

Should the “Rule in Hastings-Bass” be Followed in Australia? – Trustees’ Duty to Enquire and Trustees’ Mistakes

J C Campbell¹

In the last 10 years a startling line of cases has developed at first instance in the English courts and in the courts of various tax havens that follow English law. In these cases a trustee has dealt with the trust property in a way that involves a mistake, or turns out to have unpredicted and unwelcome consequences – usually in the form of incurring more tax than had been anticipated – but the trustee or the beneficiaries, or the trustee and the beneficiaries together, have been able to approach the court and have the transaction undone.

These cases are a development of some remarks of the English Court of Appeal in 1975 in *In Re Hastings-Bass; Hastings-Bass v IRC* [1975] Ch 25. In the decade from 1990 some cases considered the remarks and elaborated on them, but without finding that the particular cases at hand met the requirements for setting the transaction aside.² In that time a rule of law that was thought to arise from the remarks came to be called “*the rule in Hastings-Bass*”.³ As the pursuers of poltergeists and flying saucers are well aware, as soon as one coins a name, people will assume that there really is something that is referred to by the name. And it has come to be accepted in the English courts of first instance that there is such a “*rule*”.

It is only since 2000 that the working through of this “*rule*” has led to courts actually setting aside transactions that trustees have entered.⁴ In 2010, the scope of application of the “*rule*” has been extended beyond trustees to the exercise of a fiduciary power by the administrator of the property of a mentally incapable person.⁵

The power of the “*rule*” is demonstrated by the variety of trustees’ decisions have been judicially rubbed out in accordance with it:

- The trustees of a British Virgin Islands will trust exercised a power of appointment by appointing funds to an accumulation and maintenance (A & M) trust for a granddaughter of the testator. The trustees of the will trust knew that a solicitor who they appointed as one of the trustees of the A & M trust was about to retire from practice. They did not realise that the effect of his retiring was that he would lose the status of being a deemed non-resident, and that would cause not only the A & M trust, but also the entire will trust to be regarded as UK-resident for tax purposes. The will trust had huge accumulated capital gains, and bringing the trust onshore would create an enormous tax liability. The will trustees would not have made the appointment if they had realised that this would be the effect. The judge held that the appointment was void.⁶
- A complex scheme for the avoidance of capital gains tax required the trustees of an Isle of Man trust exercise a power of appointment in a later tax year to that in which the man for whose benefit the tax scheme was established and certain members of his family were excluded as beneficiaries of a trust. Despite specific counsel's advice that exercising the power of appointment in a different tax year was essential, the trustees exercised the power of appointment in a tax year when that man and his family were still beneficiaries of the trust. The judge held that the exercise of the power of appointment was void⁷.
- When a trustee's solicitor received instructions from the settlor of a trust to exercise in favour of the settlor's sons a power of appointment concerning 40% of the trust property, the trustee made an appointment of 60% of the funds. This was done in 1992. The sons received about £200,000 in capital and £200,000 in income before, in 2002, the trustee applied to the court to have the decision declared void. The judge held that, because the fault in conveying the settlor's instructions to the trustee was attributable to the trustee's solicitor, the trustee had failed to take into account a relevant consideration (namely, the settlor's wishes). He declared the appointment voidable.⁸

- The trustees of a trust exercised a power of appointment of certain property, on the basis of legal advice about the tax consequences. After the power had been exercised, it was realised that the legal advice was wrong. It was held that the exercise of the power of appointment was void. One reason was that the trustees had failed to take into account a relevant consideration, namely what the tax consequences really were, because their lawyers provided them with wrong advice on that topic.⁹

This paper will not trace in detail the sequence of cases through which the “rule” has developed.¹⁰ However, it should be noted that the development has occurred entirely at first instance level. There have been only *obiter* in passing concerning the case of **Hastings-Bass** (and no endorsement of a “rule” derived from it) in the English Court of Appeal.¹¹ It has not been mentioned in the House of Lords or the Supreme Court of the United Kingdom. In the Privy Council it has been mentioned only in a case where **Hastings-Bass** is cited as authority for the obligation of a trustee to use a discretionary power for a proper purpose,¹² and in another case in a dissenting judgment of one Law Lord.¹³

Nearly all of the cases that have developed or applied the “rule” are ones where the entity with the greatest commercial interest in resisting the remedy, namely the Revenue, was not a party, and where either the trustees and beneficiaries agreed that a transaction should be set aside, or else there is real room to wonder how vigorous any opposition to the remedy was. That makes them of weaker persuasive value than they otherwise might be. Extracurial remarks by judges on the “rule” range from cautious through puzzled to hostile.¹⁴

In Australia **Hastings-Bass** has been referred to without being followed in some first instance decisions,¹⁵ and not cited in any appellate court. Thus the question of whether the “rule in *Hastings-Bass*” should be followed in Australia is very much an open one.

I make clear that any views I express in this paper are necessarily tentative ones, and I am very conscious that judges who try to work out a legal problem on their

own often do not do as well as they might after proper argument concerning the problem¹⁶.

The English Court of Appeal decision from which the line of cases sprang, **Hastings-Bass** itself, was one that did not apply the so-called “*rule in Hastings-Bass*”. **Hastings-Bass** arose when trustees of fund A had transferred some trust funds to trust fund B, believing they were exercising a power of advancement concerning William, who a contingent beneficiary of fund A. Fund B was held for William for life, then for any wife or children he might have, with some other gifts over. When they exercised the power the trustees of fund A had not realised that the effect of the rule against perpetuities was that the trusts that followed William’s life interest were void, and there would be a resulting trust to fund A after William’s life interest.¹⁷ The Court of Appeal held that there was none the less an effective exercise of the power of advancement. It was in that context that the Court of Appeal said:

“...where by the terms of a trust ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless

- (1) what he has achieved is unauthorised by the power conferred upon him, or
- (2) it is clear that he *would not* have acted as he did
 - (a) had he not taken into account considerations which he *should not have taken into account*, or
 - (b) had he not failed to take into account considerations which he ought to have taken into account.

In the present case (2) above has not, in our judgment, been established ...¹⁸” (emphasis and formatting added by me)

Things to notice about this test are:

1. It takes the form “*the court should not interfere ... unless.*” Such a test identifies necessary conditions for the court to interfere, but does not purport to state the conditions that are sufficient for the court to interfere.
2. It is imprecise about what sort of “*interference*” there might be.
3. It presupposes that the trustee is acting in good faith in exercising the discretion.
4. There are effectively three different circumstances in which it is contemplated that the court might intervene – when the act done is outside the scope of the power, OR when taking into account improper considerations causes him to act in a way different to how he would have acted if those considerations had not been taken into account, OR when a failure to take into account considerations he ought to have taken into account causes him to act in a way different to how he would have acted if he had taken those considerations into account. In other words, the failure to take account of considerations that should be taken into account, or taking account of improper considerations, is something that occurs within the scope of the power.
5. The “*considerations*” are referred to in a question-begging way, as ones that he “*should not have*” or “*ought to have*” taken into account. The reader is not told how to identify whether any particular consideration fits one of those descriptions. However in the context of the case, it is clear enough that the consideration that the trustees failed to take into account was that the rule against perpetuities would make part of their appointment invalid, and in consequence they did not turn their minds to whether the appointment that would actually take effect (ie just William’s life interest) was for William’s benefit, as opposed to whether the appointment that they thought they were making was for his benefit. However the court was satisfied that if the trustees had turned their mind to whether an appointment of just a life interest to William was for his benefit, they would have concluded that it was.

The confusion that has resulted from the “*rule in Hastings-Bass*” is all the greater pity because its origin, the summary of relevant principles that the court gave in *Hastings-Bass*,¹⁹ was unnecessary for the decision. The court had held that the trustees had in substance asked themselves the correct question, and given the only reasonable answer to it, in the course of asking themselves what was eventually known to be the mistaken question of whether an advance to the 1957 trust, taking effect completely, would be for William’s benefit. When the trustees had in substance asked themselves the correct question (and thereby given real and genuine consideration to whether to make the advancement), and their bona fides were not in dispute, their decision stood, even though the advancement they made was cut down in its effect by the rule against perpetuities.

In the course of the later first-instance case law the principle stated by the Court of Appeal has been transmuted from a negative statement of when a court will not interfere into a positive statement of when a court will interfere. The statement that is currently accepted in first instance cases in England is that of Lloyd LJ in *Sieff v Fox* at [119]:

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

Transforming the test in that way is invalid logic. Even if the court in *Hastings-Bass* had been right in saying that “*a court should not interfere ... unless...*” one of the conditions it identified were met, that is simply not the same as saying the court *will* interfere if one of the conditions is met.²⁰ However, what matters for present purposes is whether a test as so stated is justified in principle.

My present view is that it is not, for several reasons.

Equity’s Conceptual Apparatus and Method

The first is that the “rule” as formulated in ***Sieff v Fox*** ignores a fundamental feature of the methodology and conceptual structure of equity. Equity does not proceed, code-like, by a set of rules that can be stated in propositional form and are then applied in a deductive fashion to the facts of a particular case. Rather, it proceeds by reference to two quite distinct types of concepts. They are equity’s standards, and its remedies.

The standards are the criteria by reference to which equity holds that the conduct of one person towards another is unconscientious. The case law shows that there are many and different ways in which one person can behave in what equity regards as unconscientious towards someone else. They range from causing someone to part with property or enter a transaction through fraud²¹ or undue influence, to keeping property one has received as a volunteer once one knows that it is the product of fraud or undue influence, to refusing to actually bear a burden that that person is equally liable with another person to bear. The question that judges commonly pose to plaintiff’s counsel, “*What is your equity?*” is answered by identifying the breach of equity’s standards for which the plaintiff is seeking a remedy, and showing that the plaintiff is someone who has suffered or might suffer by reason of that breach of standards.

The common law had only one remedy for all the civil wrongs it recognised, namely damages. Equity developed a wide range of remedies of its own. A distinctive feature of the way it applied its remedies is that it acted *in personam*. One aspect of acting *in personam* is that equity made an order that required the person who was before it to do something.²² Another was that precisely what that person was required to do was one tailored to the situation of that person and the facts of the individual case. The remedy was one that would require the person to do whatever actions were most likely, within the limits of what was practically possible, to undo the particular breach of equity’s standards that had been committed, or that there was a threat to commit. That there have been subsequent dealings with the properties involved, that make it impossible to put the parties back into exactly the position that would remedy the unconscionableness, was not necessarily a reason for denying a remedy

completely.²³ Frequently the unconscientious conduct was conduct that the defendant had committed or was threatening to commit, but it need not be so.²⁴

The remedy that equity granted was just a means to an end, namely fixing the departure from equity's standards.²⁵ Granting an equitable remedy required a judge to be very clear about just what was the standard that had been breached, in what way it had been breached in the particular circumstances of the case, by whom the standard was breached or would be breached, and also to form a judgment about what would be the best practical course to adopt to make good the breach so far as was possible. Though there were precedents of orders that had been made in similar situations that could guide a judge in formulating an order, each order granting a remedy was hand-crafted to meet the circumstances of the particular case.

There is nothing to stop the one case from exhibiting contraventions of more than one standard of equity. If that has happened, the judge then moulds a remedy that will, as near as is practicable, make good all the departures from equitable principle that have occurred. As the Privy Council put it in *Plimmer v Mayor of Wellington*²⁶, "*the Court must look at the circumstances in each case to decide in which way the equity can be satisfied*"²⁷.

Equitable defences can provide a reason for a court not granting a remedy, or modifying the remedy it would otherwise have given.²⁸

To state a rule in terms that "*the court will interfere*" with a trustee's action if a short list of criteria is fulfilled ignores the way that the availability and terms of an equitable remedy are based on the facts of the individual case, and many different equitable principles might impinge on a particular fact situation. Attempts to lay down either necessary or sufficient conditions for granting an equitable remedy concerning a trustee's exercise of a power seem to me to be inherently undesirable, because they fail to take account of the many different ways in which equitable standards could be breached, and the many different factors that could impinge on the judge's discretion about the appropriate remedy. For these reasons, the "*rule*" is a dogmatic oversimplification.

To make this more concrete, even if trustees have exercised a discretionary power, and the effect of the exercise is different from that which they intended, and they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account, a court will not “*interfere with their action*” in any of the following situations:

- (1) as a consequence trust property has come to be held by a bona fide purchaser for value without notice²⁹ (though there might be an action for breach of trust against the trustee)
- (2) the action of the trustees was one to which the beneficiaries gave informed consent³⁰
- (3) if there are circumstances giving rise to a defence of acquiescence, election or estoppel³¹
- (4) if the property has been transferred to a volunteer – in that situation, if the transferee still has the property it might be recovered through a tracing action, or there might in some circumstances be an action available to the trustee to recover its value, but the remedy is not to “*interfere with [the] action*” of the trustee

Mixing Different Equitable Principles

A second problem with the formulation of the “*rule*” in ***Sieff v Fox*** is that it mixes together two distinct streams of equitable principle, one concerning trustees taking into account irrelevant considerations or failing to take into account relevant considerations, the other concerning trustees acting under the influence of mistake or ignorance. There are quite distinct types of unconscientiousness involved in those two streams. The first stream concerns what a trustee must do to fulfill the requirements of conscientious behaviour in exercising a discretionary power, the second concerns identifying when it is unconscientious for someone

to keep a benefit once they know that it has been conferred on them by mistake or through ignorance. I will consider each of those streams in turn.

The Source of a Trustee's Duty³²

To state the elementary, a trust involves property being held by the trustee, for the benefit of another person or persons.³³ The fundamental expectation of the equity court is that the trustee will faithfully perform the office that he has taken on. Because the trustee has been entrusted with the property on the basis that it will be held on the terms of the trust, it is a departure from equity's requirement of conscientious behavior for him not to perform that office faithfully. Sometimes a trust instrument will state expressly certain duties of the trustee, but the courts recognize many duties that are not expressly stated. These duties of trustees have been derived by the courts by reasoning from the nature of the office of trustee, and the practical realities of the trustee carrying out the particular office that he has undertaken. To the extent they are not stated expressly, a trustee's duties are thus arrived at by a type of implication from the nature of his office.

It depends on the precise terms of the individual trust in question, the circumstances surrounding its setting up, and the nature of the property involved, just what is involved in the trustee faithfully carrying out his office. The performance of a trustee's office is one that almost inevitably involves the trustee in forming and carrying through practical judgments.³⁴ Because a trust necessarily involves the trustee in holding property, there are almost inevitably judgments of a business nature, to do with the manner of investment of the trust property, which will have consequences for whether the capital is at risk of loss in whole or part, whether the capital grows, and what income is derived from the property from time to time. Because many trusts have their origin in the desire of a man or woman to look after the financial interests of their family, often after the settlor's death or incapacity, some of the decisions that trustees are called on to make are of a familial nature, such as deciding how much income to distribute and to whom, whether to provide for specific needs like the maintenance of children and if so how much and for which children, and whether to distribute capital and if so how much and to whom.

Any trustee's duty is one that the court has arrived at by deducing or implying what, in the context of the particular trust and its particular circumstances, the trustee *must* do if the settlor's intention is to be carried out. The nature of this process of deduction is illustrated by the way the court³⁵ reasoned in ***In Re Pauling's Settlement Trusts***³⁶ about the circumstances in which a trustee acts properly in exercising a power to pay capital for the benefit or advancement of a beneficiary:³⁷

Being a fiduciary power, it seems to us quite clear that the power can be exercised only if it is for the benefit of the child or remoter issue to be advanced or, as was said during argument, it is thought to be "a good thing" for the advanced person to have a share of capital before his or her due time. That this must be so, we think, follows from a consideration of the fact that the parties to a settlement intend the normal trusts to take effect, and that a power of advancement be exercised only if there is some good reason for it. That good reason must be beneficial to the person to be advanced; it cannot be exercised capriciously or with some other benefit in view. The trustees, before exercising the power, have to weigh on the one side the benefit to the proposed advancee, and on the other hand the rights of those who are or may hereafter become interested under the trusts of the settlement.

It is also illustrated by the obligation of the trustee to convert into authorised investments wasting or reversionary property that is settled in succession.³⁸ In imposing this obligation the court is almost always not giving effect to any stated intention of the settlor that the property should be converted. Rather, it is giving effect to the settlor's intention that the beneficiaries were to enjoy the property in succession. Where the property was wasting or reversionary that intention in practical reality could only be achieved by converting it into an asset of the kind whose capital value would be retained or at least not significantly eroded (thereby protecting the interest of the remainderman), while also producing an income for the life tenant.³⁹

The duty of the trustee not to delegate arises from the settlor's intention that it will be the trustee, not someone else, who makes decisions concerning the trust, and carries the trust out. However that duty is subject to some exceptions, that arise from practical necessity, or from what the court takes the settlor's intention to be. Thus, in ***Speight v Gaunt*** (1883) 9 App Cas 1 at 5 Earl of Selborne LC described

the circumstances when a trustee was justified in using an agent to transact trust business, when there was no specific power to do so, as one where there was a “moral necessity from the usage of mankind”. Lord Blackburn said:⁴⁰

“ ... where there is a usual course of business the trustee is justified in following it, though it may be such that there is some risk that the property may be lost by the dishonesty or insolvency of an agent employed.

The transactions of life could not be carried on without some confidence being bestowed. When the transaction consists in a sale where the vendor is entitled to keep his hold on the property till he receives the money, and the purchaser is entitled to keep his money till he gets the property, it would be in all cases inconvenient if the vendor and purchaser were required to meet and personally exchange the one for the other; when the parties are, as is very often the case, living remote from each other, it would be physically impossible.

Men of business practically ascertain how much confidence may be safely bestowed, or rather whether the inconvenience and hampering of trade which is avoided by this confidence is too heavy a premium for insurance against the risk thus incurred. When a loss such as that which occurred in *Ex parte Belchier* Amb. 218 occurs from having bestowed such confidence, they doubtless re-consider all this; and when a new practice, such as that of making bankers' cheques payable to order and crossing them arises, as it has done within living memory, no doubt it is made use of in many cases to avoid incurring that risk, which was formerly practically inevitable. So that what was at one time the usual course, may at another time be no longer usual.

Judges and lawyers who see brought before them the cases in which losses have been incurred, and do not see the infinitely more numerous cases in which expense and trouble and inconvenience are avoided, are apt to think men of business rash. I think that the principle which Lord Hardwicke lays down is that, while the course is usual, a trustee is not to be blamed if he honestly, and without knowing anything that makes it exceptionally risky in his case, pursues that usual course. And I think that, independent of the high authority of Lord Hardwicke, this is founded on principle. It would be both unreasonable and inexpedient to make a trustee responsible for not being more prudent than ordinary men of business are.”

The justification for the court proceeding in that way is that the prevailing practices that prudent men of business follow are the ones that the settlor is likely to have envisaged the trustee would follow, unless the settlor has expressly said otherwise.

At least some of the cases that established or expounded various of the trustees' duties did so by reference to social conditions that existed at the time.⁴¹ At least some of the duties that the courts have evolved have been altered by legislation.⁴² Some of the duties were arrived at by reasoning that might be contestable, if it were to be argued afresh what is required as a matter of practical necessity for the trustee to faithfully carry out his office, but the duties have hardened into positive rules of law.⁴³

The point of this discussion about the origin of trustees' duties, for present purposes, is that the duties are an attempt to state what the trustee must do to carry out his office faithfully. That that is the task they seek to perform is an important aid to understanding the general language in which they are sometimes cast.

There will be many practical decisions where a range of choice is open to the trustee, consistently with the settlor's intentions. In that sort of situation, the only duty of the trustee is not to stray outside the bounds of that range of choice.

Trustees' Duty concerning Exercise of Discretionary Decisions

The duty of trustees in exercising a power exercisable in their "*absolute and unfettered discretion*" has been stated by McGarvie J in ***Karger v Paul***:⁴⁴

"... with one exception, the exercise of a discretion in these terms will not be examined or reviewed by the courts so long as the essential component parts of the exercise of the particular discretion are present. Those essential component parts are present if the discretion is exercised by the trustees in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred. The exception is that the validity of the trustees' reasons will be examined and reviewed if the trustees choose to state their reasons for their exercise of discretion."

In ***Re Beloved Wilkes Charity***⁴⁵ Lord Truro LC said that the duty of trustees was to exercise their discretion

“... with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrive at, except in particular cases. If, however ... trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision; but if, without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion.”

In ***Parkes Management Ltd v Perpetual Trustee Co Ltd*** (1977) 3 ACLR 303, Hope JA⁴⁶ held⁴⁷ that:

“In equity, where a trustee has a discretionary power, that power “must be exercised with an absence of indirect motive, with honesty of intention and with a fair consideration of the issues”: ***Jacobs Law of Trusts*** 4th ed p 301. In ***Lewin on Trusts*** 15th ed p 32, the requirement is expressed to be that the trustee’s conduct be bona fide and the determination not influenced by improper motives. There is ample authority for these propositions ...”

Barwick CJ in ***Lutheran Church of Australia South Australian District Incorporated v Farmers' Co-Operative Executor and Trustees Ltd***,⁴⁸ said of a mere power conferred on a trustee:

“... whilst the power is not in the nature of a trust so that the trustee must exercise it, equity would ensure that the trustee bona fide considers whether or not the power should be exercised, and that in doing so, proper considerations are in mind, and improper considerations excluded. The discretionary nature of the power does not mean that the discretion is absolute, in the sense that it can be exercised irresponsibly, capriciously or wantonly.”⁴⁹

Another formulation of when an exercise of a discretionary power can be held ineffective is if the trustees act for reasons that are “*irrational, perverse, or irrelevant to any sensible expectation of the settlor*”.⁵⁰

In ***Wilkinson v Clerical Administrative and Related Employees Superannuation Pty Ltd*** [1998] FCA 51; (1998) 79 FCR 469 in the Full Federal Court, Heerey J quoted a statement made by Northrop J in the court below

concerning the grounds on which an exercise of a trustee's power could be challenged in a court:⁵¹

“Where a trustee exercises a discretion, it may be impugned on a number of different bases such as that it was exercised in bad faith, arbitrarily, capriciously (*Re Pauling's Settlement Trusts* [1964] Ch 303 at p 333), wantonly, irresponsibly (*Lutheran Church of Australia South Australian District Inc v Farmers' Co-Operative Executor and Trustees Ltd* (1970) 121 CLR 628 at 639), mischievously or irrelevantly to any sensible expectation of the settler (*Re Manisty's Settlement* [1974] Ch 17), or without giving a real or genuine consideration to the exercise of the discretion (*Karger v Paul* [1984] VR 161, which includes a survey of the authorities). The exercise of a discretion by trustees cannot of course be impugned upon the basis that their decision was unfair or unreasonable (see *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896) or unwise (*Gisborne v Gisborne* (1877) 2 AC 300 at p 307). Where a discretion is expressed to be absolute it may be that bad faith needs to be shown (*Gisborne v Gisborne* at 305). The soundness of the exercise of a discretion can be examined where reasons have been given, but the test is not fairness or reasonableness (see *Re Londonderry's Settlement* [1965] Ch 918 at 928-9: *Karger v Paul* at 165-6).”

The joint decision of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ in *Attorney-General (Cth) v Breckler* [1999] HCA 28; (1999) 197 CLR 83 at [7] quoted the statement of Northrop J in *Wilkinson* concerning “... the scope for challenges in courts of equity to the exercise of discretions reposed in the trustee of a settlement.” Their Honours noted at [7] that, “In this Court, the accuracy of that summary was not disputed.” As I read the case, that should not be taken as an indication that their Honours have reservations about the accuracy of the summary. They later accepted, at [24]:

“In the present case, plainly the decision of the trustees in respect of which Mrs Leshem complained to the Tribunal was made in exercise of discretionary powers which, however, in a court of equity, would not be open to attack by application of a criterion of fairness or reasonableness.”

The other member of the court, Kirby J, specifically endorsed Northrop J's summary, at [58]:

“Before the creation of the Tribunal, disputes between beneficiaries, trustees and insurers concerning superannuation were decided, where necessary, by courts of competent jurisdiction, applying to the problem in hand the general law relating to trusts, contracts, insurance and so forth.

The grounds for challenge to the exercise by trustees of the powers reposed in them, particularly if the trustees gave no reasons for their decision, were limited (*Re Londonderry's Settlement* [1965] Ch 918 at 928-929 per Harman LJ; cf *Karger v Paul* [1984] VR 161 at 185 per Young CJ; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.) The circumstances in which relief could be obtained from a court were accurately summarised in *Wilkinson* (1998) 79 FCR 469 at 480. They are reproduced in the joint reasons. They did not extend to cases where the decision of the trustee was criticised as unfair or unreasonable (*Dundee General Hospitals Board of Management v Walker* [1952] UKHL 1; [1952] 1 All ER 896) or unwise (*Gisborne v Gisborne* (1877) 2 App Cas 300 at 307 per Lord Cairns”

Even carrying through the requirement of giving a “*real and genuine consideration*” or a “*fair consideration*” to a practical question of whether to exercise a power can involve the trustee in some measure of gathering and weighing the facts that are involved in making that particular consideration. Just how far the trustee needs to go in gathering facts will depend on the particular trust. There will be some occasions when quite extensive fact-finding is required before the trustee can make a properly informed decision. For instance, if a trustee of a superannuation fund is required to make a discretionary allocation of a benefit amongst dependents of a member, the trustee will need to find out who are the dependents, and enough about their circumstances to make the decision in a way that meets the description of “*real and genuine consideration*”.

Sometimes the fact that the trustee is someone who the settlor would know was familiar with the circumstances relevant to making the choice involved in exercise of a particular power is a reason why the court has inferred that the trustee is entitled to rely on his own knowledge of the subject matter.⁵² At other times, even if the question at issue is one involving a familial type of decision like exercise of a power of appointment where the potential beneficiaries are member of a family, if the trustee is not in a position to know the facts relevant to exercise of the power, the duty of giving “*real and genuine consideration*” would require the trustee to ascertain enough about the circumstances in life of the potential beneficiaries to be able to say that the settlor’s intention about the manner in which the power would be exercised has been complied with.

A specific aspect of faithful performance of the trustee's office is that he will exercise care in making discretionary decisions. The standard of care that the equity court held was required was the care that a reasonable man of business would exercise concerning his own affairs.⁵³ Exercising that degree of care will involve the trustee in enquiring about the facts that are relevant to any proposed decision. Thus, when trustees had a discretion to invest in any company they chose, it was held that before investing in a particular company the trustees should "*make every necessary inquiry to satisfy themselves that it is really a solvent company*".⁵⁴ In ***Elders Trustee and Executor Co Ltd v Higgins*** (1965) 113 CLR 426 at Dixon CJ, McTiernan and Windeyer JJ said:

"The duty of the trustee was to exercise due diligence, care and prudence in the conduct of the business, bearing in mind the need to preserve the capital of the testator's estate for those entitled in remainder: ***Speight v Gaunt*** (1883) 22 Ch D 727; ***Learoyd v Whiteley*** (1886) 33 Ch D 347; (1887) 12 App Cas 727. If it did not do this it was guilty of a breach of trust."

These judges explicitly recognised the need for trustees to consider relevant facts before making a discretionary decision. The reason they gave for holding a trustee's decision concerning investment to be a breach of trust was, at 451-452:

"... the appellant has asked us to infer that, since mala fides or neglect is not to be imputed to a trustee from his silence alone, the various possibilities must have all been considered and a decision made to reject them. If that were so, the decision would seem to have been one that a prudent man, *duly considering the relevant facts*, could not reasonably reach." (emphasis added)

Whether trustees have failed in performing their duty by failing to find out a relevant fact will depend on the scope of inquiry the settlor is likely to have intended them to carry out, and any implications that arise from the practical necessities of the circumstances in which they are administering the trust. Consider the situation of a trust that has a family member as trustee, and creates a power of appointment among family members. If one of the family members is undergoing financial hardship that is not observable and not known to the others, but that the family member would

disclose if asked, it would usually not be a breach of the trustee's duty to have failed to ask the question.

A similar approach is shown, in the context of trustees' business decisions, by ***Speight v Gaunt***.⁵⁵ There, a trustee had paid trust funds to a broker "*whose good faith he had then no cause to suspect*"⁵⁶ for investment. When the broker absconded, the beneficiaries sought to hold the trustees personally liable. It was held that the trustees were not personally liable, because employment of a broker was the usual way of carrying out that sort of transaction, and it had been within their power to pay the money to the broker. Lord Blackburn said⁵⁷:

"as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit."

Application of the Law concerning Trustees' Duty in the Hasting-Bass Line of Cases

In the statements of principle quoted earlier⁵⁸ concerning the duty of trustees in exercising a discretionary decision, McGarvie J and Lord Truro refer to the ability of the court to correct the discretionary decision of trustees if the trustees disclose their reasons, and those reasons are found to be inadequate. It has been a feature of the cases concerning ***Hastings-Bass*** that the trustees have been anxious to put the inadequacy of their own reasoning in front of the court, and indeed have made the inadequacy of their own reasons the basis of their application. That distinguishes them from many cases in which trustees' decision are challenged, and the trustees seek to keep their reasons to themselves.⁵⁹

The decisions that apply the ***Hastings-Bass*** principle recognise a duty of trustees to "*take relevant considerations into account*". The expression "*relevant consideration*" is inherently relational – considerations are not

relevant in isolation, they are only relevant for some particular purpose or in some particular context. What is a relevant consideration in one context might not be a relevant consideration in another context. The **Hastings-Bass** cases have come to identify the “*relevant considerations*” with an adamant objectivity that is not informed by the essential equitable question of what is not only permissible but necessary for faithful performance of this particular trustee’s office, either as a matter of the intention of this particular settlor or what is usual practice for prudent people or practical necessity. The “*relevant considerations*”, for the purpose of deciding whether a trustee has acted in breach of trust, are any that the trust instrument expressly requires be taken into account, and those without which the trustee could not give real and genuine consideration to the topic, and make a bona fide decision.

The requirement in the **Hastings-Bass** line of cases that the trustees consider the true effect of the choices they have to make means that they may well need to know the answer to a very complex legal question to perform their task correctly. For example, in **Hastings-Bass** itself, the only “*relevant considerations*” that the trustees could arguably have failed to take into account was that the interests subsequent to William’s life interest would fail because they contravened the rule against perpetuities. Yet, given that the trustees made their decision before **Pilkington**⁶⁰ was decided, to expect them to take that into account would be to expect them to be better informed than the first judges in the Chancery Division and the Court of Appeal were at the time. Another example is that Warner J’s reason in **Mettoy** for not being satisfied that the trustees would have come to a different conclusion if they had acted carried out their task properly⁶¹ was that the trustees, performing the task properly, would have realised that the power of amendment of the pension fund rules involved in **Mettoy** was fiduciary and thus would be exercised by the court in the event of liquidation. In **Sieff v Fox**, even though the trustees had obtained legal advice about the tax consequences of the appointment of a made, the advice was wrong because it did not take into account how tax impacted on particular aspects of the transaction.⁶² It seems quite unrealistic to

pitch the standard for proper exercise of trustee's duties as high as these cases do. It is not consistent with any likely intention of the settlor, nor with any practical necessity.

I would agree that, when a trustee is deciding whether to exercise a power of appointment or advancement, there will be many situations where giving "*real and genuine consideration*" to whether to exercise the power will require the trustee to take reasonable care to find out what the tax effect of the transaction would be. The purpose of many a settlor in establishing a family trust is to provide a means of reducing the family's total tax bill, the purpose of many a settlor in establishing a superannuation fund is to take advantage of the tax concessions made available to such funds, and any such intention of the settlor should appropriately be taken into account when a trustee exercises a discretionary power concerning such trust. However, the cases following ***Hastings-Bass*** have come to require the trustee to take into account the *actual* tax effect that a contemplated transaction will have, and have concluded that, concerning at least some tax consequences, that tax effect, if he has sought advice from competent people but has been given advice that could objectively be seen as wrong, then the duty has not been performed. There is an exception, of uncertain scope, if the trustee fails to take into account "*details*" of the tax effects that are "*subtle*" or "*arcane*".⁶³ But even so, requiring the trustee to take into consideration the principal or important *actual* tax effects of a decision, even if he has been misled by his advisers, goes beyond what equity requires of a trustee.

This approach can be compared with the result that the House of Lords arrived at in ***Speight v Gaunt***. In ***Speight v Gaunt***, surely it would be a relevant consideration that the agent that the trustee was proposing to employ was dishonest, and contemplating absconding. The trustees in ***Speight v Gaunt*** clearly did not take that consideration into account, because they had no reason to suspect the agent was dishonest and might abscond. There could be no realistic doubt that they would not have paid him if they knew he was dishonest. According to the ***Hastings-Bass***

line of cases, their failure to take that relevant consideration into account should have meant that their decision to pay the money to the agent was void, and hence that they had parted with the money for a purpose that was unauthorised, and hence that they should have been liable. The fact that the House of Lords concluded that the trustees in ***Speight v Gaunt*** were not liable casts doubt on the correctness of the ***Hastings-Bass*** line.

By contrast, the way in which the Court of Appeal proceeded in ***Stannard v Fisons*** was orthodox – it could have been said, as soon as the trustees' decision about dividing the fund was made, that their information-gathering was inadequate in so far as it did not consider the then present value of the fund.

Lloyd LJ in ***Sieff v Fox*** suggests that the ***Hastings-Bass*** principle might apply in circumstances other than where trustees are in breach of their duty.⁶⁴ If this means that failure to take into account relevant considerations, or taking into account irrelevant considerations, is part of the reason why it is suggested a trustee's decision made within power should be set aside, I know of no equitable principle that allow such a result, short of the trustee having acted in breach of duty. Indeed, the only criterion by reference to which a trustee ought (or ought not) have taken some consideration into account is performance of his duty as trustee. If trustees have acted within the scope of a power conferred on them, and in accordance with the standards that equity makes obligatory for trustees, their act will be valid, unless it contravenes some positive law like the rule against perpetuities or a statute.

Remedy for breach of trustees' duty re exercise of discretionary decision

If a trustee has made a decision in a way that does not accord with equity's standards, the remedy that equity grants will be the one that will undo, so far as is possible, the breach of standards that has occurred. What remedy will achieve that result will depend on what has been done to implement the decision.

If the decision of the trustees has not been acted on in any way, it would suffice for the court to declare the decision void, and (if there was any risk that the trustees might seek to implement the decision) order the trustees not to implement it.

If the trustees have parted with the trust property in accordance with the decision, the appropriate remedy will depend on in what circumstances and to whom they have parted with it. If they have transferred some trust property to a beneficiary, who still has it, the beneficiary, as a volunteer, and absent any other equitable consideration like estoppel or laches, would not be able to resist a claim for its return once he had notice that he had acquired it in breach of trust.

It is sometimes of fundamental importance to the availability of equitable remedies whether a person affected by them is a volunteer, and in many instances those in whose favour a discretionary decision of trustees operates are volunteers. Even if the beneficiaries of a trust have given value in connection with the trust, as happens concerning occupational superannuation schemes, and managed investment schemes that operate in a trust structure, the relevant question is whether, in relation to the particular decision that is in question, the beneficiary has given value. ***AMP (UK) plc v Barker***⁶⁵ was a case where a trustee had amended the rules of a superannuation scheme to increase, at comparatively small cost, the benefits payable to a small class of members. The trustee did not realise that the rules created a flow-on effect to another class of members, which would have a massive cost. While it was a rectification case, it was held that part of the reason why rectification was available was that, while the members had given consideration in relation to the pension scheme as a whole, they had not given consideration for the rights that they acquired as a result of the flow-on.⁶⁶ That reasoning would be equally applicable to applications to the court to cure a trustee's breach of duty arising from failure to take relevant considerations into account.

In ***Kerr v British Leyland (Staff) Trustees*** the Court of Appeal regarded the fact that members had given consideration in relation to the superannuation scheme as a whole as a reason why the trustees had an obligation to give properly informed consideration to a member's claim for a disability benefit.⁶⁷ I doubt that that is the reason why there was the duty to give properly informed consideration – giving properly informed consideration is part of the duty trustees owe even to volunteers. However, whether or not I am right or not in saying that, ***Kerr*** makes a different point to that made in ***AMP v Barker*** about the significance of giving consideration.

At the other extreme to volunteer beneficiaries, if the property has passed to a third party for value without notice, it will not be recoverable, and it may be that the only remedy is for the trustee to recoup the trust fund. There are numerous other situations in between. The point to make is that a declaration of voidness cannot be assumed to be always the appropriate remedy.

The question of the appropriate remedy was ignored in ***Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain***.⁶⁸ A tax scheme that was set in train in 1999 involved a company controlled by the taxpayer (AHL) making a loan of £750,000 in May 2000 to the trustee of a British Virgin Islands trust. The UK tax legislation was changed in March 2000, without the trustee being informed. In consequence the May 2000 loan was made as had originally been planned. Because of the March change in the law a large tax liability would arise. The trustees applied to have their acceptance of the loan avoided. That relief was granted.

The case as reported is highly unsatisfactory. There was a contention that the loan had in fact not been made to the trustee, which the judge did not deal with. (One would have thought that either an admission or a decision that there really was a loan would be a prerequisite to setting it aside.) The decision proceeds on an assumption that the loan had been made. It seems that the judge found, at [5], that the loan was applied in lending

£712,500 to another company, Westbourne, and as to £37,500 in applying for some shares. While AHL was party to the proceedings, Westbourne and the company in which the shares were applied for were not. If the transaction had really been carried through, Westbourne and the share-issuing company would still have the money they had been paid. No consideration was given to how the situation as between AHL and the trustee could be restored to the status quo – even if the trustee’s decision to accept the loan was declared void, that would not restore to AHL the money.

“Would” or “Might” Have Been Different?

One requirement of the statement of the “rule” by Warner J in **Mettoy** is concerned, and the modified version of it adopted by Lloyd LJ in **Sieff v Fox**⁶⁹ is that the trustee *would have* acted differently if the relevant consideration had been taken into consideration. One can readily enough understand how a minimum requirement for a court setting aside a flawed decision of trustees is that they *might* have decided differently if they had gone about their task correctly. Once there has been a departure from equity’s standards in the decision-making process, then unless the court is persuaded that that departure in fact made no difference to the outcome,⁷⁰ and equity court would search for a remedy. **Kerr** and **Stannard** both adopted the “*might have acted differently*” test as the basis for making an order that a trustees’ decision was of no effect when proper consideration had not been given to the subject matter. However, **Hastings-Bass**, **Mettoy** and **Sieff v Fox** all hold that the precondition for the court interfering is that the trustees *would not* have acted as they did had they taken into account the obligatory considerations, or failed to take into account the inappropriate considerations.

The reasons that Lloyd LJ gave in **Sieff v Fox** for adopting the tougher test, of setting aside a decision only if it could be shown that the trustees would have acted differently if they had taken into account the matters they should have, was that the trustees’ power in question in **Kerr** and

Stannard was one that they were bound to exercise, while the power he was considering was one that trustees might or might not exercise in their discretion. (*Kerr* was a case where a *superannuation disability benefit depended on whether the trustees “accepted that your incapacity is permanent”*. The only duty the trustees were held to have was to give properly informed consideration the application.) At [52] he recorded a submission:

“... that *Kerr* and *Stannard* are in a different and distinct line of authority from *Re Hastings-Bass*, because they are concerned with circumstances in which the trustees are under an obligation to act, whereas *Re Hastings-Bass* concerned a voluntary exercise of a discretion, as did *Mettoy*. Other cases in the same line as *Kerr* and *Stannard* include *Mihlenstedt v. Barclays Bank International Ltd* [1989] IRLR 522 and *Harris v. Lord Shuttleworth* [1994] ICR 991. He submitted, on this basis, that the proposition that the matter overlooked “might” have led the trustees to act differently cannot properly be transferred from the *Kerr* line of cases to the *Re Hastings-Bass* principle, both because of this distinction and because it is inconsistent with the Court of Appeal’s judgment in *Re Hastings-Bass* itself.”

He gave his reasons for accepting that submission at [55]–[56]:

“*Kerr* is thus a rather different kind of case, where the trustees are the arbiters of a beneficiary’s entitlement to a particular benefit under the rules of the pension scheme, and that entitlement is derived not from pure bounty, as would be the case in a family trust, but from the contract of employment. In those circumstances, and given the inadequate information provided to the trustees on which to take their decision, it seems to me logical that a relatively low threshold of relevance (“might”) should have been adopted by the court as the test of whether the deficiency of information entitles the beneficiary to have his case, in effect, reconsidered. *Mihlenstedt* was a similar case, though there the decision lay with the employer, not the trustees, and the claim failed on the facts. *Harris* was also a similar type of case.

Likewise in *Stannard* the trustees were under an obligation to act, by appropriating an amount to be applied for the benefit of the transferring employees, though they had to decide, after consulting the actuary, what amount should be appropriated, as being the amount which they decided to be just and equitable. Although on its facts *Stannard* is a different kind of case from *Kerr*, it seems to me that the analogy is fair. Both were pension cases, so that the rights of the members or beneficiaries arose in the context of the contract of employment. Both were cases in which the trustees

were under a duty to act, though with some freedom as to how they proceeded. It is true that even outside this type of case, if trustees have a discretionary power, they are under obligations in relation to it, including to consider from time to time whether to exercise it, and if they do decide to exercise it they are under duties in respect of that process, but it seems to me that there is a real distinction between such a case (which ***Re Abrahams' Will Trusts, Re Hastings-Bass*** and the present case are) and cases such as ***Kerr*** and ***Stannard*** where the trustees are under a duty to act, not merely a duty to consider from time to time whether to act. I consider, therefore, that Mr Herbert's submissions in this respect are well founded."⁷¹

I do not agree with this basis for the distinction. If a trustee has failed to take into account a consideration that proper performance of his duty requires him to take into account, his decision is flawed. Why should the granting of a remedy depend on whether the trustee is obliged to attempt the task again? And if trustees have made a decision that is not the type that could be made in faithful performance of their office, why should it only be when the court is positively persuaded that they would have acted differently, if they had done the task properly, that their dereliction of duty should be corrected? It is true that, if the flawed decision is set aside, the trustees might not attempt to make a decision on the same topic. But that the trustees might decide not to exercise their power is exactly the situation that the settlor brought about, by conferring a power that there is no duty to exercise. I can see no reason of principle why the court should state a principle in a way that saves flawed decisions of trustees, once the flaw has been demonstrated.

Mistake or Lack of Adequate Understanding Alternative Grounds for a Remedy

In ***Re Beloved Wilkes Charity*** Lord Truro said that if trustees disclose their reason for making a decision and it "*is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision*"

This is a recognition of the line of authority whereby a transaction conferring a voluntary benefit can in some circumstances be either set aside⁷², or a document incorporating or giving effect to it rectified,⁷³ if the decision is the product of mistake. Another line of authority results in a conferring of a voluntary benefit being set aside if it is entered without a proper understanding of the nature of the transaction.⁷⁴

While those lines of authority cover a wider field than decisions by trustees, they are capable of applying to decisions by trustees. The equity that is invoked here is not dependent on there being a breach of duty by the trustee. Rather, it is dependent on the unconscientiousness of someone receiving a benefit as a volunteer if a mistake or lack of understanding has caused that benefit to be given. These lines of authority can provide an alternative basis to a “rule in ***Hastings-Bass***” for setting aside or removing the sting of some decision of trustees that are the product of a mistake. Understanding how they work concerning dealings with trust property requires the lines of authority to be set into context.

Creation and Dealing With Interests in Trust Property

An equitable interest in trust property can come into existence through unilateral action of one person. One way is that someone declares that henceforth he will hold upon certain trusts certain property⁷⁵ that he already owns. Another is that someone who is a beneficiary of a trust and *sui juris* directs the trustee henceforth to hold the property on new trusts.⁷⁶ Likewise, the exercise of a power of appointment or a power of variation of a trust has the effect of creating a new trust on which the trust property is held – it operates because of the person exercising the power “*having sufficient dispositive power over or in respect of the [trust property] to subject [it] to new and different trusts*”.⁷⁷ An assignment of an interest in a trust similarly causes the trustee to hold the trust property for a new beneficiary.

The rationale of the express trust is that there is a moral obligation to adhere to the settlor's intention concerning the administration of the trust property. When someone declares himself trustee of property he already owns, it is his own conscience that is bound by the statement of intention. When property is transferred to a trustee with a declaration of trust, it is receiving and keeping the property in the knowledge of the terms upon which it is given that binds the trustee's conscience. If the trust contains a power of appointment or a power of variation, it is part of the settlor's intention that the trust property will be held and applied in accordance with an appointment or variation made within the scope of the power. Thus in that situation giving effect to the settlor's intention requires one to recognise the efficacy of the appointment or of the variation. But it is inherent in the notion of a power that the person who exercises it can choose what will be done, within the scope of the power. The exercise of that choice involves giving effect to the intention of the appointor.

Thus, when a new trust is brought into existence, the terms on which the trust property will thenceforth be held depend on the intention of one person only, namely the settlor. When a power of appointment or power of variation is exercised the terms on which the trust property is thenceforth held will depend on the intention of the settlor (who intended that the property should be held in accordance with an appointment or variation of a particular type) and also on the intention of the person who exercises the power.⁷⁸

There are other ways as well in which a creation or alteration of beneficial interests in a trust can involve more than one person. Trusts are often declared by a deed to which the settlor and the trustees are parties. Sometimes A transfers property to B stating that it is to be held on certain trusts, and B accepts the property. A common example of this happening is when a trust is created by a settlor settling a comparatively small sum of money on particular trusts, and someone⁷⁹ then "*feeding*" the trust with assets of more substantial value. In these examples the trustee, or B, might make promises about how the trust will be conducted, or might

passively accept the property. Trusts are often declared as a result of a previous negotiation, in which a consensus is arrived at about what the terms of a trust will be.⁸⁰ Similarly, a power of appointment could be exercised as a result of a previous consensus.⁸¹ It is common in occupational superannuation schemes for the trustees to have the power to change the rules of the scheme, with the consent of someone else (often the employer).⁸²

A release of a right under a trust, or an assignment of an equitable interest under a trust, are dealings with equitable property that are dependent for their efficacy on the intention of the person who engages in them.⁸³

At this stage, I simply draw attention to the way in which there might be one person, or more than one, involved in the historical path by which property has come to be held on particular trusts. I will seek to demonstrate that who has been involved, and their roles, can make a difference to the type of unconscientious conduct that can arise, and to the identity of the person who is seen as acting unconscientiously, and that these differences lead to differences in to how the remedies of rectification and rescission apply concerning trusts and dealings with trust property.

Setting aside settlements and dealings with trust property

In the absence of any other factors, a fully constituted trust that contains no power of revocation cannot be revoked by the settlor, binds the trustee, and can be enforced even by volunteers.⁸⁴

Settlements of property and dealings with trust property, like other transactions, can be set aside in equity if they are the product of what equity regards as fraud – which can extend to misrepresentation, undue influence, abuse of a fiduciary position, deliberately taking advantage of what one knows is a mistake, and taking advantage of weakness.⁸⁵ Dealings that have been produced by such means are set aside, because it is unconscientious for the recipients of benefits under such a document

to keep benefits that have come to them through such means. That is so even if the recipient of the benefits is not the person who has engaged in the conduct that is fraudulent.

Mistake

Even in the absence of this sort of fraud, a dealing with trust property will be set aside if it is the product of a mistake on the part of the settlor or appointor.⁸⁶

The sorts of documents that have been set aside because they are a product of such a mistake on the part of the settlor or appointor include:

- a resettlement of trust property⁸⁷
- a deed of appointment of trust property⁸⁸
- a deed of revocation of a settlement⁸⁹
 - a surrender of a life estate under a settlement⁹⁰

Examples of the sort of mistake that has justified rescission of a deed is when an appointment is made with the intention that it produce equality between the provisions made for the appointor's children but it actually produces inequality,⁹¹ when a man gives property to his wife with the intention that she should enjoy it beneficially but unbeknown to him such a gift is caught up by the couple's marriage settlement and so would not be enjoyed by her beneficially,⁹² or when a widow exercises a power to revoke a settlement, believing (on her solicitor's mistaken advice) that it will enable her to keep the settled property available to her in its then state of investment but in fact the legal effect is to cause the property to revert to her husband's estate.⁹³

The onus of showing that the dealing is the product of a mistake is on the person who seeks to set the dealing aside or have it altered.⁹⁴

Rationale

The equity that is involved here is that the mistake has caused the dealing that the settlor or appointor enters to operate completely differently to the way that person intended, so that the usual rationale for enforcement of trusts, giving effect to exercises of powers, and recognising dealing with equitable interests does not apply. When there is no intent that the donee should have the trust property in the way the dealing on its face provides, it is unconscientious for the donee to keep it.

Thus in ***Ogilvie v Littleboy*** (1897) 13 TLR 399 at 400 col 1 Lindley LJ, delivering the judgment of the court concerning an attempt by a settlor to set aside the trusts she had declared, said:

“Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor ... In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.”

The unconscientiousness of a donee keeping a benefit granted through a serious mistake has been recognised as the basis of this equity in ***Gibbon v Mitchell***.⁹⁵

Parallels With Money Had and Received

The unconscientiousness of keeping a benefit that was given by mistake is the explicit basis for one species of the common law’s remedy for money had and received, which is explicitly based on equitable principles.⁹⁶ (Lord

Mansfield, who developed the remedy, had had years of practice at the Chancery bar and on several occasions declined the Lord Chancellorship⁹⁷). In **Barrow v Isaacs & Son**⁹⁸ Kay LJ explained how the unconscientiousness of keeping the money meant that it could be recovered, even if the mistake under which it was paid arose from the forgetfulness or carelessness of the payer:

“... it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant. There undoubtedly forgetfulness of the previous payment is treated as mistake. But in those cases the payee is in possession of money which he had no right to receive, and which really belongs to the person who paid it, and no amount of carelessness on his part can justify the payee in retaining it. I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity.”⁹⁹

He went on to explain that there was not the same sort of unconscientiousness involved if a contracting party exercised a right to terminate a lease on the basis of a breach of covenant that the lessee had committed through his own forgetfulness, or if a person enters a contract because of a mistake that arises from his own forgetfulness.

A topic for further investigation is the extent to which the defence of change of position, that the common law recognizes to an action for recovery of money paid by mistake, has parallels in equitable defences.

Effect of a Transaction Cf Its Consequences

In **Gibbon v Mitchell**¹⁰⁰ Millet J said¹⁰¹ that:

“ ... wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.

This distinction between the “*effect of the transaction itself*”, and “*its consequences or the advantages to be gained by entering into it*” is a difficult one to grasp and apply in practice.¹⁰² In ***Ogden v Griffiths*** [2008] EWHC 118 (Ch); [2009] Ch 162 Lewison J has pointed out at [24]–[25] that the formulation of principle that Lindley LJ gave in ***Ogilvie v Littleboy*** was not so restricted, and doubted that the distinction was a proper limitation on the scope of the equitable jurisdiction to relieve against the consequences of a mistake.

I agree that there is no such limitation on the equity to set aside a transaction for mistake. The unconscientiousness that generates the remedy occurs whenever someone has received a benefit that he would not have received if the mistake had not been made. The precise nature of the mistake does not matter – what matters is that the mistake causes the benefit to be conferred.

Gibbon was decided in 1990, at a time when the English law concerning recovery of money paid under mistake was restricted to recovery caused by a mistake of fact. Now in both Australia and England money has been held to be recoverable if paid under mistake, whether the mistake is of fact or law,¹⁰³ provided the mistake causes the payment.¹⁰⁴ It is not necessary to categorise the mistake as “*fundamental*”.¹⁰⁵ Given the equitable origins of the action for money had and received, these developments are at least consistent with the equity to set aside transactions for mistake depending on the mistake being one that causes the transaction, rather than on the nature of the mistake.¹⁰⁶

If a mistake must be causative of transaction being entered before it can be set aside under an equity relating to mistake, it is correct to say that if trustees exercise a discretion “*but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would have not have acted as they did had they not*” made that mistake. To that extent, the formulation of the “*rule in Hastings-Bass*”

in ***Sieff v Fox*** is right. However there is no need for a causative mistake that it is sufficient to warrant a transaction being set aside to be one that arises from any failure of the trustees to take into account considerations which they ought to have taken into account, or from their taking into account considerations which they ought not to have taken into account. As shown earlier, if the failure to take into account considerations which the trustees ought to have taken into account, or taking into account of considerations which they ought not to take into account is itself a breach of the trustees' duty, that can provide a separate ground for setting the transaction aside, without any need for showing that the trustees would not have acted as they did if they had not breached their duty.

Lack of understanding

Mistake involves having a positive belief about some topic, which is incorrect. The type of mistake that is relevant to setting aside a trust dealing arises when the person in question has an intention that he seeks to carry out by the deed, but that intention is not carried out by the document actually entered.

As well as there being a line of cases setting aside settlements and dealings with trust property that are made through mistake, there is a separate line of cases whereby a settlement or dealing with trust property can be set aside if the nature of the transaction being entered was not understood by the person who entered it.¹⁰⁷ The onus of proof of the lack of understanding is on the person who seeks to have the deed set aside.¹⁰⁸ By contrast with the situation concerning mistake, there can be a lack of understanding sufficient for the deed to be set aside even if there is no proof of exactly what it was that the person intended.

Tests for setting aside the document are that the settlor did not know or have a fair opportunity to understand the nature and effect of the deed before he executed it,¹⁰⁹ or the court is satisfied the deed was not "*the free,*

determined act of the settlor".¹¹⁰ One practical guide¹¹¹ for when a deed settling a significant amount of property is binding¹¹² is that:

"All that the law requires in a deed of this description is that it should be effective, and should not contain any extraordinary clauses, unless those clauses are shewn plainly and distinctly to have been brought to the notice of the settlor, and to have been understood by him. It is not necessary to shew that the usual clauses inserted by conveyancers were explained; but any unusual clauses must be shewn to have been brought to his notice, explained and understood."

Rationale

The rationale for setting aside transactions not properly understood is that any intention with which the transaction was entered is so malformed that it would be unconscionable for those granted benefits by the transaction to keep them.

Rectification of documents effecting trust dealings

In circumstances where it is possible to establish not only that the document by which a trust dealing is effected does not give effect to the intention of the relevant person or persons, but also what that intention was, the court can rectify the document by rewriting it to make it accord with the actual intention. If there are two or more parties to the dealing in question, who have come to a common intention about its terms, it must be proved what the common intention of all the parties was before the document can be rectified,¹¹³ but if the document is a unilateral one then only the intention of the person who made it need be proved.¹¹⁴ If there is more than one party to the document, but no antecedent common intention, it may be that it is only the intention of the settlor that need be established.¹¹⁵ If the document as executed could reasonably be argued not to state the intention correctly, rectification can be granted *ex abundantia cautela*, without the court deciding the true construction of the document, because when there is a reasonable argument open that the

intention is not correctly expressed the instrument is a blot on the title of the persons who take under it¹¹⁶.

The type of mistake that justifies rectification need not be as serious as the type of mistake that justifies rescission of the document. In ***Ogilvie v Littleboy*** (1897) 13 TLR 399 Lindley LJ¹¹⁷ said at 400 col 2:

“in a long and complicated deed of gift mistakes might be made, which the court might rectify if desired by the donor, and yet such mistakes might not be important and serious enough to enable the donor to set aside the whole deed as failing in substance to carry out his intention.”

This emphasises that the mistake that justifies completely setting aside a transaction must be one that causes the transaction as a whole to be entered, not merely that the mistake produces some of the detail of the transaction. It is in that sense that a setting aside of a dealing with trust property requires a mistake that is serious.

The sorts of documents that have been rectified include a deed exercising a power of appointment (rectified to give effect to the intention of the appointor),¹¹⁸ a deed of settlement (rectified to give effect to the intention of the settlor)¹¹⁹, a deed of amendment of a trust (rectified to give effect to the intention of the person who had the power of amendment).¹²⁰

The court requires clear proof that the intention is not accurately stated,¹²¹ and the court must be particularly careful before it finds an intention on the basis of oral evidence,¹²² but there is no legal requirement that there be contemporaneous written evidence of the intention.¹²³

Even if the relevant party intended to use the actual words that were used in the document, rectification can be granted if it actually effects a different transaction to that which was intended.¹²⁴

If the practical outcome that the maker of the document intended to bring about is clear, the court can rectify by using technical words of its own drafting that are apt to achieve that practical outcome.¹²⁵ Just as in a suit for specific performance of a contract to convey property the court can use its own knowledge of what provisions are usual and appropriate to fill in gaps of conveyancing detail in the parties' agreement,¹²⁶ so in a suit to rectify a settlement made pursuant to a sketchy agreement the court can use its own knowledge to fill in such gaps.¹²⁷ There is authority that an intention as to the effect that a document is to achieve can result in rectification where “ ‘effect’ means the legal and actual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral kind (for example, its liability to stamp duty).”¹²⁸ That statement mirrors the “effect/consequences” distinction that was drawn in *Gibbon*, and may need reconsideration.¹²⁹

But if the equity of rectification is made out, the fact that a tax benefit would arise from granting a remedy is not a reason to refuse it. In ***Whiteside v Whiteside*** at first instance,¹³⁰ Harman J had refused rectification on grounds that included as a discretionary reason that the fact that the plaintiff was seeking rectification to provide “a side wind to help the plaintiff against the Revenue”. When ***Whiteside*** went on appeal¹³¹ the fact that a tax advantage was sought was not part of the reasons of the Court of Appeal for declining rectification.¹³² Later cases have held that, if a document fails to give effect to the intention of the parties it can be rectified even if there is an incidental effect that the rectification confers a tax advantage.¹³³

Rationale for rectification concerning trust transactions

Again, the rationale for the remedy is the unconscientiousness of the donee keeping a benefit that was not intended to be given. In ***Lady Hood of Avalon v Mackinnon***¹³⁴ Lady Hood made an appointment in 1904 of trust property to one of her daughters, in the same amount as she had

recently appointed to her other daughter. She entered the 1904 deed forgetting that 16 years before she had already made provision for the first daughter, so that the effect of the 1904 dealing was not, as she had intended, to create equality between the daughters, but to create inequality. The 1904 deed was set aside, but Eve J said, at 481:

Now the question is whether, in that state of facts, I can, consistently with the law, say that such a mistake on the part of the appointor entitles her to have the deed rescinded. I accept Mr. Lawrence's argument that whether it is rescission or whether it is rectification is only a question of degree. If the Court comes to the conclusion that the plaintiff is entitled to relief, then whether the proper relief be reformation or rescission is really immaterial, because whatever is the proper and necessary relief the Court is bound to give it.

That it is “*only a question of degree*” whether rescission or rectification is granted is a product of it being the same equity that underlies both remedies. Even though the order made was¹³⁵ “*that the deed be rescinded and set aside*”, as well Eve J adopted a form of order that has an analogy with the type of order made in rectification:

“... it would be a wise expedient if there was now indorsed on the original settlement a note of the three appointments which have been made and which stand, and also a note of the appointment with which I am now dealing, and a copy of the order which I am now making rescinding that last appointment, and I so direct.”

Similarly, in ***Re Strain (deceased); Allnutt v Wilding*** [2007] EWCA Civ 412; 9 ITELR 806 Mummery LJ said at [5]:

“Mistake is undoubtedly a ground on which a court may set aside or rectify a voluntary settlement. Rectification is but one aspect of a wider equitable jurisdiction to relieve parties from the consequences of their mistakes.”

Conclusion

When there are separate strands of principle and precedent that govern trustees duties, trustees mistakes and trustees lack of understanding, and the rationales for those principles are not all identical, it would be better to

keep the principles separate than to mix them together as the “*rule in the Hastings-Bass*” does.

25 November 2010

¹ Judge of the NSW Court of Appeal, Visiting Fellow Wolfson College Cambridge, Herbert Smith Visitor Cambridge University Faculty of Law Easter Term 2010

² **Mettoy Pension Trustees Ltd** [1990] 1 WLR 1587 (Warner J); **Stannard v Fisons Pension Trust Ltd** [1990] Pensions LR 179 (Warner J); **Stannard v Fisons Pension Trust Ltd** [1991] 1 Pensions LR 225 (EWCA);

³ The expression was first coined by Warner J in **Mettoy Pension Trustees Ltd** [1990] 1 WLR 1587.

⁴ **Green v Cobham** (decided 19 January 2000) HH[2000] EWHC 1564 (Ch); [2000] WTLR 1101; [2002] 1 BTC 170; **AMP (UK) plc v Barker** [2000] EWHC Ch 42; [2001] PLR 77; [2001] WTLR 1237 (**Hastings-Bass** said *obiter* to support setting aside the transaction, but not actually relied on); **Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children** (decided 17 July 2001) HH[2001] EWHC B2 (Ch); [2001] WTLR 953; [2001] STC 1344 (Patten J); **Hearn v Younger** [2002] EWHC 963; [2003] OPLR 45 (obiter discussion only); **Abacus Trust Co (Isle of Man) v Barr** [2003] EWHC 114 (Ch) 245; [2003] Ch 409 (Lightman J); **Sieff v Fox** [2005] EWHC 1312 (Ch); [2005] 3 All ER 693; [2005] 1 WLR 3811 (Lloyd LJ, sitting at first instance); **Gallagher Ltd v Gallagher Pensions Ltd** [2005] EWHC 42 (obiter discussion only); **Burrell v Burrell** [2005] EWHC 245; [2005] STC 569; **Betafence Ltd v Veys** [2006] EWHC 999 (obiter only); **St Mary and St Michael Parish Advisory Company Ltd v Westminster Roman Catholic Diocese Trustee** [2006] EWHC 762 (obiter only); **Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain** [2007] WTLR 1697 (a decision of the Grand Court of the Cayman Islands); **Pitt v Holt** [2010] EWHC 45 (Ch); ((2010) 12 ITEL 807, [2010] 1 WLR 1199, [2010] 2 All ER 774, [2010] BTC 235, [2010] EWHC 45 (Ch), [2010] STC 901, [2010] STI 1443, [2010] WTLR 269; **Futter v Futter** [2010] EWHC 449 (Ch) (Norris J); **Jiggins v Low H** [2010] EWHC 1566 (Ch)H [2010] All ER (D) 243 There have also been some decisions where the “rule” was invoked but where the court declined to set aside the transaction: **Breadner v Granville-Grossman** [2000] EWHC 424; [2001] Ch 523; **Smithson v Hamilton** [2007] EWHC 2900; [2008] 1 All ER 1216; [2008] 1 WLR 1453 (appeal settled **Smithson v Hamilton** [2008] EWCA Civ 996).

⁵ **Pitt v Holt** [2010] EWHC 45 (Ch); ((2010) 12 ITEL 807, [2010] 1 WLR 1199, [2010] 2 All ER 774, [2010] BTC 235, [2010] EWHC 45 (Ch), [2010] STC 901, [2010] STI 1443, [2010] WTLR 269

⁶ **Green v Cobham** HH[2000] EWHC 1564 (Ch); [2000] WTLR 1101; [2002] 1 BTC 170 (Jonathan Parker J)

⁷ **Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children** HH[2001] EWHC B2 (Ch); [2001] WTLR 953; [2001] STC 1344 (Patten J);

⁸ **Abacus Trust Co (Isle of Man) v Barr** [2003] EWHC 114 (Ch) 245; [2003] Ch 409 (Lightman J)

⁹ **Sieff v Fox** [2005] EWHC 1312 (Ch); [2005] 3 All ER 693; [2005] 1 WLR 3811 (Lloyd LJ, sitting at first instance).

¹⁰ That task has been performed recently by Professor Peter Edmundson in “*Setting aside trustees’ decisions: How secure is the rule in Hastings-Bass?*” (2008) 31 Australian Bar Review 36

¹¹ One that should be mentioned for completeness is **Stannard v Fisons Pension Trust Ltd** [1991] 1 Pensions LR 225 (EWCA). In it, the Court considered the 1986 decision in the Court of **Kerr v British Leyland (Staff) Trustees Ltd**, not reported until [2001] WTLR 1071, that had adopted a “*properly informed consideration*” test for the validity of trustees’ discretionary decisions, and said at [39], 233 only that there was “no difficulty in reconciling the judgment in **Kerr v British Leyland (Staff) Trustees Ltd** with the decision of this court on **Re Hastings-Bass**”. That is really a comparison of the individual decisions, and does not involve recognition of any “rule”. **Allan v Nolan** (also known as **Allan v Rea Bros Trustees Ltd**) [2002] EWCA Civ 85; [2003] O.P.L.R. 11; [2002] Pens. L.R. 169; [2002] W.T.L.R. 625; (2001-02) 4 I.T.E.L.R. 627 (a decision of Robert Walker LJ, with whom Aldous and Keene LJ agreed) concerned a purported transfer of assets from the EW pension fund to another, that to the knowledge of at least one of the trustees of the EW fund was being conducted for an improper purpose of allowing a beneficiary to get access to his benefit before reaching retiring age, and thus was ineffective to transfer any beneficial interest in the asset at all. It was in that context that Robert Walker LJ said, at [49]

“Since the court does not know the precise terms of the transfer payments power in the EW scheme it is impossible to say whether the invalidity of its exercise should be classified as an excessive (ie *ultra vires*) exercise of the power, or as a fraud on the power (which makes the exercise void, not voidable: *Cloutte v Storey* [1911] 1 Ch 18) or as an example of the operation of the principle in *Re Hastings-Bass* [1975] Ch 25: see *Mettoy Pension Trustees v Evans* [1990] 1 WLR 1587 at 1621-24, where Warner J stated at 1624

“For the principle to apply however, it is not enough that it should be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of it, they would not have acted as they did.”

This court formulated the test in less demanding terms in *Stannard v Fisons Pensions Trust Ltd* [1992] IRLR 27, but in this case even the most demanding test would lead to invalidity.”

That mention in passing seems to treat the principle as just a test for the invalidity of a trustee's decision, which is not the way that later English cases have treated it. In *Giovanni Malonne v BPB Industries plc* [2002] EWCA Civ 126; [2002] ICR 1045; [2002] IRLR 452; [2003] BCC 113 there is passing mention at [53] of counsel referring to the cases of *Hastings Bass* and *Mettoy Pension Trustees v Evans*, concerning which the only judicial remark is at [56] that “I do not believe that the cases cited assist him”.

¹² *Hayim v Citibank NA* [1987] AC 730. A testator had appointed X as the trustee of his American will (under which the plaintiffs were beneficiaries) and Y as trustee of his Hong Kong will. Clause 10 of the American will said that if (as actually happened) at the time of his death he owned a residence in Hong Kong and his brother or sister or both survived him, X's only responsibility or duty with respect to that property was one that would arise upon receipt of the proceeds of the residence or upon the death of the survivor of the brother and sister. The plaintiffs requested Y to sell the Hong Kong residence, but X requested Y not to do so. The house declined in value. The plaintiffs' action against X for breach of trust failed. Lord Templeman at 746 said:

“Clause 10 was in the circumstances designed to enable Albert and Maisie to remain in the house as long as [X] thought fit. If clause 10 were exploited for any other purpose the beneficiaries could complain and the court could find that [X] had not properly exercised the discretion conferred on [X] to postpone the sale of the house either in the interests of the beneficiaries or in the interests of Albert and Maisie: see *In Re Hastings-Bass, dec'd* [1975] Ch. 25, 41. In the circumstances which prevailed at the date when the testator made his American will, clause 10 was intended to enable [X] to be kind to Albert and Maisie without breach of any duty owed to the beneficiaries.”

While page 41 of *Hastings-Bass* is the place where the statement of principle previously quoted occurs, the circumstances of *Hayim* were not ones where X had failed to take into account any relevant consideration, or where there was any question of the actions of X not having the full effect intended.

¹³ *Oakley v Osiris Trustees* [2008] UKPC 2. The issue was whether there had been an effective exercise of the power of trustees to change the proper law of a trust from the law of Jersey to the law of the Isle of Man. Having found that, for 3 separate reasons, the exercise of the power was ineffective, Lord Scott of Foscote mentioned, at [55], that the purported exercise of power in relation to that trust did not take into account that there would be no change of proper law concerning another closely related trust, and continued:

“If these Trusts had been subject to the law of England that consideration might well have been sufficient to undermine the validity of the exercise in regard to the Tabatha Trust (see *In re Hastings-Bass* [1975] Ch. 25, *Charman v Charman* [2006] 1 WLR 1053 and *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409). It could not have been intended that the two Trusts should have different proper laws. This point, however, was not the subject of any argument either below or before the Board. There is plenty of other material that in my opinion requires the dismissal of this appeal.”

¹⁴ For example, Sir Robert Walker, “The Limits of the Principle in *Re Hastings-Bass*” [2002] PCB 226, at 238 – 239 said:

The unrestrained extension of the Hastings-Bass principle could lead to trustees being treated as new class of incapacitated persons, like children or feeble-minded adults. No-one could ever be sure that they had taken proper advice (even, as in the Abacus case, if they had teams of expert advisers) or that they meant what they said. Huge uncertainty would arise, especially as each doubtful decision would tend to have a knock-on effect making analysis of later decisions much more difficult (this will be a familiar experience for anyone who has, in investigating family trusts, identified an appointment, perhaps 20 or 30 year before, which was void for perpetuity). The

consciences of even the most honest and respectable professionals might be troubled at whether to raise doubts about a past appointment which had since proved inconvenient for tax purposes, or to suppress doubts about an appointment which, although questionable, had proved convenient.”

Justice Hayton, in the Preface to the 17th (2007) edition of Underhill and Hayton, *Law Relating to Trusts and Trustees*, says:

“The ramifications of the *Hastings-Bass* principle are clearly too extensive under the current law: as a matter of policy, can a settlor really be allowed to create a situation where his beneficiaries can insist that the trustee must always exercise its powers as a paragon of legal virtue or, otherwise, the exercise is void, so that a trustee’s mistakes can always be undone and put right? A case on the principle needs to proceed through the appellate process or Her Majesty’s Revenue and Customs need to have some limiting legislative provision in a Finance Bill.”

Justice Barrett, in *R v Barrett*, “The Principle in *Re Hastings-Bass*” (http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_barrett230206H) is suspicious and doubtful about the “rule”. There is also an extensive academic literature concerning it.

¹⁵ In *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 at [76] per Bryson J referred to *Hastings-Bass* but expressed no opinion about any “rule in *Hastings-Bass*”). In *Asea Brown Boveri Superannuation Fund No1 Pty Ltd v Asea Brown Boveri Pty Ltd*, H[1999] 1 VR 144H at 157 Beach J held that the law applicable to the court’s control of discretionary decisions of trustees was that stated by McGarvie J in *Karger v Paul* [1984] VR 161 and by Hayne J in *Esso Australia Ltd v Australian Petroleum Agents and Distributors Association* [1999] 3 VR 642., not a “so-called rule in *Hastings-Bass*”, but went on to hold that in any event the facts of the case did not satisfy that so-called rule. In *Sinclair v Moss* [2006] VSC 130 Byrne J at [13] set out principles that were common ground before him:

(2) The Court will interfere where a clear case is made out^{H^{2H}} that the discretion is not exercised upon a real and genuine consideration of the matter entrusted to the trustees’ discretion (*Rapa v Patience* (unreported) SC (NSW), McLelland J, 4 April 1985, at 11, BC8500888; *Telstra Super Pty Ltd v Flegeltaub* (2000) 2 VR 276 at 283 [26], per Callaway JA):

If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene.”^{H^{4H}}

(3) A discretionary determination may be impugned if the trustees in making it failed to take into account matters which are relevant (*Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896 at 905, per Lord Reid.), that is, matters which they should have taken into account or which should have affected their decision or where they took into account matters which they should not have taken into account (*Edge v Pensions Ombudsman* [2000] Ch 602 at 619). The importance of the word “should” in this context is emphasised in the 1993 decision of Hayne J in *Esso Australia Ltd v Australian Petroleum Agents’ & Distributors’ Assn* [1999] 3 VR 642 at 652 [41]:

The bare fact that there was material that was not placed before the trustee and which the trustee might have taken into account is not to say that the trustee should have considered it. Thus proof that there was material not considered by the trustee and which was material that the trustee might have taken into account does not show that the decision is ill founded.

(4) This principle, which is referred to in England as the Rule in *Hastings-Bass*,^{H^{8H}} is there said to contain the further requirement that, had the trustees taken into account the matter which they should have taken into account but did not, they would not have exercised their discretion in the way that they did. There seems to be some uncertainty whether the Rule in *Hastings-Bass* is accepted as the law in Victoria.^{H^{9H}} Principal (3), however, is well established by the cases to which I have referred. In argument before me nothing was made of the *Hastings-Bass* gloss.

Byrne J recorded in a footnote that “This case, as presented, did not involve a contention that the trustees took into account a matter which they should not have taken into account.”

In **BMD v KWD** [2008] WASC 196 McKechnie J decided not to grant leave to appeal against a decision of the administrator of a mentally incapable person not to take steps to set aside a contract that that person had entered. at [12] he set out the words in which the “rule in Hastings Bass” had been stated in **Mettoy v Evans**, and continued: “There is recent authority (**Sinclair v Moss** [2006] VSC 130 at [4]) casting doubt on the *Hastings-Bass* principle but I am content to apply it in this application as it is favourable to the appellant”. He went on to hold at [40] that on the facts “the appellant has failed to establish that the Public Trustee’s decision was wrong or that the SAT decision is attended with sufficient doubt to justify an appeal.”

¹⁶ Cf Campbell, “*Access by Trust Beneficiaries to Trustees’ Documents Information and Reasons*” (2009) 3 J Eq 97 text at at p 101, fn 18

¹⁷ They could not have been expected to realise that those trusts were void, because that aspect of the rule against perpetuities became clear only when the House of Lords decided **In Re Pilkington’s Will Trusts** [1964] AC 612, after the trustees had made the transfer.

¹⁸ at 41

¹⁹ Para 18 above

²⁰ If I decide that I will not buy a house *unless* it has at least 3 bedrooms and is within 15 minutes drive from the CBD, that does not mean I *will* buy a house *if* it has at least 3 bedrooms and is within 15 minutes drive of the CBD: there are quite a few more factors that enter into the decision.

²¹ And there are numerous different types of behaviour that equity regard as fraud – see text at fn 85 below.

²² Thus it did not matter that the person was required to do an act concerning a thing that was not itself within the court’s territorial jurisdiction, like foreign land (**Penn v Lord Baltimore** 1750) 1 Ves Sen 444; 27 ER 1132) or a foreign patent (**Potter v Broken Hill Pty Co Ltd** (1906) 3 CLR 479).

²³ **Earl Beauchamp v. Winn** (1873) LR 6 HL 223 at 232; **Alati v Kruger** (1955) 94 CLR 216 at 224-226

²⁴ It may be that it is only the course of the litigation itself that shows what equitable rights exist, but the court will grant a remedy to require those rights to be observed, even if there is no immediate threat on anyone’s part not to recognise them, once the court has identified them.

²⁵ Eg **O’Halloran v R T Thomas & Family** (1998) 45 NSWLR 262 at 272. In **Sindel v Georgiou** (1984) 154 CLR 661 at 667 the joint judgment said, concerning rectification of contracts, “Rectification is a remedy which cures erroneous expression of the parties’ true intention in a contract which is already binding.”

²⁶ (1884) 9 App Cas 699 at 714

²⁷ approved in **Giumelli v Giumelli** (1999) 190 CLR 101 at [10]

²⁸ In this field a relevant defence is that a settlement that could have been set aside soon after it was entered can become binding if it is later confirmed with knowledge: **Jarratt v. Aldam** (1870) L R 9 Eq. 463

²⁹ In **Turner v Turner** [1984] Ch 100 a purported exercise of a power of appointment and consequent conveyance of land occurred when trustees signed documents put in front of them without a clue about their duties as trustees, without understanding or questioning the documents, and without even realising that they were purporting to exercise a discretion. The exercise of the power of appointment was set aside as between the trustees and the beneficiaries, but not so as to prejudice a mortgagee who had acquired rights over the land, bona fide and without notice, after the conveyance.

³⁰ **Fletcher v Collis** [1905] 2 Ch 24; **In Re Pauling’s Settlement Trusts (No 1)** [1964] Ch 303 at 357–358; **Allan v Nolan** [2002] EWCA Civ 85 at [64]

³¹ **Habib Bank Ltd v Habib Bank AG** [1981] 1 WLR 1265 at 1284-1285

³² Part of this section of the paper draws on my summary in “*Exercise by Superannuation Trustees of Discretionary Powers*” (2009) 83 ALJ 159

³³ I will ignore, for ease of exposition, purpose trusts, but a similar analysis applies to them.

³⁴ An exception is a bare trust, where the sole duty of the trustee is to hold particular property in its then state of investment and hand it over to the beneficiary at a predetermined time, or when asked.

³⁵ Willmer LJ, giving the judgment of the English Court of Appeal

³⁶ [1964] Ch 303

³⁷ At 333

³⁸ **Howe v Earl of Dartmouth** (1802) 7 Ves Jun 137

³⁹ **Hinves v Hinves** (1844) 3 Hare 609; 67 ER 523 at 611,524 (“The rule did not originally ascribe to testators the intention to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention.”); **Cafe v Bent** (1845) 5 Hare 24; 67 ER 812 at 35, 817 (“The rule proceeds upon this that the testator has intended the enjoyment of perishable property by different persons in succession, and this the Court can only accomplish by means of a sale.”). This derivation of the duty to convert wasting or reversionary property was pointed out in Stebbings, **The Private Trustee in Victorian England**, CUP 2002, p 69

⁴⁰ At 19 -21

⁴¹ Eg the cases that decide what particular types of investment a trustee could safely invest in arrived at their conclusions by reference to the types of investment that were available at the time, and their relative security. In **Smith v Hassall** (1899) 20 NSW (Eq) will 165 at 171-172 A H Simpson CJ in Eq held that a difference in social conditions between England and Australia made a difference to the sorts of investments trustees could properly invest in.

⁴² Eg permissible trust investments are now identified by the criteria in s 14–14F **Trustee Act 1925** (NSW); the trustees’ duties as developed by the courts in the nineteenth century came to be seen to be too stringent, and so there was a series of ameliorating Acts in England from the **Law of Property and Trustees Relief Act 1859** to the **Judicial Trustees Act 1896**, the latter of which introduced the provision found in s 85 **Trustee Act 1925** (NSW) that allowed a trustee to be relieved from liability if he “acted honestly and reasonably and ought fairly be excused for the breach of trust and for omitting to obtain the direction of the court”. The history is traced in Chantal Stebbings, **The Private Trustee in Victorian England**, Cambridge University Press 2002, p 174-195

⁴³ I will not consider whether or to what extent those rules of law might themselves be open to question, at least in an appellate court, by reference to changed social conditions.

⁴⁴ [1984] VR 161 at 163-4

⁴⁵ (1851) 3 Mac & G 440; 42 ER 330

⁴⁶ with whom Mofitt P agreed

⁴⁷ at 311

⁴⁸ (1970) 121 CLR 628 at 639

⁴⁹ These remarks cannot be taken to be part of the ratio of the case. Only four judges sat in the High Court, and they divided equally on the validity of the disposition in question, for reasons partly influenced by whether creation of bare power of appointment by will was a valid exercise of the power to make a will – a question with complications beyond how a bare power of appointment created *inter vivos* is enforced. Even so, they still seem to me to state a correct principle.

⁵⁰ **Re Manisty's Settlement** [1974] Ch 17 at 26

⁵¹ at 480

⁵² **Karger v Paul**, where a testatrix appointed her husband and solicitor as trustees of her will, with power to appoint capital to (inter alia) the husband, and it was held that before making an appointment the husband was not bound to enquire of other potential beneficiaries about their financial circumstances, and the solicitor was entitled to rely on what the husband told him on that topic.

⁵³ **Fouche v Superannuation Trust Fund** (1952) 88 CLR 609 at 641. Under the judge made law, a trustee might sometimes be obliged to ignore some speculative investments which a prudent man of business might

make if he were investing money for himself: **Learoyd v Whiteley** (1887) 12 App Cas 727 at 733; **Smith v Hassall** (1899) 20 NSW (Eq) 165 at 170; **Bartlett v Barclays Trust Company (No 1)** (1980) Ch 515 at 531. Statute has modified the test slightly to require trustees who are professional trustees or investors of other people's funds to exercise the care, diligence and skill that a prudent person engaged in that profession, business or employment would exercise in managing the affairs of other persons, and trustees who are not professional trustees or investors of other people's funds to exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other person is: s 14A (2) **Trustee Act 1925 (NSW)**.

⁵⁴ **Consterdine v Consterdine** (1862) 31 Beav 330; 54 ER 1165 at 333, 1167 per Sir John Romilly. Similarly, in **Carlton Clock Tower Pty Ltd v Lew** (1990) V Conv R 54-389 Brooking J. at 64,773 said that even if a particular type of investment is authorised by the trust instrument, the trustees still must act with prudence in investing in that type of investment.

⁵⁵ (1883) 9 App Cas 1

⁵⁶ At 12

⁵⁷ At 19

⁵⁸ Footnotes 44 and 45 above

⁵⁹ There are some limited opportunities for a beneficiary to require disclosure of trustees' reasons – see Campbell, "Access by trust beneficiaries to trustees' documents information and reasons" (2009) 3 J Eq 97

⁶⁰ see fn 17 above

⁶¹ **Mettoy** at 1614 – 1617

⁶² The capital gains tax charge on certain not exempt chattels, and the effect of a particular clause of the settlement

⁶³ **Sieff v Fox** at [86]

⁶⁴ Para (iii) of the summary of his conclusions in [119]

⁶⁵ [2000] EWHC Ch 42; [2001] WTLR 1237

⁶⁶ At [77], 1262

⁶⁷ per Fox LJ at 1079

⁶⁸ [2007] WTLR 1697 (a decision of the Grand Court of the Cayman Islands)

⁶⁹ quoted at page 6 above

⁷⁰ eg **Cowan v Scargill** [1985] Ch 270 at 294

⁷¹ There is some supplementary discussion of the topic at [77], which does not make any significant new point.

⁷² Examples concerning decisions of trustees are **Meadows v Meadows** (1853) 16 Beav 401; 51 ER 833; **Ellis v Ellis** (1909) 26 LT 166; **Anker-Petersen v Christensen** [2001] EWHC B3 (Ch) [2002] WTLR 313; **Lady Hood of Avalon v Mackinnon** [1909] 1 Ch 476; **In Re Walton's Settlement** [1922] 2 Ch 509; **Gibbon v Mitchell** [1990] 3 All ER 338; [1990] 1 WLR 1304; **Dent v Dent** [1996] 1 WLR 683; **Phillipson v Kerry** (1863) 32 Beav. 628; 55 ER 247; **Forshaw v Welsby** (1860) 30 Beav 243; **Ogden v Griffiths** [2008] EWHC 118 (Ch); [2009] Ch 162

⁷³ Examples concerning decisions by trustees are **Wright v Goff** (1856) 22 Beav 207; 52 ER 1087; **Walker v Armstrong** (1856) 8 D M & G 531; 44 ER 495; **Lackersteen v Lackersteen** (1860) 30 LJ Ch 5; **Welman v Welman** (1880) 15 Ch. D. 570; **Killick v Gray** (1882) 46 LT 583

⁷⁴ Examples are **Dutton v Thompson** H(1883) 23 ChD 278H; **Wollaston v Tribe** (1869) L.R. 9 Eq. 44

⁷⁵ The property in question might be legal property, or it might be equitable property

⁷⁶ **Comptroller of Stamps (Victoria) v Howard-Smith** (1936) 54 CLR 614 at 622-623

⁷⁷ per Nettle JA, **Commissioner of State Revenue v Lam & Kym Pty Ltd** (2004) 10 VR 420 at [31]

⁷⁸ If a power of appointment is exercised by will the witnesses to the will are essential to the validity of the will, but not because they have any input into its contents – a will can be validly witnessed by people who know nothing of the contents. Thus their intent is not relevant to the trusts on which the property is thenceforth to be held.

⁷⁹ In Australian practice usually not the settlor

⁸⁰ This commonly happened with marriage settlements, where representative of the families of bride and groom negotiated about what property each would bring into the settlement, and on what trusts it would be held.

⁸¹ There are limits about the sorts of consensus that can result in a valid exercise of a power of appointment. If a power is exercised for a purpose outside the scope of the power, that exercise is not valid in equity, eg **Clouette v Storey** [1911] 1 Ch 18, where a father's exercise of a power of appointment in favour of his son was done with the agreement that the son would then give the money to his father.

⁸² Eg **AMP (UK) plc v Barker** [2000] EWHC Ch 42; [2001] WTLR

⁸³ **Norman v FCT** (1963) 109 CLR 9 at 30

⁸⁴ **Villers v Beaumont** (1682) 1 Vern 100, 23 ER 342; **Petre v Espinasse** (1834) 2 My & K 496; 39 ER 1034; **Bill v Cureton** (1835) 2 My & K 503; 39 ER 1036

⁸⁵ **Harvey v Mount** (1845) 8 Beav 439; 50 ER 172;

⁸⁶ In **Asea Brown Boveri Superannuation Fund No1 Pty Ltd v Asea Brown Boveri Pty Ltd, H**[1999] 1 VR 144H at [40] Beach J. said he knew of no such principle, but the relevant authorities do not, with respect, seem to have been cited to him.

⁸⁷ **Meadows v Meadows** (1853) 16 Beav 401; 51 ER 833; **Anker-Petersen v Christensen** [2001] EWHC B3 (Ch) [2002] WTLR 313

⁸⁸ **Lady Hood of Avalon v Mackinnon** [1909] 1 Ch 476

⁸⁹ **In Re Walton's Settlement** [1922] 2 Ch 509

⁹⁰ **Gibbon v Mitchell** [1990] 3 All ER 338; [1990] 1 WLR 1304

⁹¹ **Lady Hood of Avalon v Mackinnon** [1909] 1 Ch 476

⁹² **Ellis v Ellis** (1909) 26 LT 166

⁹³ **In Re Walton's Settlement** [1922] 2 Ch 509

⁹⁴ **Henry v Armstrong** (1881) 18 Ch D 668 at 669; **Ogilvie v Littleboy** (1897) 13 TLR 399 at 400 col 1; **Ogilvie v Allen** (1899) 15 TLR 294 at 295 col 1 (House of Lords)

⁹⁵ [1990] 3 All ER 338; [1990] 1 WLR 1304 at 1309 – 10

⁹⁶ In **Kelly v Solari** (1841) 9 M & W 54; 152 ER 24 Baron Parke said at 58, 26: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake." Gurney B concurred with him. Rolfe B said, at 59, 26: "With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it." See also **Rogers v Ingham** (1876) 3 Ch D 351 at 355 per James LJ, **Muschinski v Dodds** (1985) 160 CLR 583 at 619 per Deane J. re the connection between money had and received and equitable principles.

⁹⁷ Oldham, **English Common Law in the Age of Mansfield**, University of North Carolina Press 2004 p 6, 27

⁹⁸ [1891] 1 QB 417 at 426

⁹⁹ Other authority that paying a debt forgetting that part has already been paid is mistake, for the purpose of recovery of the money as being paid under mistake of fact, is found in **Lucas v Worswick** (1833) 1 M & R 293; 174 ER 100. In **Laimond Property Investment Co Ltd v Arlington Park Mansions Ltd** [1989] 1 EGLR 208 at 210 Dillon LJ (with whom Butler-Sloss and Staughton LJ J agreed) said:

“when a person has forgotten the existence of a pre-existing fact and assumes that such fact did not pre-exist, he is labouring under a mistake, and that a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist.”

¹⁰⁰ [1990] 3 All ER 338; [1990] 1 WLR 1304

¹⁰¹ at 1309 of WLR

¹⁰² in **AMP (UK) plc v Barker** (decided 8 Dec 2000) [2000] EWHC Ch 42; [2001] WTLR 1237 at [70], 1260 Lawrence Collins J was cautious in recognising this principle (“It is sometimes said that...”), which he traces back to the 1929 edition of Kerr on Fraud and Mistake

¹⁰³ **David Securities Pty Ltd v Commonwealth Bank of Australia** (1992) 175 CLR 303 at 376; **Kleinwort Benson Ltd. v Lincoln City Council** [1999] 2 AC 349

¹⁰⁴ **Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation** (1988) 164 CLR 662 at 675; **Deutsche Morgan Grenfell Group plc v IRC** [2007] 1 AC 558, in particular at [59], [60] and [143]

¹⁰⁵ **David Securities Pty Ltd v Commonwealth Bank of Australia** (1992) 175 CLR 353 377-8, 402

¹⁰⁶ Judge Purle QC has previously made a similar point in **Fender v National Westminster Bank** [2008] EWHC 2242 (Ch); [2008] 3 EGLR 80

¹⁰⁷ **Wollaston v Tribe** (1869) L.R. 9 Eq. 44; **Everitt v Everitt** (1870) L.R. 10 Eq. 405; **Phillips v Mullings** (1871) 7 Ch App 244 at 246–248; **Dutton v Thompson** H(1883) 23 ChD 278H; **Bullock v Lloyds Bank Ltd** [1955] Ch 317 at 324–326;

¹⁰⁸ **Anker-Petersen v Christensen** [2001] EWHC B3 (Ch); [2002] WTLR 313 at [35]–[36], 329-330

¹⁰⁹ **Meadows v Meadows** (1853) 16 Beav 401; 51 ER 833 at 404, 834-835

¹¹⁰ **Hall v Hall** H(1873) 8 Ch App 430H at 438

¹¹¹ which seems incorrectly to reverse the onus of proof

¹¹² **Phillips v Mullings** (1871) 7 Ch App 244 at 248

¹¹³ **Thompson v Whitmore** (1860) 1 J & H 268, 70 ER 748 (marriage settlement not rectified when mistaken effectuation of wife’s intention proved, but no positive proof of husband’s intention); **Sells v Sells** (1860) 1 Dr & Sm 42, 62 ER 294; **Rooke v Lord Kensington** (1856) 2 K & J 753; 69 ER 986 at 764, 990; **In Re Colebrook’s Conveyances** [1973] 1 All ER 132.

¹¹⁴ **Wright v Goff** (1856) 22 Beav 207; 52 ER 1087 at 214, 1090; **Behrens v Heilbut** (1956) 222 L T Jo 290; (1956) 106 LJ 794; **Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd** (1995) 41 NSWLR 329 (intention of the trustee who had the power of variation). There are two decisions of Sir John Rommily MR that a voluntary deed cannot be rectified in the lifetime of the grantor if the grantor is unwilling to make the alteration (**Phillipson v Kerry** (1863) 32 Beav. 628; 55 ER 247; **Lister v Hodgson** (1867) LR 4 Eq 30), but these decisions may require reconsideration – the former might be an example of a deed set aside because a fundamental aspect of the transaction (that it might leave the grantor utterly destitute) was not understood, while the latter proceeds by reasoning that treats rectification of a unilateral document in a way that is arguably too close to rectification of a contract, and in any event there was a finding that there was no intention to have a presently constituted trust at all, so rectification to alter the terms of the trusts declared in the document would not have been available even after the death of the “settlor”. By contrast, **Thompson v Whitmore** (1860) 1 J & H 268, 70 ER 748 had held that a volunteer could seek rectification of a settlement, and in **Kent v Brown** (1942) 43 SR (NSW) 124 (affirmed (without reasons being reported) **Brown v Kent** (1943) 66 CLR 670) Roper J said he could not see the difference. A settlement can be rectified after the death of the settlor, provided the settlor has not affirmed the deed as executed during his lifetime: **Weir v**

Van Tromp (1900) 16 TLR 531 *Kent v Brown* (1942) 43 SR (NSW) 124, affirmed (without reasons being reported) *Brown v Kent* (1943) 66 CLR 670

¹¹⁵ *Re Butlin's Settlement* [1976] Ch 251 at 262 – 263; *Will v Gibbs* [2007] EWHC 3361 (Ch); [2008] STC 808

¹¹⁶ *Walker v Armstrong* (1856) 8 D M & G 531; 44 ER 495 at 541-2, 499

¹¹⁷ In the House of Lords each of Lord Halsbury LC, Lord Macnaghten and Lord Morris agreed completely with the judgment of Lindley LJ (who by then had become Master of the Rolls): *Ogilvie v Allen* (1899) 15 TLR 294

¹¹⁸ *Wright v Goff* (1856) 22 Beav 207; 52 ER 1087; *Summers v Kitson* [2006] EWHC 3655 (Ch); [2006] All ER (D) 134; (*Walker v Armstrong* (1856) 8 D M & G 531; 44 ER 495; *Daniel v Arkwright* (1864) 2 H & M 95, 71 ER 396 (in the last two cases mentioned there were two joint appointors, and it was the intention of both of them that needed to be proved)

¹¹⁹ *Lackersteen v Lackersteen* (1860) 30 LJ Ch 5; *Kent v Brown* (1942) 43 SR (NSW) 124; *Re Butlin's Settlement* [1976] Ch 251

¹²⁰ *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329

¹²¹ *Wright v Goff* (1856) 22 Beav 207; 52 ER 1087 at 214, 1090; *Lackersteen v Lackersteen* (1860) 30 LJ Ch 5 (where there was evidence from the settlor of his intention, evidence from the solicitor who drew the deed of what his instructions were, but the judge still required an affidavit from the solicitor that there were no written instructions)

¹²² *Bonhote v Henderson* [1895] 1 Ch 742 at 748, appeal dismissed without discussion of principle *Bonhote v Henderson* [1895] 2 Ch 202

¹²³ *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 335-336

¹²⁴ *AMP (UK) plc v Barker* [2000] EWHC Ch 42; [2001] WTLR 1237 at [70], 1260

¹²⁵ In *Killick v Gray* (1882) 46 LT 583 a woman had a power of appointment under 4 different trusts, each of which could be exercised in favour of her children. Only one of those trusts had a clause requiring anyone in whose favour a power of appointment was exercised to bring the appointed property into hotchpot. Upon the marriage of one daughter she executed four deeds of appointment, each of which appointed to that daughter 1/3 of the respective trust funds. She died intestate, and without having made any further appointment, in consequence of which the unappointed property in the 3 trusts that did not contain hotchpot clauses was divisible equally among her 3 daughters. Hall V-C was satisfied that it was her intention to produce equality among her daughters. Thus he ordered that each of the deeds of appointment relating to those 3 trusts should have inserted into it a hotchpot clause, providing that the appointee "should not be entitled to any other part of " the capital of the 3 trusts "except the one-third thereof ... to her appointed, without bringing such appointed share into hotchpot, and accounting for the same accordingly, unless a direction to the contrary should be contained in any appointment to be thereafter made by the said" appointor. Similarly in *Will v Gibbs* [2007] EWHC 3361 (Ch); [2008] STC 808 a deed was rectified by adding words appropriate to bring about a tax benefit that the maker of the deed wished to achieve. Though it is not a case concerning trusts, the principle is the same as that invoked in *Jervis v Howle and Talke Colliery Co Ltd* [1937] Ch 67 when an agreement to pay a royalty of "3d per ton free of tax" was entered without taking into account that legislation made such a covenant void, it was rectified to require payment of a royalty (69) "of such an amount as after deduction of income tax at the standard rate from time to time shall leave the sum of three pence", as the judge was satisfied that that was what the parties had intended.

¹²⁶ *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 38 per Handley JA

¹²⁷ *Cogan v Duffield* (1876) 2 Ch D 44 at 50

¹²⁸ *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 345 per McLelland A-JA (a statement not endorsed by other judges in the Court of Appeal in that case)

¹²⁹ In *Allnut v Wilding* [2007] EWCA Civ 412; [2007] BTC 8003 there is a statement that rectification is not possible if a settlor intends to execute a particular document, and mistakenly believes that a document of that type will achieve a particular practical outcome. That statement would be in keeping with the authorities I have earlier cited, and the rationale for rectification of unilateral instruments relating to trusts, only if the settlor does not also intend that executing the document will achieve that outcome.

¹³⁰ [1949] 1 All ER 755

¹³¹ ***Whiteside v Whiteside*** [1950] Ch 65

¹³² It was more, in substance, that the court was not satisfied that any tax advantage was ever part of the intention of the wife (75-76), and that in any event there was no need for rectification because the parties had already entered a supplemental deed that created the same rights that they sought to have the original deed rectified to confer (76, 77)

¹³³ ***In Re Colebrook's Conveyances*** [1973] 1 All ER 132; ***Re Slocock's Will Trusts*** [1979] 1 All ER 358 at 363

¹³⁴ [1909] 1 Ch 476

¹³⁵ at 484