary English authority,<sup>856</sup> there could be no ‘reason in principle to distinguish between dispositive and administrative discretions’ since in each case ‘the trustee is acting under a discretion in circumstances in which it is free to decide whether or not to exercise that discretion’,<sup>857</sup> albeit that it would not permit the *Re Hastings-Bass* rule to be applied to the prejudice of a ‘bona fide third party purchaser for value’.<sup>858</sup> Subsequent Jersey cases have adopted the same approach.<sup>859</sup> In the Cayman Islands, the point appears to have been decided without argument in *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain*<sup>860</sup> although it is notable in that case that the third party company which had entered into the contract with the trustees which was challenged on *Re Hastings-Bass* grounds was controlled by the trustees themselves,<sup>861</sup> thus rendering the possible arguments about third party rights much less attractive. It is at least clear, therefore, that the extension of *Re Hastings-Bass* to administrative powers would not be impossible, and some commentators have argued

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<sup>855</sup> *Seaton Trustees Ltd v Morgan* (2008-09) 11 ITEL 1 (Royal Court of Jersey).

<sup>856</sup> *Re Duxbury's Settlement Trusts* [1995] 1 WLR 425 (CA), cited at *Seaton Trustees Ltd v Morgan* (2008-09) 11 ITEL 1 (Royal Court of Jersey) [16].

<sup>857</sup> *Seaton Trustees Ltd v Morgan* (2008-09) 11 ITEL 1 (Royal Court of Jersey) [16].

<sup>858</sup> *ibid* [12]. The Royal Court relied on its earlier decision in *Re Representation Friedman and Asiastrust Ltd* (2007) 21 TLI 43 (Royal Court of Jersey) and that of the Grand Court of the Cayman Islands in *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* (2006-07) 9 ITEL 302 (Grand Court of the Cayman Islands).

<sup>859</sup> *Re Howe Family Number 1 Trust* [2009] WTLR 419 (Royal Court of Jersey); *Re Seaton Trustees Ltd* [2010] WTLR 105 (Royal Court of Jersey) [16].

<sup>860</sup> *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* (2006-07) 9 ITEL 302 (Grand Court of the Cayman Islands) 306. See J Goldsworth, ‘*Hastings-Bass* considered in Cayman Islands court’ (2007) 13 T & T 221.

<sup>861</sup> *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* (2006-07) 9 ITEL 302 (Grand Court of the Cayman Islands) 304.

for this approach.<sup>862</sup> Given the view taken in chapter three that the duty of care ought apply not only to purely administrative powers, but also to the administrative aspects of dispositive powers, it might be supposed that the same would apply in reverse to the first *Re Hastings-Bass* duty of consideration. However, there are cogent reasons to decline to adopt the course of the Jersey and Cayman courts in making this extension.

First, it must be clearly understood that this would be an expansion of the scope of the rule as presently understood. No English case has applied *Re Hastings-Bass* to an administrative power,<sup>863</sup> and in *Re Duxbury's Settlement Trusts*<sup>864</sup> Rattee J rejected the extension of the *Re Hastings-Bass* rule to the appointment of trustees under section 36 of the Trustee Act 1925, a decision which was not challenged on appeal.<sup>865</sup> The courts have demonstrated a degree of reluctance to extending the *Re Hastings-Bass* doctrine in other respects<sup>866</sup> and have indeed sought to limit, rather than extend, its scope.<sup>867</sup> This natural reluctance to enlarge the scope of an uncertain and novel principle is well justified here, since the only significant consequence of such extension would be to put in issue the protection of third parties dealing with trustees. It could create damaging uncertainty in cases which should be clear-cut,

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<sup>862</sup> I Dawson, 'The Effect of an Unthinking Trustees' Action' [2002] Conv 67, 72; J Hilliard, 'Limiting *Re Hastings-Bass*?' [2004] Conv 208, 220-21.

<sup>863</sup> See J Howard, '*Hastings-Bass* - Oceans Apart?' [2011] PCB 23, 25.

<sup>864</sup> *Re Duxbury's Settlement Trusts* [1995] 1 WLR 425 (CA).

<sup>865</sup> *ibid* 427-28.

<sup>866</sup> *cf* *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [63] (no extension of *Re Hastings-Bass* rule to trustees' failure to exercise power).

<sup>867</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [82].

since beneficiaries could seek to establish that a third party had constructive notice of the trustees' failure to comply with their *Re Hastings-Bass* duty of consideration, and was therefore not protected from rescission as a bona fide purchaser. The courts, in order to avoid trustees being treated as 'a new class of incapacitated persons, like children or feeble-minded adults'<sup>868</sup> with whom third parties could not confidently transact, would have to adopt a stringent approach to such claims of constructive notice, and be willing to exercise their discretion<sup>869</sup> not to avoid the exercise of powers of an administrative character. Yet in this formative stage in the development of the *Re Hastings-Bass* rule after *Pitt v Holt*, doubts would nevertheless linger about the degree of protection afforded to third parties, whilst beneficiaries would doubtless seek to push for the kind of approach seen in Jersey and Cayman, where even contracts could be vitiated on *Re Hastings-Bass* grounds.<sup>870</sup> To decide now that administrative powers are simply not subject to the first *Re Hastings-Bass* duty would avoid all of these difficulties. No injustice would thereby be done to beneficiaries, who would retain the control over their trustees' exercise of such powers conferred by the duty of care.<sup>871</sup>

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<sup>868</sup> R Walker, 'The Limits of the Principle in *Re Hastings Bass*' [2002] PCB 226, 238-39.

<sup>869</sup> See n 751.

<sup>870</sup> See text to n 853 and following.

<sup>871</sup> In relation to the statutory powers of investment (Trustee Act 2000, s 3) and insurance (Trustee Act 1925, s 19), the duty of care under the Trustee Act 2000, s 1, pursuant to sch 1 of that Act; in relation to powers not listed in sch 1, the equitable duty often attributed to the case of *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA).

Secondly, this duty of care has developed in equity as an acceptable means of controlling the exercise of administrative powers by trustees.<sup>872</sup> Extending the *Re Hastings-Bass* duty of consideration to such powers would interfere with that developed scheme, by which breaches of duty generate only personal liability on the part of the trustees to pay equitable compensation, or for the surcharging of the trust accounts.<sup>873</sup> This ensures that third parties can confidently deal with trustees, which is ultimately in the interests of beneficiaries generally, who would otherwise be deprived of proper opportunity for the investment of their funds, whilst ensuring that the beneficiaries have an adequate remedy in case of trustee default. Indeed, extending the first *Re Hastings-Bass* duty would very rarely extend the scope of the remedy available to a beneficiary in any case, since, as already seen,<sup>874</sup> a proprietary remedy will usually be barred against a third party. Only where the third party is excluded from the bona fide purchase defence<sup>875</sup> would there be the possibility of a proprietary claim which would not be available if the beneficiaries had to rely solely on a claim for breach of the duty of care. But it is submitted that allowing such a proprietary claim is undesirable, with the potential to have the deterrent effect on third party dealings with trustees already described.<sup>876</sup> In relation to dispositive

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<sup>872</sup> See text to n 493 and following. The duty of care is not, of course, the only such control. Administrative powers must be exercised within the scope of the power conferred, and not for an improper purpose: *Robinson v Briggs* (1853) 1 Sm & G 188, 223-24; 65 ER 81, 97. On the application of the fraud on a power doctrine in this context, see text to n 1077 and following.

<sup>873</sup> See text to n 691 and following.

<sup>874</sup> See text to n 847 and following.

<sup>875</sup> See text to n 755 and following.

<sup>876</sup> See text to n 868.

powers, the *Re Hastings-Bass* rule is a recent and controversial innovation, but one which does at least fill a perceived gap in the law, by controlling dispositive powers further than existing requirements<sup>877</sup> of staying within the terms of the trust,<sup>878</sup> good faith<sup>879</sup> and not committing a fraud on the power.<sup>880</sup> But in the context of administrative powers there is no such gap; as already seen, there is a very substantial overlap indeed between the *Re Hastings-Bass* duty of consideration and the duty of care<sup>881</sup> with the result that extending the *Re Hastings-Bass* rule here would simply be to introduce needless complexity for no clear benefit.

Thirdly, if the foregoing arguments are accepted as to the undesirability of applying the *Re Hastings-Bass* rule to administrative powers, this distinction can also be drawn doctrinally. Contrary to the assertion by the Royal Court of Jersey that there is no ‘reason in principle to distinguish between dispositive and administrative discretions’,<sup>882</sup> it is submitted that they are in fact clearly distinct. The administrative powers of trustees, such as to sell investments, or to conclude contracts, derive from their title to the trust property, and their personal legal capacity,<sup>883</sup> whereas

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<sup>877</sup> See generally R Nolan, ‘Controlling Fiduciary Power’ (2009) 68 CLJ 293, 295-304.

<sup>878</sup> See DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [43.1]–[43.3] and cases there cited.

<sup>879</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) 18.

<sup>880</sup> *Vatcher v Paull* [1915] AC 372 (PC) 378.

<sup>881</sup> See text to n 695 and following.

<sup>882</sup> *Seaton Trustees Ltd v Morgan* (2008-09) 11 ITELR 1 (Royal Court of Jersey) [16].

<sup>883</sup> *Donaldson v Smith* [2007] WTLR 421 (Ch) [54]–[55]; R Nolan and M Conaglen, ‘*Hastings-Bass* and Third Parties’ (2006) 65 CLJ 499, 501.

dispositive powers ‘depend on the law of trusts for their very effect’<sup>884</sup> and can be vested independently of title to trust property. There is no clear reason, therefore, why equity should treat both species of power identically, and as has been demonstrated here, several compelling reasons *not* to do so in this case. Whilst this was not a matter confronting the Court of Appeal in *Pitt v Holt*, it is to be hoped that any future *Re Hastings-Bass* litigation should clarify that whilst the duty of care is of broad application, the duty of consideration peculiar to the *Re Hastings-Bass* rule should apply to the exercise of dispositive powers only.

### ***Types of power and power-holder***

The foregoing discussion has taken as its premise the exercise of a dispositive power by a trustee on whom the power has been conferred as such. This is the paradigm *Re Hastings-Bass* situation, seen in the great majority of the cases. But this raises two questions about the scope of the *Re Hastings-Bass* rule: first, whether it applies to powers often referred to as ‘personal’, that is, vested in a person, usually an individual, rather than an office-holder such as a trustee; secondly, whether it is possible to infer from the *Re Hastings-Bass* rule anything about its application to fiduciaries other than trustees. It is notable in this regard that *Pitt* itself was concerned with the actions of a receiver appointed under the Mental Health Act 1983, rather than a trustee.

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<sup>884</sup> R Nolan and M Conaglen, '*Hastings-Bass* and Third Parties' (2006) 65 CLJ 499, 501.

## PERSONAL AND FIDUCIARY POWERS

In *Mettoy Pension Trustees Ltd v Evans*<sup>885</sup> Warner J distinguished what he described as a ‘power given to a person to determine the destination of trust property without that person being under any obligation to exercise the power or to preserve it’<sup>886</sup> and a ‘power conferred on the trustees of the property or on any other person as a trustee of the power itself’.<sup>887</sup> This follows the contours drawn by Lord Wilberforce in *McPhail v Doulton*<sup>888</sup> and adopted in *Re Manisty’s Settlement*<sup>889</sup> and *Re Hay’s Settlement Trusts*<sup>890</sup> in determining the obligations of what may be called a ‘fiduciary power in the full sense’.<sup>891</sup> The holder of a fiduciary power is obliged to consider whether and how to exercise the power, in accordance with the purpose for which the power was conferred, and cannot release it.<sup>892</sup> The holder of a personal power, on the other hand, is entitled to release the power, and has no duty to consider exercising it.<sup>893</sup> He may only exercise the power within its terms, and may not commit a fraud

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<sup>885</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>886</sup> *ibid* 1613.

<sup>887</sup> *ibid* 1614.

<sup>888</sup> *McPhail v Doulton* [1971] AC 424 (HL) 449.

<sup>889</sup> *Re Manisty's Settlement* [1974] Ch 17 (Ch) 22.

<sup>890</sup> *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 208-10.

<sup>891</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1614 (Warner J), adopting the language used by Chitty J in *Re Somes* [1896] 1 Ch 250 (Ch) 255.

<sup>892</sup> *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch) 474; *McPhail v Doulton* [1971] AC 424 (HL) 449; *Re Manisty's Settlement* [1974] Ch 17 (Ch) 24; *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 210; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1614.

<sup>893</sup> See n 1075 and Law of Property Act 1925, s 155 (donee of power entitled to release it by deed).

on the power,<sup>894</sup> but is otherwise free from the control of the court.<sup>895</sup> None of the cases address the potential application of the *Re Hastings-Bass* rule to personal powers, but it is submitted that it cannot apply.

First, the account already given of the origins of the *Re Hastings-Bass* rule places it firmly in the duty of consideration detailed by Lord Wilberforce in *McPhail v Doulton*.<sup>896</sup> Once it is understood that the *Re Hastings-Bass* duty is rooted there, then it follows that where the power holder has no such duty to consider exercising the power, there can be no *Re Hastings-Bass* duty.

Secondly, the limitations on the exercise of the personal power are limitations conventionally seen as going to the scope of the power. That the power can only be exercised within its terms is obvious.<sup>897</sup> But it is also widely accepted<sup>898</sup> that the doctrine of fraud on a power goes to the scope of the power purportedly exercised.<sup>899</sup> This may be essential to understanding why prevailing authority treats the doctrine as rendering a purported exercise wholly void.<sup>900</sup> If the *Re Hastings-Bass* rule were treated as closely analogous to the doctrine of fraud on a power, that might justify

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<sup>894</sup> See *Re Crawshay (deceased) (No 2)* [1948] Ch 123 (CA); *Re Dick* [1953] Ch 343 (CA); *Re Brook's Settlement* [1968] 1 WLR 1661 (Ch).

<sup>895</sup> *Re Wright* [1920] 1 Ch 108 (Ch) 118; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1613.

<sup>896</sup> See text to nn 120, 422 and 562.

<sup>897</sup> GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [8.02].

<sup>898</sup> The author's view is that the links between fraud on a power and ultra vires are complex. For a full discussion, see chapter five, and particularly text to n 1063 and following.

<sup>899</sup> *Vatcher v Paull* [1915] AC 372 (PC) 378; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 297; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.02].

<sup>900</sup> *Re Marsden's Trusts* (1859) 4 Drew 594, 62 ER 228; *Cloutte v Storey* [1911] 1 Ch 18 (CA); *Vatcher v Paull* [1915] AC 372 (PC) 378.

likewise applying the *Re Hastings-Bass* rule to the exercise of personal powers. But this would be ultimately unsustainable.<sup>901</sup> Whereas fraud on a power is concerned with the purpose for which the power may be exercised, and so may be considered to relate to the scope of the power at least in so far as that it is accepted that a power is conferred in order to achieve particular purposes, the *Re Hastings-Bass* rule is concerned with the manner in which the power is exercised, and the process by which the power-holder comes to decide how to exercise it.<sup>902</sup> Whilst it would be possible to choose to understand the conferral of a power as impliedly subject to a limitation only to exercise the power once the power-holder has taken care adequately to inform himself of those matters which he ought to take into account, it could just as easily be said that it is subject to an implied limitation only to exercise the power with reasonable care; any duty relating to the manner of exercise could be made relevant to the scope of the power. But to treat this as coming about impliedly, simply from the conferral of the power, would be 'very artificial indeed'.<sup>903</sup> Consequently there is no reason to expect that the *Re Hastings-Bass* rule would be applied to a purely personal power, and no reason of principle why it should be.

## OTHER FIDUCIARIES

The converse question is whether the *Re Hastings-Bass* rule will apply to fiduciary office-holders other than trustees who exercise dispositive powers. The case law is both very limited, and somewhat mixed. In *Segesta Ltd v HMRC* a judge of the First

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<sup>901</sup> R Nolan and A Cloherty, 'Taxing Times for *Re Hastings-Bass*' (2010) 126 LQR 513, 514-15.

<sup>902</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 294, 306-09.

<sup>903</sup> R Nolan and A Cloherty, 'Taxing Times for *Re Hastings-Bass*' (2010) 126 LQR 513, 515.

Tier Tax Tribunal held that the *Re Hastings-Bass* rule was applicable only to ‘a trust where the discretion is given by the terms of the trust’.<sup>904</sup> The earlier decision of the High Court in *Hunter v Senate Support Services Ltd*<sup>905</sup> does not appear from the tribunal’s judgment to have been cited before it. In that case John Randall QC<sup>906</sup> applied the *Re Hastings-Bass* rule by analogy to company directors and decided that a decision taken by the directors was voidable because they had failed to take into account relevant matters.<sup>907</sup> In *In the Matter of the Ta-Ming Wang Trust*<sup>908</sup> the Grand Court of the Cayman Islands followed *Hunter* to hold that, in principle, the *Re Hastings-Bass* rule could be directly applied to directors.<sup>909</sup> *Pitt v Holt* has confirmed that the *Segesta* approach is unduly narrow, since the Court of Appeal treated the *Re Hastings-Bass* rule as applying to Mrs Pitt in her capacity as a receiver appointed under the Mental Health Act 1983,<sup>910</sup> although the force of the decision on this point is somewhat diminished by the fact that, having unsuccessfully argued at first

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<sup>904</sup> *Segesta Ltd v HMRC* [2010] UKFTT 235 (TC) [104] (Judge Berner).

<sup>905</sup> *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175.

<sup>906</sup> Sitting as a Deputy Judge of the High Court.

<sup>907</sup> *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175 [187]. It is notable that this case was decided before the enactment of the Companies Act 2006, which makes new provision in part 4 in relation to the validity of a company’s acts, and those of its directors.

<sup>908</sup> *In the Matter of the Ta-Ming Wang Trust* (Grand Court of the Cayman Islands, 12 April 2010).

<sup>909</sup> C Russell and R Reynolds, ‘Applicability of the *Hastings-Bass* Principle to the Payment of Dividends by a Trust Company into the Trust: *In the Matter of the Ta-Ming Wang Trust*, 12 April 2010 (unreported)’ (2010) 16 T & T 595.

<sup>910</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [147], [162].

instance that the *Re Hastings-Bass* rule did not apply to Mrs Pitt's position, HMRC did not renew this argument before the Court of Appeal.<sup>911</sup>

In light of the fiduciary language used in the *Re Hastings-Bass* case law generally<sup>912</sup> and in *Pitt v Holt* especially<sup>913</sup> it would be tempting to conclude that whenever a power is vested in a fiduciary, the *Re Hastings-Bass* rule should apply to regulate the proper exercise of that power. This would not, however, be the correct approach. It has already been argued here that the *Re Hastings-Bass* duty to consider relevant matters cannot properly be characterised as a fiduciary duty<sup>914</sup> but is rather a duty arising from the donee of the power holding the office of trustee, and the power being vested in the trustee in that capacity.<sup>915</sup> Trusteeship is almost universally treated as the paradigm fiduciary relationship<sup>916</sup> so it would be unsurprising to find this particular aspect of trusteeship exported to other fiduciaries, as to Mrs Pitt as receiver in *Pitt v Holt*. But as the duties of a trustee are not identical to those of a company director,<sup>917</sup> a solicitor or an agent, the question remains in each case

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<sup>911</sup> *ibid* [147].

<sup>912</sup> For example: *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1621; *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [16]; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [176]; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [97].

<sup>913</sup> See n 456.

<sup>914</sup> See text to n 477 and following.

<sup>915</sup> See text to n 546 and following.

<sup>916</sup> P Birks, 'Lionel Cohen Lecture: The Content of Fiduciary Obligation' (2000) 34 *Israel L Rev* 3, 8-9. See also M Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing 2010) 8; J Edelman, 'When do Fiduciary Duties Arise?' (2010) 126 *LQR* 302, 305ff.

<sup>917</sup> Company directors' duties are now statutory, but a breach of them has the same effect as breach of the corresponding common law rule or equitable principle: Companies Act 2006, ss 170, 178. Even where trustees and directors appear to have certain duties in common, such as the duty of care, it is not

whether the *Re Hastings-Bass* duty is a duty of the particular office-holder in question. Robert Englehart QC,<sup>918</sup> deciding *Pitt v Holt* at first instance,<sup>919</sup> was confronted with the argument for Mrs Pitt that the *Re Hastings-Bass* rule would apply ‘whenever there is a duty to take all relevant considerations into account’<sup>920</sup> or at least ‘to the exercise of discretionary power by a person in a fiduciary position’.<sup>921</sup> The Deputy Judge was concerned to decide the matter solely in relation to the facts before him, being that of a receiver under the Mental Health Act 1983, on the basis that ‘[t]he nature of different fiduciary relationships is very variable. Often a fiduciary will be required to follow the instructions of a principal. In such a case, it may be that the Hastings-Bass principle would not apply’.<sup>922</sup> Similarly Nolan and Cloherty have suggested that the rule’s application should at least be limited in relation to company directors,<sup>923</sup> presumably because it might be thought desirable for company directors to be able to make decisions speedily and to take risks,<sup>924</sup> in order best to exploit commercial opportunities, even where this is at the expense of the quality of the decision-making process.

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clear that there is a sound analogy between the different contexts: see WM Heath, 'The Director's "Fiduciary" Duty of Care and Skill: A Misnomer' (2007) 25 C&SLJ 370, 389-93.

<sup>918</sup> Sitting as a Deputy Judge of the Chancery Division of the High Court.

<sup>919</sup> *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] 1 WLR 1199.

<sup>920</sup> *ibid* [35].

<sup>921</sup> *ibid* [36].

<sup>922</sup> *ibid* [38].

<sup>923</sup> R Nolan and A Cloherty, 'Taxing Times for *Re Hastings-Bass*' (2010) 126 LQR 513, 514.

<sup>924</sup> See MW Lau, *The Economic Structure of Trusts* (OUP 2011) 97.

If it is accepted that there is some core of meaning which links fiduciary relationships, and that this core is to be located in acting in the interests of another, or loyalty to that other,<sup>925</sup> then it is certainly plausible that the duties arising from any fiduciary office could include a duty to consider relevant matters when exercising a power held by the office-holder, since such a duty furthers the interests of the principal by helping to ensure that the office-holder's decision-making is sound. But this can only be a starting point, since with each type of office, different considerations will apply to shape the scope of the relevant duties. So whilst it is possible to infer from *Pitt v Holt* and the version of the *Re Hastings-Bass* rule it endorses that the *Re Hastings-Bass* rule is not limited solely to powers exercised by trustees, and that other fiduciaries may also be subject to its demands, it is not possible to infer the offices and circumstances in which it will, and will not, apply. Rather that will remain to be established in relation to each type of fiduciary office separately, and with reference to the law's conception of the precise duties of such an office-holder, rather than to any over-arching statement of the scope of the *Re Hastings-Bass* rule.

## **Specific issues**

### ***Legal and other advisers***

Perhaps the most practically important aspect of *Pitt* is Lloyd LJ's treatment of reliance by trustees on professional advisers.<sup>926</sup> The status of decisions based on professional advice was previously very unclear. Warner J stated in *Mettoy* that 'The

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<sup>925</sup> See text to n 451.

<sup>926</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [119]-[125].

duty to take into account all material considerations is that of the trustees. The extent of that duty is not affected by the amount or quality of the professional advice they may seek or obtain'.<sup>927</sup> In *Smithson v Hamilton* Park J likewise accepted that under the then current formulation of the *Re Hastings-Bass* rule, a decision of trustees could be set aside 'not because the trustees should have worked out for themselves some technical issue on which they needed advice, but because the professional advice was itself wrong'.<sup>928</sup> Whilst no case before *Pitt* directly asserted the contrary, there were suggestions that this may be too rigid an approach: in *Abacus Trust Co (Isle of Man) Ltd v Barr* Lightman J treated the trustee as liable for a miscommunication by his agent on which the trustee had reasonably relied only because the trustee was, in Lightman J's view, vicariously liable for the agent's default;<sup>929</sup> in *Burrell v Burrell* Mann J similarly treated trustees as liable in respect of their solicitors' negligent advice only because the trustees had not sufficiently instructed them.<sup>930</sup> Once *Pitt* adopted the duty-oriented approach to the *Re Hastings-Bass* rule it became inevitable that Lightman J's underlying reasoning in *Barr* – that reliance by a trustee on a third party is not *per se* a breach of duty when the third party makes a mistake – would come to the fore, since once the rule is seen in terms of the reasonableness of the trustees' conduct, the taking of professional advice is of obvious relevance and

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<sup>927</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1626.

<sup>928</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [104].

<sup>929</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [25], [27].

<sup>930</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [23].

importance.<sup>931</sup> It is already well accepted in other aspects of trust law that trustees not only may take professional advice, but in many circumstances ought to do so.<sup>932</sup> So whilst *Pitt* maintains the distinction between advice and delegation or dictation – advisers may advise but the trustees must make their own decision<sup>933</sup> – it also accepts that a trustee who appreciates the need for professional advice in relation to a relevant matter acts reasonably in obtaining and acting upon such advice. Lloyd LJ stated that:

unless the process of taking and acting on the advice is itself open to challenge in some way, I do not see that the trustees can be said to be in breach of their duty if they proceed to address the exercise of their discretionary power on the basis of the advice given to them.<sup>934</sup>

In practical terms this is immensely important for trustees. Now that the reformulation of the rule has largely removed the possibility of collusive action by trustees and beneficiaries to eliminate the unwanted consequences of the trustees' actions, and the risk of hostile litigation against the trustees is correspondingly higher, this offers something of a safe haven: a trustee who can demonstrate that he has taken professional advice – usually at the beneficiaries' expense – and has acted on it, can be reasonably confident that he has not thereby committed a breach of duty. But two important issues remain unresolved. First, the extent to which a trustee can legitimately rely on professional advice, and therefore the scope of the protection

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<sup>931</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [124]. See also A Molloy, 'What Really is the Rule in *Hastings-Bass*?' (2009) 15 T & T 200, 206 citing *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78, 87.

<sup>932</sup> *Re Allsop* [1914] 1 Ch 1 (CA) 13; *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [119].

<sup>933</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [119]. See: PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 20-24; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [51.1]-[51.42]; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [10.58]-[10.63], ch 6.

<sup>934</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [124].

offered to trustees; secondly, whether a beneficiary who has suffered a loss caused by incorrect professional advice given to his trustees can recover from the adviser.

## LIABILITY OF TRUSTEES

In relation to the scope of the professional advice exception, a few ground rules can be established. First, the trustees must in fact seek appropriate advice. Seeking advice from a professional adviser on one matter may not protect the trustee in relation to other matters if the trustee ought to have appreciated the need for such further advice. This was essentially the difficulty in *Burrell v Burrell* where neither trustee had appreciated the need for legal advice in relation to fiscal matters.<sup>935</sup> This is qualified in *Pitt* such that trustees who ‘retain appropriate professional advisers, whose duty it is to either to give the necessary advice or to point out areas on which advice may be needed which should be sought from another adviser’<sup>936</sup> do not commit a breach where they fail to seek advice on a particular point, in relation to which their advisers ought to have alerted them. It may be that the distinction here is simply a question of what a trustee ought reasonably to do: a trustee will not lose the protection of the professional advice exception because they fail to identify some matter on which they need advice, where the identification of the matter is itself something which the trustee could not reasonably be expected to achieve without such advice. Whereas in a clear case, such as a trustee confronted by ambiguous investment powers who chooses to take advice solely and explicitly in relation to tax and not in relation to investment, there is no difficulty in identifying in the trustee’s failure to take advice a

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<sup>935</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 [23].

<sup>936</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [162].

breach of his own duty to the beneficiaries. It may well be, however, that a trustee who retains solicitors to advise generally on the administration of the trust may be able to avoid this pitfall relatively easily.

Secondly, it remains possible that in an unusual case it might be unreasonable for the trustee to follow the professional advice obtained. This has arisen in the case law concerned with section 61 of the Trustee Act 1925, in connection with whether a trustee can be said to have acted 'reasonably' for the purposes of that provision, and thereby to seek the court's excusal of his breach of duty.<sup>937</sup> In this context the courts pay lip service to the view that each case will turn on its own facts, and that acting on professional (usually legal) advice will not necessarily be reasonable in every case<sup>938</sup> but nevertheless invariably treat a trustee who acts on such advice as acting reasonably.<sup>939</sup> Extreme cases could be imagined: where the value of the estate and complexity of the dispute is such that legal advice of a particularly high quality, or the direction of the court, is required<sup>940</sup> such that reliance on the advice of a solicitor with no special expertise may not be reasonable; or where the trustees are aware that some relevant factual matter has only come to light since the advice was sought, or was otherwise not taken into account on the face of the advice given. In the case of a

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<sup>937</sup> Assuming that the trustee can also establish that he has acted honestly and ought fairly to be excused. In fact many of the cases are concerned solely with the question of reasonableness, the other criteria having caused fewer difficulties in this field: see *Re Turner's Settled Estates* (1884) 28 Ch D 205 (CA); *Perrins v Bellamy* [1899] 1 Ch 797 (CA) 801; *Davis v Hutchings* [1907] 1 Ch 356 (Ch); *Re Allsop* [1914] 1 Ch 1 (CA) 13; *Marsden v Regan* [1954] 1 WLR 423 (CA) 434-35. This may be because dishonest trustees are unlikely to seek s 61 relief, and 'ought fairly to be excused' has been treated as essentially a matter of judicial discretion: *Marsden v Regan* [1954] 1 WLR 423 (CA) 435.

<sup>938</sup> *Marsden v Regan* [1954] 1 WLR 423 (CA) 434-35.

<sup>939</sup> *Perrins v Bellamy* [1899] 1 Ch 797 (CA) 801; *Marsden v Regan* [1954] 1 WLR 423 (CA) 435.

<sup>940</sup> *Re Allsop* [1914] 1 Ch 1 (CA) 13.

professional acting as a trustee in that capacity, and therefore expected to meet the standards of their profession in the conduct of the trusteeship,<sup>941</sup> it would be reasonable to expect a higher degree of discernment in using advice relating to the trustee's own field of expertise. So it may be unreasonable for a solicitor trustee to follow without question clearly wrong legal advice,<sup>942</sup> where a competent solicitor would have appreciated that the advice was incorrect, even though it may be entirely reasonable for a lay trustee to follow such advice.

Whilst this approach may appear very generous to trustees in providing them with broad protection from liability, it accords with the clear policy of the law of trusts in relation to the use by trustees of professional advisers. Gardner has pointed out that taking such advice protects both trustees and beneficiaries: the advice will usually be good, and will help the trustees better to perform their duties to their beneficiaries; if it turns out to be bad, the trustees will often be protected because they will not have breached a duty of care, or they will have the protection of an exemption clause, or in the last resort they can rely on the advice to seek excusal under section 61.<sup>943</sup> This helpfully aligns the private interest of the trustees in avoiding liability with the interests of the beneficiaries in avoiding breaches of duty causing loss to them, and is reflected in the case law on third party liability. For example, an adviser or agent acting for trustees does not thereby become a trustee *de*

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<sup>941</sup> Trustee Act 2000, s 1(1)(b).

<sup>942</sup> Lloyd LJ refers to the permissibility of reliance on 'apparently competent' advisers: *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [125]. The question of apparent competence must be judged by reference to any special skills of the trustee who is seeking to ascertain it.

<sup>943</sup> S Gardner, *An Introduction to the Law of Trusts* (Clarendon Law Series, 3rd edn, OUP 2011) 193.

*son tort* even though he does ‘acts characteristic of the office of trustee’<sup>944</sup> and indeed is likely to be engaged precisely to do such acts, because he acts as agent not as trustee;<sup>945</sup> liability is consequently incurred only when the agent strays outside the scope of the agency.<sup>946</sup> Defining the scope of the liability by reference to the scope of the adviser or agent’s engagement means that such an adviser need never fear liability on this basis: he can avoid it simply by remaining within the terms on which he is retained. Similar concern for advisers is seen in relation to dishonest assistance. When in *Royal Brunei Airlines Sdn Bhd v Tan* Lord Nicholls considered the appropriate fault requirement for liability for assisting in a breach of trust, he was particularly concerned with the position of professional advisers and agents<sup>947</sup> and the consequences of imposing on them duties of care owed to the beneficiaries, rather than the trustees who engaged them.<sup>948</sup> Implicit in this is the risk that professional advice might become less readily available if advisers were at risk of liability to beneficiaries, outside the direct, usually contractual,<sup>949</sup> relationship between adviser and trustee. In relation to knowing receipt the same policy is evidenced by the established exception for ministerial receipt, so that an agent who receives trust

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<sup>944</sup> *Mara v Browne* [1896] 1 Ch 199 (CA) 209.

<sup>945</sup> *ibid* 207.

<sup>946</sup> *Williams-Ashman v Price and Williams* [1942] Ch 219 (Ch) 228.

<sup>947</sup> *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) 391.

<sup>948</sup> *ibid* 392.

<sup>949</sup> The adviser’s liability to the trustees therefore being susceptible to exclusion or limitation by express term.

property for his principal and pays it over in accordance with his duty does not incur liability.<sup>950</sup>

It consequently appears that the generous approach taken in *Pitt* is at least in line with the approach of trust law generally to the use of professional advisers; that in general, trustees should be encouraged to take such advice, and the law should do nothing to deter advisers from providing their services to trustees.<sup>951</sup> Seen in this light there is no reason to read the professional advice exception narrowly or to apply its limits stringently, whether in relation to the terms in which the advice is sought, the choice of adviser or the reasonableness of relying on the advice given. Offering trustees this safe haven should increase the quality of trustee decision-making and so ultimately be advantageous to beneficiaries too.

#### LIABILITY OF ADVISERS

The second major issue arising from the *Pitt* approach to professional advice is the extent to which beneficiaries can recover losses caused by defective advice. Where the trustees are liable for their own breach of duty, the beneficiaries have a straightforward remedy.<sup>952</sup> But when the trustees have reasonably relied on incorrect professional advice, the beneficiaries are faced with some difficulty: the trustees have committed no breach of duty, and the professional adviser usually owes no duty to the beneficiaries. Thus whilst it was often suggested in the pre-*Pitt* case law that a

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<sup>950</sup> *Agip (Africa) Ltd v Jackson* [1990] Ch 265 (Ch) 291-92.

<sup>951</sup> This appears to be premised on the view, for which there does not appear to be empirical evidence, that the gain to beneficiaries generally from having their trustees seek advice when appropriate is greater than the loss to beneficiaries in cases where the advice is bad and the beneficiaries have ready access to a remedy.

<sup>952</sup> See text to n 674 and following.

more appropriate remedy to deal with typical *Re Hastings-Bass* situations would be a personal claim against a negligent adviser<sup>953</sup> it has since been suggested that such a claim would be ‘by no means straightforward’<sup>954</sup> or even that no such claim would succeed.<sup>955</sup>

It is submitted, however, that it is possible to overstate the difficulties here, and that doing so is in part a consequence of conflating two distinct types of claim. First, there can be a claim by the trustees for loss caused to the trust fund, or, if necessary, by the beneficiaries standing in the stead of the trustees to bring the same claim. This claim is well-established, and suggestions that it might be barred<sup>956</sup> where the trustee is not personally liable are misguided. Secondly, there can be a claim by a beneficiary for a loss suffered personally and not reflected in any diminution of the trust fund. Such a claim, problematic recent cases notwithstanding,<sup>957</sup> is unlikely to succeed against an adviser, since it depends on finding breach of a directly owed duty. It is submitted, therefore, that rather than there being any general difficulty in claims against advisers, it is possible to see the first type of claim as straightforward, and the latter as essentially impossible.

In relation to the first type of claim, the suggestion that beneficiaries may not be able to recover from advisers in respect of losses to the trust fund if they cannot

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<sup>953</sup> Eg *Re Green GLG Trust* [2002] JLR 571 (Royal Court of Jersey) [29].

<sup>954</sup> P James and S Pickford, 'Putting Right a Wrong Turn?' (2011) 161 NLJ 592, 593.

<sup>955</sup> E Hewitt, 'The End of *Re Hastings-Bass*' (2011) 17 T & T 704, 712.

<sup>956</sup> *ibid* 710-11.

<sup>957</sup> Confusion here is principally the result of the decision of the Court of Appeal in *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86. See text to n 980 and following.

identify some loss suffered by the trustee personally<sup>958</sup> misunderstands the nature of the trust institution. In the pre-1875 courts, the answer would simply be that as far as a common law court is concerned, the trustee is owner of the entire trust estate, and that any loss caused to it is a loss to the trustee, recoverable by him in any ordinary claim in tort or contract. Since the court cannot 'see' the trust,<sup>959</sup> it cannot accede to any claim that the loss is in truth the beneficiaries'.<sup>960</sup> That the modern court can 'see' the trust does not deprive the trustee of such remedies. But now rather than relying on the supposed invisibility of the trust to the common law, it is preferable to see the substance of the institution: that the trust property is vested in the trustee precisely so that he can manage it for the beneficiaries, which necessarily involves protection against external threats. It would be strange indeed if despite the courts' willingness to stretch private law principle to avoid remedial lacunae, as in *White v Jones*,<sup>961</sup> this straightforward and principled understanding of the trust were to be rejected in favour of one which denied a remedy both to trustees (who, on that view, would suffer no loss) and beneficiaries (who are owed no duty). Indeed it would surely call into question the nature of the duty owed by the adviser to the trustee, if such duty could by its nature never be actionable. Whilst the case law is peculiarly inexplicit on this point, there are strong indications that this view meets with widespread acceptance. In relation to contract law claims, the right of a trustee to recover for the loss suffered by

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<sup>958</sup> E Hewitt, 'The End of *Re Hastings-Bass*' (2011) 17 T & T 704, 711.

<sup>959</sup> Though for the suggestion that the common law courts did take account of equitable interest, see: L Smith, 'Simplifying claims to traceable proceeds' (2009) 125 LQR 338, 346.

<sup>960</sup> *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 (CA) 691; *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), 523.

<sup>961</sup> *White v Jones* [1995] 2 AC 207 (HL) 259-60.

his beneficiaries is a well-established ‘exception’ to the usual rule that a party can recover only for his own loss,<sup>962</sup> at least where both parties are aware that the trustee is contracting *qua* trustee.<sup>963</sup> Where the trustee institutes a claim against a third party, the beneficiaries will be bound by the decision of the court, even though not parties to the proceedings.<sup>964</sup> The position in tort is similar. The Court of Appeal in *Shell UK Ltd v Total UK Ltd*<sup>965</sup> approved<sup>966</sup> Neuberger J’s suggestion in *Chappell v Somers & Blake*<sup>967</sup> that a trustee would be entitled to sue a solicitor for negligent advice in relation to the distribution of the trust fund, even though it would be the beneficiaries on whom the loss would ultimately fall.<sup>968</sup> Similarly in *Malkins Nominees Ltd v Societe Financiere Mirelis SA*<sup>969</sup> Laddie J rejected the suggestions that the right of the trustee to recover on behalf of his beneficiaries was limited to claims in contract, and that tort claims were permissible when brought by executors but not by trustees.<sup>970</sup> Where the trust fund suffers loss as a result of negligent professional advice, it is

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<sup>962</sup> *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 (HL), 522-23 (Lord Clyde), 581 (Lord Millett); *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86 [138]; E Peel, *Treitel on the Law of Contract* (12th edn, Sweet & Maxwell 2007) [14-023]-[14-024]; H Beale (ed) *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) [18-049], [18-052]; P Turner, 'Consequential Economic Loss and the Trust Beneficiary' (2010) 69 CLJ 445, 446.

<sup>963</sup> *Rolls-Royce Power Engineering Plc v Ricardo Consulting Engineers Ltd* [2003] EWHC 2871 (TCC), [2004] 2 All ER (Comm) 129 [116]. See also: H Beale (ed) *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) [18-052] n 300; E Peel, *Treitel on the Law of Contract* (12th edn, Sweet & Maxwell 2007) [14-024] n 136.

<sup>964</sup> CPR 19.7A. See: *Cooper v Vesey* (1881-82) LR 20 Ch D 611 (CA) 635-36.

<sup>965</sup> *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86.

<sup>966</sup> *ibid* [139]-[142].

<sup>967</sup> *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch), [2004] Ch 19.

<sup>968</sup> *ibid* [27]-[28].

<sup>969</sup> *Malkins Nominees Ltd v Societe Financiere Mirelis SA* [2004] EWHC 2631 (Ch).

<sup>970</sup> *ibid* [58]-[59].

therefore open to the trustee to seek to recover the loss from the adviser. If the trustee refuses, the beneficiary may take proceedings to compel him to do so, and, in an exceptional case, may bring a derivative action in the trustee's name, joining the trustee as a defendant.<sup>971</sup>

In sharp contrast, neither trustee nor beneficiary can recover for losses suffered personally by the beneficiary as a result of the adviser's breach of duty to the trustee, where that loss is not reflected in any loss to the trust estate. Where the relationship is contractual, the beneficiary is simply not a party, and so has no cause of action,<sup>972</sup> unless he can bring himself within the limited scope of the Contracts (Rights of Third Parties) Act 1999. In relation to tort, the analysis depends upon the species of tort in issue. The orthodox understanding in professional negligence claims is that the adviser owes no duty of care to the trust beneficiaries<sup>973</sup> and assumes responsibility for his advice only to the trustee who has engaged him. Where the tort is conversion rather than negligence, it is equally clear that, except where the beneficiary has his own possessory title, only the trustee can bring proceedings.<sup>974</sup>

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<sup>971</sup> *Hayim v Citibank NA* [1987] AC 730 (PC) 747; *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 AC 240 [62]; KFK Low, 'Equitable Title and Economic Loss' (2010) 126 LQR 507, 507; E Hargreaves, 'The Nature of Beneficiaries' Rights Under Trusts' (2011) 25 TLI 163, 177. This mechanism is known as the *Vandepitte* procedure, after *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 (PC). See also: *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 2 All ER (Comm) 445 [45].

<sup>972</sup> *Harmer v Armstrong* [1934] Ch 65 (CA) 95. See E Hargreaves, 'The Nature of Beneficiaries' Rights Under Trusts' (2011) 25 TLI 163, 170.

<sup>973</sup> *Roberts v Gill & Co* [2010] UKSC 22, [2011] 1 AC 240 [21]. See E Hargreaves, 'The Nature of Beneficiaries' Rights Under Trusts' (2011) 25 TLI 163, 167.

<sup>974</sup> *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 (CA) 691.

Two reported cases have taken the heterodox view that a beneficiary can recover in tort for his own loss. The first, the decision of Ferris J in *Yudt v Leonard Ross & Craig*<sup>975</sup> is premised on finding that the solicitor advising the trustees owed a duty of care to the trust beneficiaries directly, for breach of which they could bring their own claims. Whilst there is no absolute bar to such a direct duty existing in unusual circumstances, Ferris J's finding of such a duty on the basis only of the beneficiaries' proprietary interests and the fact that the loss would 'ultimately fall' on them<sup>976</sup> must be wrong in principle. It is inconsistent with the orthodox understanding of the role of trustee and beneficiary<sup>977</sup> and imposes a burden on professional advisers which may be unduly onerous – as where there are many beneficiaries – and which may be impossible satisfactorily to discharge – as where such duty to an individual beneficiary may conflict with the adviser's duty to the trustees, or to other beneficiaries. This case does not appear to have been cited to the court in *Chappell v Somers & Blake*<sup>978</sup> or *Malkins Nominees Ltd v Societe Financiere Mirelis SA*<sup>979</sup> and is certainly inconsistent with the approach there espoused.

The decision of the Court of Appeal in *Shell UK Ltd v Total UK Ltd*<sup>980</sup> represents a more direct challenge to orthodoxy in that the court there permitted a beneficiary to recover for its own pure economic loss flowing from damage to the

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<sup>975</sup> *Yudt v Leonard Ross & Craig* [1998] 1 ITELR 531 (Ch).

<sup>976</sup> *ibid* 576.

<sup>977</sup> See text to n 958 and following.

<sup>978</sup> *Chappell v Somers & Blake* [2003] EWHC 1644 (Ch), [2004] Ch 19.

<sup>979</sup> *Malkins Nominees Ltd v Societe Financiere Mirelis SA* [2004] EWHC 2631 (Ch).

<sup>980</sup> *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86.

trust property.<sup>981</sup> This appears to permit a wholesale circumvention of the trust structure<sup>982</sup> and has been heavily criticised in relation to its understanding of the trust concept.<sup>983</sup> It is not clear that the Court of Appeal intended to go beyond admitting of an exception to the general rule barring recovery of purely economic losses in negligence claims, except where consequent on property damage, so the scope of any new rule is wholly uncertain. From the perspective of a *Re Hastings-Bass* claim it means only that for the time being there may be a possible route to arguing that a beneficiary can recover in tort against an adviser for his own personal loss.

The reformulated *Re Hastings-Bass* rule does not therefore create any novel difficulty in connection with the relationship between beneficiaries and professional advisers. Where the adviser has caused an actionable loss, it will usually be a loss to the trust fund, in respect of which the trustee may bring proceedings, holding the proceeds of such a claim for the beneficiaries. This would include cases of tax liability incurred which the trustees must meet from the trust estate. The second type of loss, to a beneficiary personally but not to the trust estate, is likely to arise only rarely. To the limited extent that the irrecoverability of this loss<sup>984</sup> might cause hardship to some beneficiaries, it can properly be seen as justified by and as a necessary corollary of the policy already discussed of encouraging trustees to make

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<sup>981</sup> *ibid* [142].

<sup>982</sup> See KFK Low, 'Equitable Title and Economic Loss' (2010) 126 LQR 507, 512.

<sup>983</sup> N Macklam, '*Colour Quest Ltd v Total Downstream UK Plc*: The Nature of a Beneficiary's Interest Under a Trust' [2010] Conv 265, 267-69; A Rushworth and A Scott, 'Total Chaos?' [2010] LMCLQ 536, 541-42; P Turner, 'Consequential Economic Loss and the Trust Beneficiary' (2010) 69 CLJ 445; E Hargreaves, 'The Nature of Beneficiaries' Rights Under Trusts' (2011) 25 TLI 163, 173-81; T Cutts, 'The Nature of 'Equitable Property': A Functional Analysis' (2012) 6 J Eq 44, 45-47.

<sup>984</sup> Subject to *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86.

full use of professional advice.<sup>985</sup> In any case, the limitations on beneficiaries' actions against third parties are of general application, not limited to *Re Hastings-Bass* claims. Such limitations could be revisited – and *Shell UK Ltd v Total UK Ltd*<sup>986</sup> may be seen in such a light – but their existence does not cast doubt on the principled reformulation of the *Re Hastings-Bass* rule. Whatever disadvantages confront the beneficiaries in terms of recovering their loss arise from the conventional understanding of the trust structure, not from the *Re Hastings-Bass* rule. If such disadvantages were considered unacceptable, the appropriate course would be to adopt and extend the course charted in *Yudt v Leonard Ross & Craig*<sup>987</sup> and *Shell UK Ltd v Total UK Ltd* rather than to resist the principled reformulation of the *Re Hastings-Bass* rule.

### ***Tax***

As far as taxation issues are concerned, the central message from *Pitt v Holt* is that they have no special status: a *Re Hastings-Bass* dispute involving the Revenue is to be treated in the same way as any other. In principle this is surely unremarkable, but it is noteworthy for two reasons: first, because much of the most trenchant criticism of the *Re Hastings-Bass* rule before *Pitt v Holt* was directed at its implications for trusts taxation, and secondly, because much recent scholarship has emphasised the

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<sup>985</sup> See text to n 943 and following and text to n 977 and following.

<sup>986</sup> *Shell UK Ltd v Total UK Ltd* [2010] EWCA Civ 180, [2011] QB 86.

<sup>987</sup> *Yudt v Leonard Ross & Craig* [1998] 1 ITEL 531 (Ch).

extent to which tax does raise issues which cannot be seen in pure private law terms.<sup>988</sup>

As to the former, it is clear that fiscal considerations will be treated as relevant matters for a trustee to take into account, in accordance with established practice,<sup>989</sup> but that this confers no effective immunity from taxation. Before *Pitt* the possibility existed of trustees seeking to carry out aggressive tax avoidance on the basis that either the avoidance scheme would succeed, or if it failed, they could rely on the *Re Hastings-Bass* rule to treat the scheme as void *ab initio* – because they would never have carried out the scheme had they appreciated that it would fail. Beneficiaries could consequently be seen as having a preferential status in relation to taxation, not open to taxpayers outside the trust context.<sup>990</sup> Such an approach is now impossible, since it is inevitable that a trustee who has sufficiently considered the fiscal implications of a particular transaction, whether personally or by means of professional advice, such that he enters into it with a view to tax avoidance, would be treated as having taken those fiscal matters into account in making his decision. Accordingly there would be no breach of duty, and no possibility of avoidance.

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<sup>988</sup> See R Williams, *Unjust Enrichment and Public Law* (Hart Publishing 2010) 36-39. See also: J Alder, 'Restitution in Public Law: Bearing the Cost of Unlawful State Action' (2002) 22 LS 165; M McInnes, 'Restitution for Ultra Vires Taxes' (2007) 123 LQR 365; JD McCamus, 'Restitutionary Liability of Public Authorities in Canada' in CEF Rickett and R Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing 2008); C Mitchell and P Oliver, 'Unjust Enrichment and the Idea of Public Law' in R Chambers, C Mitchell and JE Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (OUP 2009).

<sup>989</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [115]. See also *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [85]-[86].

<sup>990</sup> A Molloy, '*Hastings-Bass*: The True and the Spurious' (2008) 14 T & T 26, 30.

As far as the ‘otherness’ of tax is concerned, these difficulties simply do not arise in the *Re Hastings-Bass* context. Whilst certain aspects of the recovery of overpaid tax do generate significant complexity and require an appreciation of the limits and interaction of private and public law<sup>991</sup> the *Re Hastings-Bass* issue is an altogether simpler one. Where the relevance of tax is that it has been paid on a transaction which is voidable on the *Re Hastings-Bass* basis, the question of the trustees’ (or beneficiaries’) entitlement to repayment from the Revenue on avoidance of the relevant transaction is a matter of statute. The transaction was valid when taxed, so no question of mistake<sup>992</sup> or improper levy<sup>993</sup> arises, merely the commonplace of how to undo the consequences of an avoided transaction. In this regard the law offers no special privilege to the Revenue, which stands in relation to such a transaction in essentially the same position as any private party.<sup>994</sup> In relation to inheritance tax the avoidance question is squarely addressed by statute, and provision is made for repayment of such sums as would not have been due had the transaction been void *ab initio*.<sup>995</sup> No similar provision is made in relation to capital

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<sup>991</sup> For example, in *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 (HL) the House of Lords accepted the possibility of concurrent unjust enrichment claims founded on mistake and on the principle in *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL), reversing the Court of Appeal which had treated the availability of the *Woolwich* claim as excluding any mistake claim. See also: R Williams, *Unjust Enrichment and Public Law* (Hart Publishing 2010) ch 2.

<sup>992</sup> Such as in *Deutsche Morgan Grenfell Group plc v IRC* [2007] 1 AC 558 (HL).

<sup>993</sup> Pursuant to *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL).

<sup>994</sup> In the analogous context of rectification of a document such that tax would not be payable, see: *Re Slocock's Will Trusts* [1979] 1 All ER 358 (Ch) 363. But see also: R Nolan and A Cloherty, 'Taxing Times for *Re Hastings-Bass*' (2010) 126 LQR 513, 516.

<sup>995</sup> Inheritance Tax Act 1984, s 150.

gains or income tax,<sup>996</sup> although in *Pitt* the Revenue was prepared to accept (without conceding) that the same treatment would in any case apply in relation to capital gains tax,<sup>997</sup> albeit that in relation to the latter two taxes, the right to recover from the revenue would be subject to the repayment provisions of the Taxes Management Act 1970.<sup>998</sup>

### ***Pension trusts***

Similar issues arise in connection with pension trusts, which is to say that it might at first be thought that they could be treated differently from other species of trust as far as the *Re Hastings-Bass* rule is concerned. It is widely accepted that although most pension arrangements are constituted through the mechanism of a trust,<sup>999</sup> they have characteristics<sup>1000</sup> which have led to the description of pension trusts as a ‘drastically different species’<sup>1001</sup> whose trustees require a ‘different mindset’.<sup>1002</sup> However, whilst there has been some suggestion that pension trusts ought to be treated entirely

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<sup>996</sup> See text to n 687 and following.

<sup>997</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [91].

<sup>998</sup> Taxes Management Act 1970, s 33 and sch 1AB.

<sup>999</sup> Although they need not be: *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [4]; N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51, 60.

<sup>1000</sup> *Wilson v Law Debenture Trust Corp plc* [1995] 2 All ER 337 (Ch) 347; *Stevens v Bell* [2002] EWCA Civ 672, [2002] OPLR 207 [26], cited with approval at *Re IMG Pension Plan* [2009] EWHC 2785 (Ch), [2010] Pens LR 23 [110].

<sup>1001</sup> DJ Hayton, 'Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts' [2005] Conv 229, 245.

<sup>1002</sup> *ibid* 229.

distinctly from ‘traditional’ trusts,<sup>1003</sup> the law remains that pension trusts are treated primarily as simply a particular use of the underlying trust.<sup>1004</sup> The key difference is that most pension trust beneficiaries are not volunteers, having either made direct financial contributions to the fund, or having received such contributions made by their employer as a form of deferred remuneration pursuant to a contract of employment for work done by the employee.<sup>1005</sup> Another is the extent of statutory regulation,<sup>1006</sup> including rules directly affecting the conduct of trustees and its consequences such as the prohibition on the exclusion of trustee liability for negligence in investing.<sup>1007</sup>

These differences have led to the suggestion that the *Re Hastings-Bass* rule might apply differently to pension trusts.<sup>1008</sup> In particular, it has been argued that in this context a beneficiary ought to be able to invoke the rule on the strength of evidence that the trustees ‘might’ have acted differently, rather than requiring proof

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<sup>1003</sup> *ibid* 236, where Hayton relies on the distinction drawn by Lord Browne-Wilkinson between ‘basic principles of trust law and those specialist rules developed in relation to traditional trusts’: *Target Holdings Ltd v Redfern* [1996] AC 421 (HL) 435. See also: G Moffat, ‘Pension Funds: A Fragmentation of Trust Law’ (1993) 56 MLR 471; HW Tang, ‘Rationalising *Re Hastings-Bass*: A Duty to Act on Proper Bases’ (2007) 21 TLI 62, 75; M Conaglen, ‘Explaining *Target Holdings v Redfern*’ (2010) 4 J Eq 288, 292.

<sup>1004</sup> *Cowan v Scargill* [1985] Ch 270 (Ch) 292; *Wilson v Law Debenture Trust Corp plc* [1995] 2 All ER 337 (Ch) 342.

<sup>1005</sup> *Kerr v British Leyland Staff Trustees Ltd* [2001] WTLR 1071 (CA) 1079; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1610; *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) [73]-[76]; *Stevens v Bell* [2002] EWCA Civ 672, [2002] OPLR 207 [27].

<sup>1006</sup> Principally found in: Pension Schemes Act 1993; Pensions Act 1995; Pensions Act 2004. See also: A Oakley, *Parker and Mellows: The Modern Law of Trusts* (9th edn, Sweet & Maxwell 2008) 570-71; S Gardner, *An Introduction to the Law of Trusts* (Clarendon Law Series, 3rd edn, OUP 2011) 208.

<sup>1007</sup> Pensions Act 1995, s 33.

<sup>1008</sup> In *Pitt Lloyd LJ* notes this possibility, without expressing any definite view on its desirability: *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [114].

that they ‘would’ have done so, had they appropriately considered or excluded some relevant or irrelevant matter.<sup>1009</sup> However, the better view is that the reformulated *Re Hastings-Bass* rule applies in the ordinary way to pension trusts, without any special alterations. It has been argued here that the ‘might’ approach is the better one in all cases<sup>1010</sup> and on this view that particular distinction falls away. But the wider point is that many of the *Re Hastings-Bass* rule cases,<sup>1011</sup> and some of those dealing with closely analogous issues,<sup>1012</sup> are pension trust cases, so that the rule has been developed with pension trusts precisely in mind. Furthermore, whilst pension trust beneficiaries might be due more solicitous treatment since they are not volunteers, it would be peculiar if the question of whether monetary or other consideration was given affected the trustees’ duty to consider the proper exercise of their powers.<sup>1013</sup> In any case, such privileged status extends only to benefits properly conferred by the terms of the scheme, since these alone are the benefits for which the beneficiaries have contracted, and does not confer any special entitlement in respect of benefits improperly awarded, where these can be set aside pursuant to the *Re Hastings-Bass*

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<sup>1009</sup> *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), [2006] All ER (D) 91 [72]; DJ Hayton, ‘Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts’ [2005] Conv 229, 238-39; HW Tang, ‘Rationalising *Re Hastings-Bass*: A Duty to Act on Proper Bases’ (2007) 21 TLI 62, 76. See also DJ Hayton, ‘A Review of Current Trust Law Issues’ (2008) 22 TLI 81, 86-87.

<sup>1010</sup> See text to n 608 and following.

<sup>1011</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch); *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch); *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57; *Betafence Ltd v Veys* [2006] EWHC 999 (Ch), [2006] All ER (D) 91; *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453.

<sup>1012</sup> *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27 (CA); *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).

<sup>1013</sup> GW Thomas, ‘Challenging the Exercise of a Trustee’s Discretion’ (2005) 12 JTCP 139, 148-50.

rule.<sup>1014</sup> There is consequently nothing objectionable in allowing the rule to operate to invalidate pension trustees' decisions in favour of beneficiaries, or particular groups of them. It could be said the pension beneficiaries' non-volunteer status gives them a greater claim to the protection of the *Re Hastings-Bass* rule than volunteer beneficiaries of traditional trusts. But since the rule does extend to the protection of such volunteer beneficiaries, the issue of differentiating pension trusts from others on this basis simply does not arise.

### ***Partial invalidity***

A final difficulty raised by the *Re Hastings-Bass* case law, though not in issue in *Pitt v Holt*, is the question of whether the *Re Hastings-Bass* rule can be used to avoid part of the result of exercising a power, whilst leaving part intact. Lloyd LJ mentioned the problem, but explicitly left it open.<sup>1015</sup> It is submitted that in general, partial avoidance will be inappropriate, and that the cases in which it may be possible will be cases where in effect there is more than one purported exercise of the power, and not every such exercise is affected by breach of the *Re Hastings-Bass* rule.

The starting point must be that the breach of the reformulated *Re Hastings-Bass* rule consists in a failure to comply with standards of proper decision-making in connection with the exercise of a power.<sup>1016</sup> The rule is not concerned with the results of exercising the power, except in so far as they relate to showing that the trustees

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<sup>1014</sup> *AMP (UK) Plc v Barker* [2001] WTLR 1237 (Ch) [77], followed by *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57 [147]-[148].

<sup>1015</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [72].

<sup>1016</sup> See text to n 416 and following.

might have acted differently had they acted properly in the decision-making process.<sup>1017</sup> It follows that since the defect is in the decision whether or how to exercise the power at all, that all of the results of that exercise are tainted by the trustees' breach of duty. It should not therefore be open to the court to treat the power as having been exercised in a way different to what was actually done,<sup>1018</sup> just as it is not open to the court to use the rule to treat an unexercised power as exercised.<sup>1019</sup> To do so would be to risk creating new difficulties<sup>1020</sup> as in *Smithson v Hamilton*<sup>1021</sup> where Sir Andrew Park rejected the possibility of avoiding part of a pension scheme deed, which would have resulted in a significant and unintended lacuna in the scheme rules,<sup>1022</sup> and condemned the attempt to use the *Re Hastings-Bass* rule to obtain 'rectification by the back door'.<sup>1023</sup>

The difficulty that this view must surmount is that certain of the *Re Hastings-Bass* cases appear to take the opposite line. In *Mettoy Pension Trustees Ltd v*

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<sup>1017</sup> See text to n 608 and following.

<sup>1018</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453; C Groves and D Goodman, 'Need Trustees' Mistakes Stand? The Application of "the Rule in *Hastings-Bass*"' [2002] PCB 111, 116. The principal commentators are unanimous in the view that where the purported exercise of a power is invalid (eg because perpetuous), that power cannot be treated as having been exercised in some other way which would have been valid: EB Sugden, *A Practical Treatise of Powers* (8th edn, 1861) 505; G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 340; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [5.41].

<sup>1019</sup> *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523 [63]. See also N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51 [76].

<sup>1020</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [71].

<sup>1021</sup> *ibid.*

<sup>1022</sup> *ibid* [72].

<sup>1023</sup> *ibid* [61].

*Evans*<sup>1024</sup> Warner J expressly rejected the submission that the *Re Hastings-Bass* rule has an ‘all or nothing’ effect<sup>1025</sup> holding that where the trustees, had they taken their decision in accordance with the *Re Hastings-Bass* rule, would have acted differently in part only, the court could declare void only that part.<sup>1026</sup> This analysis is simply wrong, and is based upon a misuse of the ‘would have acted differently’ proviso then understood to limit the effect of the rule.<sup>1027</sup> The purpose of the proviso has been explored here at some length.<sup>1028</sup> What is absolutely clear is that it restricts the scope of the rule, limiting it to cases where the defective decision-making has made some difference to the outcome. To treat the proviso as extending the rule into cases of partial as well as total invalidity is to misunderstand entirely its purpose. On this point Warner J’s dicta are irreconcilably opposed to Sir Andrew Park’s in *Smithson v Hamilton*;<sup>1029</sup> as Stallworthy has noted in respect of the latter case: ‘what the Court could not do under the guise of granting *Hastings-Bass* relief was to uphold the Definitive Deed in the form in which the Trustees *would have* executed it.’<sup>1030</sup> For the reasons already given, Sir Andrew Park’s view is preferable.

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<sup>1024</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>1025</sup> *ibid* 1624.

<sup>1026</sup> *ibid* 1624-25.

<sup>1027</sup> See text to n 616 and following.

<sup>1028</sup> See text to n 632 and following.

<sup>1029</sup> *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [67]-[80].

<sup>1030</sup> N Stallworthy, ‘Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*’ (2009) 23 TLI 51, 76.

More apparently problematic is *Burrell v Burrell*<sup>1031</sup> since in that case Mann J applied the *Re Hastings-Bass* rule to set aside the exercise of a power of appointment in relation to certain shares which had been appointed, and not in respect of certain other shares appointed under the same exercise.<sup>1032</sup> In doing so, Mann J relied on the judgment of Neuberger J in *BESTrustees v Stuart*.<sup>1033</sup> This was not a *Re Hastings-Bass* case, but concerned the exercise of a power to amend the rules of a pension scheme. The power had been purportedly exercised to implement a retrospective amendment, which the court held was outside the proper scope of the power.<sup>1034</sup> The court held that such an ‘excessive execution’ could be ‘good in part and bad in part’<sup>1035</sup> and that accordingly where a conceptual, rather than simply linguistic, distinction could be drawn between the two aspects of the exercise of the power – here the retrospective and prospective effects – it would be possible to treat as void only the excessive aspect.<sup>1036</sup>

It is not suggested that either *Burrell* or *BESTrustees* is wrong on its own facts. But it must be appreciated that neither is quite the usual *Re Hastings-Bass* situation. In *BESTrustees* there was no difficulty with the decision-making process; the problem was simply that what was done was, in part, outside the scope of the

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<sup>1031</sup> *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569.

<sup>1032</sup> *ibid* [25].

<sup>1033</sup> *BESTrustees v Stuart* [2001] OPLR 341 (Ch).

<sup>1034</sup> *ibid* 350.

<sup>1035</sup> GW Thomas, *Thomas on Powers* (Property and Conveyancing Library, 1st edn, Sweet & Maxwell 1998) [8-02], quoted at: *BESTrustees v Stuart* [2001] OPLR 341 (Ch) 350, and repeated at GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [8.02].

<sup>1036</sup> *BESTrustees v Stuart* [2001] OPLR 341 (Ch) 351. See also B Green, ‘The Law Relating to Trustees’ Mistakes - Where Are We Now?’ (2003) 17 TLI 114, 118-19.

power. *BESTrustees* considered that as a matter of authority it was possible to sever that which was done ultra vires whilst leaving intact that which was done intra vires, at least in so far as that the different aspects were ‘not so tied up ... as to form one system of non-severable trusts’.<sup>1037</sup> The position is similar where the exercise of a power of appointment creates interests, some of which are void as offending against the rule against perpetuities.<sup>1038</sup> The non-perpetuitous interests are valid unless ‘both valid and void limitations are so intermixed or so drastic in their consequences as to vitiate the entire settlement.’<sup>1039</sup> As a matter of principle, this can be clearly distinguished from the *Re Hastings-Bass* situation. Where the power has been properly exercised and objection can be taken only to some part of what has been achieved, then in respect of those parts of the result which are valid, it can still be said that they have properly been brought into effect. It is only where partial invalidity brings about some significant difference in the effects of what has been done that the invalidity of one part can be seen to taint the other, valid, parts. This is in stark contrast to the exercise of a power in breach of the *Re Hastings-Bass* rule, where every consequence of the exercise of the power is tainted from the outset by the manner of the power’s exercise being improper.

*Burrell v Burrell* is likewise distinguishable by the fact that although there was only a single deed of appointment in respect of the two types of shares, this was

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<sup>1037</sup> GW Thomas, *Thomas on Powers* (Property and Conveyancing Library, 1st edn, Sweet & Maxwell 1998) [8-02], quoted at *BESTrustees v Stuart* [2001] OPLR 341 (Ch) 351, and repeated at GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [8.02].

<sup>1038</sup> GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [5.41] and following.

<sup>1039</sup> GW Thomas, *Thomas on Powers* (Property and Conveyancing Library, 1st edn, Sweet & Maxwell 1998) [4-36]. See also *Re Abrahams’ Will Trusts* [1969] 1 Ch 463 (Ch).

mere happenstance. The issues relating to each of the two types were different, and the trustees could very well have exercised the power of appointment separately in respect of each. *Burrell* ought therefore to be seen as the exceptional *Re Hastings-Bass* case where partial invalidity may be possible: not because of any distinction which can be drawn between the outcomes of the single exercise of a power, but because it can properly be treated as if it were two distinct exercises of the power, only one of which is affected by breach of the *Re Hastings-Bass* rule.<sup>1040</sup> This narrow view fits with Sir Andrew Park's decision in *Smithson v Hamilton*, where because the trustees took a 'single unitary decision' in respect of the scheme rules 'as a whole',<sup>1041</sup> it was not possible to treat the single decision as if it were a series of decisions on individual clauses.

It is submitted in consequence that the rule for cases of partial validity under the reformulated *Re Hastings-Bass* rule can be simply stated. In general, where the exercise of a power is avoided for breach of the *Re Hastings-Bass* rule, the entire exercise is invalid, even if aspects of the outcome produced by that exercise are conceptually distinct from one another. Only where the exercise can genuinely be seen as a composite of two or more potentially distinct exercises of the power, some of which are untainted by the breach of duty, and where these are not inextricably linked with the tainted exercise, then the untainted aspects may remain valid when the tainted aspects are avoided.

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<sup>1040</sup> See: *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 [71]; N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51, 75.

<sup>1041</sup> *ibid.*

## 5. FRAUD ON A POWER

The doctrine of fraud on a power is, like the rule in *Re Hastings-Bass*, among the controls imposed by equity on the exercise of powers. At first glance they may appear to have little else in common. Where the former addresses the purpose for which a power is exercised,<sup>1042</sup> the latter is concerned with the donee's duty to take relevant matters into account in exercising a power.<sup>1043</sup> The reformulated *Re Hastings-Bass* rule applies only to trustees and those in analogous positions<sup>1044</sup> whereas fraud on a power applies equally to powers held in a purely personal capacity.<sup>1045</sup> Fraud on a power dates from at least the mid-18<sup>th</sup> century<sup>1046</sup> whereas the *Re Hastings-Bass* rule first appeared in anything like its present form in 1989.<sup>1047</sup>

Yet these differences are precisely the reason why a proper understanding of the contours of the *Re Hastings-Bass* rule can only be achieved alongside an examination of the extensive fraud on a power case law. First, since the two doctrines operate in the same sphere, there is clear potential for overlap. For example, a trustee

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<sup>1042</sup> *Aleyn v Belchier* (1758) 1 Eden 132, 138; 28 ER 634, 637; *Duke of Portland v Topham* (1864) 11 HL Cas 32, 52; 11 ER 1242, 1251; *Vatcher v Paull* [1915] AC 372 (PC) 378; EB Sugden, *A Practical Treatise of Powers* (8th edn, 1861) 606; G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 457-58; PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 38-39; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 297.

<sup>1043</sup> See text to n 414 and following.

<sup>1044</sup> See text to n 885 and following.

<sup>1045</sup> *Aleyn v Belchier* (1758) 1 Eden 132, 138; 28 ER 634, 636-37; J Gold, 'The Classification of Some Powers of Appointment' (1942) 40 Mich L Rev 337, 377; PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 39; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 312; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.05], [9.10]. See also *Re Dick* [1953] Ch 343 (CA), and text to n 1074 and following.

<sup>1046</sup> *Lane v Page* (1754) Amb 233, 27 ER 155.

<sup>1047</sup> In *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

who pursues some improper purpose in the exercise of a power commits a fraud on it, and arguably also takes into account an irrelevant consideration, namely the improper purpose itself.<sup>1048</sup> The differences between the doctrines affect both the extent of their application to such a situation, and the consequences. There is little point, for example, in seeking to define with the utmost care the concepts of relevant and irrelevant considerations<sup>1049</sup> in relation to the *Re Hastings-Bass* rule if such distinctions are undercut by a less restrictive approach to fraud on a power. Similarly, whilst *Pitt v Holt* establishes that successfully invoking the *Re Hastings-Bass* rule renders the exercise of a power voidable,<sup>1050</sup> it is established orthodoxy<sup>1051</sup> that the consequence of a fraud on a power is that the purported exercise is wholly void.<sup>1052</sup>

Secondly, the development of the *Re Hastings-Bass* rule is still at an early stage, and as the preceding chapter has shown, its precise future operation in the light of *Pitt v Holt* remains somewhat uncertain. In this context, it is likely that the courts will consider the analogy between the two doctrines in developing the *Re Hastings-Bass* rule. Where it is argued that the *Re Hastings-Bass* rule should follow a different course from fraud on a power, it will be important to establish either that there is some good reason for the divergence of the doctrines, or that the position in relation to fraud on a power is incorrect in principle. This is seen most clearly in relation to

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<sup>1048</sup> See text to n 1126 and following.

<sup>1049</sup> See text to n 576 and following.

<sup>1050</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99]-[101]. See also text to n 408 (on Lloyd LJ's preference for voidable in *Pitt*, and text to n 725 (on the doctrinal basis of void and voidable in equity).

<sup>1051</sup> Though not beyond challenge: see text to n 1147 and following.

<sup>1052</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA).

the proprietary consequences of invalidating the exercise of a power, where both judges<sup>1053</sup> and commentators<sup>1054</sup> have previously relied on fraud on a power to endorse a ‘void’ outcome in *Re Hastings-Bass* cases.

This chapter will therefore examine the analogy between fraud on a power and the *Re Hastings-Bass* doctrine to show both that they may be founded in distinct conceptual origins and that overlap between them is not likely to cause significant difficulty. Most importantly, it will show that even if an analogy between *Re Hastings-Bass* and fraud on a power were accepted, there would nevertheless be sound reasons not to endorse void as the proper outcome in relation to *Re Hastings-Bass*, and even to doubt the orthodoxy in relation to fraud on a power.

### **Doctrinal basis**

The basis and operation of the *Re Hastings-Bass* rule has been discussed at length in the previous chapters. It suffices here to note that the rule is concerned with a positive duty on any trustee who is also the donee of a power or discretion,<sup>1055</sup> this duty existing independently of the requirement that the trustee exercise the power only within its terms,<sup>1056</sup> and that the consequence of a breach of this rule is that the

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<sup>1053</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [76]. Fraud on a power was also discussed without endorsement by Lightman J in *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [31].

<sup>1054</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.22].

<sup>1055</sup> See text to n 546 and following.

<sup>1056</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [96], [99]. See also: *Re Gulbenkian's Settlement Trusts (No 1)* [1970] AC 508 (HL) 518; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.9].

purported exercise of the power is voidable, not void.<sup>1057</sup> Fraud on a power could be seen in similar terms. Farwell states the doctrine as requiring that ‘[a] person having a limited power, must exercise it bonâ fide for the end designed’,<sup>1058</sup> which language would be apt to describe a positive duty similar to that with which *Re Hastings-Bass* is concerned, albeit one which engages with why the donee exercises the power, rather than with the matters he takes into account in doing so. The case law makes clear, however, that fraud on a power is instead about the limited extent of the power conferred, with Lord Parker in *Vatcher v Paull* noting that ‘fraud’ here means simply ‘that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.’<sup>1059</sup> More recently Lloyd LJ in *Sieff v Fox* suggested that a purported exercise of a power of appointment held to be fraudulent as for the benefit of a non-object ‘is treated as having been, in effect, to a non-object’<sup>1060</sup> even though made, in form, to a proper object of the power. Both the modern case law<sup>1061</sup> and the literature<sup>1062</sup> are replete with similar

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<sup>1057</sup> See text to n 1050.

<sup>1058</sup> G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 457.

<sup>1059</sup> *Vatcher v Paull* [1915] AC 372 (PC) 378.

<sup>1060</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [78].

<sup>1061</sup> *Hillsdown Holdings Plc v Pensions Ombudsman* [1997] 1 All ER 862 (QB) 884; *Wong v Burt* [2004] NZCA 174 [27]; *Kain v Hutton* [2008] 3 NZLR 589 (Supreme Court of New Zealand) [17], [47]; *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [96], [237]; *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch), [2012] 2 All ER 734 [72].

<sup>1062</sup> G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 458; Anonymous, ‘Fraud on a Limited Power of Appointment’ (1936) 46 Yale LJ 344, 345-46; Y Grbich, ‘Fraud on a Power: Judicial Control of Appointments by Discretionary Trustees’ (1977) 3 Mon LR 210, 210; R Grantham, ‘The Purpose of a Company Receiver’s Powers’ [1993] Conv 401, 406; R Grantham, ‘The Powers of Company Directors and the Proper Purpose Doctrine’ (1994) 5 KCLJ 16, 34; M Thomas and B Dowrick, ‘The Odd Couple? *Hastings Bass* and Mistake’ [2006] Conv

statements of the doctrinal basis of fraud on a power. The relevance of this to the *Re Hastings-Bass* rule is straightforward: if it is correct in principle to see *Re Hastings-Bass* as a matter of positive duty, and fraud on a power as a limit on the scope of the power conferred, and if these conceptions can be clearly distinguished, then the posited analogy between them can be rejected as a merely superficial similarity. The difference in doctrinal basis could potentially be relied upon to justify the different operation of each rule, and to deny the relevance of the fraud on a power case law in developing the *Re Hastings-Bass* rule. If, however, the basis of fraud on a power proves to be closer to the *Re Hastings-Bass* duty, these differences would be much harder to account for.

***Fraud on a power as a species of ultra vires***

Support for an account of fraud on a power based on the scope of the power conferred is provided: first by the language used in the case law and by commentators seeking to explain and rationalise it; secondly by the operation of the doctrine in certain respects; and thirdly by the underlying idea of the conferral of a limited power. As far as the case law is concerned, the leading English fraud on a power cases are *Vatcher v Paull*<sup>1063</sup> and *Topham v Duke of Portland*.<sup>1064</sup> Lord Parker's view in the former case

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91, 98; P Matthews, 'The Doctrine of Fraud on a Power: Part 1' [2007] PCB 131, 138; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 300; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.35]; R Nolan and A Cloherty, 'Taxing Times for *Re Hastings-Bass*' (2010) 126 LQR 513, 514; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.02].

<sup>1063</sup> *Vatcher v Paull* [1915] AC 372 (PC).

<sup>1064</sup> *Topham v Duke of Portland* (1869-70) LR 5 Ch App 40 (CA in Chancery).

of fraud on a power as concerned with scope has been set out already,<sup>1065</sup> and follows seamlessly from Lord Hatherley LC's dicta in the earlier *Topham* case, where he stated that 'any attempt to exceed the limitations of the power through the medium of any appointment to one of the objects of it' is a fraud on the power as 'a literal execution of the power, with a purpose which it does not sanction'.<sup>1066</sup> The language of the academic literature naturally follows the leading cases<sup>1067</sup> but particularly notable is *Farwell on Powers*, which authoritatively sets out the orthodox conclusion from *Vatcher* and *Topham* 'that the essential notion is disposition beyond the scope of the power, not breach of trust by the donee'.<sup>1068</sup> Grbich goes further still, advocating the renaming of fraud on a power as the "'ultra vires appointments' doctrine' since in his view its aim is 'to ensure that they [donees of powers] act within the authorising terms of the trust instrument'.<sup>1069</sup>

A number of key aspects of the fraud on a power doctrine are entirely consistent with the ultra vires analysis. First, that a fraudulent purported exercise of a power is void<sup>1070</sup> 'shows the close alliance between this doctrine and the doctrine of

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<sup>1065</sup> See text to n 1059.

<sup>1066</sup> *Topham v Duke of Portland* (1869-70) LR 5 Ch App 40 (CA in Chancery) 59.

<sup>1067</sup> See n 1062.

<sup>1068</sup> G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 458.

<sup>1069</sup> Y Grbich, 'Fraud on a Power: Judicial Control of Appointments by Discretionary Trustees' (1977) 3 Mon LR 210, 210.

<sup>1070</sup> Though see text to n 1147 and following.

simply attempting to appoint outside the class of objects'.<sup>1071</sup> Voidness is always the result where a power is purportedly exercised outside its proper scope, such as where a power of appointment is exercised in favour of a non-object,<sup>1072</sup> and does not ordinarily follow from a mere breach of duty in the exercise of the power.<sup>1073</sup> Secondly, it is beyond doubt that the fraud on a power doctrine applies to the holders of purely personal powers.<sup>1074</sup> The holder of such a power is usually understood to owe no duty to the potential objects of its exercise,<sup>1075</sup> but must nevertheless act only within the scope of the power conferred. Treating fraud on a power as an aspect of scope explains why it is applicable to personal powers when other controls, such as *Re Hastings-Bass*, are not.<sup>1076</sup> Thirdly, it has already been seen that there is some doubt over the application of the *Re Hastings-Bass* rule to trustees' administrative powers, and it has been argued here that the rule should not extend so far.<sup>1077</sup> Yet it is clear that fraud on a power does encompass administrative as well as dispositive

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<sup>1071</sup> P Matthews, 'The Doctrine of Fraud on a Power: Part 1' [2007] PCB 131, 138. See also DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.35].

<sup>1072</sup> *Re Gulbenkian's Settlement Trusts (No 1)* [1970] AC 508 (HL) 518; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [78]. See also DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.9].

<sup>1073</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [99]. See also text to n 731 and following.

<sup>1074</sup> *Aleyn v Belchier* (1758) 1 Eden 132, 138; 28 ER 634, 637. Further non-trustee donee cases include: *Re Crawshay (deceased) (No 2)* [1948] Ch 123 (CA); *Re Dick* [1953] Ch 343 (CA); *Re Brook's Settlement* [1968] 1 WLR 1661 (Ch), discussed at GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.05]. See also: J Gold, 'The Classification of Some Powers of Appointment' (1942) 40 Mich L Rev 337, 377; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 312.

<sup>1075</sup> *Re Brown's Settlement* [1939] Ch 944 (Ch) 954; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch) 1613. See: PD Finn, *Fiduciary Obligations* (Law Book Co 1977) 271.

<sup>1076</sup> See text to n 885 and following.

<sup>1077</sup> See text to n 853 and following.

powers, since the doctrine has been applied in relation to powers of sale,<sup>1078</sup> leasing,<sup>1079</sup> investment,<sup>1080</sup> the appointment of both trustees<sup>1081</sup> and protectors,<sup>1082</sup> and amendment of the terms of a pension scheme,<sup>1083</sup> and without dissent in the academic literature.<sup>1084</sup> Whilst a duty-oriented conception of fraud on a power could apply to administrative powers, it could be expected to be a little more controversial than has proven to be the case. The unequivocal acceptance of fraud on a power in this sphere most likely results from acceptance of the ultra vires approach, since administrative powers, as much as dispositive powers, can only be exercised within the scope of the power conferred.

The justification for this ultra vires approach is that whilst the terms of the power may spell out some express limits, other restrictions on the scope of the power

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<sup>1078</sup> *Robinson v Briggs* (1853) 1 Sm & G 188, 223-24; 65 ER 81, 97.

<sup>1079</sup> *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169 (Ch) 187.

<sup>1080</sup> *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch), [2012] 2 All ER 734 [66]. See also *Cowan v Scargill* [1985] Ch 270 (Ch) 286-87, in which case fraud on a power is not explicitly mentioned, but the language of Sir Robert Megarry is that of exercising the power conferred only for proper purposes. On *Cowan*, see P Matthews, 'The Doctrine of Fraud on a Power: Part 1' [2007] PCB 131, 136.

<sup>1081</sup> *Re Osiris Trustees Ltd* (1999-2000) 2 ITELR 404 (High Court of the Isle of Man) 416-18; *Basel Trust Corp (Channel Islands) Ltd v Ghirlandina Anstalt* [2008] WTLR 1505 (Royal Court of Jersey) [80], [92]; *Re IMG Pension Plan* [2009] EWHC 2785 (Ch), [2010] Pens LR 23 [203], [206].

<sup>1082</sup> *Basel Trust Corp (Channel Islands) Ltd v Ghirlandina Anstalt* [2008] WTLR 1505 (Royal Court of Jersey) [90]-[92].

<sup>1083</sup> *Bank of New Zealand v Board of Management of the Officers' Provident Association* [2003] UKPC 58, [2003] OPLR 281 [18], [21].

<sup>1084</sup> See: EB Sugden, *A Practical Treatise of Powers* (8th edn, 1861) 616; R Grantham, 'The Powers of Company Directors and the Proper Purpose Doctrine' (1994) 5 KCLJ 16, 32-33; L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 69-70; P Matthews, 'The Doctrine of Fraud on a Power: Part 1' [2007] PCB 131, 136; R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 297-98; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.04].

can arise by implication, either from the express terms, or by operation of law.<sup>1085</sup> In *Wong v Burt* Hammond J asserted that it is a ‘fundamental juristic principle that any form of authority may only be exercised for the purposes conferred, and in accordance with its terms.’<sup>1086</sup> Similarly in *Free Church of Scotland v Overtoun* Lord Lindley stated that ‘there is a condition implied in ... instruments which create powers, namely, that the powers shall be used bonâ fide for the purposes for which they are conferred’.<sup>1087</sup> In this way the purpose is one of the ‘defining characteristics of the power, not a duty controlling its exercise.’<sup>1088</sup> This accords too with the approach adopted in administrative law, where ‘[t]he law reports abound with examples of the courts striking down discretionary decisions where the discretion has been used for an improper purpose ... the purpose of a particular statute [to be ascertained] as a matter of construction’.<sup>1089</sup> These statements do not, however, go further than showing that it is possible to conceive of the purpose for which a power is conferred as impliedly limiting the scope of its exercise. Grantham suggests that the reason why it is desirable to adopt this course is because the donor ‘cannot foresee every eventuality and cannot, therefore, enumerate every use of the power

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<sup>1085</sup> See *Hillsdown Holdings Plc v Pensions Ombudsman* [1997] 1 All ER 862 (QB) 884; G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 458-59.

<sup>1086</sup> *Wong v Burt* [2004] NZCA 174 [27].

<sup>1087</sup> *General Assembly of Free Church of Scotland v Overtoun* [1904] AC 515 (HL) 695.

<sup>1088</sup> R Grantham, ‘The Purpose of a Company Receiver’s Powers’ [1993] Conv 401, 406.

<sup>1089</sup> P Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) [17-010]. See: *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 [174]; S Taube, ‘The Principle in *Hastings-Bass* and *Sieff v Fox*: Analogies with Administrative Law’ [2006] PCB 155. See also: D Oliver, ‘Review of (Non-Statutory) Discretions’ in CF Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing 2000); M Conaglen, ‘Public-Private Intersection: Comparing Fiduciary Conflict Doctrine and Bias’ [2008] PL 58.

[he] must confer a power that is in its terms literally wider than [he] intend[s]' and therefore the law must 'devise means to ensure that quite apart from [the] literal terms of the power it is used only for the purposes for which it was intended.'<sup>1090</sup> So whilst there is no logical requirement that fraud on a power should operate as an aspect of ultra vires, it is clear both that it is both theoretically possible and consistent with the case law for it to do so.

### ***Difficulties with the ultra vires analysis***

There are, however, some difficulties with the ultra vires analysis of fraud on a power. First, there is some ambiguity in the case law as to the equivalence of fraud on a power and ultra vires. Secondly, there is some controversy as to what qualifies as an improper purpose and the link between such purposes and ultra vires. Thirdly, there are important practical distinctions between the purported exercise of a power outside its stated terms and exercise for an improper purpose.

The difficulty with the case law arises from the lack of clarity as to whether the ultra vires account is premised on a fraudulent purported exercise of a power being outside the scope of the power, or on there being a rule of law which treats such purported exercises as if it were outside its scope. The former is supported by Grbich, who describes fraud on a power as 'a judicial extension of the primary, objective part of the ultra vires appointments doctrine to cover a very obvious means of circumventing it'<sup>1091</sup> and also by the recent decision of the Supreme Court of New

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<sup>1090</sup> R Grantham, 'The Powers of Company Directors and the Proper Purpose Doctrine' (1994) 5 KCLJ 16, 37.

<sup>1091</sup> Y Grbich, 'Fraud on a Power: Judicial Control of Appointments by Discretionary Trustees' (1977) 3 Mon LR 210215.

Zealand in *Kain v Hutton*.<sup>1092</sup> In that case Blanchard J took the view that a fraudulent appointment was in substance ultra vires the power conferred, even if in form it was not, describing fraud on a power as ‘a particular variant’ of excessive execution where the appointment ‘appears on its face to be to an object but in reality is a device to effect the appointor's purpose of benefiting a non-object.’<sup>1093</sup> Tipping J agreed, calling a fraud on a power a ‘clandestine excessive execution’.<sup>1094</sup> The contrary view, however, is expressed by leading commentators: the authors of *Underhill and Hayton* describe fraud on a power as ‘closely related ... to the case where the appointor seeks directly to exercise the power outside the class otherwise specified’<sup>1095</sup> and Thomas, although describing fraud on a power as ‘a disposition beyond the scope of the power’,<sup>1096</sup> later notes that ‘The existence and scope of a particular power must be distinguished from the purpose for which it is exercised.’<sup>1097</sup> This uncertainty is reflected in divergent dicta in *Pitt v Holt*, where Lloyd LJ stated that:

Cases of a fraud on the power are similar to the latter [an appointment to someone who is not within the class of objects], since the true intended beneficiary, who is not an object of the power, is someone other than the nominal appointee.<sup>1098</sup>

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<sup>1092</sup> *Kain v Hutton* [2008] 3 NZLR 589 (Supreme Court of New Zealand).

<sup>1093</sup> *ibid* [17].

<sup>1094</sup> *ibid* [47].

<sup>1095</sup> DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.31].

<sup>1096</sup> GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.02].

<sup>1097</sup> GW Thomas, *Thomas on Powers* (Property and Conveyancing Library, 1st edn, Sweet & Maxwell 1998) [9-06].

<sup>1098</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [96].

effectively following his own dictum in *Sieff v Fox* that ‘the appointment is treated as having been, in effect, to a non-object’.<sup>1099</sup> Mummery LJ, on the other hand, did not speak of similarity between fraud on a power and ultra vires, preferring to treat fraud on a power as simply an example of ‘a misapplication of property outside the scope of the power’.<sup>1100</sup> It may be, as Nolan has suggested,<sup>1101</sup> that either analysis is consistent with the case law, and that the outcome is the same in any event. Nevertheless, it does deprive the ultra vires analysis of some force, since to say that fraud on a power will be treated ‘as if’ ultra vires is simply to state that it is a rule of law that a fraud on a power renders a purported exercise void; such a rule, once freed from the requirement of consistency with ultra vires, could equally take some other course.

Secondly, the difficulty in relation to improper purposes arises from the wide variety of circumstances in which a purpose has been held to be improper. The great majority of fraud on a power cases are concerned with special powers of appointment where the donor has purported to exercise the power in favour of a proper object, but with a view to benefiting a non-object. Lloyd LJ in *Pitt v Holt* stated that ‘an intention to benefit someone who is not an object of the power is generally of the essence’<sup>1102</sup> of fraud on a power. Older cases have emphasised that such a power must be exercised to give ‘the benefit to the person whom he pretends or affects to

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<sup>1099</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [78].

<sup>1100</sup> *ibid* [237].

<sup>1101</sup> R Nolan, ‘Controlling Fiduciary Power’ (2009) 68 CLJ 293, 300.

<sup>1102</sup> *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] 1 WLR 1199 [97].

give it to',<sup>1103</sup> or 'with the sole object of benefiting the appointee who is the object of the power'<sup>1104</sup> and not to procure 'the receipt of a material benefit by some person not among the designated class'.<sup>1105</sup> A particularly obvious case of this kind is where a power is exercised to benefit the appointor<sup>1106</sup> (assuming that he is not also an object of the power). The zenith of this line of cases is to be found in *Re Merton*, where Wynn-Parry J held that *Vatcher v Paull*<sup>1107</sup> required that:

if, and only if, it appears from the evidence that the object was to secure a benefit for himself [the donor of the power] or for some other person not an object of the power, is the transaction to be held to be invalid.<sup>1108</sup>

This definition has found favour in the literature,<sup>1109</sup> and it is easy to see how when fraud on a power is so confined the link to ultra vires appears to be a strong one. To treat an appointment made to an object with the purpose of benefiting a non-object as ultra vires as much as a direct appointment to a non-object is simply to choose to accept that equity may focus on the substance of the appointment rather than its form,

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<sup>1103</sup> *Mackechnie v Marjoribanks* (1870) 39 LJ Ch 604, 605.

<sup>1104</sup> *Re Simpson's Marriage Settlement* [1952] Ch 412 (Ch) 416.

<sup>1105</sup> *Re Greaves* [1954] Ch 434 (CA) 445.

<sup>1106</sup> See *Re Brook's Settlement* [1968] 1 WLR 1661 (Ch) 1668.

<sup>1107</sup> *Vatcher v Paull* [1915] AC 372 (PC).

<sup>1108</sup> *Re Merton* [1953] 1 WLR 1096 (Ch) 1100.

<sup>1109</sup> See: R Grantham, 'The Powers of Company Directors and the Proper Purpose Doctrine' (1994) 5 KCLJ 16, 35; P Matthews, 'The Doctrine of Fraud on a Power: Part 1' [2007] PCB 131, 138; N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51, 64; R Chambers, 'The rule in *Hastings-Bass (Deceased): Pitt v Holt*' (2011) 25 TLI 17, 19.

as recognised by Blanchard J in *Kain v Hutton*,<sup>1110</sup> and as seen in another context in the tax avoidance cases concerned with artificial transactions.<sup>1111</sup>

The analogy with ultra vires is much more strained, however, where the improper purpose giving rise to the fraud on the power is of a different sort. Thomas states that a fraud on a power will ‘generally involve an intention to benefit someone who is not an object of the power’<sup>1112</sup> and contrary to Wynn-Parry J’s assertion<sup>1113</sup> it is not clear that *Vatcher* does mandate such a narrow approach, since that case was concerned with whether a power could be exercised with a view to defeating forced inheritance rules in Jersey.<sup>1114</sup> In any case it is a matter of high authority that other purposes may be improper, since in *Duke of Portland v Topham* the House of Lords held that it was a fraud on a power to use it ‘to carry into execution any indirect object’,<sup>1115</sup> being in that case to try to prevent a daughter from marrying a man of whom her family disapproved.<sup>1116</sup> Many other similar examples can be seen in the

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<sup>1110</sup> *Kain v Hutton* [2008] 3 NZLR 589 (Supreme Court of New Zealand) [17]. See text to n 1092 and following.

<sup>1111</sup> See: *W T Ramsay Ltd v IRC* [1981] 2 WLR 449 (HL); *MacNiven (HM Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2003] 1 AC 311; *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 AC 684; B McFarlane and E Simpson, ‘Tackling Avoidance’ in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003); Lord Templeman, ‘Form and Substance’ in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003).

<sup>1112</sup> GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.27] (emphasis added).

<sup>1113</sup> See text to n 1107 and following.

<sup>1114</sup> *Vatcher v Paull* [1915] AC 372 (PC) 374-75.

<sup>1115</sup> *Duke of Portland v Topham* (1864) 11 HL Cas 32, 55; 11 ER 1242, 1251. See also *Re Simpson's Marriage Settlement* [1952] Ch 412 (Ch) 416-17, which adopts very similar terms.

<sup>1116</sup> *Topham v Duke of Portland* (1862) 31 Beav 525, 544; 54 ER 1242, 1249-50.

case law:<sup>1117</sup> the exercise of a power so as to procure an object of the power to live in France;<sup>1118</sup> where the donee of the power is bribed by an object to appoint to that object;<sup>1119</sup> where a power to amend the rules of a pension scheme was used to alter its purposes.<sup>1120</sup> Whilst doubt has occasionally been cast upon the breadth of this conception of improper purpose<sup>1121</sup> it does appear now to be a well accepted feature of the fraud on a power jurisprudence. The problem, then, is simply that it is difficult to see the link between such improper purposes and ultra vires. For example, in a power of appointment case where the donee appoints in favour of a proper object, and intends thereby that the object should receive the full benefit of that appointment, it is difficult to see how that could be characterised as being outside the scope of the power conferred, even if the donee has some ulterior reason for making the appointment. This is not a case of a formally intra vires appointment being ultra vires in substance, since the substance here matches the form: the appointment is made wholly to a proper object for that object's benefit. It may well be proper for equity to impose further restrictions on the way in which the decision to exercise such a power is made, but such restrictions arise as a matter of the duty of the donee, not the scope of the power conferred.

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<sup>1117</sup> See generally: G Battersby and G Ferris, 'The General Principles of Overreaching and the Reforms of 1925' (2002) 118 LQR 270, 288-89.

<sup>1118</sup> *D'Abbadie v Bizoin* (1871) 5 IR Eq 205 (Rolls Court). See also: G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 479; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.28].

<sup>1119</sup> *Re Wright* [1920] 1 Ch 108 (Ch) 118.

<sup>1120</sup> *Re Courage Group's Pension Schemes* [1987] 1 WLR 495 (Ch) 505.

<sup>1121</sup> Eg by Lord Romilly MR in *Re Huish's Charity* (1870) LR 10 Eq 5, 9.

Thirdly, it is apparent that whilst, at least in the cases of appointments for the benefit of non-objects, there may be a good analogy between fraud on a power and ultra vires, there remain some crucial differences. As Nolan has pointed out, there are differences between the proper construction of the terms of a power, and the limits on the exercise of that power implied from the purposes for which it was granted, as the former is concerned with ‘attributing meaning to words’ and the latter with ‘the particular ends intended to be achieved’,<sup>1122</sup> the relevant intention being that of the settlor.<sup>1123</sup> The difference from a third party perspective is an important one. As has been explained already, a purchaser is much less likely to be able to detect a fraud on a power having been committed than a straightforwardly ultra vires purported exercise of a power, with the result that he is at much greater risk of buying equitable property which the vendor does not have to sell. If the vendor is impecunious, the purchaser may have no practical remedy for his loss.<sup>1124</sup>

It is consequently apparent that, much as with the *Re Hastings-Bass* rule, there remains a high degree of uncertainty as to the doctrinal basis of the fraud on a power doctrine. The language of the case law is largely, but not unequivocally, supportive of the ultra vires approach, and the theoretical basis for such an approach is plausible but not compelling. On the other hand there are important practical reasons to differentiate improper purpose from excessive execution, and some of the more fanciful cases of improper purpose seem to bear no relation to considerations of

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<sup>1122</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 299.

<sup>1123</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 301.

<sup>1124</sup> See text to n 823 and following.

scope. If the question were a novel one, it could certainly be argued from the foregoing that fraud on a power should be characterised solely in duty-oriented terms, and not as a form of substantive ultra vires. But as the law stands at present, it would be fair to conclude that it remains committed to fraud on a power as a species of ultra vires. However, this can only be justified at all in the core case of an appointment made in form to an object but in substance for a non-object. The consequences of such reanalysis of fraud on a power will be considered<sup>1125</sup> once key aspects of the relationship between fraud on a power and *Re Hastings-Bass* have been considered: the overlap of purposes and relevant considerations; the scope of the doctrines' application to different types of power and power-holder; the void orthodoxy in fraud on a power and the preference for voidable in *Pitt v Holt*.

### **Lessons for *Re Hastings-Bass***

#### ***Purposes and relevant considerations***

As previously explored, the reformulated *Re Hastings-Bass* rule must be carefully limited in its application to avoid unacceptably invalidating trustees' exercise of powers too frequently or unpredictably.<sup>1126</sup> Yet there will be circumstances in which relevant considerations and improper purposes cut across each other. At the simplest level, a trustee who seeks to achieve some improper purpose thereby takes the achievement of that purpose into account – and very likely, if the purpose is *per se* improper, it would be a consideration which the trustee ought not take into account. For example, if a trustee holds a power to appoint in favour of A, B or C, and

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<sup>1125</sup> See text to n 1227 and following.

<sup>1126</sup> See text to n 576.

appoints to C on the agreed basis that she will then transfer the trust property to D, the trustee commits a fraud on a power<sup>1127</sup> and the purported appointment to C is void.<sup>1128</sup> Equally, it could be said that in deciding how to exercise the power of appointment, the trustee has improperly taken into account the interests of D, a non-beneficiary, and has thereby breached his *Re Hastings-Bass* duty. This situation may arise relatively commonly, but is unproblematic as long as fraud on a power has a wider sphere of application, and consequences at least as severe, as the *Re Hastings-Bass* rule; in effect these cases can be treated simply as fraud on a power cases, and a parallel *Re Hastings-Bass* analysis neither conflicts with this nor adds anything of value.

However, the potential for overlap between the doctrines also raises the more difficult possibility that the development of the *Re Hastings-Bass* rule to exclude a particular matter from the status of ‘relevant consideration’, such that a failure to consider it is not a breach of duty and does not affect the validity of the exercise of the power, might be undermined by seeking to treat the same matter as going to the purpose for which the power is conferred and so invalidating its purported exercise as a fraud on the power. It has been argued here that if fraud on a power is truly to be seen as a species of ultra vires, it should be limited to improper purposes which are concerned in substance, if not in form, with the prescribed scope of the power,<sup>1129</sup> or

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<sup>1127</sup> *Vatcher v Paull* [1915] AC 372 (PC) 378.

<sup>1128</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA).

<sup>1129</sup> See text to n 1112 and following.

even, according to Wynn-Parry J's statement in *Re Merton*,<sup>1130</sup> to attempts to exercise dispositive powers in favour of non-objects.<sup>1131</sup> If such an approach – admittedly inconsistent with *Duke of Portland v Topham*<sup>1132</sup> – were accepted, then the delineation between a fraud on a power 'purpose' and a *Re Hastings-Bass* 'relevant consideration' would be much clearer, since the scope of fraud on a power would be so tightly constrained: fraud on a power would be concerned with the most serious misuse of a power, viz ultra vires exercise, and *Re Hastings-Bass* with lesser forms of decision-making impropriety. This would make some sense of the different consequences of the respective rules: strict void for fraud on a power, exactly as for simple ultra vires,<sup>1133</sup> and the greater flexibility of voidability in the more varied and disparate *Re Hastings-Bass* cases.

If, however, the courts are not willing to so constrain fraud on a power – and if would only be open to the Supreme Court to do so – then the potential for overlap is greater. Other techniques are however available to seek to limit the scope of the problem here. For example, the courts have been astute in fraud on a power cases to distinguish the purpose for which a power is exercised from the donee's motive in exercising it,<sup>1134</sup> such that, for example, 'circumstances of anger and resentment' are

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<sup>1130</sup> *Re Merton* [1953] 1 WLR 1096 (Ch) 1100.

<sup>1131</sup> See text to n 1108.

<sup>1132</sup> *Duke of Portland v Topham* (1864) 11 HL Cas 32, 11 ER 1242.

<sup>1133</sup> That is to say, the purported exercise is simply a nullity: see R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 316.

<sup>1134</sup> *Topham v Duke of Portland* (1863) 1 De G J & S 517, 571; 46 ER 205, 227; *Topham v Duke of Portland* (1869-70) LR 5 Ch App 40 (CA in Chancery) 57; *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169 (Ch) 191. See also: EB Sugden, *A Practical Treatise of Powers* (8th edn,

not to be adverted to.<sup>1135</sup> This ‘very thin’<sup>1136</sup> distinction may not always be easy to operate, and has been doubted,<sup>1137</sup> but what is important for present purposes is the willingness of the courts to seek to confine the scope of the fraud on a power doctrine by limiting what counts as an improper purpose, perhaps motivated in part by the desire expressed by Sir Raymond Evershed MR in *Re Dick* not to invalidate appointments whenever there is some improper intention merely ‘secreted in the bosom of the appointor’.<sup>1138</sup> Now that *Re Hastings-Bass* is established as a parallel control on the exercise of powers, with a wide scope and a high degree of remedial flexibility, it is likely that a restrictive approach to fraud on a power will be adopted in future. Most ‘relevant considerations’ in *Re Hastings-Bass* cases are factual matters which affect the donee’s decision-making; as long as the courts remain resistant to submissions which seek to transform these into an aspect of the purpose for which the power is conferred, any overlap can be minimised.

In any event, if fraud on a power is not confined to the cases of substantial ultra vires then, at least in cases not of that class, it ought not to be treated as having

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1861) 618; G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 469, 484; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.78].

<sup>1135</sup> *Vane v Lord Dungannon* (1804) 2 Sch & Lef 118, 129 (Lord Redesdale CJ). On the irrelevance of motive to the exercise of private law rights and English law’s rejection of an ‘abuse of rights’ doctrine, see: *Bradford Corp v Pickles* [1895] AC 587 (HL); *Allen v Flood* [1898] AC 1 (HL); T Weir, *Economic torts* (Clarendon Law Lectures, OUP 1997) 21-25; M Taggart, *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford Studies in Modern Legal History, OUP 2002).

<sup>1136</sup> *Re Huish's Charity* (1870) LR 10 Eq 5, 9.

<sup>1137</sup> *Campbell v Home* (1842) 1 Y & C Ch Cas 664, 669; 62 ER 1062, 1065; *Re Wright* [1920] 1 Ch 108 (Ch) 117. See also: L Smith, ‘The Motive, Not the Deed’ in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK 2003) 69-70.

<sup>1138</sup> *Re Dick* [1953] Ch 343 (CA) 360.

the remedial consequences of ultra vires, that is, voidness. If, as is argued below,<sup>1139</sup> the correct remedial response to that scenario is voidability, then the overlap between purpose and relevant considerations is much less important, since the same remedial flexibility would be available in both types of case.<sup>1140</sup>

### ***Types of power and power-holder***

As already explained, if fraud on a power is seen as a type of ultra vires, its application to purely personal powers is uncontroversial.<sup>1141</sup> If, however, it were concluded that fraud on a power is too wide in scope to be seen in such terms, it would then raise the question of whether *Re Hastings-Bass* too should apply to personal powers. In that case, it is submitted that the reasons already given to restrict the *Re Hastings-Bass* rule to powers held by trustees, or those in an analogous position,<sup>1142</sup> would apply with equal force to the broader conception of fraud on a power. The explanation for the resulting disparity is essentially historical: that fraud on a power did undoubtedly develop as an aspect of, or close relative to, ultra vires, such that in the core substantial ultra vires case of fraud on a power, application to

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<sup>1139</sup> See text to n 1147 and following.

<sup>1140</sup> Nolan and Conaglen propose that in situations where there are overlapping controls on the exercise of a power, one of which renders the exercise void, and the other voidable, the claimant who succeeds in relation to both can elect between these alternative responses: R Nolan and M Conaglen, 'Good Faith: What Does it Mean for Fiduciaries and What Does it Tell Us About Them?' in E Bant and M Harding (eds), *Exploring Private Law* (CUP 2010) 338-39. But this assertion is dependent upon Nolan and Conaglen's view that a void exercise can be treated as effective if no declaration that it is void is sought or granted (at 338), since if a void exercise is a nullity, the role of the court is simply to declare that, and electing the voidable response would be nonsensical, as there would be nothing to avoid. Having rejected the 'discretionary void' view as unsustainable (see text to n 812 and following), it follows that in the present author's view there can be no question of such an election: the purported exercise is simply void *ab initio*.

<sup>1141</sup> See text to n 1074 and following.

<sup>1142</sup> See text to n 896 and following.

personal powers is wholly defensible. As the scope of fraud on a power was widened by its application to other ‘improper’ purposes, the remedial consequences of moving away from the doctrine’s ultra vires origins do not appear to have been appreciated. As such, the correct solution would be to treat the wider fraud on a power doctrine of improper purpose without substantial ultra vires as applying only in the same circumstances as the *Re Hastings-Bass* rule, whilst applying the narrower fraud on a power as ultra vires doctrine to all powers.

In relation to administrative powers, the same argument holds true in relation to the substantial ultra vires cases. Whether the broader fraud on a power doctrine should apply to administrative power cases is open to question. The arguments made here not to extend the *Re Hastings-Bass* rule so far are primarily ones of policy and practicality,<sup>1143</sup> premised on the idea that the trustee’s duty of care already sufficiently regulates the exercise of administrative powers and in a way which does not cause undue difficulties for third parties. This argument is less strong for fraud on a power, since not all improper purposes can be conceived of as breaches of a duty to act with care and skill. Unlike in *Re Hastings-Bass*, there already exists a line of cases applying fraud on a power to administrative powers,<sup>1144</sup> and several of the more recent of these are concerned with wider improper purposes which could not readily be characterised as substantially ultra vires. For example, in *Basel Trust Corp (Channel Islands) Ltd v Ghirlandina Anstalt* the Royal Court in Jersey applied a fraud on a power analysis to the allegedly improper purpose of moving the trust from one

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<sup>1143</sup> See text to n 863.

<sup>1144</sup> See text to n 1078 and following.

jurisdiction to another to avoid regulatory interference, albeit deciding that on the facts that the purpose was not improper.<sup>1145</sup> In *Re IMG Pension Plan* Arnold J similarly accepted that the exercise of a power to appoint trustees of a pension scheme in order to appoint trustees who would simply do the bidding of the employer without exercising independent judgment could be a fraud on the power.<sup>1146</sup> As far as fraud on a power is concerned, then, it would be fair to conclude that whilst the question of its broad application to administrative powers remains open, present indications are that it will be so applied. More importantly, though, it is clear that this is so for reasons which do not also provide a basis for doubting the conclusions reached in relation to the *Re Hastings-Bass* rule, where there is no difficulty in treating failure to consider cases as breaches of the duty of care.

### **Void or voidable**

More troubling, however, is the connection, if any, between the proprietary consequences of the two doctrines: void, in the case of fraud on a power, and voidable, in the case of *Re Hastings-Bass*. That *Pitt v Holt* is right to prefer voidable for *Re Hastings-Bass* has been argued at some length.<sup>1147</sup> But a significant obstacle remaining to the analysis proposed here is that *Cloutte v Storey* appears to put beyond doubt that the consequence of a fraud on a power is that the purported exercise is

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<sup>1145</sup> *Basel Trust Corp (Channel Islands) Ltd v Ghirlandina Anstalt* [2008] WTLR 1505 (Royal Court of Jersey) [96]-[99].

<sup>1146</sup> *Re IMG Pension Plan* [2009] EWHC 2785 (Ch), [2010] Pens LR 23 [203]-[206].

<sup>1147</sup> See text to n 725 and following.

wholly void,<sup>1148</sup> and this is accepted as a matter of authority by Lloyd LJ in *Pitt*.<sup>1149</sup> If the ultra vires analysis of fraud on a power is accepted, then the void result simply follows from this<sup>1150</sup> and has no relevance to the *Re Hastings-Bass* rule, which is not about the scope of the power conferred.<sup>1151</sup> But serious doubt has been cast here on that account of fraud on a power, such that it appears that at least as far as those improper purposes which cannot be characterised as ultra vires in substance are concerned, it would not be right to rely on the analogy with ultra vires to justify the void outcome. The difficulty, then, for *Re Hastings-Bass* is that this type of fraud on a power case looks very closely analogous to the *Re Hastings-Bass* relevant considerations rule, making ‘void’ in respect of this type of fraud on a power powerful ammunition for criticism for *Pitt*’s preference for ‘voidable’. The answer is that in fact the position in relation to fraud on a power is much less conclusive than might appear.

### ***Challenging the ‘void’ orthodoxy***

No serious challenge has ever been mounted, at least in the reported cases, to the authority of *Cloutte v Storey* on this point; it has been accepted without serious consideration.<sup>1152</sup> Lloyd LJ was doubtless right as a matter of *stare decisis* to treat

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<sup>1148</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>1149</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [98].

<sup>1150</sup> See text to n 1070 and following.

<sup>1151</sup> See: R Nolan and A Cloherty, ‘Taxing Times for *Re Hastings-Bass*’ (2010) 126 LQR 513, 514-15.

<sup>1152</sup> Eg *Allan v Rea Brothers Trustees Ltd* [2002] EWCA Civ 85 [49]; *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 [78].

*Cloutte* as binding on the Court of Appeal,<sup>1153</sup> but it is sincerely to be hoped that the Supreme Court might in future look more closely here and see that the position is much less unequivocal than the conclusions reached in *Cloutte* would suggest. It is argued here that those judges and commentators who have cast doubt on the cogency of *Cloutte*<sup>1154</sup> have been right to do so. First, because in spite of *Cloutte* there are fraud on a power cases which use the language of voidability rather than voidness; secondly, because the circumstances in which trustees can become liable for paying pursuant to a fraudulently exercised power do not fit with the void account; and thirdly, and most importantly, because there are serious difficulties with the premises and reasoning adopted in *Cloutte* itself.

The first and second reasons can be addressed briefly. In *Lane v Page* Lord Hardwicke LC says that the transaction is ‘to be set aside’<sup>1155</sup> and indeed it is ultimately set aside in part only.<sup>1156</sup> In *Campbell v Home Knight-Bruce* V-C held that the exercise of a power would be treated as presumptively valid, albeit that ‘those who are interested in doing so can apply to set it aside.’<sup>1157</sup> In *Wellesley v Mornington* Page-Wood V-C held that ‘the deeds must be set aside’.<sup>1158</sup> In each case the language

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<sup>1153</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [98].

<sup>1154</sup> *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409 [31]; *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 [98]; Y Grbich, 'Fraud on a Power: Judicial Control of Appointments by Discretionary Trustees' (1977) 3 Mon LR 210, 231; R Walker, 'The Limits of the Principle in *Re Hastings Bass*' [2002] PCB 226, 240.

<sup>1155</sup> *Lane v Page* (1754) Amb 233, 236; 27 ER 155, 156.

<sup>1156</sup> *ibid* 235, 156.

<sup>1157</sup> *Campbell v Home* (1842) 1 Y & C Ch Cas 664, 669; 62 ER 1062, 1065.

<sup>1158</sup> *Wellesley v Mornington* (1855) 2 K & J 143, 162; 69 ER 728, 736.

is much more consistent with the avoidance of an otherwise valid transaction, than a declaration that the transaction is and always has been a nullity.

Secondly, there is a peculiarity in the case law in relation to the liability of a trustee who pays the trust property to a third party, X, in accordance with the exercise of a power over that property held by a fourth party, Y. It is clear that where Y commits a fraud on the power and the trustee knows or ought to have known of it, the trustee is liable if he pays the property over nevertheless.<sup>1159</sup> What is peculiar is that if the trustee does not realise and has no grounds for suspicion, then he is not liable.<sup>1160</sup> Indeed, where the trustee is unduly suspicious and refuses to pay, he is likely to have to pay his own costs if sued for payment by the appointee.<sup>1161</sup> But if the fraudulent exercise of the power by Y was wholly void, then there would be no basis for payment by the trustee to X, which would be ultra vires. This would not depend on the trustee's knowledge of the fraud; the trustee would be in the same position as one who appoints to someone believed to be a member of the class of objects of the power, but who on a proper construction of the power is not an object. On a claim by the default beneficiaries to falsify the payment out in the trust accounts the trustee will be liable to reconstitute the fund in the amount of the payment made.<sup>1162</sup> If, however, the fraudulent appointment is only voidable, and has not yet been avoided,

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<sup>1159</sup> *Mackenzie v Marjoribanks* (1870) 39 LJ Ch 604, 605-06.

<sup>1160</sup> *Re Deane* (1889) LR 42 Ch D 9 (CA) 18.

<sup>1161</sup> *Campbell v Home* (1842) 1 Y & C Ch Cas 664, 62 ER 1062; *Patterson v Wooler* (1875-76) LR 2 Ch D 586 (Ch). See also: G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 470-71; P Matthews, 'The Doctrine of Fraud on a Power: Part 1' [2007] PCB 131, 140-51; DJ Hayton, P Matthews and C Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (18th edn, LexisNexis 2010) [57.41]; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.120].

<sup>1162</sup> See n 554.

then there is some sense to the approach in the case law, since the trustee pays to X on the strength of a presumptively valid exercise of the power. The subsequent setting aside of that exercise does not invalidate anything already done by the trustee. Only if the trustee realises, or should realise, that the exercise of the power is fraudulent and pays to X nevertheless, is he personally liable, because in doing so he entangles himself in the fraudulent exercise of the power.

Much the most important reason to be cautious of *Cloutte*, though, is that it is not a cogently reasoned decision. In order to understand the difficulties, it is necessary to examine the detail of the case, and of the arguments presented and accepted, first by the High Court and then the Court of Appeal.

### ***Cloutte v Storey***

Mrs Harvie was entitled in reversion to a share in property held on trust for her, subject to her parents' life interests. This interest was assigned to trustees who held it on trust for Mrs Harvie for life, then for Mr Harvie for life, then for such of their children as they should appoint by deed. In default of appointment the interest was held on trust for all the children. Mr and Mrs Harvie appointed part of the fund to their son, Arthur. Arthur mortgaged this interest to an insurance society for £1000, and the society transferred the mortgage to Storey. Mrs and Mrs Harvie subsequently appointed the residue of the interest to Arthur. Arthur sold and assigned his interest in the residue to a corporation, which then assigned it to the Property and Estates Company. Two of Arthur's siblings brought an action against the mortgagees and purchasers of Arthur's interests asserting that the appointments were frauds on the

power and that consequently the defendants had no interest in the trust property whatsoever.

Giving the judgment of the Court of Appeal, Farwell LJ held that the appointments were indeed void as frauds on the power. The purchasers had argued that the fraud rendered the appointments voidable, and that as purchasers for value without notice of the fraud, the appointments ought not to be set aside as against them.<sup>1163</sup> Farwell LJ gave two reasons for rejecting this view. First, he held that in the case of an equitable power which affects only equitable interests ‘the difference between void and voidable is of little, if any, importance.’<sup>1164</sup> Secondly, he held that the decisions of the Court of Appeal and House of Lords in the series of cases concerning the Duke of Portland and Lady Topham<sup>1165</sup> were binding authority for treating the appointments as entirely void.<sup>1166</sup> At first instance, Neville J had accepted that there could be a distinction in principle between voidness and voidability in this context<sup>1167</sup> but also held that it was decided by authority that such an appointment was void. Although Neville J did not refer to these cases in his judgment, saying only ‘I think the preponderance of authority ... is in favour of the further proposition that the execution of a power in fraud of that power is also void.’<sup>1168</sup> The cases cited by

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<sup>1163</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 30.

<sup>1164</sup> *ibid.*

<sup>1165</sup> *Topham v Duke of Portland* (1862) 31 Beav 525, 54 ER 1242; *Topham v Duke of Portland* (1863) 1 De G J & S 517, 46 ER 205; *Duke of Portland v Topham* (1864) 11 HL Cas 32, 11 ER 1242; *Topham v Duke of Portland* (1869-70) LR 5 Ch App 40 (CA in Chancery).

<sup>1166</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>1167</sup> *Cloutte v Storey* [1911] 1 Ch 18 (Ch) 24.

<sup>1168</sup> *ibid.*

counsel to persuade him of this were *Daubeny v Cockburn*,<sup>1169</sup> *Aleyn v Belchier*<sup>1170</sup> and *Topham v Duke of Portland*.<sup>1171</sup>

## VOIDNESS AND VOIDABILITY

In relation to the first limb of his reasoning, that there is no relevant difference between voidness and voidability in this context,<sup>1172</sup> Farwell LJ stated that:

Equity administers the trusts of the settlement and has regard only to equitable interests and equities: the appointments operate only in equity ... [the Court] deals with the parties according to their rights in equity only.<sup>1173</sup>

It was therefore of no significance to Farwell LJ whether the effect of the fraud on the power was to render the appointment void or voidable in equity, as the consequence would be the same. However, as Neville J recognised,<sup>1174</sup> and as has been extensively discussed in the previous chapter, there is a vitally important difference: a void appointment is a nullity and the appointee receives nothing; a voidable appointment conveys a defeasible equitable title, liable to be divested if the appointment is set aside, but admitting of the possibility that the appointment might not be set aside in spite of the fraud on the power, such as where third party rights have intervened.<sup>1175</sup> Farwell LJ's approach is premised on the view that in either case the appointee gets

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<sup>1169</sup> *Daubeny v Cockburn* (1816) 1 Mer 626, 35 ER 801.

<sup>1170</sup> *Aleyn v Belchier* (1758) 1 Eden 132, 28 ER 634.

<sup>1171</sup> *Topham v Duke of Portland* (1863) 1 De G J & S 517, 46 ER 205.

<sup>1172</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 30.

<sup>1173</sup> *ibid.*

<sup>1174</sup> *Cloutte v Storey* [1911] 1 Ch 18 (Ch) 24.

<sup>1175</sup> See text to n 738 and following.

(at most) an equitable title to the property which is subsequent in time, and therefore lower in priority, to the equitable title of the default beneficiaries,<sup>1176</sup> and that bona fide purchase is only relevant where the legal estate is purchased.<sup>1177</sup> As already established, this view is wrong: the default beneficiaries' right to set aside the exercise of the power will not prevail against a bona fide purchaser for value of an equitable interest.<sup>1178</sup> Since Farwell LJ proceeds on this wrong basis, he does not have to consider how voidability might operate in the fraud on a power context; indeed, having concluded that void and voidable in equity are essentially the same, his conclusion that a fraud on a power renders the exercise void appears to follow ineluctably.

#### THE CASES RELIED UPON

The second limb of Farwell LJ's argument for voidness was that this question had already been settled as a matter of authority.<sup>1179</sup> Neville J took the same approach at first instance.<sup>1180</sup> However, none of the four cases upon which they together relied provide a sound basis for the decision in *Cloutte*.

The first of these was *Aleyn v Belchier*.<sup>1181</sup> Edmund Aleyn exercised a power of jointure<sup>1182</sup> under his father's will to appoint the entire estate to his wife for life.

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<sup>1176</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>1177</sup> *ibid.*

<sup>1178</sup> See text to n 757.

<sup>1179</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>1180</sup> *ibid* 24.

<sup>1181</sup> *Aleyn v Belchier* (1758) 1 Eden 132, 28 ER 634.

This was done pursuant to an agreement with Belchier according to which they would subsequently convey the life estate (as an estate *pur autre vie*) to Belchier, in return for the payment of annuities to them and the discharge of debt owed by Aleyn to Belchier. The remainderman under the father's will sought to have the appointment declared void as a fraud on the power, and succeeded. On its face this appears to support the void view; the defendant was a third party who had given valuable consideration for the equitable interest he purportedly acquired. If the appointment was only voidable, one would expect Belchier's defence to have succeeded. However, Henley LK did not consider this question. The case was primarily concerned with whether there was in fact a fraud on the power and the judge stated that he had to decide 'whether Edmund Aleyn has properly executed the power as a jointure ... or whether the transaction is void *in toto*'.<sup>1183</sup> The possibility of voidability does not appear to have been advanced in argument or to have been considered by the judge. In any case, Belchier was not a bona fide purchaser. It appears from the facts, and from the arguments of counsel, that Belchier knew that the power was being exercised to pay the debt owed to him, rather than for the benefit of the wife. Counsel for the remainderman described the scheme which was put in place as 'an artful contrivance of Belchier and the defendant Jane [Edmund's wife]'<sup>1184</sup> and said that

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<sup>1182</sup> A power to settle property on husband and wife for their lives as joint tenants, or to settle an estate on the wife solely. See: G Farwell, CJW Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, Stevens and Sons Ltd 1916) 575ff; GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012) [9.116].

<sup>1183</sup> *Aleyn v Belchier* (1758) 1 Eden 132, 138; 28 ER 634, 636.

<sup>1184</sup> *ibid* 136, 636.

‘Belchier put it into Edmund's head with a view to secure his own debt’.<sup>1185</sup> The distinction between voidness and voidability would therefore make no difference in this case. Belchier seems to have been a party to the fraud on the power, and would not therefore be able to resist the avoidance of the appointment.

The second case relied upon was *Daubeny v Cockburn*.<sup>1186</sup> This arguably provides the most potent support for Farwell LJ's conclusions, since the judgment of Sir William Grant MR does appear to decide that the appointments in question were void. James Cockburn made an appointment of a reversionary interest in the sum of £5000 to his daughter Margaret, on trust for such persons as she should appoint, and in default of appointment for Margaret absolutely. Margaret appointed £2000 of this to Judith, who was not an object of the power. Margaret subsequently agreed with Andrew Daubeny that he would lend her £2000 on the security of the trust money. In consideration of the £2000, Margaret assigned her right to the £5000 to Daubeny, ‘subject to redemption on payment of the £2000 and interest’.<sup>1187</sup> The agreement recited that Margaret had made no appointment of the trust money.<sup>1188</sup> The original appointment made by James to Margaret was held to be a fraud on the power, because James had made it a condition of the appointment to Margaret that she should make the subsequent appointment to Judith.<sup>1189</sup> Daubeny was party to the proceedings and argued that he was a purchaser for valuable consideration who

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<sup>1185</sup> *ibid.*

<sup>1186</sup> *Daubeny v Cockburn* (1816) 1 Mer 626, 35 ER 801.

<sup>1187</sup> *ibid* 629, 803.

<sup>1188</sup> *ibid* 628-29, 802.

<sup>1189</sup> *ibid* 636-37, 805.

should not therefore be affected by the fraud between James and Margaret. If the appointment was merely voidable, this argument should have succeeded. That it did not, however, appears to reflect the judge's failure to appreciate the significance of this argument, rather than any rejection of the principle underpinning it. Having decided that there was no legal estate in issue here, Sir William Grant MR rejected Daubeny's argument because:

there are only equities to deal with. If the appointment be such, that a Court of Equity will hold it did not vest any thing in Mrs. Cole [Margaret], how could it divest anything out of Sir William Cockburn? The payment of a money consideration cannot make a stranger become the object of a power created in favour of children. He can only claim under a valid appointment executed in favour of some, or one, of the children.<sup>1190</sup>

The significance of the statement that 'there are only equities to deal with'<sup>1191</sup> is unclear. Whilst clearly true (in the sense that no legal interests are involved) it lacks any explanatory force, except perhaps as indicating that the Master of the Rolls viewed this as a question of equitable priority. Since *Daubeny v Cockburn*<sup>1192</sup> predates *Phillips v Phillips*<sup>1193</sup> a conclusion which determines priority purely according to time, without distinguishing equities and equitable interests, is perhaps unsurprising. The second statement 'If the appointment be such, that a Court of Equity will hold it did not vest any thing in Mrs. Cole [Margaret], how could it divest anything out of Sir William Cockburn?'<sup>1194</sup> also fails to explain why Daubeny's claim

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<sup>1190</sup> *ibid* 638, 806.

<sup>1191</sup> *ibid*.

<sup>1192</sup> *Daubeny v Cockburn* (1816) 1 Mer 626, 35 ER 801.

<sup>1193</sup> *Phillips v Phillips* (1861) 4 De G F & J 208, 45 ER 1164.

<sup>1194</sup> *Daubeny v Cockburn* (1816) 1 Mer 626, 638; 35 ER 801, 806.

fails. Clearly it is true that if the appointment conveyed no property to Margaret then it could not have divested William, the default beneficiary, of any property, but this simply fails to answer the question in issue: *did* the appointment convey anything to Margaret, which Daubeny could then purchase? The third statement, that ‘[t]he payment of a money consideration cannot make a stranger become the object of a power created in favour of children’<sup>1195</sup> is obviously true but not obviously relevant. The judge is here attacking a man of straw. It is clearly not the argument for the innocent third party purchaser that his payment makes him an object of the power; such an argument would be logically unsustainable. The third party no more claims that he is an object of the power than he would so have to claim if an appointment was validly made to an object and the object then sold his interest to the third party. In both cases the question is what title the appointee acquires. Later in his judgment the Master of the Rolls describes a voluntary appointment made by a man from his own property, or property over which he has ‘a power unlimited as to objects’<sup>1196</sup> and states that a purchaser for consideration from the appointee ‘may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the estate had been granted, or the power executed.’<sup>1197</sup> Whilst this may be true, this is not the argument for a purchaser such as Daubeny, and the judge appears to have elided the two situations in his reasoning. The final statement was: ‘He can only claim under a valid appointment executed in favour of some, or one, of the

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<sup>1195</sup> *ibid.*

<sup>1196</sup> *ibid.*

<sup>1197</sup> *ibid.*

children.’<sup>1198</sup> This is not so much a reason for finding against Daubeny as a conclusion. Without making clear what ‘valid’ means in this context it takes the argument no further forward; ‘valid’ could mean any appointment which takes effect in equity (ie not a void appointment) or could be limited to those appointments which are not liable to be avoided. Consequently it is clear that whilst it must be accepted that on its facts, *Daubeny v Cockburn* does decide that the appointment is void, not voidable, this is a decision founded on incoherent reasoning underpinned only by bare assertion of the very question being decided. Whilst it was open to Neville J in *Cloutte* to rely on it, its persuasiveness is undermined by its lack of convincing reasoning.

Thirdly, Farwell LJ expressly relied<sup>1199</sup> upon *Topham v Duke of Portland*<sup>1200</sup> and the subsequent affirmation of the Court of Appeal’s order by the House of Lords.<sup>1201</sup> The case concerned appointments made under a power to appoint portions among the Duke of Portland's younger children. Appointments were made to Lady Harriet such that she took a double share, and not to Lady Mary, because her father disapproved of her proposed marriage. Mary claimed that the appointment to Harriet was invalid as a fraud on the power. There was no third party involvement at all; the case was solely concerned with the rights of the children *inter se*. Consequently there was no argument in relation to the precise effect of the purported appointment. Both

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<sup>1198</sup> *ibid.*

<sup>1199</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>1200</sup> *Topham v Duke of Portland* (1863) 1 De G J & S 517, 46 ER 205.

<sup>1201</sup> *Duke of Portland v Topham* (1864) 11 HL Cas 32, 11 ER 1242.

the arguments and the judgments are concerned almost solely with whether the admitted facts amount in law to a fraud on the power. Farwell LJ's reliance on the case is therefore premised solely on the language used in the order of the court, which stated: 'their Lordships do declare that the appointment made by the deed-poll of the 13th day of October 1848, in the pleadings mentioned, is void so far as relates to the sum of £8000'.<sup>1202</sup> Given that there was no argument on this point in the Court of Appeal, this is of very minor significance in the context of a case not involving third parties, such that there is no real difference between a void appointment and a voidable appointment which has already been avoided.

In the House of Lords the order was affirmed.<sup>1203</sup> Again, no argument was addressed to the issue of voidness or voidability, but the language of the speeches points, if anything, to voidability rather than voidness. Lord Westbury LC said that the Court of Appeal had 'rightly set aside the deed of appointment.'<sup>1204</sup> Lord St Leonards said that 'it is quite enough for this House to declare that it is a void appointment, and to set aside the appointment'.<sup>1205</sup> These statements are, at the least, ambiguous as between voidness *ab initio* and the voidness of a voidable transaction which has been avoided, and as such they cannot sensibly bear the very great weight

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<sup>1202</sup> *Topham v Duke of Portland* (1863) 1 De G J & S 517, 575; 46 ER 205, 228.

<sup>1203</sup> *Duke of Portland v Topham* (1864) 11 HL Cas 32, 11 ER 1242.

<sup>1204</sup> *ibid* 54, 1251.

<sup>1205</sup> *ibid* 58, 1252.

which Farwell LJ places upon them in arguing that fraudulent appointments are invariably void.<sup>1206</sup>

The fourth and final case relied upon in *Cloutte* was the last in the *Topham v Duke of Portland*<sup>1207</sup> saga, and concerned new appointments made after the House of Lords had set aside the previous appointment to Lady Harriet. The new appointments were again held to be frauds on the power<sup>1208</sup> and Farwell LJ in *Cloutte* again relied<sup>1209</sup> on the form of the order: ‘Declare ... that the two appointments in the pleadings mentioned ... are void’.<sup>1210</sup> Exactly the same criticisms apply to reliance on the form of this order as in the previous case. Both Lord Hatherley LC and Giffard LJ used the language of voidability in referring to the previous litigation<sup>1211</sup> and gave no indication that they thought they were doing anything different in this case. As before, the words of the order, used without argument on the point or the judges applying their minds to the issue, simply cannot bear the weight which Farwell LJ sought to put upon them.

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<sup>1206</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>1207</sup> *Topham v Duke of Portland* (1869-70) LR 5 Ch App 40 (CA in Chancery).

<sup>1208</sup> *ibid* 59-60 (Lord Hatherley LC) 61 (Giffard LJ).

<sup>1209</sup> *Cloutte v Storey* [1911] 1 Ch 18 (CA) 31.

<sup>1210</sup> HW Seton and others, *Forms of Judgments and Orders in the High Court of Justice and Court of Appeal: Having Special Reference to the Chancery Division, with Practical Notes* (6th edn, Stevens and Sons Ltd 1901) 1742.

<sup>1211</sup> ‘the deeds which have been set aside in the former suit’: *Topham v Duke of Portland* (1869-70) LR 5 Ch App 40 (CA in Chancery) 59 (Lord Hatherley LC); ‘The result of that suit was to set aside those deeds as invalid’: 60 (Giffard LJ).

## VOIDABILITY CASES

To finally dispose of *Cloutte* as convincing authority for voidness two cases must be considered which were cited in argument before Farwell LJ but which were not mentioned in the judgment.<sup>1212</sup> The first is *Askham v Barker*<sup>1213</sup> in which a father made appointments pursuant to a power in his marriage settlement in 1834, and these appointments were manifestly frauds on the power.<sup>1214</sup> He subsequently made appointments in 1844, reciting what had previously been done and appointing the remaining portion of the trust property and all other property comprised in the settlement to his daughters. Lord Langdale MR held that the 1844 appointments were invalid as frauds on the power.<sup>1215</sup> He rejected the argument that he should consider the 1844 appointments as if the power had never previously been executed<sup>1216</sup> and held that the 1844 deed of appointment did not have:

the same operation as if the previous execution of the power were completely void and non-existing. If it had been authoritatively and properly declared, that the first execution of the power was entirely gone ... the second execution of the power might not have been bad  
.....<sup>1217</sup>

Whilst this does not formally decide that the 1834 appointment was voidable rather than void, the fact that Lord Langdale treats it as contaminating the 1844 appointment strongly suggests that it is not void in the sense of being an absolute nullity.

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<sup>1212</sup> Although *Preston v Preston* (1869) 21 LT 346 (Rolls Court) was considered by Neville J.

<sup>1213</sup> *Askham v Barker* (1850) 12 Beav 499, 50 ER 1152.

<sup>1214</sup> *ibid* 502, 1153.

<sup>1215</sup> *ibid* 504, 1154.

<sup>1216</sup> *ibid* 503, 1153.

<sup>1217</sup> *ibid* 504, 1154.

Furthermore, the suggestion that the 1844 appointment would not have been tainted ‘If it had been authoritatively and properly declared, that the first execution of the power was entirely gone’<sup>1218</sup> is highly suggestive of voidability: the first appointment must be treated as having legal effect at least until it has been formally set aside.

The second case not discussed was *Preston v Preston*.<sup>1219</sup> Christopher and Elizabeth Preston’s marriage settlement provided life interests for both of them, the property to then be held on trust for their children in such shares as they should appoint in writing, and in default of appointment to all the children in equal shares. Appointments were made to two of the children who sold their shares to two reversionary societies. After Elizabeth Preston’s death a deed was executed by all the children,<sup>1220</sup> the husbands of the married daughters, and Mr Preston, which detailed the appointments and declared that they were all satisfied with them. One of the children then claimed that the appointments were void as frauds on the power. Lord Romilly MR held that the appointments were frauds on the power, and the two reversionary societies were purchasers for value without notice.<sup>1221</sup> The judge then expressly considered whether the appointments were void or only voidable, concluding that ‘the appointment was not ipso facto void’.<sup>1222</sup> Rather ‘they were only voidable and consequently that they were capable of being confirmed.’<sup>1223</sup> The

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<sup>1218</sup> *ibid.*

<sup>1219</sup> *Preston v Preston* (1869) 21 LT 346 (Rolls Court).

<sup>1220</sup> The children who were still infants at this time executed the deed after attaining majority.

<sup>1221</sup> *Preston v Preston* (1869) 21 LT 346 (Rolls Court) 348.

<sup>1222</sup> *ibid* 348.

<sup>1223</sup> *ibid.*

decision on voidability was crucial to the reasoning of the decision, since had the appointments been absolutely void, they could not be confirmed by the subsequent deed; there would be nothing to confirm. The contrary view of this case taken by Neville J in *Cloutte*,<sup>1224</sup> that the deed operated as a release of the power and an assignment of the beneficial interests by all the persons who together were absolutely entitled to the trust property, is unconvincing. It does not accord at all with the language of Lord Romilly MR who decided the case entirely as being about the confirmation of a previous appointment, and whether that confirmation bound the plaintiff.

In the light of the foregoing it can be seen clearly that neither limb of Farwell LJ's reasoning in *Cloutte* adequately supports the apparently definitive conclusion that fraud on a power renders the exercise of the power void, not voidable. The failure to appreciate that there is a difference between voidness and voidability in this context seriously undermines the authority of the decision, as by failing to distinguish them Farwell LJ was then precluded from making a rational choice between them. Then to rely on the cases discussed above is inadequate, since none is persuasive on the differentiation of voidness from voidability and the choice between them. This is coupled with a failure to consider *Preston v Preston*<sup>1225</sup> and *Askham v Barker*,<sup>1226</sup> which, at the very least, point strongly to voidability rather than voidness; *Preston v Preston* may arguably be binding authority for that proposition.

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<sup>1224</sup> *Cloutte v Storey* [1911] 1 Ch 18 (Ch) 24.

<sup>1225</sup> *Preston v Preston* (1869) 21 LT 346 (Rolls Court).

<sup>1226</sup> *Askham v Barker* (1850) 12 Beav 499, 50 ER 1152.

## Conclusions

Whilst *Cloutte* remains technically binding in the Court of Appeal, it is apparent that there are very good technical reasons why the Supreme Court should not feel itself compelled to follow its analysis or conclusions. Once this is accepted, the ‘void’ orthodoxy in fraud on a power starts to look rather thin. In relation to the core case of an exercise ultra vires in substance though not in form, two alternative routes are open. The first is both to reject the analogy with ultra vires for the reasons canvassed here<sup>1227</sup> and to reject *Cloutte* as a convincing explanation for a void rather than voidable outcome. On this approach, fraud on a power is reanalysed as a duty akin to the *Re Hastings-Bass* duty, and with the same proprietary consequences in cases of breach. The second is to accept the analogy with ultra vires<sup>1228</sup> in relation to the core case, and therefore to treat the orthodox void conclusion as defensible as the inevitable consequence of true ultra vires. This conclusion would not be affected by the many deficiencies identified in *Cloutte*, which was not reasoned in such terms. But away from this core case, where the ultra vires analogy manifestly breaks down,<sup>1229</sup> the effect of the doctrine must be to render the exercise of the power voidable for breach of duty, and not void due to ultra vires. On either approach the wider fraud on a power doctrine would be brought into line with the *Pitt v Holt* conception of the *Re Hastings-Bass* rule,<sup>1230</sup> thus avoiding most problems with the

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<sup>1227</sup> See p 237 and following.

<sup>1228</sup> See p 232 and following.

<sup>1229</sup> See text to n 1102 and following.

<sup>1230</sup> Is oriented around the trustee’s duty, and producing a voidable outcome in cases of breach of duty.

overlap between purposes and relevant considerations, and precluding an undesirable divergence in the equitable control of powers. The arguments in relation to the core substantive ultra vires case are more finely balanced,<sup>1231</sup> but even if the first approach were preferred, preserving the ultra vires orthodoxy in many cases, the extent of overlap between fraud on a power and *Re Hastings-Bass* would be significantly reduced.<sup>1232</sup>

The real danger to the proper development of the *Re Hastings-Bass* rule comes not from the precise nature of the relationship between *Re Hastings-Bass* and fraud on a power, but rather from the uncritical invocation of fraud on a power, and *Cloutte v Storey* especially, as if it straightforwardly settled the question in favour of void; or, at the minimum, set up a powerful countervailing position to the arguments made in *Pitt* for voidability by preferring void in very similar, but differently pleaded, circumstances. If fraud on a power is fully understood, and in particular the limits of the analogy with ultra vires and the weaknesses of the void thesis in the case law, then seeking to rationalise its relationship with *Re Hastings-Bass* is a desirable, if complex, endeavour. But it is the fraud on a power orthodoxy, unchallenged in recent years and treated as seemingly immutable, rather than the *Pitt v Holt* account of the *Re Hastings-Bass* rule, which is most open to criticism, and which needs to be brought into line with the new duty-oriented approach.

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<sup>1231</sup> See text to n 1124 and following.

<sup>1232</sup> See text to n 1129 and following.

## 6. THE FUTURE

In March 2013 the Supreme Court will hear appeals against the decisions of the Court of Appeal in *Pitt v Holt* and *Futter v Futter*.<sup>1233</sup> It will be apparent from the foregoing chapters that the present author's view is that neither appeal should succeed. Whilst Lloyd LJ's judgment is inevitably open to debate and criticism on certain points of detail, it is clear that it gets the essentials absolutely right: a duty-oriented conception of the *Re Hastings-Bass* rule, the invocation of which is dependent on the proof of a breach of duty by the trustee, and the consequence of which is to render the impugned exercise of the power voidable, not void. But this interlude before the Supreme Court hearing is an opportune moment at which to look more broadly at the *Re Hastings-Bass* doctrine, to reflect on the processes through which it has been, and will continue to be, moulded and refined, and to consider what questions remain unanswered, and what the Supreme Court might do to chart the future course of this field of legal practice and scholarship.

In granting permission for the appeal<sup>1234</sup> the Supreme Court has brought about the first serious opportunity for consideration of trustees' powers at this level<sup>1235</sup> since *Re Gulbenkian's Settlement Trusts (No 1)*<sup>1236</sup> and *McPhail v Doulton*.<sup>1237</sup> Both

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<sup>1233</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>1234</sup> Permission was granted on 1<sup>st</sup> August 2011 by Lord Walker, Lord Collins and Lord Clarke SCJJ. Lord Walker has previously written on *Re Hastings-Bass* (R Walker, 'The Limits of the Principle in *Re Hastings Bass*' [2002] PCB 226) and is widely expected to be a member of the panel which will hear the appeals.

<sup>1235</sup> At least in England and Wales. There have been important decisions in other jurisdictions, notably *Kain v Hutton* [2008] 3 NZLR 589 (Supreme Court of New Zealand).

<sup>1236</sup> *Re Gulbenkian's Settlement Trusts (No 1)* [1970] AC 508 (HL).

decisions are now more than 40 years old, and in the four decades since then the House of Lords and the Supreme Court have rarely been troubled by such matters. Indeed *McPhail v Doulton* especially might now properly be seen as the modern cornerstone of this branch of the law. Lord Wilberforce, for the first time, made clear the interaction between trustees' duties and the powers they hold, and in doing so dispelled the notion that trustees were largely free from judicial control in the exercise of dispositive powers, and firmly established the requirement of due consideration.<sup>1238</sup> In the period since, two major trends of particular relevance to the present issues have been evident. First, the ever increasing professionalization of trusteeship<sup>1239</sup> has led to demands for higher standards of trustee competence and conduct where the trustee is paid to act. This arguably culminated in section 1 of the Trustee Act 2000 which replaced the 'ordinary prudent man of business'<sup>1240</sup> standard with a duty to 'exercise such care and skill as is reasonable in the circumstances', thus making clear that there could be no question of a less stringent or more subjective standard for trustee diligence.<sup>1241</sup> By requiring what is 'reasonable' to be interpreted by reference to the business, profession or special knowledge of the

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<sup>1237</sup> *McPhail v Doulton* [1971] AC 424 (HL).

<sup>1238</sup> *ibid* 448-49. See also *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch) 202, and text to n 123 and following.

<sup>1239</sup> See: Law Commission, *Trustee Exemption Clauses* (Law Com CP No 171, 2003) [4.4]; JH Langbein, 'Rise of the Management Trust' (2004) 143 (10) *Trusts & Est* 52; L Aitken, 'Limiting the Trustee's Liability - Is "Gross Negligence" Relevant?' (2011) 127 *LQR* 503, 503.

<sup>1240</sup> *Speight v Gaunt* (1883) LR 22 Ch D 727 (CA) 740.

<sup>1241</sup> See n 503.

trustee<sup>1242</sup> the Act makes clear that a higher standard is generally expected when the trustee is paid.<sup>1243</sup> In tension with these developments, the second trend is to the increased use of liability exemption clauses by all types of trustee,<sup>1244</sup> but perhaps most especially by professional and corporate trustees.<sup>1245</sup> Through this mechanism trustees can avoid all liability except for their own actual dishonesty,<sup>1246</sup> potentially leaving out-of-pocket beneficiaries with no source of recompense. The conflict here is particularly evident in the Law Commission's work on exemption clauses – first proposing to restrict their use to unpaid trustees<sup>1247</sup> then relenting under the pressure of consultation responses opposed to such restriction.<sup>1248</sup> Against this background the *Re Hastings-Bass* rule can be seen as a subtle way of avoiding such difficulties: if an improper disposition by a trustee is voidable (or indeed void), there is a prospect of

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<sup>1242</sup> Trustee Act 2000, s 1(1)(a) and (b).

<sup>1243</sup> Arguably codifying the existing law in this respect: *National Trustees Company of Australasia v General Finance Company of Australasia* [1905] AC 373 (PC) 381; *Re Waterman's Will Trusts* [1952] 2 All ER 1054 (Ch) 1055; *Bartlett v Barclays Bank Trust Co Ltd (No 1)* [1980] Ch 515 (Ch) 534; Law Commission, *Trustees' Powers and Duties* (Law Com No 260, 1999) [2.15].

<sup>1244</sup> In the leading case on exemption clauses, *Armitage v Nurse* [1998] Ch 241 (CA), Millett LJ stated that 'the view is widely held that these clauses have gone too far' (at 256). See: DJ Hayton, 'The Irreducible Core Content of Trusteeship' in A Oakley (ed) *Trends in Contemporary Trust Law* (Clarendon Press 1996) 48; Law Commission, *Trustee Exemption Clauses* (Law Com CP No 171, 2003) [2.1]-[2.2], [3.19]-[3.27]; J Getzler, 'Am I My Beneficiary's Keeper? Fusion and Loss-Based Fiduciary Remedies' in S Degeling and J Edelman (eds), *Equity in Commercial Law* (Lawbook Co 2005) 264-65; Law Commission, *Trustee Exemption Clauses* (Law Com No 301, 2006) [3.6]-[3.10].

<sup>1245</sup> See: C Harpum, 'Fiduciary Obligations and Fiduciary Powers - Where are We Going?' in P Birks (ed) *Privacy and Loyalty* (Clarendon Press 1997) 167-68; Law Commission, *Trustee Exemption Clauses* (Law Com CP No 171, 2003) [4.23]-[4.28]; Law Commission, *Trustee Exemption Clauses* (Law Com No 301, 2006) pt 4.

<sup>1246</sup> *Armitage v Nurse* [1998] Ch 241 (CA) 253-54.

<sup>1247</sup> Law Commission, *Trustee Exemption Clauses* (Law Com CP No 171, 2003) [4.85].

<sup>1248</sup> Law Commission, *Trustee Exemption Clauses* (Law Com No 301, 2006) [1.13]-[1.18].

protecting the beneficiaries by recovering the trust property (or its traceable proceeds), even if the trustee is personally immune from liability.<sup>1249</sup>

In this context, of Lord Wilberforce's approach to powers in *McPhail* and the tension between expecting high standards of professional trustees and the reality of limited individual liability, the judgment of Warner J in *Mettoy Pension Trustees Ltd v Evans*,<sup>1250</sup> an undoubtedly radical extension of *Re Hastings-Bass* itself<sup>1251</sup> and arguably the true *fons et origo* of the modern *Re Hastings-Bass* rule, is perhaps best understood as reflecting a sound judicial instinct: that justice requires that an effective remedy be available where trustees are less than appropriately competent or diligent in the exercise of their powers.<sup>1252</sup> But when Warner J decided this case in 1989 he took legal practice in the pursuit of justice far ahead of the theoretical underpinnings of the law. Much scholarship on proprietary remedies, and on voidness and voidability, mostly developed in the field of unjust enrichment, was then still yet to be written,<sup>1253</sup> and with little in the courts or the literature since *McPhail v Doulton* on trustees' duties in relation to powers it is unsurprising that the precise nature of the cause of action for which the *Re Hastings-Bass* rule provided a remedy was to remain elusive through the line of cases down to *Sieff v Fox*.<sup>1254</sup> Not only did not one of these

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<sup>1249</sup> See text to n 711.

<sup>1250</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch).

<sup>1251</sup> Because *Re Hastings-Bass* itself was concerned only with perpetuity and partial invalidity, not the duty to consider: see text to n 206 and following.

<sup>1252</sup> See text to n 53 and following.

<sup>1253</sup> See n 738.

<sup>1254</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

cases proceed as far as any appellate court, but over this period before *Pit v Holt* the scholarship on powers was also somewhat wanting (though Thomas's 1998 treatise on powers,<sup>1255</sup> and important articles by Harpum<sup>1256</sup> and Nolan<sup>1257</sup> are notable exceptions).

What has been missing most of all, though, is a comprehensive analysis of the control of trustees' powers as a system, rather than a series of unconnected rules. This thesis has attempted to provide an analytically robust account of the *Re Hastings-Bass* rule and its place in a rational system of controls. In doing so it has filled in some of the unknowns on the map of controls of powers, and has tried to draw principled links between the elements described and discussed. But a great deal more remains to be done. Three examples will suffice to show the scale of the remaining challenge. First, as has been seen, the fraud on a power case law is far from straightforward and that doctrine's relationship with other controls is fraught with difficulty. The roles of good faith, of the fiduciary prohibitions, and of the duty of care in the powers context are likewise not fully understood.<sup>1258</sup> Secondly, there remains much to be said on the law of mistake, both in relation to the scope and application of that doctrine generally, but more specifically as to how it relates to the

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<sup>1255</sup> GW Thomas, *Thomas on Powers* (Property and Conveyancing Library, 1st edn, Sweet & Maxwell 1998). A new edition has since been published, taking into account the decision of the Court of Appeal in *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132: GW Thomas, *Thomas on Powers* (2nd edn, OUP 2012)

<sup>1256</sup> C Harpum, 'Fiduciary Obligations and Fiduciary Powers - Where are We Going?' in P Birks (ed) *Privacy and Loyalty* (Clarendon Press 1997).

<sup>1257</sup> R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293.

<sup>1258</sup> Nolan (n 1257) does address these matters, but his account of each specific control is necessarily brief, and in relation to the *Re Hastings-Bass* rule, pre-dates the Court of Appeal's decision in *Pitt v Holt*.

other controls applied to a trustee, and how far it operates identically as between a trustee and an individual acting on his own behalf. For mistake as for the *Re Hastings-Bass* rule, *Pitt v Holt*<sup>1259</sup> is likely to be only a starting point for rationalisation and understanding. Thirdly, this is a field into which modern unjust enrichment analysis, now so notably prevalent throughout English private law, has not yet fully penetrated. At the most superficial level there are obvious questions unanswered, such as whether a personal claim in unjust enrichment is available against the recipient of property pursuant to an invalid exercise of a power, and if it is, whether that is dependent on the prior setting aside of the exercise.<sup>1260</sup> More theoretically, questions of taxonomy, causative event<sup>1261</sup> and the justification for a proprietary, rather than personal,<sup>1262</sup> response have not been widely addressed in the powers context.<sup>1263</sup>

Clearly the Supreme Court will not be in a position to address all, or even very many, of these issues in 2013. However the opportunity is available, as it was in *McPhail v Doulton*, to set the direction of travel for the lower courts, and for legal scholarship and practice, perhaps for very many years to come. If, in upholding the Court of Appeal's decisions, the Supreme Court can set out what principles the *Re*

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<sup>1259</sup> *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

<sup>1260</sup> See text to n 744 and following.

<sup>1261</sup> See: P Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 UWL Rev 1; P Birks, *Unjust Enrichment* (Clarendon Law Series, 2nd edn, OUP 2005) ch 2; AS Burrows, *The Law of Restitution* (3rd edn, OUP 2011) 9-12.

<sup>1262</sup> See n 738.

<sup>1263</sup> Though see: C Mitchell, P Mitchell and S Watterson, *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) [8-94]–[8-101].

*Hastings-Bass* rule is built upon, and if it can make clear the pressing need for the systematic rationalisation of this field of law, then it will go some way towards achieving that. *Pitt v Holt* might then be remembered as following on from *McPhail v Doulton* as the next great landmark case in our understanding of trustees' powers.

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