Scottish Law Commission
promoting law reform

Consultation Paper on Defects in the Exercise of Fiduciary Powers

December 2011

This Consultation Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

NOTES

1. Please note that information about this Consultation Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may attribute comments and publish a list of respondents' names.

2. Where possible, we would prefer electronic submission of comments. A downloadable electronic response form for this paper is available on our website.

3. The Consultation Paper is only available on our website at http://www.scotlawcom.gov.uk/. It has been processed for accessibility but it you have any difficulty in reading it, please contact us and we will do our best to assist.

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

Contents

Defects in the exercise of fiduciary powers

Introduction

1. In our Discussion Paper on Supplementary and Miscellaneous Issues relating to Trust Law,[1] we considered the question of errors and other defects in trustees' exercise of discretionary powers. Consultation was carried out at a general level because the English Court of Appeal decisions on *Pitt v Holt* and *Futter v Futter*[2] had only recently been issued. Nevertheless, the suggested way ahead was not to follow the English authorities but to develop a new remedy in Scots law, based to some extent on remarks made by Lord Reid in *Dundee General Hospitals v Bell's Trustees.*[3] A copy of chapter 14 of our earlier discussion paper is appended to the present paper.

2. Such an approach met considerable support on consultation. In particular the Faculty of Advocates supported the development of a rule based on the *Dundee Hospital* case, carried forward in legislation. The Senators of the College of Justice did not express a concluded view, but pointed out that the Commission might wish to consider whether a remedy is or ought to be available in Scotland on the ground of unilateral essential error in the granting of a gratuitous deed, as exemplified by *Hunter v Bradford Property Trust Ltd.*[4] The Law Society of Scotland submitted two responses. One of these, from the Trusts and Succession Sub-Committee, was opposed to the enactment of a rule permitting relief for defects in the exercise of fiduciary powers. Their view was that all other individuals have to stand by the choices that they make for tax purposes, and trustees should be no different. The only reason to support such a rule would be for reasons of equity if a similar right existed in England and Wales.

3. On the other hand, the Law Society's Pensions Sub-Committee favoured legislation. We found their response to be powerful, and the material part is as follows:

> "In the Committee's view there is a pressing requirement for a 'simple non-technical procedure' to facilitate the correction of errors or other defects which are identified in the exercise of trustees' powers in relation to pension schemes.
>
> With the best will in the world, mistakes and ambiguities frequently arise in pensions documents, particularly as amendments tend to be 'layered' on top of each other, so that changes designed to achieve one particular result can inadvertently lead to inconsistencies with other provisions in the documents.
>
> The absence of a simple non-technical forum to address such issues results in disproportionately large legal bills where employers and trustees take the view that legal certainty has to be achieved if at all possible. Alternatively, and less satisfactorily, the view is often taken that a corrective document should be signed, and the employer and trustees keep their fingers crossed that no-one will ever challenge their actions in correcting the error in this way."

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[1] DP No 148, April 2011.
[2] [2011] EWCA Civ 197, 9 March 2011.
[3] 1952 SC (HL) 78; 1952 SLT 270.
[4] 1970 SLT 173.

The paper goes on to refer to English pension cases where the so-called rule in *Hastings-Bass*[5] has been invoked.[6] Thereafter, after referring to the Scottish case of *Low & Bonar Plc v Mercer Ltd*,[7] the response continues:

> "It is the Committee's view that the administration of occupational pension schemes would benefit enormously from the continued development and application of a 'commercially sensible' approach to the resolution of the difficulties and doubts which can arise in interpreting and applying the provisions of pension scheme documentation, in a forum which allows the issues to be aired and examined properly, but with efficiency and as little expense and formality as is consistent with giving proper consideration to the issues in hand."

In the light of the foregoing responses, we have decided that it is appropriate to develop a remedy along the lines suggested in our last discussion paper. The purpose of this consultation paper is to put forward definite proposals to that end. We do not think that there is any point in waiting until the conclusion of the appeals in *Pitt* and *Futter*.[8] The issues raised in those cases are peculiar to English equity. The so-called rule in *Hastings-Bass* arose out of existing equitable principles, and the judgment of Lloyd LJ in the Court of Appeal contains an extensive discussion of mistake in equity (as opposed to mistake at common law). The equitable doctrines that apply in both cases have no precise parallel in Scots law, and consequently we do not think that there is any advantage to be gained in trying to develop a solution from the principles that have been discussed in the English courts. Scots law already provides some help, in the form of the decisions in *Dundee General Hospitals v Bell's Trustees*[9] and *Hunter v Bradford Property Trust Ltd*,[10] and we think that these form an appropriate starting point for considering how Scots law might proceed.

4. Although this consultation paper is issued as a part of our trusts project, and the exercise of discretionary powers by trustees is likely to be the main area of interest, we think that consideration should be given to the exercise of fiduciary powers of all sorts. The importance of this is illustrated by *Pitt*, which involved the exercise of such a power by a receiver acting under the (English) Mental Health Act 1983. We think that any discretion exercised under a fiduciary power should be covered; all such powers share the important feature that they must be exercised in the interests of another person or other persons, and it is this distinctive feature that informs much of our consideration of the issues.

Illustrative cases

5. In order to indicate the issues that are involved, we outline the facts of six cases in which the rule in *Hastings-Bass* was invoked in England. These are intended merely to illustrate the type of situation where a remedy to correct defects in the exercise of fiduciary powers might be useful.

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[5] *Re Hastings-Bass* [1975] Ch 25.
[6] *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch); *Smithson v Hamilton (Re Siemens)* [2008] 1 All ER 1216, a case which is heavily criticised.
[7] [2010] CSOH 47; 2010 GWD 16-321.
[8] These cases have been appealed to the Supreme Court, and no decision can be expected until well into next year (2012).
[9] 1952 SC (HL) 78; 1952 SLT 270.
[10] 1970 SLT 173.

Re Hastings-Bass (Deceased) [1975] Ch 25 (Court of Appeal)

6. On his marriage in 1947, Captain Hastings-Bass became entitled to a life interest in a trust fund over which he had a power of appointment. He exercised this power in 1958 in favour of his eldest son. At the time it was thought to achieve its desired purposes. However, in the light of a subsequent decision of the House of Lords,[11] it was clear that the transfer of funds had, in part, infringed the rule against perpetuities. Was the transfer effective? Captain Hastings-Bass died in 1964 and the trustees sought a ruling from the court as to whether estate duty became payable at that point. The Commissioners of the Inland Revenue, who were the defenders, were successful at first instance in their argument that the transfer was ineffective, but this was largely reversed on appeal with the effect that estate duty was not payable from the 1964 death.

Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587

7. Mettoy Co PLC made Corgi toys until, in the early 1980s, its fortunes declined and it went into receivership and liquidation. Mettoy Pension Trustees Ltd was a wholly owned subsidiary which ultimately held the assets of the company's occupational pension scheme. When the parent company failed the pension scheme was in surplus. Until March 1983 (which was some months before the date of liquidation) Mettoy and the trustees of the scheme had power to apply the surplus as they thought fit for the benefit of pensioners and members. In that month a deed was executed by the trustees, exercising their fiduciary powers, to amend the trust deed and rules of the scheme in order to rectify a defect in the appointment of the trust company as trustee. The deed had other effects, however; in particular it altered the power to distribute any surplus in such a way that the surplus might be applied, at the trustees' discretion, either to benefit pensioners and members or for the benefit of the participating employers. Following liquidation, proceedings were raised to determine how the surplus should be applied in consequence of the winding up of the pension scheme. One issue in the proceedings was whether the amendment of March 1983, permitting distribution of the surplus to participating employers, was valid. This was the first case in which the rule in *Hastings-Bass* was examined (and indeed it appears to be the case in which the expression "rule in *Hastings-Bass*" was coined). The court held that when the 1983 deed was executed the then trustees had failed to take account of a relevant consideration, namely the effect that the deed would have on the power to distribute surplus assets on winding up of the scheme. That was not sufficient for a remedy under the rule in *Hastings-Bass*, however; it was also necessary to consider what the trustees would have done if they had considered the matters that they failed to consider, and to conclude that if they had considered these matters they would have acted differently. The court held that this requirement was not satisfied; had the trustees been advised of the consequences of their act they might well still have proceeded to execute the deed in question. The case does, however, illustrate that a rule permitting challenge to the defective exercise of fiduciary powers can be relevant to deeds executed by pension trustees under their fiduciary powers.

[11] *Pilkington v Inland Revenue Commissioners* [1964] AC 612.

Green v Cobham [2002] STC 820

8. Sir Alan Cobham was a pioneer of the air industry. The company he founded in the 1930s, which is now known as Cobham plc, grew rapidly. He settled in the British Virgin Islands and, in his will, created a trust for the benefit of his family, who were UK resident. Amongst the assets were shares in companies set up by the testator. There were considerable accrued gains, held off-shore. In 1990, some years after the trust came into being and in an effort to distribute some of the assets in a tax-efficient way, the trustees decided to transfer funds to the testator's six grandchildren by way of deed of appointment. For the assets to be treated as part of an off-shore fund a majority of the trustees needed to be non-resident in the UK. As an oversight, this condition was not met when the deeds of appointment were executed. The court described the capital gains tax consequences of this as "catastrophic" and found that, had the trustees directed their minds to CGT they would not have acted as they did. Therefore the court held that, under the rule in *Hastings-Bass*, the deeds of appointment were void.

Sieff v Fox [2005] EWHC 1312 (Ch)

9. The trust assets in this case included an interest in the Woburn estate and valuable chattels in Woburn Abbey. Acting under a trust established in 1971, and having taken tax advice, the trustees exercised a power of appointment in 2001. In 2002 it was discovered that the advice relating to capital gains was erroneous and the trustees sought to have the appointment set aside. The CGT liability in respect of the interest in the estate was not thought to be large but in respect of the chattels it was estimated to be of the order of £1m. The court, whilst being tempted, in the interests of the clarification of the law, to give the Court of Appeal the chance to review the *Hastings-Bass* rule by dismissing the claim, in fact held that the rule applied and set aside the appointment.

Futter v Futter [2010] EWHC 449 (Ch) (first instance); [2011] EWCA Civ 197 (appeal)

10. On the basis of professional advice Mr Futter set up two life-interest settlements for the benefit of himself and his family. The intention was to mitigate the effect of stockpiled gains for the purpose of capital gains tax. Advancements were made from the settlements in reliance on the advice, which was later realised to be erroneous. The CGT bill was larger than anticipated. Mr Futter sought a declaration that the advancements were void. The court at first instance granted this, holding that the fact that professional advice was taken and followed, even though it turned out to be mistaken, did not render the rule in *Hastings-Bass* inapplicable. This decision was overturned on appeal; the decision of the Court of Appeal is discussed subsequently.

Pitt v Holt [2010] EWHC 45 (Ch) (first instance); [2011] EWCA Civ 197 (appeal)

11. Mr Pitt suffered serious brain damage in a car accident in 1990. in 1994 he received a damages award consisting of a lump sum and a monthly annuity for life. His wife, as his receiver under the Mental Health Act 1983, took legal and financial advice and accordingly placed the lump sum award into a discretionary settlement. The annuity was also assigned to this settlement. Mr Pitt died in 2007 whereupon the balance of the trust fund transferred into his estate. Unhappily, the advice received by Mrs Pitt completely overlooked the impact of inheritance tax, which fell due at various points: on the creation of the settlement, on subsequent capital distributions, after ten years, and on the husband's death. If the trust had

12. Even though, as her husband's receiver, she had not been acting as his trustee under a trust instrument, Mrs Pitt applied to set aside the settlement under the rule in *Hastings-Bass* because of her failure to take account of a relevant consideration, namely the inheritance tax consequences. HMRC intervened and submitted that the rule should be confined to cases where the immediate purpose of the act in question was not achieved and that tax consequences were always irrelevant.

13. The court at first instance granted the application. First, it held that there was no material distinction between a trustee exercising a power for the benefit of a beneficiary under a trust instrument and a receiver exercising a power for the benefit of a patient under the 1983 Act. In each case the power was a fiduciary one, and the person exercising the power was doing so in the interests of another but not on their instructions. Secondly, it applied the three-stage test established in *Mettoy Pension Trustees Ltd v Evans*,[12] ie (a) what Mrs Pitt was obliged to consider; (b) whether she failed to consider it; and (c) if she had considered it, what she would have done. Having done so the court had no difficulty in holding that the failure of her advisers to consider IHT meant that Mrs Pitt had not taken into account all relevant tax considerations and that the effect of this was to create significant liabilities which could readily have been avoided. As with *Futter* this decision was overturned on appeal.

English law

14. Although we do not intend to follow English law, we should comment briefly on the judgment of the Court of Appeal in *Pitt v Holt* and *Futter v Futter.*[13] Prior to that decision, a principle had been developed in a series of English cases, purportedly following the decision in *Re Hastings-Bass*,[14] that might be formulated as follows:

> "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."[15]

The principle had attracted some criticism,[16] and the cases did not appear to establish any doctrinal consistency.

15. The effect of *Pitt* in the Court of Appeal has been to reverse the supposed rule in *Hastings-Bass*. The leading opinion, by Lloyd LJ, is long and most impressive in its review of authorities. Nevertheless, it proceeds on an approach heavily infused with traditional English equity, and it is perhaps fair to say that its general tone is foreign to the approach

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[12] [1990] 1 WLR 1587, described in para 7 above.
[13] [2011] EWCA Civ 197.
[14] [1975] Ch 25.
[15] *Sieff v Fox* [2005] EWHC 1312 (Ch); [2005] 1 WLR 3811, at para 119, per Lloyd LJ.
[16] Eg Lord Neuberger, "Aspects of the Law of Mistake: *Re Hasting-Bass*", (2009) Trusts and Trustees 189.

that Scots law has generally taken to the correction of errors. The most important passages relating to the *Hastings-Bass* rule in its strict sense are set out in paragraph 14.2 of our discussion paper.[17] Two situations are distinguished. First, if the act performed by trustees in the exercise of a discretion is *ultra vires* of the relevant power, it will be void. Secondly, if the act of trustees is *intra vires* of the relevant power, the trustees' act is not void but may be voidable. It will be voidable if, and only if, it can be shown to be in breach of the trustees' fiduciary duties. In that event, it may be capable of being set aside at the instance of a beneficiary, subject to equitable defences and the court's discretion.

16. The critical question, accordingly, in cases where the trustees' act is *intra vires* is whether there is a breach of fiduciary duty. The trustees' duty to take relevant matters into account (and to exclude irrelevant matters from consideration) is a fiduciary duty, and thus any act performed in breach of that duty will be voidable. If, however, the trustees seek professional advice from apparently competent advisers as to the course of action under consideration, and follow that advice, there is no breach of fiduciary duty merely because that advice turns out to be wrong. In such a case, therefore, the trustees' decision is not voidable. This means that in the typical case where the trustees have obtained advice on the tax consequences of their decision that turns out to be wrong, there will be no remedy, other than an action against the professional advisers for negligence.

17. We have some difficulty with this reasoning. If the trustees obtain *ex facie* proper professional advice there is clearly no breach of their fiduciary duty to obtain proper professional advice, but if that advice is wrong, with the result that the trustees take account of an irrelevant consideration (or fail to take account of a relevant consideration), it can be said that they are in breach of the *separate* fiduciary duty to take account of relevant considerations but not irrelevant considerations. In other words, two separate fiduciary duties appear to be involved here, and the fact that there is no breach of one duty does not mean that there is no breach of the other. In this respect, we are of opinion that the faults of the professional advisers must be imputed to the trustees; the simple fact is that when they exercised the discretion the trustees were in error as to the considerations that they should take into account, whatever the source of that error. Moreover, in other areas of the law where the issue of relevant and irrelevant considerations is material, the fact that such a consideration is ignored (where relevant) or taken into account (where irrelevant) as a result of professional advice does not matter; the decision-taker is still wrong in what it has or has not taken into account. That would apply, for example, to judicial review of a public authority's actions. Likewise in areas of the law where error is relevant, for example contracts and unilateral deeds, an error induced by defective professional advice is still an error.

18. Lloyd LJ deals with possible criticisms of his approach.[18] He accepts that it has the result of making potentially vulnerable an act done by trustees who fail to take advice, whereas the same act would not be vulnerable if the trustees did take advice. He further accepts that claims against professional advisers might face difficulties even if liability could be established, because different losses might be suffered by different persons, not all of whom would have a claim against the advisers; this recognises the fundamental difference between the position of the trustees and the position of the beneficiaries. Nevertheless,

[17] See Appendix. The critical passages are found at paras 127 and 222.
[18] [2011] EWCA Civ 197, para 128.

Lloyd LJ did not see an anomaly in the distinction that he had drawn. He stated that it arose from the need to find a breach of trust in order to set aside an act of the trustees which is within their powers.

19. In such a case we think that two separate and distinct possible breaches of trust are involved: (i) failure to take proper professional advice and (ii) taking account of irrelevant considerations or failure to take account of relevant considerations. The fact that there is no breach of trust in the first category does not mean that there is not a breach of trust in the second category. The same is broadly speaking true of error: it is not obvious that a breach of trust should be essential before an error can be remedied. Error and breach of trust raise fundamentally different issues (just as contractual error raises fundamentally different issues from breach of contract).

20. Lloyd LJ also considers the equitable jurisdiction to set aside a voluntary transaction for mistake (at paragraphs 164-220). This involves an impressively detailed review of a substantial number of cases in England and other jurisdictions. Generally speaking, however, these cases involve the setting aside of a gift. That is not the issue that is presently under consideration, which rather involves a challenge to a decision made in error by trustees acting under fiduciary powers. The difference is that a gift is wholly voluntary, whereas the trustees are dealing with other people's property in terms of a duty conferred by the truster. Moreover, this part of Lloyd LJ's opinion involves principles of English equity that do not form any part of Scots law. For this reason we do not think that it is necessary to give detailed consideration to this part of the opinion.

21. It may nevertheless be helpful to summarise the test that was applied in *Pitt*. This is set out at paragraph 210:

> "I would therefore hold that, for the equitable jurisdiction to set aside a voluntary disposition for mistake to be invoked, there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction. (I leave aside cases where there is an additional vitiating factor such as some misrepresentation or concealment in relation to the transaction […]). Moreover the mistake must be of sufficient gravity as to satisfy the *Ogilvie v Littleboy*[19] test, which provides protection to the recipient against too ready an ability of the donor to seek to recall his gift. The fact that the transaction gives to unforeseen fiscal liabilities is a consequence, not an effect, for this purpose, and is not sufficient to bring the jurisdiction into play."

22. As that formulation makes clear, the equitable doctrine is primarily concerned with gifts or other wholly voluntary dispositions. In Scotland the leading case in this area is *Hunter v Bradford Property Trust Ltd*,[20] discussed below. The test in *Hunter* is that a gratuitous undertaking (including, it would seem, a voluntary disposition) can be reduced for essential error. That clearly involves a much more permissive attitude towards challenge than is allowed in the English equitable doctrine. Consequently there appears to be a discrepancy in this area between Scots law and English equity. No doubt it is correct that some control must be exercised over challenges to voluntary deeds or undertakings, but a requirement along the lines of essential or material error provides such a control and, in any event, the trustees' exercise of a power is not the same as a voluntary disposition. If

[19] (1897) 13 TLR 399.
[20] 1970 SLT 173.

anything, the case for correcting errors seems to us to be stronger in the case of the exercise of a power than that of a purely voluntary disposition or unilateral undertaking.

The basic issue

23. The fundamental question is whether statutory provision should be made in Scotland to enable beneficiaries and others to overturn the exercise of fiduciary powers, on appropriate grounds. We incline to the view that such a procedure should be possible, on clearly defined grounds. We reach this view for a number of reasons. First, Scots law already allows unilateral acts to be challenged by the granter. In the case of a straightforward voluntary disposition or unilateral undertaking, challenge is possible on the ground of essential error, in the sense of an error but for which the disposition would not have been made; authority is found in the case of *Hunter v Bradford Property Trust*.[21] In the case of the exercise of a fiduciary power by trustees, challenge appears possible at common law on grounds that broadly correspond to the grounds for judicial review: consideration by the trustees of the wrong question, a failure of the trustees to apply their minds to the right question; the trustees' perversely shutting their eyes to the facts; trustees' failure to act honestly or in good faith. Authority for that is found in *Dundee General Hospitals v Bell's Trustees*.[22] The type of case under consideration falls into the second of these categories, the exercise of a fiduciary power, rather than the first. When a trustee or other person exercises a fiduciary power, that is not a voluntary disposition but rather the exercise of a power that is given to benefit others. In such a case we think that, if there is a significant defect in the exercise of the power, challenge ought to be possible. The same may be true if at the time when the power is exercised the trustees or other fiduciaries are labouring under a material error.

24. Secondly, the essential feature of a fiduciary power is that it is exercisable for the benefit of others, not the donee of the power. If the power is not exercised properly, it is normally not the donee, the fiduciary, who suffers the loss but the objects of the power. That is a situation that seems to us to require the possibility of challenge by the beneficiaries, the objects, if there has been a defect in the exercise that has prejudiced them. That is no doubt the reasoning that underlay the view expressed by Lord Reid in the *Dundee General Hospitals* case.

25. Thirdly, both our consultation and our researches reveal that there is a considerable demand for such a power. We have already quoted the views of the Pensions Sub-Committee of the Law Society of Scotland.[23] We found those views powerful, and indeed persuasive. In addition, the so-called rule in *Hastings-Bass* has been followed in a substantial number of jurisdictions other than England and Wales, and in many of those it is regarded as important.[24] Even since the decision of the Court of Appeal in *Pitt*, the Royal Court in Jersey has decided to maintain the rule in *Hastings-Bass* in, broadly, its original form.[25] The practical importance of the rule is emphasised in a recent article, where it is stated that the rule "has been vitally important in the protection of beneficiaries from tax

[21] Ibid. Discussed below at paras 35-36.
[22] 1952 SC (HL) 78 at 92; 1952 SLT 270 at 275.
[23] Para 3 above.
[24] Eg Jersey, Guernsey, the Isle of Man and the Cayman Islands. See Appendix, fn 5 to para 14.1.
[25] *Re the S Trust* [2011] JRC 117. For a discussion of this case see Robert MacRae and Alexa Saunders, "The law of mistake in Jersey: the Royal Court declines to follow *Pitt v Holt*" T & T 2011, 17(10), 952-958.

charges arising from the acts of trustees".[26] In the same article, it is said that "the offshore trust industry is highly competitive, and a jurisdiction that is perceived to have no *Hastings-Bass* principle will lose business to another which is more accommodating".[27]

26. Fourthly, while facilitating tax avoidance may not appear an especially worthy objective, that would not be by any means the only use of a ground of challenge. Pension trusts are an obvious area where the power would be important, and the same may be true of other examples of the defective exercise of fiduciary powers. A good example is found in *Pitt*, where the wife of a seriously disabled man, appointed his receiver, decided to place the compensation that he received in trust but failed to do so in such a way as to obtain the benefit of inheritance tax provisions that were specifically designed to benefit trusts for disabled persons. The result was very heavy inheritance tax liabilities, which were clearly a serious problem for the couple and their family, described by the judge at first instance as persons of relatively modest financial resources.[28] Moreover, in such cases those who suffer the loss are not usually the trustees who exercise the power defectively, but the beneficiaries in whose interests they are supposed to act.

27. Finally, in many cases where powers are exercised defectively the reason will be incorrect legal advice. It is true that in such cases there may well be a right of action against the professional advisers for their negligence, but it seems to us that this is not a complete answer. In a typical trust situation proceedings for professional negligence are far from straightforward.[29] Establishing negligence may not be easy in cases where, for example, the relevant tax law is not clear. Furthermore, professional advice will normally be given to the trustees, and the result, at least in Scots law, would be that only the trustees had title and interest to sue for professional negligence. They are not, however, the parties who normally suffer the loss; the loss is likely to be suffered by beneficiaries, who lack title and interest to sue because they have no contract with the professional advisers. The defence might therefore be mounted that trustees themselves have suffered no loss, and thus should recover nothing. It might be possible to avoid this problem using a technique, developed in the field of building contracts, whereby one party to a contract can recover for losses suffered by others but subject to an obligation to account for any damages recovered to those others.[30] Nevertheless, the fundamental point is that proceedings for professional negligence will not be entirely easy. Furthermore, the powers in question will normally be discretionary, and in such a case the beneficiaries have no pre-existing right to any property, and only obtain property through the acts of the trustees. If, therefore, the beneficiaries receive less than they might have hoped for because of a tax liability, can it be said that their position is any worse than it was before the power was exercised? The complexities involved in actions for professional negligence are such that we think that more direct remedy, of reduction of the exercise of the discretionary power, is more satisfactory.

28. We now turn to the grounds on which such a power might be exercised.

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[26] Joseph Howard, "Hastings-Bass – Oceans apart?" 2011 Private Client Business 1, 23 at 26.
[27] Ibid.
[28] See paras 11-13 above.
[29] For a discussion of this in relation to the *Pitt* & *Futter* decisions see Teresa Rosen Peacocke, "Liability of professionals retained by settlors and trustees following *Pitt v Holt/Futter v Futter*" Tru LI 2011, 25(3), 125-144.
[30] *Alfred McAlpine Construction Ltd v Panatown Ltd (No 1)* [2001] 1 AC 518 (HL); *McLaren Murdoch & Hamilton Ltd v Abercromby Motor Group Ltd* 2003 SCLR 323, 100 Con LR 63. See also the article cited in the preceding footnote at pp 138ff.

Grounds of challenge

Defects in the fiduciary's approach to exercising the power

29. If a statutory right is granted to challenge the exercise of fiduciary powers, the grounds of challenge must clearly be specified. The obvious starting point is the list of defects mentioned by Lord Reid in *Dundee General Hospitals v Bell's Trustees*:

> "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."[31]

These grounds bear some similarity to the grounds of challenge recognised in England in the *Hastings-Bass* line of cases. They are, however, somewhat more comprehensive, and clearly bear some relationship to the grounds of challenge that are recognised in relation to the judicial review of administrative action. The control of trustees' decisions obviously falls into a wholly different area of the law from the control of administrative action, but nevertheless there are points of similarity, in that discretionary powers, according fairly wide freedom of action, are involved in both cases.

30. The grounds suggested in *Dundee General Hospitals* can perhaps be generalised as follows:

(i) Consideration of the wrong question or failure to consider the correct question;

(ii) Failure by the trustees to apply their minds properly to the correct question, even though they purport to do so;

(iii) Perversity, whether through the trustees' shutting their eyes to the facts or in some other manner; this should probably extend to unreasonableness, in the sense of a decision that no reasonable trustees, properly instructed in the facts and law, could properly have reached;[32]

(iv) Failure to act honestly or in good faith; this would probably be sufficient to cover fraud on a power, although it is possible that that concept should be referred to expressly;

(v) As an extension of the first and second of these grounds, failure to take relevant considerations into account or taking irrelevant considerations into account.

31. *Ultra vires* is not included in the list. If a decision by trustees is *ultra vires* of their powers, it is simply void; that is recognised so far as English law is concerned in *Pitt*, and it is clearly in accordance with Scots law. Nevertheless, in the interests of providing a comprehensive remedy to deal with the defective exercise of trustees' and other fiduciary powers, it might be desirable to consider whether *ultra vires* should be included as a specific ground of challenge.

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[31] 1952 SC (HL) 78 at 92; 1952 SLT 270 at 275.
[32] Unreasonableness in the *Wednesbury* sense.

Error

32. The foregoing list of grounds of challenge, based on *Dundee General Hospitals*, does not include straightforward error. Error is of course recognised as a ground of challenge in other areas of the law, notably in relation to contracts, voluntary deeds and the field of unjustified enrichment, and the question arises as to whether beneficiaries should be entitled to challenge a decision by trustees or other fiduciaries on the simple ground of error.

33. At the outset, we are of opinion that no distinction should be drawn between errors of fact and errors of law. This distinction, once important, became discredited in the field of unjustified enrichment during the 1990s,[33] and we can see no virtue in resurrecting it in relation to fiduciary powers. Indeed, if the grounds of challenge were restricted to errors of fact, the utility of any remedy would be seriously curtailed, especially in cases of defective advice; such advice will usually be legal in nature.

34. In the case of ordinary bilateral contracts, error is recognised as a ground of invalidity, but in heavily restricted circumstances. The law in this area is immensely complex and frequently difficult to state with any certainty but, speaking at a very high level of generality, it is probably fair to say that error will only be relevant if it is common to both parties (or shared by both parties) or where it is induced by a representation made by one party or where the error of one party is known to the other and taken advantage of by him in concluding the contract.[34] There are clearly policy reasons for restricting the relevance of error in this way. Where it is common it affects both parties, and therefore it is plainly reasonable to take it into account. Likewise, where it is induced by the misrepresentation of one party, it is only fair that the other party should be able to escape the consequences of any error so induced by reduction of the contract. Likewise, when one party to a contract is in error and the other knows of the error but says nothing, thereby taking advantage of the error, basic fairness may, in appropriate circumstances, call for a remedy, once again reduction of the contact.[35] Apart from these cases, however, bilateral contracts involve rights and obligations on both sides, and the general policy that contracts must be performed overrides any desire to take a tender attitude towards those who make mistakes. Moreover, the general principle that contracts are interpreted and enforced according to objective criteria supports the view that a subjective error made by one party should generally be disregarded.

35. These considerations do not apply, however, to unilateral deeds or undertakings. There are few cases in this area, and the most significant is *Hunter v Bradford Property Trust Ltd*[36] In that case Lord Reid stated the law as follows:

> "Then the appellants maintained that it is not the law that a gratuitous contract can be reduced by reason of essential error of only one party. There is no decision of this House to that effect, but I think that it follows from the decision of *McCaig's Trustees v The University Court of the University of Glasgow* (1904) 6 F 918. That decision

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[33] *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151; *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; Scottish Law Commission, Report on *Unjustified Enrichment, Error of Law and Public Authority Receipts and Disbursements* (SLC No 169).

[34] This relates to the pure question of error, and ignores the law of fraudulent or negligent misrepresentation.

[35] This was the situation in *Steuart's Trustees v Hart* (1875) 3 R 192 and *Angus v Bryden* 1992 SLT 884.

[36] 1970 SLT 173. The case was decided by the House of Lords in 1960 but not reported for a decade. The Outer House decision, handed down in 1957, was not published until even later: 1977 SLT(N) 33.

> followed on earlier decisions which could perhaps be explained on other grounds. But it has stood unchallenged for over half a century, and it appears to me to be reasonable and in accord with the principles of Scots law that a person should not be entitled to retain a gratuitous benefit given under essential error on the part of the person conferring the benefit."[37]

Lord Keith stated the law as follows:

> "That a gratuitous obligation entered into under a material error reasonably entertained is a ground of reduction under the law of Scotland is, I think, well settled by authority. The error may sometimes be an essential error as to the nature of the obligation undertaken. Such error is illustrated, I think, in the cases of *Purdon v Rowat's Trustees* (1856) 19 D 206, *McLaurin v Stafford* (1875) 3 R 265, and possibly *Macandrew v Gilhooley* 1911 SC 448, 1911 1 SLT 92. Material error with regard to some extrinsic deed or circumstance is illustrated, I think, in the cases of *Dickson v Halbert* (1854) 16 D 586 and *McCaig v The University Court of the University of Glasgow* (1904) 6 F 918. In the matter of gratuitous obligation entered into through error it does not, in my opinion, matter whether the error is essential error as to the nature of the deed, or error as to some extrinsic circumstance material to the granting of the deed. In either case the deed is, in my opinion, reducible. The present case appears to me to come into the latter category."[38]

36. As mentioned above, the exercise of a fiduciary power by trustees is not the same as the granting of a unilateral deed or the entering into of some other gratuitous obligation. The latter case involves a voluntary act of the obligant. The exercise of a power by trustees can in some respects be regarded as a voluntary act,[39] but it is an act performed under a power that is granted by a third party, the truster. Moreover, when trustees are given a fiduciary power, there will almost invariably be a duty to consider, on a continual basis, whether that power should be exercised. Finally, and importantly, the trustees' exercise of a power is a fiduciary act, dealing with property to which others are entitled. These are all important differences, and in our view they point to the conclusion that the case for interference with the trustees' exercise of a power is greater than exists with mere voluntary deeds and other gratuitous obligations. Nevertheless, the policy adopted by Scots law towards voluntary deeds and other gratuitous obligations provides some support for reducing the exercise of powers by trustees on the ground of material error.[40] The considerations that apply to bilateral contracts are absent. Overall, it may be that the fiduciary nature of the exercise of trustees' discretionary powers is a factor that strengthens the case for interference in cases of error; because the trustees have been charged by another person with the exercise of a discretionary function, if they are in error in exercising that function, they are doing damage not to themselves but to the beneficiaries in whose interests they are intended to exercise the power, and are thereby failing to fulfil properly the trust reposed in them by the truster.

Nature of error required

37. If a remedy is to be granted for error, it is imperative that the nature of the error that is relevant should be specified. Two features are germane here. First, the error must be of

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[37] Ibid at 186.
[38] Ibid at 191. It should be noted that the decision of the House of Lords was by a majority of 3 to 2; the dissent was on the question of whether the agreement entered into by the pursuers was in fact gratuitous.
[39] Although in some cases, eg the exercise of a narrowly drawn power of apportionment, there may be a duty to act.
[40] This connection was drawn to our attention in the consultation response received from the judges of the Court of Session.

sufficient materiality to justify the intervention of the court; it is not every trivial mistake that will justify the overturning of the fiduciary's decision. In this connection we propose that the criterion should be that the error is "material", in the sense that the fiduciary would not have made the decision but for the error. We avoid the traditional contractual terminology of "essential" error for two reasons. First, the exercise of a fiduciary power raises issues which are in some respects fundamentally different from the law of contract and the difference will be highlighted by the change in terminology. Secondly, and perhaps more importantly, there is some doubt in the field of contract as to what "essential error" actually means.[41] Historically, Bell[42] provided a well known classification of essential error, stating that it would invalidate consent when it fell into one of five defined categories.[43] Bell's classification is directed specifically at the position of parties to a contract, and it is not appropriate to the exercise of a power. Moreover, we would be anxious to avoid confining the notion of material error to defined categories, and we think that this result will be achieved by the change in terminology.

38. We think that the notion of material error, in the sense described above, would be sufficient to cover errors as to the nature of the act that is being performed by the trustees or as to its effects or consequences. In some English Chancery cases a distinction has been drawn between effects and consequences.[44] For our part we have difficulty in following the distinction between "effects" and "consequences"; the dictionary meanings of those words tend to be similar, and both, in their basic signification, refer to the results that are achieved by an act. There may be an intention in the English cases to draw a distinction between the immediate effects and the more remote consequences.[45] A difference of that nature is one of degree rather than kind, and we are inclined to think that it would give rise to undue uncertainty.[46] The notion of materiality seems to us to be the important criterion, and the remedy should be available for any error as to the nature, effects or consequences of the fiduciary's act, provided that the error is sufficiently material.

39. The second feature that we think should be essential before a remedy can be granted is that the error should be as to the legal or factual position at the time when it is made. The result is that subsequent developments cannot create an error retrospectively.

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[41] See McBryde, *The Law of Contract in Scotland* (3rd ed), paras 15-04 and 15-22; Gloag and Henderson, *The Law of Scotland* (12th ed, 2007), para 6.33.

[42] *Principles* (4th ed), s 11.

[43] The relevant passage is as follows: "Error in substantials, whether in fact or in law, invalidates consent where reliance is placed on the thing mistaken. Such error in substantials may be – (1) In relation to the subject of the contract or obligation, as when one commodity is mistaken for another; (2) In relation to the person who undertakes the engagement, or to whom it is supposed to be undertaken, wherever personal identity is essential; (3) In relation to the price or consideration for the undertaking; (4) In relation to the quality of the thing engaged for, if expressly or tacitly essential to the bargain; or (5) In relation to the nature of the contract itself supposed to be entered into."

[44] The distinction appears to have been drawn originally by Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304. The law is discussed at length in *Pitt* and *Futter* [2011] EWCA Civ 197 at paras 186 onwards, 204 onwards and 210. See also David Hayton, "Setting gifts aside for mistake" T & T 2011, 17(10), 937-944.

[45] Millett J, in his original formulation of the distinction, stated that a mistake might justify setting aside a deed "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": *Gibbon v Mitchell* [1990] 1 WLR 1304 at 1309 D-F.

[46] In Chambers Dictionary "effect" is defined as "the result of an action"; "consequence" is defined as "that which follows or comes after as a result or inference: effect: the relationship of an effect to its causes". In the Shorter Oxford English Dictionary "effect" is defined as "something accomplished, cause or produced; a result, a consequence". "Consequence" is defined as "a thing or circumstance which follows as in effect or result from something preceding". In each case it is the primary meaning that is quoted. It is clear from these definitions that the two words are close to being synonyms. Differentiating between them is the sort of distinction that brings the law into disrepute.

We think that this is implicit in the very notion of an "error". Certainly that seems to be a feature of error in the law of contract; the error must relate to present facts or law, not developments that take place in future. So far as fiduciary powers are concerned, if a development takes place in future that makes the exercise of the power unwise, there might be a remedy using either the trust variation jurisdiction or our proposed new jurisdiction to permit the court to alter trust purposes to take account of a material change of circumstances.[47] The remedy does not, however, lie in the law of error.

40. Two qualifications should be made in relation to this point. First, a situation that can frequently occur is that trustees proceed on a current understanding of the law in exercising a fiduciary power, but that understanding is shown to be wrong by a subsequent court decision. The effect of the court's decision is of course that the law is declared always to have been as the court finds it to be. The result is to make the trustees' decision erroneous, in the sense just discussed, because it relates to what is ultimately held to be the correct state of the law when the trustees' decision is made.

41. Secondly, an error as to present circumstances can include an erroneous belief that some event will take place in future. For example, trustees might make a decision in the belief that a particular amendment to the tax legislation will come into force on 6 April the following year. It is then decided by the tax authorities that the change should be postponed or abandoned, and legislation is passed cancelling the earlier, prospective, legislation. In that situation we think that what is involved can properly be described as an "error", because it relates to the trustees' current understanding. What would not be covered is a case where trustees exercise a power of appointment and then, say, three years later, the law is altered with adverse consequences. In this case the alteration in the law would be a new matter, and it cannot be said that the trustees were in error; their objectives were rather frustrated by subsequent events.[48] While this distinction is important, we think that it is covered by the basic notion of "error".

Remedy

42. A further question relates to the remedy that should be available in the event of a defective exercise of a fiduciary power. The normal remedy for such cases in Scots law is of reduction, and we think that that should be the remedy in the sort of cases under consideration. Reduction is of course an equitable remedy (in the Scottish sense), with the result that the court can in an appropriate case refuse it if the result appears unfair. That would apply, for example, where trustees exercise a fiduciary power in a particular manner and either the beneficiaries or third parties acted on the faith of that exercise; in that situation reduction might be refused or granted on the condition that those who have acted on the faith of the exercise of the power are compensated. These considerations are potentially applicable to any attempt to invoke the remedy of reduction, however, and we do not think that they require to be elaborated for the purposes of the present remedy. The equitable nature of the remedy of reduction does not appear to give rise to many difficulties in practice. While difficult cases can be imagined, it is very difficult to lay down any general rules in this area, and we think that the best course is to leave it to the courts to deal with matters as they arise on the facts of individual cases.

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[47] Considered in our Discussion Paper on *Accumulation of Income and Lifetime of Private Trusts* (No 142), Pt 5.
[48] In this respect there is a parallel with the distinction in the law of contract between error on the one hand and impossibility of performance or frustration on the other.

43. The effect of reduction is that a legal act is annulled *ab initio*, although acts that take place on the faith of the exercise of the power during the period before the exercise is reduced may still be valid and effective. This is important in relation to the equitable nature of reduction: to the extent that rights have accrued during the period prior to reduction, they must be taken into account by the court and may form a ground for either refusing reduction or granting reduction on conditions designed to protect or compensate for accrued rights.

44. We should also draw attention to the fact that the principles of homologation and adoption can apply to the exercise of fiduciary powers. Even where a power is invalidly exercised, where those benefiting from it adopt the exercise as valid, or otherwise homologate it, the exercise will still be treated as valid, and reduction is likely to be excluded. This is the result of general principles of law, and we do not think that specific provision need be made in any legislation designed to deal with the defective exercise of fiduciary powers.

45. The parties with a right to challenge would normally be the beneficiaries or objects of the fiduciary power, but it might be appropriate to allow the trustees or other donees of a fiduciary power to have their own act reduced if they realise the error. It might also be appropriate to permit a truster, and any protector, to seek reduction of the decision of trustees or other fiduciaries. In general we think that the rules about title to bring an action of reduction in this area should not be limited, and should essentially coincide with the notion of interest to sue.

Conclusion

46. In the light of the foregoing discussion, we raise the following proposals and questions:

1. A statutory procedure should be made available in Scots law to permit challenge to the exercise of any fiduciary power on specified grounds that cover, generally, cases where the power is defectively exercised.

2. Challenge should be possible on the following grounds:

(i) Consideration by the fiduciary of the wrong question or failure to consider the correct question;

(ii) Failure by the fiduciary to apply his or her mind properly to the correct question, even though he or she purports to do so;

(iii) Perversity, whether through the fiduciary's shutting his or her eyes to the facts or in some other manner; this should probably extend to unreasonableness, in the sense of a decision that no reasonable fiduciary, properly instructed in the facts and law, could properly have reached;

(iv) Failure by the fiduciary to act honestly or in good faith; this would probably be sufficient to cover fraud on a power, although it is possible that that concept should be referred to expressly;

(v) As an extension of the first and second of these grounds, failure by the fiduciary to take relevant considerations into account or taking irrelevant considerations into account.

3. **Should the grounds also include cases where the exercise of the power is *ultra vires* of the fiduciary? In such cases the exercise is void *ab initio*, and the purpose of the remedy would be to provide legal certainty rather than to annul the fiduciary's act, but it may be desirable to provide a comprehensive remedy for every form of defective exercise of a fiduciary power.**

4. **Should challenge to the exercise of a fiduciary power also be possible on the ground that at the time of exercise the fiduciary was subject to a material error?**

5. **If the answer to question 4 is in the affirmative, would the following criteria be appropriate? Should any other criteria be added?**

   (a) Error should be relevant for this purpose when it is "material", in the sense that but for the error the fiduciary would not have reached the decision that he or she did.

   (b) To be relevant, the error may be of either fact or law.

   (c) To be relevant, the error must relate to the legal or factual situation at the time when the power is exercised, but this includes any subsequent declaration by a court of the law as it existed as at the date of exercise of the power.

   (d) Without prejudice to the generality of the notion of "material error", the error may relate to the nature, effects or consequences of the exercise of the power.

6. **The remedy that is available should be reduction, which should be subject to equitable considerations, in the sense in which that concept is used in Scots law.**

7. **The following persons should have a right of challenge: the beneficiaries or objects of the power; the trustees or donees of the power; the truster or granter of the power; and any other person who has a patrimonial interest in the exercise or non-exercise of the power.**

Finally we would welcome any comments that consultees may have about this area of law.

APPENDIX

Chapter 14 Error and other defects in trustees' exercise of discretionary powers

14.1 A further issue on which we would like to consult, at a very general level, is the way in which errors (or other defects) in trustees' exercise of their discretionary powers can be corrected. This involves consideration of the English rule that is usually known as the rule in *Hastings-Bass*.[1] Very shortly before this paper was ready to be published, the Court of Appeal issued a decision reviewing and restating this rule in greatly restricted form in two conjoined cases, *Pitt v Holt* and *Futter v Futter*.[2] The leading judgment is given by Lloyd LJ who, in a case heard shortly before he was promoted to the Court of Appeal, had set out the generally accepted formulation of the rule:

> "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."[3]

It has been suggested that *Hastings-Bass* itself did not establish any principle upon those lines.[4] Nevertheless, what (until the recent decision of the Court of Appeal) was understood to be the rule has been applied in a large number of cases in England and in other jurisdictions.[5] It seems that the principle proved useful in cases where trustees had made a discretionary decision that ultimately turned out to have been based on false premises or a false understanding of the likely consequences. Frequently the misunderstanding related to the tax consequences of the trustees' decision. Consequently, the rule attracted criticism

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[1] *Re Hastings-Bass*, [1975] Ch 25. As will be clear from what follows the rule has been developed a great deal from its initial formulation, and we explain at para 1.20 that the most recent development came shortly before this Discussion Paper was ready to be published.

[2] [2011] EWCA Civ 197, 9 March 2011. The appeals are from *Pitt v Holt* [2010] EWHC 45 (Ch) and *Futter v Futter* [2010] EWHC 449 (Ch).

[3] *Sieff v Fox* [2005] EWHC 1312; [2005] 1 WLR 3811 at para 119.

[4] Lord Neuberger, "Aspects of the law of mistake: re Hastings-Bass" (2009) Trusts and Trustees 189.

[5] Eg Jersey (*Re K Holdings Trust* [2009] JRC 245; *Re Sanne Trust Co Ltd* [2009] JRC 25A), Guernsey (*Gresh v RBC Trust Co (Guernsey) Ltd* (judgement 25/2009)), the Isle of Man (*McBurney v McBurney* [2009] WTLR 1489), and the Cayman Islands (*A v Rothschild Trust Cayman Ltd* [2004-05 CILR 485]; *Re Wang Trust* (April 2010, unreported)). We set out the new formulation of the rule in para 14.2.

from Revenue and Customs, who have began to oppose its application in a number of cases before the courts and tax tribunals.[6] They were the appellants in *Pitt*.

14.2 Lloyd LJ's judgment in *Pitt* is lengthy and reviews the many relevant authorities. The full implications will no doubt emerge over the coming weeks and months, as practitioners' and academics' comments begin to appear. (We also do not know whether there will be an appeal to the Supreme Court.) There is a useful summary towards the end of Lloyd LJ's judgment of the extent of "the *Hastings-Bass* rule":

> "222. *The Hastings-Bass rule*. The principle promulgated first by Warner J in *Mettoy*, developed thereafter, and set out by myself in paragraph 119(i) of my judgment in *Sieff v Fox* is not correct. Two kinds of case need to be distinguished.
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> i) On the one hand there may be a case in which, for example because of an inadvertent misunderstanding of the position, an act done by trustees in the exercise of a dispositive discretion is not within the scope of the relevant power. If so it is void. That was the case in *Re Abrahams' Will Trusts*, as it was interpreted in *Re Hastings-Bass*. It would have been the case in *Re Hastings-Bass* but for the Court of Appeal having allowed the appeal by the trustees.
>
> ii) On the other hand, the case may be one in which the trustees' act in exercise of their discretion is within the terms of their power, but is said to have been vitiated by their failure to take into account a relevant matter, or their taking something irrelevant into account, when deciding to exercise, and exercising, the discretion. The correct approach to such cases is dealt with at paragraph [127] above.[7] The trustees' act is not void; it may be voidable. To be voidable it must be shown to have been done in breach of a fiduciary duty of the trustees. The duty to take relevant, and no irrelevant, matters into account is a fiduciary duty. Relevant matters may include fiscal consequences of the act in question. However, if the trustees fulfil their duty of skill and care by seeking professional advice (whether in general or in specific terms) from a proper source, and act on the advice so obtained, then (in the absence of any other basis for a challenge) they do not commit a breach of trust even if, because of inadequacies of the advice given, they act under a mistake as to a relevant matter, such as tax consequences. In the absence of a breach of trust, the trustees' act is not voidable. Even if it is voidable, it cannot be avoided unless a beneficiary seeks to have it avoided, and a claim to that effect will be subject to the discretion of the court and to the usual range of equitable defences.

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[6] See HM Revenue & Customs, Tax Bulletin 83, available at http://www.hmrc.gov.uk/bulletins/tb83.htm.

[7] Para 127 reads: "The cases which I am now considering concern acts which are within the powers of the trustees but are said to be vitiated by the failure of the trustees to take into account a relevant factor to which they should have had regard – usually tax consequences – or by their taking into account some irrelevant matter. It seems to me that the principled and correct approach to these cases is, first, that the trustees' act is not void, but that it may be voidable. It will be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and to the court's discretion. The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. Fiscal considerations will often be among the relevant matters which ought to be taken into account. However, if the trustees seek advice (in general or in specific terms) from apparently competent advisers as to the implications of the course they are considering taking, and follow the advice so obtained, then, in the absence of any other basis for a challenge, I would hold that the trustees are not in breach of their fiduciary duty for failure to have regard to relevant matters if the failure occurs because it turns out that the advice given to them was materially wrong. Accordingly, in such a case I would not regard the trustees' act, done in reliance on that advice, as being vitiated by the error and therefore voidable."

iii) The same principles may apply to acts on the part of other persons in a fiduciary position, of whom a receiver appointed under the Mental Health Act 1983 is an example."

14.3 The rule has not been applied in Scotland; indeed, so far as we are aware, no attempt has been made to argue that it should apply. There has, however, been an interesting article by Mr Derek Francis[8] suggesting how an analogous principle might be evolved in Scotland on the basis of the decision in *Dundee General Hospitals v Bell's Trustees.*[9] In that case, Lord Reid considered the circumstances in which the discretion of trustees might be reviewed. He expressed the view that this might be possible:

> "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."[10]

14.4 That principle approaches what is now the rule in *Hastings-Bass*, as set out in paragraph 14.2 above. It proceeds on grounds, analogous to those that apply to judicial review of administrative action, that require the court to hold that in effect there was no proper decision at all. (The rule in *Hastings-Bass* is also based on the law of mistake,[11] although there has been a good deal of confusion in the cases about the precise manner in which it proceeds.[12]) We will take time to consider the Court of Appeal's full decision in *Pitt*, and we may decide to issue a short paper on matters raised by that case in the near future.[13] In the meantime it seems to us that two questions arise that are relevant to our present project: first, should a rule dealing with errors and other deficiencies by trustees in exercising their discretionary powers be incorporated into Scots law, and if so should such incorporation be in statutory form? We think that, if such a rule is to be incorporated, statutory provision would be desirable; the English cases which preceded the Court of Appeal's decision in *Pitt* – which were influential in other jurisdictions,[14] whose reaction to the recent decision is yet to be seen – are far from clear as to the basis for the rule, and there has been some critical academic commentary.[15] We would, therefore, like to know whether there is any support for, or opposition to, an appropriate statutory enactment. We accordingly ask the following question:

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[8] Derek Francis, "*Hastings-Bass* and his Scottish friends" 2008 SLT (News) 161.
[9] 1952 SLT 270; 1952 SC (HL) 78.
[10] 1952 SLT 270 at 275; 1952 SC (HL) 78 at 92.
[11] See *Pitt v Holt; Futter v Futter*, cited in fn 2 above, at paras 164-210 and 223.
[12] See Michael Ashdown, "In Defence of the Rule in *Re Hastings-Bass*" (2010) 16 Trusts and Trustees 826.
[13] One point which strikes us about the effect of the Court of Appeal's decision – and which Lloyd LJ recognises in para 128 of his judgment – is that where trustees rely on negligent or incorrect professional advice (eg on tax) it may be hard for the beneficiaries to recover the resulting loss to the trust. Hitherto, the *Hastings-Bass* rule allowed trustees to seek to have their actions based on such advice declared void, and many successfully did so. It is difficult to imagine that the beneficiaries would have similar prospects of success in an action of professional negligence in respect of defective advice.
[14] See fn 5 above.
[15] Most notably in the article by Lord Neuberger cited at fn 4 above; in a further article by Lord Walker of Gestingthorpe, "The limits of the principle in *Re Hastings-Bass*" (2002) 4 Private Client Business 226; and in a recent article by Richard Nolan and Adam Cloherty, "Taxing times for *Re Hastings-Bass*" (2010) 126 LQR 513. In favour of a version of the rule, see Michael Ashdown, "In Defence of the Rule in *Re Hastings-Bass*" (2010) 16 Trusts and Trustees 826.

38. Is there support for, or opposition to, the statutory enactment of a rule which would enable the exercise of trustees' discretionary powers to be reduced or otherwise altered if the trustees were in error as to the considerations that ought to have been taken into account by them in the exercise of their power?