M v St Anne's Trustees Limited
Royal Court
12th January 2018

JUDGMENT
1/2018

In the matter of the Richmond Retirement Plan and in the matter of S.69 of the Trusts (Guernsey) Law, 2007. Application for *Hastings-Bass* relief.

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION

IN THE MATTER OF THE RICHMOND RETIREMENT PLAN
AND IN THE MATTER OF S.69 OF THE TRUSTS (GUERNSEY) LAW 2007

BETWEEN:

M

Applicant

-and-

ST ANNE'S TRUSTEES LIMITED

Respondent

Before: Her Honour Hazel Marshall QC, Lieutenant Bailiff

Hearing date: 8th November 2017
Judgment handed down: 12th January 2018

Counsel for the Applicant: **Advocate A C Williams**
Counsel for the Respondent: **Advocate K M Le Cras**

Cases, texts and legislation referred to:

(1) Legislation

(a) Guernsey
The Trusts (Guernsey) Law 2007, s 69

(b) UK

Finance Act 2004 (as amended in 2006), ss 174 and 185 and Schedule 29A Para 2

(2) Cases

(a) Guernsey

HCS Trustees Ltd Trustees v Camperio Legal and Fiduciary Services Limited. 30th June 2015

Gresh v RBC Trust Company (Guernsey) Limited Royal Court Judgment 6/2016

Carlyle Capital Corporation Ltd v Conway (Royal Court, unreported, 5th September 2017),

(b) Jersey

S*eaton v Morgan* 2007 [JRC] 206

Re Seatons Trustees [2009] JRC 050

Re Seaton Trustees Ltd [2010] WTLR 105

Re The Onerati Settlement [2012] (2) JLR 324

(c) United Kingdom

Donoghue v Stephenson [1932] AC 562

In re Hastings Bass (deceased) [1975] Ch 25

Gibbon v Mitchell [1990] 1WLR 1304

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

Bristol & West Building Society v Mothew [1998] Ch 1

V*enables v Hornby* [2002] STC 1260

Abacus Trust Co (Isle of Man) v Barr [2003]

Extrasure Travel Insurances Limited v Scattergood [2003]12 BCLC 89

Sieff v Fox, [2005] 1 WLR 381

Futter v Futter [2010] EWHC 449

Pitt v Holt [2011] EWCA Civ 97

Futter v Futter, Pitt v Holt [2013] UKSC 26

Re Gareth Clark TC/2014/05909

(d) Isle of Man

AB v CD (2016) 19 ITELR 316

(e) Cayman Islands

Megerisi v Protec Trust Management (2012) 16 ITELR 665

Schroder Cayman Bank v Schroder Trust AG (2015) ITELR 567

(3) Other materials

Mitchell: "*Reining in the rule in In re Hastings-Bass"* (2006) 122 LQR 35

Langlois and Cloherty: "Playing the "get out of jail free" card: mistake in the law of trusts" (2010) 14 JGLR 10

Ham: *The Rule in Hastings-Bass after Pitt v Holt and Futter v Futter*: 2016 Trusts and Trustees vol 22 No 9,

Underhill: *Trusts and Trustees* 19th Ed. para 27.2

Snell's *Equity,* 33rd Ed paras 7-008 to 7-013

JUDGMENT

Introduction – the claim

1. The Applicant, whom I will refer to as "M", is a member of the Richmond Retirement Plan, ("the Scheme"). The Respondents are the Trustees of the Scheme.

2. By this application M applies under s 69 of the Trusts (Guernsey) Law 2007 (see s 69(1) and 69(2)(d)) for the court to exercise its jurisdiction under the doctrine which is well-known (although strictly incorrectly) as the *"rule in Hastings-Bass",* to set aside, and thereby avoid, the Respondents' implementation of a transaction which took place between M and them, as Trustees of the Scheme and more particularly of his own individual pension plan within the Scheme (which I will call "the Plan"). This transaction took place in May 2014, and it turned out to attract a very large United Kingdom tax charge for M.

Background and overview

3. M lives in Bermuda. He moved there from the United Kingdom in 2007, and, as he was entitled to do, he moved the personal pension scheme which he had accrued in the UK offshore, although he in fact only did this some three years later, in 2010. This was arranged through a Mr Bhargaw Buddhdev of Barnett Waddingham LLP, financial consultants, who were M's pension advisers. The Richmond Retirement Plan, which operates in Guernsey, was chosen, I am told, because it permits multi-currency investment. It operates as a Qualified Recognised Overseas Pension Scheme ("QROPS") for the purpose of UK tax.

4. The purposes of the Richmond Retirement Plan (it is called "the Scheme" in its documentation) are to provide superannuation benefits for Members and their Dependants, as defined. Under it, assets are held and administered by the Respondents, a wholly owned subsidiary of the Richmond Fiduciary Group Limited, in accordance with the general rules of the Scheme, but each Member has his or her own separate pool of assets, backing his or her individual pension plan.

5. As requested, the Respondents appointed M's then investment adviser, a Mr Jeremy Barrett of St James's Place Wealth Management ("St James"), as investment adviser to M's pension Plan and resolved to invest the transferred assets as he should advise. They also appointed Barnett Waddingham to provide actuarial services to M's Plan.

6. In 2013, M had, perfectly properly, borrowed a large sum from the Plan to fund a payment to his wife on their divorce. Under the Scheme rules this had to be repaid before M could start to draw a periodic pension, as he wished to do. What then happened was that M wanted to repay this loan by transferring to the Trustees and into his Plan his shares in two companies which were wholly-owned by him and which were the property holding vehicles for him of, respectively, an apartment in Miami, and a flat in London, which he had acquired as investments, and the Trustees agreed to this. In May 2014 the Trustees received the shares, made a balancing cash payment to M (because the valuation of the underlying properties was greater than the outstanding loan and interest) and later granted M occupancy rights for the two properties, presumably so that he could arrange their letting. Then, from October 2014, M began to receive a monthly pension payment from his Plan, comprising an agreed cash sum as well as the rental value of the two properties.

7. In February 2015, M engaged PricewaterhouseCoopers ("PwC") to review his financial and tax position generally, and it came to light that the transaction described above gave rise to a very significant personal income tax liability for him in the United Kingdom, arising out of the placing of residential properties into a personal pension scheme comprising UK derived funds. This was despite the fact that M had, through his Bermuda solicitors, taken UK tax advice from English solicitors and the advice had been, in effect, that there were no tax implications or disadvantages for him in what he proposed. Had M been apprised of his potential tax liability, he says (and I can accept) that he would not have repaid his loan in this way, but could and would instead have done so by liquidating other assets (American shareholdings), as this would not have had any such similar tax consequences.

8. The Respondents had not themselves taken tax advice, but they had intimated to M that he should himself take tax advice as they wanted the comfort of knowing that he had been advised to do so, and they had also said that they proposed taking advice themselves about possible implications for the Plan of the transfer of the properties and any consequent reporting requirements which would fall on them. Under the terms of their engagement they were entitled to do so at the expense of the Plan. However, in the event they had neither checked up on the former nor pursued the latter. The explanation appears to be that this was overlooked when a change of personnel took place at the Respondents' offices in about January 2014.

9. In this situation, Advocate Williams, on behalf of M, argues that the Respondents were in breach of their fiduciary duty, such that the jurisdiction of the court under the *Hastings-Bass* doctrine, as recently examined, narrowed and defined in the English Supreme Court combined appeals in *Futter v Futter* and *Pitt v Holt* (by which latter name this case is usually known) at [2013] UKSC 26, is engaged. He argues that this jurisdiction, which I will describe in more detail later, is a part of Guernsey law, and that this court therefore can, and should, intervene to set aside the transaction, (or rather, more precisely, the Respondents' acceptance of the shares and their resolution to make the balancing payment) and thereby avoid the transaction as if it had never taken place, making appropriate orders where necessary to undo its effects. The consequence of this, it is anticipated, will be that there will then be no effective transaction giving rise to any UK tax charge, and the very disadvantageous, and entirely unnecessary, taxation consequences of the transaction for M will be avoided.

10. The Respondent Trustees support M's application, even to the extent that Advocate Le Cras, appearing on their behalf, was prepared to concede at the hearing that the Trustees had been in breach of their fiduciary duty in some respect. She reserved her clients' position, however, as to whether any such breach of duty would be actionable by M against them, first because the relevant Trust Deed contained the usual form of trustee exoneration clause, excluding the Trustees' liability except in respect of matters of wilful default and *gross* negligence, and second because she suggested that, on analysis, whatever the precise breach of fiduciary duty, it had not caused any loss to the trust (ie M's pension Plan) itself.

11. From the above it will be apparent that all the parties before the court were in practice arguing on the same side, even though the Trustees' position might be thought to be somewhat delicate. At the end of the day, if the court is prepared to intervene to wave the judicial magic wand and put the situation back to what it would have been as if M had not transferred these shares into his pension Plan, then everyone – M, his dependants, his legal advisers, his financial advisers, his Trustees, and a number of professional indemnity insurers - would all be very relieved, as any damage suffered would then be limited to the costs occasioned by the effort of retrieving the situation. These would be far less than the tax charge attracted.

12. The only entity with an interest in putting the arguments in opposition to M's case is therefore Her Majesty's Revenue and Customs ("HMRC"). They were twice invited to consider whether they wished to be convened in the proceedings, once at the outset and once again by my direction some weeks ago, when the Guernsey Income Tax authority made it clear that if

the transaction was reversed by the court, that authority would not be concerned to disturb the pension benefits which had been paid to M in the interim, even though these would then have been contrary to the rules and requirements of such a recognised scheme. On both occasions HMRC has written stating that it did not propose to apply to be convened in the proceedings, but was content to make representations to the court by letter. This is principally because HMRC takes the view that the restoration of the *status quo ante* by the court would not affect the applicability of the charge to tax caused by the triggering event of the original transfer, although it also suggests that, on a proper view, the Trustees were <u>not</u> in any breach of their fiduciary duty, because they made it a condition (on HMRC's interpretation) of their accepting the relevant shares into the Plan that M should have taken his own tax advice on the proposal.

13. The result has been that the legal argument in this case has been one-sided. Short of convening an *amicus curiae*, which I considered would be disproportionate, this was inevitable, but it has resulted in the court's having to examine and test the arguments advanced by those before it with particular rigour.

The "Hastings-Bass" jurisdiction

14. It is worth recounting the origins and development of the *Hastings-Bass* jurisdiction at the outset, because a review of how it has arrived at the position today is helpful in considering where it now stands and what considerations affect its application or ought now to affect its development in Guernsey law.

15. The case of *In re Hastings Bass (deceased)* [1975] Ch 25 was decided in 1974. It concerned the English tax of estate duty which is payable on the transfers of property on death, subject to authorised exceptions and with many anti-avoidance provisions. In that case, the trustees of a family trust had purported to exercise their powers of advancement during the settlor's lifetime, and to do so by transferring funds to be held on the terms of a different settlement. Their objective was to mitigate the incidence of estate duty on the settlor's death. After his death, it emerged that intervening judicial authority showed that the terms of the new settlement would be treated as if read into the terms of the original settlement, and on that basis, all but one of the new provisions made would fail for infringing an English rule of law (the "Rule against Perpetuities") which outlaws excessive delay in interests in land taking effect absolutely in possession. The English Revenue contended that this vitiated the whole of the advancement, which was therefore void and estate duty was payable as if it had never occurred. The Court held that only the provisions which infringed the perpetuity rule were void and the advancement, which was a disposition within the trustees' powers in principle, took effect to the extent that it was not so void.

16. On one view this decision appears to be simply a decision that the disposition with its attenuated effect was nonetheless objectively within the scope of the trustees' powers and was therefore valid and effective. On that basis the actual decision depended simply on a view about *vires.* However, in the course of reaching its decision, the Court of Appeal necessarily rejected a more subtle argument made by the Revenue. This was that, as the trustees had misunderstood the actual effects of what they were approving (which effects the court was now declaring) they had never turned their attention to considering those effects. There had therefore been no proper deliberation about the actual effects of the advancement in its attenuated form and therefore there had been no valid exercise of the trustees' discretion in that regard. Therefore, the advancement in its attenuated form was void because it was not the product of a decision-making process in accordance with the trustees' powers. The Court of Appeal rejected this argument, finding that the principal consideration in deciding to make the defective advancement was that of estate duty saving, which applied with just as much force to the permissible attenuated form of the advancement, as it had to the more extensive original version, and the attenuated version was not, therefore, void. The Court thereby treated

the test of validity as being, not whether the trustees had subjectively given actual adequate consideration to the actual disposition, but whether the actual disposition could still be seen to be for the benefit of the relevant beneficiary(s) – an objective test. On any view, though, the arguments in the case were focused on issues of validity versus voidness.

17. However, at page 41 F-H of the judgment, Buckley LJ purported to summarise the effects of the earlier judgment. He did so in terms, which were subsequently made use of, eagerly and gratefully, by applicants to the court. What Buckley LJ said was that

> *"….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"* (emphasis added).

18. This formulation was criticised in *Pitt v Holt* by Lloyd LJ in the Court of Appeal (see [2011] EWCA Civ 97 at [59] and [65]) a criticism endorsed by Lord Walker in the Supreme Court (see 2013] UKSC 26 at [24]-[25]), both for not accurately expressing the actual *ratio decidendi* of the Court of Appeal decision itself, and also for being too wide. Lord Walker said that criticisms of Buckley LJ's formulation, apart from its not actually being what had been decided in *Hastings-Bass* itself, were, first, that the words underlined were too general as to what were material unintended consequences, and, second, that the actual decision in *Hastings-Bass* had not required limb (2) of the formulation at all, because its effects were subsumed in limb (1). He commented that this formulation had unfortunately opened ajar the door by which, as Longmore LJ had put it in *Pitt v Holt* in the Court of Appeal (at [227]), "*the law [had taken] a seriously wrong turn".*

19. The Buckley *dictum* became deployed in many subsequent cases in order to ask the court to undo the effects of transactions, distributions or just acts entered into or effected by trustees which had turned out to have unanticipated disadvantageous consequences, usually as to taxation and in trust contexts right across the range of more or less complex family trusts and settlements to individual and corporate pension trusts. The following examples are notable points in the development of the doctrine during subsequent years.

20. *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 concerned an application to the court to determine the effects of a company's employer and its pension trustees having executed a revised trust deed which incorporated a change that would transfer from the trustees to the employer the power to decide whether to use any surplus of the fund on its winding up to augment benefits to pensioners etc. In this context Warner J, purporting to apply the *Hastings-Bass* doctrine, reformulated the Buckley principle positively (at pp 1621G-1622A), into

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

He thus not only inaccurately reproduced the inaccurately conceived "rule" in *Re Hastings-Bass,* but widened its apparent scope still further (see *Pitt v Holt* per Lord Walker at [28] - [32]), also paving the way for a later dispute about whether the correct test was that the trustees "would" or merely "might" have acted differently. Perhaps more importantly, this dictum also gives the impression that the court's intervention in such a situation would follow as a matter of course.

21. Over the next 10 years or so, the value of this judicially pronounced principle as a basis to apply for the convenient undoing of things which had "gone wrong" in a trust context came to be well-appreciated by the profession. It was seen as providing an easier basis on which to procure the setting aside of an act or disposition by trustees which had turned out to have unforeseen adverse consequences than either making a case that that act or disposition was outside the scope of the trustees' powers properly construed, or making a case that the relevant misapprehension was sufficiently fundamental to render the act or disposition voidable for mistake in equity, on general principles. It came, therefore, to be the remedy of first resort.

22. In *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409, Mr Barr had told his trustees that he wished 40% of his shares in a company to be settled in favour of his sons, but the Trustees mistakenly settled 60% of the funds. Although the mistake was discovered in 1992, nothing was done to attempt to rectify it until 2002. By this time, misgivings about the potential perceived breadth of the rule in *Hastings-Bass* were beginning to emerge. Lightman J observed that

> *"equity does not afford a beneficiary or a trustee a free pass to rescind a decision which subsequently proves unpalatable or unfortunate and substitute another. Relief is only available if the necessary conditions for its grant are satisfied."*

23. Setting out to identify those conditions in the context of the law as it appeared at the time, Lightman J concluded that the necessary conditions for invoking the *Hastings-Bass* doctrine were that there had been a relevant mistake or misapprehension about the disposition in question, but not necessarily a fundamental one - simply one which would or might have affected the trustees' decision (and he did not need to decide which in this particular case) - and that that mistake had been the failure by the trustees to consider a matter which they were under a duty to consider (this being the essence of the *Mettoy* formulation) which necessarily meant that the mistake was a breach of fiduciary duty, namely the trustees' duty to consider all material matters with regard to exercising their discretion to effect the disposition. Lightman J concluded, therefore, that a breach of the trustees' duty was a necessary pre-condition for a successful claim for *Hastings-Bass* relief. He also decided that the effect of any such mistake was to render the trustees' act or disposition voidable, and not void. He did not, however, have to decide the application of the principles which he had just distilled, because, having stated his findings as to those principles, he adjourned the case to enable the parties to seek settlement. There is no further report of the case, so they apparently did so.

24. The scope of the *Hastings-Bass* doctrine remained controversial, however. In *Sieff v Fox*, [2005] 1 WLR 381, again at first instance, Lloyd LJ (as he had become before delivering his judgment) dealt with an application on complicated facts to set aside an appointment made out of a family settlement to Lord Howland, as to which his consent was required but had been given in ignorance of some matters including adverse tax consequences. The disposition was challenged and avoided successfully both on the grounds of mistake and under the *Hastings-Bass* doctrine, but Lloyd LJ was of a different view from that of Lightman J and held that a breach of fiduciary duty was not necessary for the invocation of the *Hastings-Bass* doctrine. (He subsequently changed his mind, in the Court of Appeal in *Pitt v Holt*, below.)

25. The breadth of the availability of the doctrine began to alarm commentators. In 2006 in an article entitled "*Reining in the rule in In re Hastings-Bass"* (see (2006) 122 LQR 35 at 41-43) Professor Charles Mitchell asked rhetorically

> *"Why should a beneficiary be placed in a stronger position than the outright legal owner of property if he wishes to unwind a transaction to which he has given his consent but which has turned out to have unforeseen tax disadvantages?"*

He suggested that control of the doctrine was needed and would most likely be achieved by invoking the equitable bars to unwinding a transaction that would come into play if it were recognised that the rule renders transactions voidable rather than void.

26. The continued flow of trustees applying to the court to have their own actions set aside because it had been discovered that they had adverse tax consequences continued, however, to the extent that in *Futter v Futter* the first instance judge, Norris J, commenced his judgment

> *"This is another application by trustees who wish to assert that they have acted in an untrustee-like fashion and so have failed properly to exercise a power vested in them. The trustees wish to take advantage of this failure to perform their duties in order to enable the beneficiaries to avoid paying the tax liability consequent upon the trustees' decision…"*

and he commented that this perspective might suggest that the development of the rule in *Hastings-Bass* had been diverted from its true course ([2010] EWHC 449 Ch at [2]).

27. In 2010, Langlois and Cloherty commented in an article in the Jersey and Guernsey Law Review "Playing the "get out of jail free" card: mistake in the law of trusts" (JGLR 2010 Vol 14 p10 at [135]) on

> "*the desire of the higher courts to impose some limits on a jurisdiction which has been increasingly noted for its lack of boundaries."*

The revised doctrine - *Pitt v Holt*

28. The conjoined appeals in *Futter v Futter* and *Pitt v Holt* in 2012-13 brought the opportunity to the English Court of Appeal and later the Supreme Court to consider the state of the *Hastings-Bass* doctrine in English law, and to set it back on a more appropriate path. Naturally, though, these courts were there very much focused on resolving the particular points of contention which had emerged during the development of the doctrine up to that time.

29. In *Futter v Futter*, described in the Court of Appeal as "more typical" of the line of cases which had developed the *Hastings-Bass* doctrine, trustees had exercised their powers of advancement to beneficiaries of a settlement in the belief that such advancements could be offset against tax-losses already accumulated by those beneficiaries, and thereby avoid UK capital gains tax. This belief was incorrect, as the trustee and the trust's solicitors, an eminent city firm in which one trustee was a partner, had overlooked a material provision in the tax legislation. The trustees therefore themselves brought proceedings against the beneficiaries for orders to set aside the advancements which they had made, under the *Hastings-Bass* doctrine. They did not argue any case on mistake. HMRC was later joined as a party.

30. At first instance Norris J considered himself bound by authority to hold that the disposition was vitiated under the *Hastings-Bass* rule, because the trustees had acted under a failure to consider a relevant matter, namely the true tax implications of what they were doing, but he also held that, on that basis, the transaction was void and not voidable. The Court of Appeal allowed the Revenue's appeal on the grounds that a breach of trust by the trustees was a prerequisite to invoking the *Hastings-Bass* doctrine, and there had been none; the trustees had taken apparently competent tax advice and had acted upon it. The Court further held that, if the advancement had been vitiated under the *Hastings-Bass* doctrine, it would have been voidable and not void, and further stated that it was inappropriate for trustees to bring a *Hastings-Bass* application relying on their own failures and that, at least in a normal situation, an affected beneficiary must do so.

31. *Pitt v Holt* was a more unusual case, decided more or less contemporaneously with *Futter* at first instance. Mr Pitt had received large damages for head injuries in a road accident which had also cost him mental capacity. Mrs Pitt was appointed his Receiver by the Court of Protection. On advice, and with the sanction of the Court of Protection, Mr Pitt's damages were placed into a discretionary trust for the benefit of himself, his wife, children and remoter issue during his lifetime and after his death for the benefit of his estate. Such a discretionary trust attracted a charge to UK inheritance tax upon its creation, a ten yearly tax levy on capital, and a tax charge on any payment of capital out of the trust other than to a spouse. There was an exception for discretionary trusts created for the benefit of disabled persons contained in the tax legislation, and this would have applied if only a stipulation had been included that at least half of the trust funds applied during Mr Pitt's lifetime must be applied for his benefit, but that provision had been overlooked. After Mr Pitt's death, Mrs Pitt and another, as personal representatives of Mr Pitt, brought proceedings against the trustees for a declaration that the transfer of the funds into the discretionary trust was void or alternatively voidable under the *Hastings-Bass* doctrine, or alternatively for a declaration that that transfer, as a voluntary disposition, was void in equity for mistake. HMRC was again joined in as a defendant. Proceedings by the estate and the trust against the relevant financial advisers for negligent advice were stayed pending the outcome of the proceedings.

32. At first instance, the Deputy High Court Judge set aside the settlement by applying the *Hastings-Bass* doctrine, but stated that he would not have done so on the grounds of equitable mistake, because the mistake in question had not been a mistake as to the nature of the transaction, but only as to its consequences, a distinction which had been forcefully advanced as being crucially material by Millett J, as he then was, in *Gibbon v Mitchell* [1990] 1WLR 1304 at 1309. The Court of Appeal allowed the appeal of HMRC, as in *Futter*, holding that whilst the *Hastings-Bass* doctrine applied to Receivers such as Mrs Pitt, there had been no breach of fiduciary duty about her entering into the settlement, which had, once again, been entered into on apparently competent advice. Moving on to consider the alternative claim to set aside the settlement on the grounds of equitable mistake, it concluded that the basis of a claim to relief under that doctrine was the making of a mistake as to either the legal effect of the disposition itself or as to some fact which was the basis of the transaction, and a mistake sufficiently grave in its character as to render it unjust for the donee (here, the trust) to retain the property given to him/it. It held, though, that taxation effects were a consequence, and not an effect, of the relevant transaction, so that Mrs Pitt's claim failed on that score as well.

33. In the Supreme Court, both appeals against the Court of Appeal's decisions on the *Hastings-Bass* doctrine were dismissed, but Mrs Pitt's cross-appeal on the basis of equitable mistake was allowed.

34. The only speech was delivered by Lord Walker. He analysed the history of the *Hastings-Bass* cases and generally approved the analysis of Lloyd LJ in the Court of Appeal, and his criticisms of the formulation by Buckley LJ of the original rule in Hastings-Bass, noted above. In brief, and endorsing most if not all of Lloyd LJ's observations and analysis of the *Hastings-Bass* cases, Lord Walker held that the true "rule in *Hastings-Bass*" did require there to be conduct (generally described in shorthand as "inadequate deliberation") by the trustee amounting to a breach of duty [25], although it did not have to go so far as to be a "fundamental" mistake [39], [73]. He also held that, in consequence where trustees had obtained and acted on apparently competent professional advice, *Hastings-Bass* relief was not available [41].

35. Dealing with the other major point of contention in the case he held that a transaction which was successfully challenged under the *Hastings-Bass* doctrine would be voidable and not void. The situation was to be distinguished from that where trustees purported to do an act which was outside their powers; this would be ineffective and void ([43], [93]). He approved the principle expressed by Lloyd LJ at [127] in his Court of Appeal judgment:

"…….It will be voidable if but 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 the beneficiaries, but this is subject to equitable defences and to the court's discretion."

36. The Supreme Court therefore dismissed the appeals and upheld the refusal of *Hastings-Bass* relief, but it went on to allow Mrs Pitt's cross appeal invoking the jurisdiction of equity to set aside a transaction for mistake. I am not directly concerned with that jurisdiction in this case, and it is certainly not appropriate to analyse it in detail, but as I find it to be helpful general context I must record the analysis briefly. In summary, (and as it has been applied in later decisions) the requirements for setting aside a voluntary disposition in equity were held to be that

    (i) there should have been a positive mistake by the donor (to be distinguished from mere ignorance, inadvertence, forgetfulness or misprediction of some possible future event),

    (ii) the mistake should be as to some such sufficiently fundamental matter that it effectively caused the transaction to take place, and

    (iii) the mistake was of such a seriously grave nature as to render it unconscionable (meaning: unjust or unfair) that the donee should retain the property which had been transferred to him.

37. Unlike the Court of Appeal, the Supreme Court took the view that a mistake about the tax consequences of a transaction could be a mistake of sufficiently fundamental a nature with regard to the transaction to qualify under this doctrine. It also took the view that the mishap in *Pitt v Holt* did qualify under this test; on the actual facts of the case, the funds remaining in the discretionary settlement would have been insufficient to pay the inheritance tax, and as this would have meant that they were insufficient both to pay the tax and to meet Mr Pitt's needs, it could be said that this defeated the very underlying objective of the trust. Mr Pitt had in fact died by the time the case came to the Supreme Court, but the fact remained that the funds in the discretionary trust were insufficient to pay the inheritance tax liability remaining. The finding that this was a mistake sufficiently fundamental, therefore, for the transaction to be void for mistake in equity is therefore not particularly surprising, although this result may well have been helped along by the realisation that the Court of Protection itself had authorised, even if not positively directed, the execution of the disastrous transaction, without query.

38. Returning to the *Hastings-Bass* aspect, the actual decision in *Pitt v Holt* thus did have the effect of reining in the jurisdiction somewhat, principally by firmly establishing the requirement that the jurisdiction could only be invoked if there had been a breach of duty by the trustees. I need, though, to mention some further points from the judgment.

39. First, Lord Walker recognised that the requirement of a breach of duty produced the result (which some might think the inverse of what is appropriate) that where a trustee has entered into a transaction with relevant adverse tax consequences but having behaved impeccably in terms of carefully taking and acting on apparently competent advice which turned out to be wrong, an innocent or disappointed beneficiary has no prospect of having the matter put right by the court to protect him, whereas where a trustee has acted in cavalier disregard of the consequences, and either taken no advice or ignored it, the court can step in and pull the chestnuts out of the fire. Lord Walker, did not, however, shrink from this as a consequence of the revised principle: see [40]-[41], [70] and [80]. It would seem to be this effect which has caused the swell of criticism of the revised rule, mentioned below.

40. Second, he pointed out at [83] that

> "*….there have been and no doubt will be in the future, cases in which small variations in the facts lead to surprisingly different outcomes. That is inevitable in an area where the law has to balance the need to protect beneficiaries against aberrant conduct by trustees (the policy behind the Hastings-Bass rule) with the competing interests of legal certainty and of not imposing too stringent a test in judging trustees' decision-making."*

41. Third, he acknowledged at [8] the force in the sentiment of the quotation from Professor Mitchell, cited at paragraph 25 above.

42. Fourth, he recorded at [93] and [94] that

> *"we are in an area in which the court has an equitable jurisdiction of a discretionary nature although the discretion is not at large, but must be exercised in accordance with well-settled principles. ….The working out of these principles will raise problems which must be dealt with on a case by case basis."*

Reactions to the revised *Hastings-Bass jurisdiction*

43. Reaction to this case, and the narrowing of the *Hastings-Bass* principle, has been varied and interesting. Mr Robert Ham QC, an eminent specialist English trust practitioner who appeared on the unsuccessful appeals in the Supreme Court, has suggested, in an article cited to me in this case by Advocate Williams, ("The Rule in Hastings-Bass after Pitt v Holt and Futter v Futter": *Trusts and Trustees* Vol 22 No 9, Nov 2016*)* that the decision of the Supreme Court limiting the rule is wrong in principle and should be reversed, because it limits the protection afforded to beneficiaries by the court's potential to intervene, to cases of "aberrant" conduct. He suggests, even apparently interpreting "aberrant" conduct as if it simply means "fault" rather than "serious fault", that this is too strict a test in the context of the habitual inclusion of exoneration clauses in trust deeds.

44. Some of the other off-shore jurisdictions, with significant trust industries, seem to share this view. In Jersey, Sir Michael Birt, sitting with Jurats in the case of *Re The Onerati Settlement* [2012] (2) JLR 324 held that Jersey law would follow the revised *Hastings-Bass* doctrine in the application of its own Trust Law, but on the facts of the case, he was able to set aside the rogue disposition of trust funds under the narrower rule. However, the States of Jersey subsequently intervened quickly to amend its Trust Law by introducing provisions which effectively restored the breadth of the old *Hastings-Bass* doctrine. Bermuda has enacted legislation to similar effect. There has been no particular reaction from the BVI, but in the Cayman Islands, Smellie CJ appears to have indicated that in that jurisdiction the rule might well continue to be operated by the courts as before. Closer to home, in the Isle of Man Deemster Doyle has taken a robustly independent line, warning in this context (but without deciding) in *AB v CD (2016)* 19 ITELR 316 at [53] that

> *"….It would be a mistake to assume that Manx law would automatically follow English law especially in respect of a decision which appears largely driven by UK policy and UK tax revenue considerations*"

(although I confess that I do not really understand the grounds for his final comment). The Scottish Law Commission has proposed legislation to enable beneficiaries to seek the courts' intervention simply where there has been a defect in the exercise of a fiduciary power which has prejudiced them.

The position in Guernsey

45. There have so far been two noted cases in Guernsey touching on the application of the rule in *Hastings-Bass/Pitt v Holt* since the latter decision.

46. The first was my own decision in *HCS Trustees Ltd Trustees v Camperio Legal and Fiduciary Services Limited,* 30th June 2015, of which only a transcript is available, as no written judgment was delivered. In that case, without hearing argument to the contrary, I assumed (as I was invited) that Guernsey law would adopt the interpretation of the *Hastings-Bass* jurisdiction advocated by *Pitt v Holt*. Stripping the situation to its simplest, the issue arose because assets of a trust of which the settlor and at least one beneficiary were resident in Italy were owned by a BVI company whose shares were held by the trustees. The former trustees had procured the transfer of the assets from that company to be held by them directly, but had failed to appreciate that this transfer would bring about UK tax charges because of a change of circumstance. The application, made by subsequent trustees, was therefore to avoid the transfer and leave the property as if it had remained at all times in the BVI company. The situation was complicated by two factors, the first being that the BVI company had, in the interim, been wound up and removed from the BVI companies registry, and required to be reinstated in order to receive back the shares, and the second being that the trustees had obtained the benefit of a tax amnesty in Italy, in which they had, albeit on advice that it was proper to do so, represented to the Italian tax authorities that the relevant shares were held by the trustees directly and had not mentioned the medium of the BVI company. Before setting aside the transfer of the shares, I required further evidence that the trust had not obtained any benefit from the tax amnesty which it would not have been able to obtain if it had been disclosed that the shares in question had been held by a BVI company. On receiving Italian law evidence to this effect, I granted the relief sought. I took the view that the mistake was an obvious administrative mistake which had prejudiced wholly innocent beneficiaries.

47. The other decision is that of Collas B in *Gresh v RBC Trust Company (Guernsey) Limited* Royal Court Judgment 6/2016. That was not directly concerned with the rule in *Hastings-Bass*, because the application made on *Hastings-Bass* grounds was withdrawn and the case proceeded solely on the basis of invoking the court's jurisdiction to set aside a voluntary disposition for equitable mistake. Mr Gresh had received advice to the effect that if he took a lump sum and a periodic pension from his Guernsey pension fund, then because he was resident outside the UK, these benefits would be payable free of UK tax. This advice was incorrect; it was only the pension itself and not the lump sum which would be free of tax. Mr Gresh applied against the trustees for an order that the distribution to him of the lump sum should be set aside on the grounds of mistake. The Bailiff set out the basis for that relief, as derived from *Pitt v Holt*, and held that there had been a mistake, and a serious mistake, as to a material matter. However, he also held that it was not unconscionable for Mr Gresh to retain the benefits which he had received from the pension fund at his own request; it was neither unjust nor unfair that he should do so, even in the light of the unexpected 40% tax charge on his lump sum. He therefore refused to set aside the distribution.

48. In the course of his judgment, the Bailiff referred to the decision in *Pitt v Holt*, holding that it was a "*highly persuasive*" judgment as regards Guernsey law, and added.

> "*I know of no reason why, under Guernsey law, we should not apply the principles set out in the judgment of Lord Walker of Gestingthorpe".*

49. Apart from these cases, both Advocates, in their skeleton arguments, drew attention to the real possibility adverted to by Deemster Doyle in the Isle of Man that off-shore jurisdictions which had operated the original wide version of the *Hastings-Bass* doctrine could simply hold that this remained the law of that jurisdiction. They both suggested, although Advocate Williams did so with far more enthusiasm than Advocate Le Cras, that this was a course which

Guernsey and this court might reasonably follow. In practice, though, both Advocates rested their main case on the proposition that the trustees had been in breach of duty under the *Pitt v Holt* revised version of the doctrine.

The position in Guernsey law

50. Having reviewed the material above, the position in Guernsey law is, I find, as follows:

    (1) Guernsey law has adopted the general principles of English trust law, albeit modifying this in detail by its own legislation, and being free, where those principles require judicial interpretation, to mould them appropriately to meet the perceived needs of the Island, and consistently with its own legal heritage.

    (2) Guernsey law will therefore consider English authority regarding points of trust law which have not been the subject of legislation or decision in Guernsey law to be potentially useful guidance. Such authority is not binding in Guernsey law, but only persuasive, albeit no doubt highly persuasive in the case of a decision of the Supreme Court. Only a decision of the Privy Council sitting on appeal in a Guernsey case will become binding in Guernsey law.

    (3) The decision in *Pitt v Holt* therefore commands great respect.

    (4) Guernsey has not reacted to the decision in *Pitt v Holt* by legislating to restore, in effect, the *status quo*. It might be open to Guernsey, as appears to be contemplated at least in the Isle of Man and possibly other Caribbean jurisdictions, to reach the same result by rejecting the modification of principle which was laid down in *Pitt v Holt* and instead finding that Guernsey had taken the *Hastings-Bass* doctrine into its own law on the basis of its previously understood breadth, and was not minded to depart from this.

    (5) However, and (with respect) like the Bailiff in Gresh, I can see no reason not to accept the appropriateness of the revised approach in *Pitt v Holt.* The legal rationale for limiting the liberal availability of the *Hastings-Bass* jurisdiction is the same for Guernsey law as for English law. It would therefore not be right, in my judgment to accept the relatively lukewarm invitation of the advocates in this case to follow the course which has been trailed in the Isle of Man.

    (6) In my judgment, therefore, Guernsey law will apply the general effect and reasoning of *Pitt v Holt* to the *Hastings-Bass* doctrine as it operates in Guernsey law. However, that does not mean that it should slavishly follow the detail of that decision. Guernsey is free to adapt the general approach of the Supreme Court under the revised doctrine, especially as the Supreme Court itself recognised (see the citations at paragraphs 40 and 42 above) that its principles will be subject to development, and that the results in individual cases will be very much fact-specific.

    (7) In this regard, for the same reasons as caused the Supreme Court to consider that the *Hastings-Bass* jurisdiction needed to be reined in, this court should, in my judgment, be careful, even in applying the revised doctrine, not to allow the same undesirable breadth of availability to be re-introduced by the back door, by being over-astute to discern the (now necessary) breach of duty on the part of trustees, by applying an over-exacting standard of conduct so as to enable the jurisdiction to be invoked

General Approach

51. Moving on, therefore, to the appropriate approach to a case such as this, where the court's assistance is sought to avoid the act of a trustee which interested parties (a beneficiary or bene-

ficiaries) wish to have set aside, there is, in my judgment a two stage approach, although each subsequently divides into further aspects. The two main stages are:

(1) Does the applicant establish that there has been a relevant breach of duty by the trustee? This is necessary to make the jurisdiction available at all.

(2) Ought the court to set aside the act or disposition in question? This arises because the remedy is ultimately a matter of the court's discretion.

52. I emphasise that the second question is a further, and additional requirement to the first question. It does not follow from the mere establishment of a breach of duty which answers the first question affirmatively that that the court will set aside the impugned act or disposition. The effect of approaching the matter in that way would simply be to create a further remedy for breach of duty as an alternative to recognised established remedies (namely an award of compensatory damages or restitution of value) but a remedy available only to beneficiaries of trusts. In my judgment the *Hastings-Bass* jurisdiction has never been intended to operate so widely, and certainly not under the limits now deliberately established by the approach of the Supreme Court in *Pitt v Holt.*

53. The second stage consideration thus has substance, and is not merely a formality. It depends first on any question of the availability (or, in the case where there is no serious opposition, the apparent application) of the usual equitable defences (such as culpable delay, acquiescence, impossibility of *restitutio in integrum,* intervention of innocent third party rights, etc) which may rule out the grant of this form of relief, or even defeat any claim to relief at all. However, the second stage also depends on the exercise of the court's discretion. The fact that this latter is a further and separate matter in itself is clearly stated in the dictum of Lloyd LJ at [127] in the Court of Appeal in *Pitt v Holt,* and its approval by Lord Walker in *Pitt v Holt* at [70]. For this separate requirement to have meaning, it must be possible for the court to refuse relief in the exercise of its discretion, just as much as to grant it. The discretion may not be at large, and (but as commonplace with judicial discretions) it requires to be exercised in accordance with recognised and established principles (see [93] in the Supreme Court), but it does not follow from this there is either a rule, or even a presumption, that the relief will always be granted if the stage (1) qualifying condition is found.

Stage (1) – The necessary breach of duty

54. Before moving into the detail of this, I must make one general point. It seems to me that there is a danger in legal discussion or argument, of analysing a concept, giving it a convenient shorthand label, and then proceeding to use that label in further argument or analysis in a way which results in the original scope of the underlying concept getting lost. This can happen either at the level of discussing general legal principle or at a more detailed level as part of the particular jargon of an individual case. The three phrases which have caused me concern in this regard in this case are "breach of fiduciary duty", "inadequate deliberation" and "tax advice", as will appear later. However, before that, in order to examine the issue of breach of duty, I need to recount the facts of what occurred in a more detail. This account is taken from the very helpful Schedule of Agreed Facts, prepared by the parties.

(a) **The relevant facts in more detail**

55. As already noted, in 2010, M transferred his UK pension into the notional account held for his benefit by the Trustees under the Scheme as his personal pension Plan. The cash assets so transferred were significant; they amounted to some £5.7M.

56. M was accustomed to deal with the Trustees through the intermediary of Mr Buddhdev, who appears generally to have simply transmitted relevant emails with additional comments.

57. In July and October 2013, with the consent of the States of Guernsey Income Tax authority, the Trustees loaned to M, at his request, first £1.85M and then a further £750K. The initial loan was at a commercial, though I think fairly benevolent, rate of interest, which was then taken to be 3% per annum, and it was repayable in July 2017 or earlier on written demand. The loans were required in order to facilitate payments to M's ex-wife under a divorce settlement.

58. M enquired, just after the first loan was made, what income he could draw from his pension plan and had been informed that he could not draw any pension whilst loans to him remained outstanding. In October 2013, through Mr Buddhdev, and when requesting the second tranche of the loan, M promised to repay all the intended loans (ie some £2.6M) by 1st April 2014 and also made an insistent request that he should then be able to receive an annual pension of £325,000 a year, and hopefully nearer to £400,000. He also asked for confirmation that if he chose to repay the loans by using shares owned by him, he could use US$ denominated stocks.

59. On 22 October 2013 the Trustees resolved to make the further loan and instructed St James to encash £750,000 of investments from the Plan and transfer the funds to M. In the event, this loan was not made until January 2014 because there was a delay (no explanation is given) in M's returning the signed agreement. This tranche of the loan was repayable in October 2017 or earlier written demand.

60. Some three weeks later, on 19 November 2013, M sent to Mr Buddhdev a copy of an article which he had seen in the Daily Telegraph, about people who had transferred commercial properties, such as shares in an airport, into their pension funds and were delighted with the situation. He queried whether he could place two investment properties into his pension Plan, being one in London and one in Miami, which he had bought as investments because there would be no capital gains chargeable to him on them. He believed them to be worth at least £1.25M (London) and about £2M (Miami). He asked Mr Buddhdev: "what do you think?"

61. On 25 November, he again emailed both Mr Buddhdev and Mr Barrett of St James, recording his desire to draw a maximum pension from his Plan as soon as he could do so, and asking two questions, the first being whether, in order to repay the loan, he could simply transfer £2.6M of his own managed share portfolio into the Plan in lieu of cash, and if so, which shares should be so transferred, and the second being, once again the question whether he could repay the loan by transferring the two properties into the Plan. He received a response from St James (a Miss Coates) suggesting a telephone discussion. There is no evidence as to what actually transpired in such a discussion.

62. Possibly as a result of such a discussion, a written valuation of M's London property at £1.35M was obtained on 5th December and a valuation equivalent to £1.65M was obtained for the Miami property on 10th December 2013. These showed clearly, even if it had not been understood before, although on balance of probability I would find that it had, that the properties were residential. M sent these to Mr Buddhdev, pressing him to send them on to the Trustees and to move on to implement the transfers of the property, with calculations about rentals which could be obtained, leading on to requests to be told how much pension he would then be able to draw from the Plan.

63. On 16th December 2013, the Trustees replied to Mr Buddhdev confirming that, under the local (ie Guernsey) pension rules the Scheme could buy any type of property as an investment but that the rental must be on a commercial basis, and that by implication the plan-Member could be the tenant. They also stated that they would need to engage a solicitor to deal with the "legalities" of the transaction from their point of view. They continued

> *"Can you please confirm whether [M] has taken appropriate tax advice, as you know we are not tax advisors and the Trustees would like to seek comfort that [M] has been advised to take appropriate advice.*
>
> *"We would also propose seeking advice on behalf of the Trustees to determine what/if any implications the actual transfer of the properties has in respect of the QROPS itself and also determine what on-going reporting requirements the Trustees will have in terms of the US (and UK) source income they will be receiving."*

64. On 23rd December, Mr Buddhdev relayed the above to M, stating that the Trustees had "*requested*…."

> *"You have taken appropriate tax advice as neither Richmond nor Barnett Waddingham are not* [sic] *tax advisors"*

He also informed M that the Trustees had said that they

> "*proposed to determine what, if any implications the actual transfer of the properties has in respect of the QROPS itself and to also determine what ongoing reporting requirements the Trustees will have…..".*

65. In an exchange of correspondence in late January 2014, Barnett Waddingham and the Trustees confirmed which entity would actually receive the shares in the companies which formally held the properties. By this time, Emma Edwards, who had been dealing with the matter on a day to day basis at the Trustees' offices up to the end of December 2013 had moved on and been replaced by Michelle Stone.

66. On 17th February 2014, Mr Buddhdev emailed Mr Anthony Link of the Trustees in anticipation of a meeting with M which was due to take place two days later to review the Plan assets, including the loans, and in anticipation of the transfer of the properties to the Plan. There is no evidence of what took place at the meeting itself.

67. On 10th March 2014, the Trustees emailed Mr Buddhdev confirming the current value of M's Plan and that receipt of the shares representing the value of the two properties would result in a balancing payment due to M of £292,249. Thus the transfer was being treated as, effectively, a sale and purchase.

68. On 13th March 2014, on M's instructions, Mr Ian Stone of M's Bermudian solicitors emailed Ms Louise Walker, of the English solicitors Hunters, explaining the proposed loan repayment transaction in reasonable detail and stating

> *"We wanted to clear with you, from a UK tax perspective, that these transfers/disposals by [M] will not create UK tax or legal issues for [M] personally."*

69. There is no indication what prompted M to seek tax advice at this particular point, but it seems unlikely that there were not some other communications which brought this about. It is to be observed, first, that M had not sought such advice in prompt response to the advice and request that he do so transmitted by Mr Buddhdev on 23rd December 2013, and, second, that the advice now sought was expressly personal tax advice for himself.

70. On 21st March 2014, Hunters responded by email to Mr Stone giving tax advice. The writer stated that he would

> "*concentrate on the two main UK taxes which might affect [M] on your proposals, ie capital gains tax ("CGT") and inheritance tax (IHT)".*

The broad thrust of the advice was that the disposal of the shares in the property holding companies by M would not incur UK capital gains tax provided M was not UK resident in the year of disposal (subject to any possible changes in legislation), and also (but this comment does not appear to have been confined to the loan being satisfied by the transfer of property *in specie)* that it was probably unlikely that the repayment of the loan would incur IHT consequences, in particular if M were accepted as not being UK domiciled. The IHT section of the advice concluded that the writer would be happy to talk this through with Mr Stone

> *"and to establish a little more of the background. My knowledge of QROPS and the rules which govern them is limited."*

There is no evidence as to whether this invitation was taken up, but it would seem unlikely. A final "stop press" paragraph drew attention to recently announced UK government proposals to introduce an "annual tax on enveloped dwellings" which would impose tax charges in respect of UK properties held by non-UK residents, but opined that on a quick look, this did not appear to make any difference.

71. Mr Link of the Trustees has confirmed that the Trustees did not see a copy of this advice at the time, but received one only later, from PwC. He has also confirmed that the Trustees did not seek any advice of their own before the transfer transaction was effected in May 2014, whether as to tax or as to other implications of the transfers for the Plan itself, or as to reporting requirements.

72. On 29th April 2014 the Trustees resolved to receive the shares in the two holding companies, Limehouse Holdings Ltd and Beachlife DLM Limited, into the Scheme on behalf of M's Plan and, noting that the value of their underlying properties exceeded the value of the loans made to him, they further resolved that upon such receipt, the Loans to M would be fully satisfied and that a balancing payment of £292,249 should be made to him. On 6th May 2014 M countersigned a letter acknowledging all this. The transaction was completed on 28th May 2014 and M received the payment.

73. On 5th August 2014 the Trustees resolved to grant M occupation of the properties on the basis of a commercial monthly rental valuation of approximately £10,500 a month. M thus became free to let these properties and receive the income. They also resolved to grant him a monthly pension of £24,000 from the plan commencing on 1st July 2014, although in the event he did not begin to receive this until 1st October 2014.

74. In February 2015, for some reason which has not been explored, M instructed PwC's tax department to undertake a review of his financial position, and the Trustees became involved in supplying information. On 25th February PwC queried whether any analysis had been made or advice taken with regard to the tax consequences of the fact that the two properties transferred indirectly into the trust through the transfer of shares were residential properties. The Trustees passed this query on to Mr Buddhdev, who responded, on 17th March 2015, that he

> *"understood that it was [M]'s intention to take advice in relation to the tax implications of selling the properties to the QROPS. However, I am not privy to the advice or whether this did indeed go ahead."*

75. On 25th March 2015 the Trustees therefore replied to PwC to the effect that

> *"the Trustees did not take any specific tax advice in respect of the transfer of property. Any advice received was directly from [M]'s advisors. We do not know if [M] took personal advice."*

76. On 19th June 2015, PwC wrote to the Trustees, in the tone of a letter before action, informing them that the transfer of the properties to the plan had triggered a tax charge to M under the UK Finance Act 2004. (This relates to legislative provisions introduced in 2006 by amendment to that Act, when the UK government took the view that the freedom given to persons to set up self-administered pension plans was too generous insofar as it enabled them to transfer residential properties into those plans, and that accordingly any such transfers would attract a stiff - some would no doubt say penal - rate of tax, apparently designed to recoup what the Revenue regarded as the equivalent pension contribution tax advantages likely to have been gained.) The tax charge was initially calculated at £1.75M.

77. The letter argued that the Trustees had been in breach of their fiduciary duty to the Plan, and to M, to obtain tax advice The letter went on to demand that the Trustees make a *Hastings-Bass* application to the Guernsey Court to get the transaction set aside and be responsible for the costs. PwC had plainly not read the *dicta* in *Pitt v Holt* [69] which state that it is inappropriate for trustees to make such an application except where there is no other suitable person.

78. M's tax liability was eventually confirmed in November 2015 at £2,069,000, but this was later reduced to £1.8M.

79. I need mention only three more matters. During February and March 2017, Carey Olsen on behalf of the Trustees obtained confirmation, first, that M would be in a position to repay the original loans and interest if a *Hastings-Bass* application were successfully pursued on his behalf, and second, from the Guernsey Income Tax authorities, that if a *Hastings-Bass* application succeeded, the pension benefits paid to M (and fees paid to PwC) would not be required by them to be recouped by the Plan, and they would extend their agreement to the retrospective effect of the continued loan to M, provided this was temporary and repaid within the permitted time frame.

80. Later, PwC tried to negotiate with HMRC for a waiver of the tax liability on the grounds of "genuine error" but HMRC refused to accept their arguments, on the basis that the indirect transfer of the properties into the Plan had been perfectly intentional.

(b) **The issues relating to breach of duty.**

81. I turn, then, to consider whether the requisite breach of duty is made out in this case.

82. I am fully aware that Advocate Le Cras has conceded that, in principle it has been. However, I have some misgivings about the correctness of that concession. It is robustly contested by HMRC in their letter of 18th September 2017, even if perhaps from a position of not being fully aware of the detail of the evidence which I have recounted above. This is on the succinct but *prima facie* forceful basis that the Trustees "imposed a condition" that M take appropriate tax advice, and that any failure by the Trustees to take their own separate advice or to consider M's advice was insufficiently serious to amount to a breach of duty. HMRC were strictly inaccurate as to the imposition of a "condition", but the actual facts come very close to this, and in any event the Trustees did ask M to take his own tax advice before committing to the transaction.

83. As I have had no detailed or considered argument against Advocate Le Cras' concession, I feel obliged to examine that concession critically. It just does not seem to me, even on a more detailed consideration of the facts of this case, to be really so obvious that the Trustees were in breach of duty, materially for present purposes.

(1) Is a breach of <u>fiduciary</u> duty necessary? Is "inadequate deliberation" a breach of fiduciary duty?

84. I take these two questions together because they become intertwined with one another.

85. It is often said that the required breach of duty in relation to a *Hastings-Bass* application is breach of a fiduciary duty. In concluding above that the basic approach to such applications is two-stage, I avoided referring to the nature of the duty in question.

86. The proposition which is frequently found in the authorities is that

    (i) what is required is a breach of fiduciary duty,

    (ii) a trustee's duty to take all relevant matters into account in making a decision is a fiduciary duty, and that consequently

    (iii) "inadequate deliberation" of such matters, ie failure to take all relevant matters into account, is a breach of fiduciary duty.

87. The proposition that "inadequate deliberation" by trustees is a breach of their fiduciary duty has been stated so often in the cases, as a matter of routine and as an obvious and uncontroversial proposition, that it seems to me now to be too late to argue against it. However, I do question whether this classification is really correct in principle. It also seems to me that it is this classification which has led to much of the convoluted argument and academic dispute which has beset this area of law, and also to be what has generated the famous dispute as to whether an act or disposition by trustees which is vitiated by "inadequate deliberation" is void or voidable.

88. The fundamental point here arises from the issue which I identified and discussed, in relation to the duties of company directors, in *Carlyle Capital Corporation Ltd v Conway* (Royal Court, unreported, 38/2017, 5th September 2017), that there is a "bright line" distinction of quality between a fiduciary duty and a duty of care (see [360] to [366] and [402] of that judgment). I referred in particular to the judgment of Mr Jonathan Crow QC in *Extrasure Travel Insurances Limited v Scattergood* [2003]12 BCLC at [89], and to the emphatic words of Millett LJ in *Bristol & West Building Society v Mothew* 1998 Ch 1 at [16]:

> *"[it is] inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties".* .

89. In fact the application of the term "fiduciary duty" to the sin of "inadequate deliberation" seems to me to be an example of the point which I mentioned earlier, that using a label such as "fiduciary duty" without careful thought as to whether it is really apt can result in its coming to be misapplied. The epithet "fiduciary" has been, and all too often still is, deployed generally without thought, simply to refer to a duty which rests on a person with fiduciary obligations, without regard to the nature of the particular duty in question and whether that really is itself "fiduciary" in character.

90. A *fiduciary* duty is a duty of *loyalty*; it is not a duty of *care.* The essential characteristic of a fiduciary duty is that it is a duty which the person owing it is obliged to discharge in the best interests of another party (the beneficiary) and in priority, if necessary, to his own interests: see Underhill *Trusts and Trustees* 19th Ed. P 510 para 27.2. It is that obligation which makes him accountable as a fiduciary, and it is not the same as a duty of care. For anyone who is further interested in this distinction, the discussion in Snell's *Equity,* 33rd Ed at p [144] paras 7-008 to 7-013 provides an incisive and helpful review of it.

91. It is an attribute of very many true fiduciary duties that, because they are conferred for particular purposes, their proper exercise is confined to use for the furtherance of those purposes. If, therefore, the power which is being exercised is used in a manner or to an effect which is

not in accord with those purposes, the use in question is ineffective, because it is simply not within the scope of the authority possessed by the holder of that power. It is therefore just plain void.

92. Difficulty arises when these two qualities - loyalty and carefulness - come together, as they do in consideration of the fault of "inadequate deliberation". Inadequate deliberation, as a concept, smacks overwhelmingly of a lack of care. In fact there scarcely seems to be any other quality comprehended in it (unless one takes the stringent approach that it is a fault of strict liability, an analysis which has been rejected because trustees' fiduciary duties require to be operated with a subjective mental element - see below). This point is, I think, even demonstrated by considering the difference between "adequate deliberation" and "inadequate deliberation", as this distinction can only be made according to the degree of care exercised. The notion of "proper" or "adequate" deliberation has, however, been diverted from this quality of due care by becoming labeled as a "fiduciary duty" without asking whether it is a fiduciary duty, or a duty (of care) owed by a fiduciary. It is only this diversion which makes it then possible to argue that a failure to perform this (now labeled) "fiduciary" duty to "consider all relevant matters" turns the resulting act into an act which is not within the scope of the power being exercised, and is consequently "void". It has also led to the even more extreme submission, which was rejected in *Pitt v Holt* (see [80] and [88]), that liability for "inadequate deliberation" could or should be treated as imposing strict liability, to be judged by objective standards of due deliberation, after the event rather than at the time.

93. If one tests the proposition that the "duty to take all relevant matters into account" fits comfortably, as such, into being an aspect of the duty to act loyally and deliberately in the best interests of another (ie a true fiduciary duty,) rather than simply as a duty to undertake one's charge as a trustee or fiduciary with a proper degree of care and diligence, it seems to me to be rather difficult to say that it does. This only becomes possible by classing the duty of "adequate deliberation" as part of the fiduciary duty of another shorthand description, namely the "duty to act for the proper purposes of the trust", and then treating the making of fully informed decisions as a "purpose" of the trust. I do not think that this is legitimate.

94. In short, the argument above is a means of either trying to slide the duty of proper deliberation into the scope of the proper purposes of the trust, or treating a "duty to act in the best interests of the beneficiaries" as a "fiduciary" duty, even though that broad duty extends just as much to duties of carefulness as to loyalty. Either analysis seems to me to be illegitimate and it is for those reasons that it seems to me that the duty of "adequate deliberation" ought to be classified as a breach of the trustees' duty of care,. It fits far more comfortably, conveniently and therefore correctly into this concept, rather than being labeled a breach of "fiduciary duty" when there is no true fiduciary aspect to it.

95. However, and of crucial importance for present purposes, this difference only matters if it is critical to the engagement of the *Hastings-Bass* jurisdiction that the breach of duty relied upon must be a breach of a "fiduciary" duty as distinct from any other kind of duty, such as (obviously) a duty of care. By dint of the same reasoning as I have set out above, it also seems to me that it is not.

96. Lawyers with deep and wide trust backgrounds and experience have argued and decided trust cases for many years on the basis that they find it so natural as to be unworthy of comment, to speak of the duty of "proper deliberation", or the duty to "take all relevant matters into account", as being a "fiduciary" duty. Whatever its true juridical character, breach of the duty of "proper deliberation" has been invoked, time and time again, to found the *Hastings-Bass* jurisdiction, without any misgivings. Either, the term "fiduciary duty" is not being used in those cases in the strict sense which I have suggested above to be correct, or, alternatively, the breach of duty which is the required gateway for the engagement of the *Hastings Bass* jurisdiction is not confined to a breach of fiduciary duty thus strictly so-called. In my judgment

the position is, or ought to be, the latter, but for practical purposes it does not make any difference if it is the former.

97. In the end, it seems to me that any breach of duty by a trustee is capable of being treated as the qualifying condition enabling the court to intervene and exercise the *Hastings-Bass* jurisdiction to set aside the relevant act or transaction if the court is otherwise appropriately satisfied that it should do so, and this is not dependent on whether the duty breached is properly described as "fiduciary". This approach is consistent with the purpose of the jurisdiction being to protect beneficiaries from aberrant conduct by their trustees. The nature of the duty breached is scarcely relevant to a need for protection from the consequences of its breach. I do not think that this apparently broader approach risks unduly extending the boundaries of the availability of the remedy yet again to unacceptable breadth, because, insofar as it might seem to do so, the means for limiting these boundaries come in, effectively, at later stages in the decision process.

98. To summarise, therefore, in my judgment, breaches of duty by trustees fall into three broad types for present purposes (i) breach of a duty to act only within the ambit of the proper purposes of the trust, (ii) breach of a duty of good faith/loyalty to the trust and (iii) breach of a duty of care to the trust/the beneficiaries. Categories (i) and (ii) are both fiduciary duties in the strict sense. However a breach of a category (i) duty renders the relevant act void whilst a breach of a category (ii) duty renders it voidable. For *Hastings-Bass* purposes, a breach of either a category (ii) or (iii) duty will suffice potentially to engage the jurisdiction, although in practice it will need to be sufficiently serious. Either will render the act in question potentially voidable by the court, in its discretion. There is no need for *Hastings*-Bass relief in respect of a category (i) breach, because the act is void anyway, and the court will declare it to be such; there, there is no discretion.

99. Before leaving this topic I want to add four points. The first is that this problem of analysis, as I see it, seems to me to have arisen because of the early development of the concept of the trust and the principles of law (more accurately, of equity) governing these and the historic establishment of the court's jurisdiction in supervising trusts. In the course of this, the English courts of equity laid down standards of conduct, applicable to trustees, including, in effect, to use proper care. But this all pre-dated the eventual recognition in English law (see *Donoghue v Stephenson* [1932] AC 562) of a general concept of duty of care and therefore the general tort of negligence. This superseded the previous development of the law, which had found such duties individually in the context of particular relationships. The relationship of trustee and beneficiary was such a particular relationship. It is therefore not surprising that duties which might later have been classified solely as duties of care should, because of their historic recognition by equity in the context of trusts, have come to be easily perceived as, and labeled, "fiduciary" duties.

100. The second further point is that Advocate Williams submitted that the test of whether the qualifying condition for *Hastings-Bass* relief has been met is that there is a "sufficiently serious" breach of duty as to amount to a breach of fiduciary duty, citing the use of this phrase by, or with the approval of, Lord Walker in paragraphs [39] [68] and [73] of *Pitt v Holt.* I would not accept this as a definitive formulation of the test for two reasons. The first is that it strikes me as being hugely uncertain and arising from the elision of concepts which I have just been discussing. The second is that I cannot see how the degree of "seriousness" of a duty of the character of a duty of "adequate deliberation" can convert what would <u>not</u> be a breach of fiduciary duty <u>into</u> a breach of fiduciary duty - yet this is exactly what the requirement of a "sufficiently" serious breach of duty to "amount to" a breach of fiduciary duty appears to be contemplating in this context. As a test for engaging a jurisdiction this does not seem satisfactory. Using this expression in this way seems to me, once again, to arise from not distinguishing between duties of care and of loyalty as I have discussed.

101. However, I do not see that by saying this I am rejecting anything fundamental in the approach of Lord Walker in *Pitt v Holt*. This is, first, because it is unlikely to make any difference to the correct end result, and, second, because it seems to me that the way in which I prefer to analyse the situation in this judgment has the merit of being simpler, more certain, and likely to lead to less potential argument than may arise through applying the words of Lord Walker precisely. In my judgment, therefore, even if I were to be rejecting this precise formulation, I am still deriving appropriate guidance for Guernsey law from the decision of the Supreme Court.

102. The third point is to mention that, in support of his submission that the failure by the Trustees to "take tax advice" as part of their "inadequate deliberation" was a breach of fiduciary duty, Advocate Williams cited to me my own description of the fiduciary duty of a company director in *Carlyle* (above) at [544] as being one of acting with "*subjective honesty and conscientiousness*". He argued that this was an acknowledgement that a key part of a fiduciary duty was therefore acting "*conscientiously*".

103. I should therefore make it clear that, in that passage, I was not using the word "conscientiousness" in the sense of "care" or "diligence" but in the sense of "conscious commitment" or "dutifulness", or "subjective faithfulness". I used it in order to convey that something extra, over and above mere "honesty", which is required in the performance of a fiduciary duty, and which is sometimes expressed by the additional words "in good faith". Second I do not regard the duties of company directors to be of any real help in the context of considering the duties of trustees. Directors are not trustees in the full sense and their duties, albeit some are fiduciary in nature, have been developed specifically in the context of company law and corporate purposes, such that any analogy is unlikely to be material at anything but a very general level. Third, on a practical point, the judgment in the *Carlyle* case is 525 pages long. It takes up a small ring-binder on its own. If it is ever desired, therefore, to cite any part of it (such as the half dozen lines cited by Advocate Williams on this application) those preparing trial materials should emphatically <u>not</u> copy the entirety of the judgment into all the court bundles, but should confine themselves to, at most, the relevant section. Otherwise they may find that the consequent waste of paper attracts a penalty in costs.

104. The fourth point is a final point of substance. The breach of duty in question must, it seems to me and I so hold, be a breach of a duty owed by the trustee in relation to the trust itself, or, to put it another way, to the relevant beneficiaries in their capacity as beneficiaries of the trust. This point will probably not cause any issue in the usual case, but in my judgment it is a principle which is not to be overlooked or ignored. Advocate Williams' proposition that the trustee has a "duty to act in the interests of the beneficiaries" must be implicitly qualified by the addition of the words "as such", even if this will usually go unsaid.

105. To pull the above points together, in the end, I am satisfied that even if, as I would conclude if left to myself, the duty of "proper deliberation" is better classed as a breach of a trustee's duty of care, and not as a breach of fiduciary duty, this does not matter for *Hastings-Bass* purposes, as I cannot see that any material consideration with regard to the exercise of that jurisdiction rests either at this stage or subsequently on the correct classification of the duty breached. The point is simply that there has been some act or omission so serious as to amount to breach of duty owed by the trustee to the trust's beneficiaries as such (I leave aside, here, the separate and different question of any duty to the settlor). The policy behind the recognition of the *Hastings-Bass* jurisdiction is the arising of a need to protect beneficiaries from the aberrant conduct of trustees (*Pitt v Holt* at [83]) and it cannot matter, therefore, in what way the guilty trustee can be said to be aberrant. I shall though, studiously refer from this point only to a "breach of duty", rather than to a "breach of <u>fiduciary</u> duty".

(2) Nexus of the breach of duty and damage

106. The next point is that, in my judgment, the breach of duty must have had some direct bearing on the act or transaction which it is sought to set aside and thus to the damage which is to be rectified by doing so. My concern to record this point arises from what I see as a tendency to refer to a "breach of [fiduciary] duty" being necessary to engage the *Hastings-Bass* jurisdiction, and then to assume, without considering critically, its relationship to the act or disposition which is sought to be set aside. Even a demonstrated breach of duty cannot, it seems to me, open the way to setting aside an act or disposition to which it is not causally connected. Again, it may well be that in the ordinary case, such a causal connection is so apparent as to need no comment, but it seems to me that the facts of this case illustrate why the point must not be overlooked.

107. The question is: what degree of connection is required? I have already said that, to justify the setting aside of an act or disposition effected by trustees, the breach of duty which is relied upon must, in my judgment, have been a breach of duty in relation to the trust property itself and/or the purposes of the trust, so as to be a breach of duty which has prejudiced the beneficiaries of the trust *qua beneficiaries*. This therefore requires examination of (i) what are the purposes of the trust, and (ii) what exactly is the breach of duty alleged to have consisted of.

108. In the very usual, perhaps even most usual, case of a family discretionary trust, the general purposes of the trust are to consider the circumstances, claims and interests of the various potential beneficiaries, and to administer and distribute the trust assets, subject to any particular stipulations in the trust itself, for the benefit of the respective beneficiaries (principally financial, but potentially possibly wider or indirect) as evaluated by the trustees, in their discretion. That is a very generalised expression of such purposes, but it shows that considering them in any particular case will extend to a potentially wide range of factual circumstances.

109. This case, however, is not concerned with a family discretionary settlement, but with an individual pension plan trust. The purposes of that trust are far narrower and more specific. The sole purpose of the Scheme as an objective is to provide superannuation benefits for Members and their Dependants: see Clause 2.3 of its governing Deed. In practice, this involves accepting and investing Plan assets and distributing them or their fruits as duly authorised pension benefits (lump sum or periodic pension) to the beneficiary Member, and, again in accordance with the Scheme rules, distributing any surplus on his death in accordance with his expressed wishes. The scope of the Trustees' duties, and the question of any breach of duty, must therefore be examined in the context of these purposes.

110. I note here, also, that this is all in the context of a trust which PwC observed, in their letter of 19th June 2015 to the Trustees, was a trust in which the member "*is or has been able (directly or indirectly) to direct influence or advise on the manner of investment*", this being the definition of an Investment-Regulated Pension Scheme contained in Paragraph 2 of Schedule 29A of the UK Finance Act 2004, which qualifying condition brought about the tax treatment of the transaction in this case. This seems to me also to cast potentially relevant light on the nature of the client/trustee relationship, which may affect the scope of the trust duties owed.

(1) Was there a qualifying breach of duty?

111. Advocate Williams first pointed out, and I accept, that the *Hastings-Bass* jurisdiction is not confined to acts of distribution of trust assets, although many of the authorities are concerned with such distributions having attracted adverse consequences, usually as to unforeseen tax. He cited the case of *Re Seaton Trustees Ltd* [2010] WTLR 105, in particular at 110 E, as an example of a *Hastings-Bass* case in which the rogue act had been in the administration of the trust. I accept his submission that an act of any kind executed in the course of any of the trustees' functions as trustees, can found a *Hastings-Bass* application.

112. He also cited *Seaton v Morgan* 2007 [JRC] 206 as authority for the proposition that the doctrine applied equally to the acceptance of assets into a trust as to dispositions out of it, in particular if the trustee undertook positive obligations in connection with such receipt. I again accept this proposition. As I have remarked above, though, the transaction effected here was effectively a purchase by the Trustees of M's properties, effected by way of share transfer, rather than the more usual case of a voluntary settlement being made.

113. Advocate Williams' next submission was that the act complained of, namely the acceptance of the shares in the two companies into the Plan, was an exercise of the trustees' discretion, because "*they didn't have to do it*". I accept that proposition as well.

114. He then pointed to the numerous authorities to the effect that fiscal considerations will be among the relevant matters which ought to be taken into account in the interests of the relevant beneficiaries in the proper administration of modern trusts. That too I accept.

115. Advocate Williams then went on to list six points which he submitted demonstrated that the Trustees had been in breach of their [fiduciary] duty to consider all relevant matters, in particular the tax implications of the transaction as they affected M.

    (i) The Trustees were not, and admittedly not, tax experts, and taxation implications were a matter which required consideration and therefore expert knowledge and advice.

    (ii) They had power to take such advice at the expense of the Plan.

    (iii) They were members of the Guernsey Association of Pension Providers (GAPP), whose Code of Practice for QROPS providers, issued in March 2011 as a guide to "best practice" at that time, expressly draws attention (at section 6.3) to the potential tax charges levied on the plan Member under ss 174 and 185 of the UK Finance Act 2004 in respect of "taxable property", including residential property, where this is held in a QROPS which is an Investment Regulated Pension Scheme (being one in which the beneficiary directs or has influence over the investments of the scheme, which the Plan in this case plainly was). The Code states that in such cases pension trustees should "not normally" hold taxable property in the scheme.

    (iv) Their email of 13th December 2013 showed that the Trustees had identified tax considerations as being material (as they should have done) because they expressly wanted M to take tax advice. However, they never followed up these concerns.

    (v) They told M's advisers that they would obtain advice (by implication tax advice) and also reporting advice for themselves, but they did not do so.

    (vi) They said that they wanted confirmation of M's having taken his own tax advice, but they never obtained that confirmation.

116. As to these points, it seemed to me that the third was of some strength in support of a submission that the Trustees' failure to appreciate the potential existence of serious tax consequences for M associated with putting residential property into his pension plan was culpable, although I note that this Code was stated to be "best practice", and *Pitt v Holt* made it clear that the standards of breach of duty were not necessarily to be treated as being as high as <u>best</u> practice. There would still, therefore, need to be an assessment of the seriousness of any failure to comply with such practice, in all the circumstances.

117. In the course of the hearing I therefore twice asked Advocate Williams what was the relevant duty of which he said there was a breach. His response was, in one instance, the trustees' fiduciary "duty to act in the best interests of the beneficiaries" and in the other their "duty to take tax advice".

118. The former response does not seem to me to assist; it is too general. When I pointed out that the purposes of the trust in this case were limited to providing pension benefits, Advocate Williams expanded this to a "duty to act in the best interests of the beneficiary in performing their duty to maintain the corpus and value of the trust assets…" (implicitly adding "…..for the purpose of providing pension benefits"). That formulation does not seem to me, though, to add anything.

119. Implicit in it in each case, in order to bring the facts of this case within its scope, is an allegation that it was part of the Trustees' duty as trustees of the pension fund to be looking out for and protecting the personal tax interests of M as the Member. I do not find that proposition to be so self-evident that I can take it as read.

120. This brings me to Advocate Williams' second answer. It is summarised under the shorthand label of a "duty to take tax advice", but that immediately raises two obvious questions: tax advice as to what? And, in what respects is it alleged that such duty was breached?

121. I therefore asked Advocate Williams to identify for me exactly what he said the breach of duty consisted in. In other words, what did he contend the trustees did not do which they ought to have done (or vice versa)?

122. A very obvious point in this case is that by their letter of 13th December 2013 the Trustees did, put at its lowest, draw M's attention to the fact that he ought to take personal tax advice as to what he was proposing. Indeed, they did so in terms which implied that their co-operation in the matter would be conditional upon his doing so, even if, in the end, they did not follow this through. What more, therefore, was it suggested that it was their duty (fiduciary or otherwise) to do, in all the circumstances?

123. Advocate Williams suggested various ways in which he would argue that the Trustees' duty in this regard had been breached:-

    (1) The Trustees should have ensured that M not only took his own advice but insisted on seeing and reviewing that advice before permitting the transaction to go ahead.

    (2) Alternatively, they should have ensured that M took his own advice and insisted on receiving confirmation from him that he had done so before permitting the transaction to go ahead.

    (3) As they had express power to take tax advice under the terms of the Plan, they should have taken advice themselves which should have included consideration of M's position.

    (4) They should have taken advice for themselves as to the taxation and reporting implications of the transaction for the Plan, and if they had done so this would have thrown up a warning as to the taxation implications for M which would obviously then have been conveyed to him, and the transaction would not have gone ahead.

    (5) They should have taken tax and reporting obligation advice because they had told M that they were going to do so, but they did not.

124. None of these strikes me as being obviously a breach of the Trustees' duties to the trust or to its beneficiary as such, or alternatively a sufficiently serious breach, given that they had fulfilled the fundamental step of advising, in clear and quite insistent terms, that M, the beneficiary, needed to take personal tax advice. M is an intelligent adult and a sophisticated businessman. He also had other intelligent and sophisticated advisers, who were privy to the Trustees' warnings. Moreover, he was not the passive acceptor of the benefits of his Plan; he at least exercised influence over the investments taken into his Plan. It does not seem to me that, in those circumstances, it is obvious that the Trustees owed any greater duty to M or to the Plan itself, in the ways in which Advocate Williams suggested.

125. I reject the first suggestion on any basis. It involves imposing on the Trustees a degree of nannying and second guessing a process which was reasonably to be undertaken by M for himself which strikes me as going too far.

126. Since M did in fact take advice, the second suggested breach had no consequence and I am not satisfied that it can be used as a peg on which to hang unconnected relief.

127. The third suggestion comes back to the question how far a trustee's duties as trustee extend to looking out for the separate personal interests of the beneficiary outside his interest in the actual trust, which I consider further later.

128. The fourth really depends on whether the trustees did have a duty to take tax advice on their own account; it rests on an asserted likely consequence of this. I do not see that such a duty could reasonably amount to an absolute duty in all cases, which Advocate Williams' submission seemed at times to amount to. That would impose a far too high, and absurdly mechanical, duty on trustees. It comes back to the question whether it was enough that the transaction did not appear to them to raise any issues requiring such advice and whether this was reasonable, or was reasonable in the context of their having told M that he should get his own tax advice. Looked at another way, any failure to take tax advice for themselves might have made them liable for any consequent damage suffered by the trust itself. However, that is not the same thing as saying that this should spill over and make them responsible for losses suffered by M in his personal capacity, because it meant that an opportunity to warn him more directly of potential disadvantage did not occur, as a result. (This highlights the point that there is a differences between a cause which can be truly regarded as an "effective cause" or even a "but for" cause and a fact which simply provides the occasion for another misfortune to occur, but that point has not been analysed in detail.)

129. As to the fifth, M, in his affidavit evidence, (there was no cross-examination, not least because there was no party with an interest in cross-examining) appears to hint that he relied on the fact that the Trustees had said that they were going to take their own advice and he assumed that they had done so. He does not say this expressly, however, and I find such an inference implausible from the paperwork which I have seen. The only reliance which M could reasonably place on the fact that the Trustees had said that they would be taking separate advice, but then had not come back with any comments or queries about this, was that they were satisfied that the transaction caused no issues <u>for them</u>; that is not the same as reliance that the transaction could cause no issues for <u>him</u>, and indeed, M did take his own advice on that subject, so he plainly made no such assumption.

130. However, having set out all these points which have concerned me as to whether it really is right to conclude that the Trustees did commit a breach of duty which had a material connection with the actual loss suffered by M, particularly bearing in mind that *prima facie* he suffered this loss in his personal capacity and not as a beneficiary of the trust itself, I will nonetheless proceed, without expressly deciding, on the basis that some such sufficient breach of duty is made out. I do so, though, very much in the context that I have not had the benefit of contested argument on this quite intricate point.

131. I will also accept, albeit again with some doubts, that any such breach of duty was sufficiently material, for present purposes. This is because, as I have already mentioned, it appears to me that, if there was a breach of duty, it did not cause any loss or damage to the trust itself (ie to the pool of assets held for the purpose and benefit of providing M with a pension).

132. Advocate Le Cras, in conceding that the Trustees had been in breach of trust, expressly reserved her clients' position with regard to (i) invoking the usual trustee exoneration clauses in the trust deed and (ii) arguing that if there were a breach of trust it had caused no loss to the trust to which the Trustees' duties were owed.

133. Her first reservation raises the interesting but technical question whether the presence of a particular form of exoneration or indemnity clause is apt to render the conduct described in it no breach of the trust at all, or merely takes effect to bar any remedy of the beneficiary. That is not an easy point, and has not been the subject of any argument at all in this case. It does, though, seem to me to be of such a technical nature that I doubt whether it could be invoked to bar a claim to *Hastings-Bass* relief, in the unlikely case that any respondent trustee had the incentive to do so.

134. However, her second reservation of position, ie that although there was an (assumed) material breach of duty it caused no loss, seems to me to raise clearly the proposition that a relevant loss must be one suffered by the trust, or at least by beneficiaries as a result of loss to the trust. Since M clearly suffered some damage personally, it is difficult to see how Advocate Le Cras could support this position without making and relying on this distinction. This squarely raises the point whether, in order to be a material breach for *Hastings-Bass* purposes, the breach in question must have caused material damage to the trust property, or to the interests of the beneficiaries *qua* beneficiaries. Damage to a beneficiary in some <u>other</u> capacity may give rise to a different cause of action, such as for negligence, but that is not a cause of action which, it seems to me, can found the *Hastings-Bass* jurisdiction to set aside acts of trustees for the protection of <u>beneficiaries</u>.

135. In my judgment, therefore, the necessary connection to be established is a breach of duty, causing damage either to the trust itself or the interests of a beneficiary as such. It also seems to me that the damage to M which is alleged in this case, namely the incurring of a very large personal tax charge, is not, on the face of it, any such damage.

136. However, there is just one aspect of the matter which occurred to me whilst writing this judgment, and in the course of a very much closer consideration of the facts than took place for the purposes of the half day hearing of this case, and which might give rise to an argument that the facts do disclose the kind of connection between a breach of duty of the relevant type (discussed earlier) and loss of the type required to found a *Hastings-Bass* application, which is what is being examined here. I therefore ought to mention this.

137. The tax charges incurred and potentially incurred by M comprised three elements. The first was a one-off "unauthorised payment" charge of 55% of the acquisition value of the properties, estimated at £1.718M. The third was a one-off potential charge to 40% tax on any capital gain made on disposal of the property out of the Plan, initially estimated at a prospective £225,000. The second was an annual charge to 40% tax on the deemed annual rental value of the property (which was 10% of its indexed acquisition value), or £125,000 per annum, (indexed) while held in the Plan, an annual levy, therefore, of 4%. It is a notable fact that the actual annual rental value of the properties appears to have been of the same order as the tax charge imposed in this respect.

138. Many of the cases in which the *Hastings-Bass* jurisdiction has been successfully invoked have concerned distributions to beneficiaries which have incurred an overlooked and unexpected tax charge to them (the beneficiaries), which has been found to justify the setting aside

of the disposition. The rationale of finding that a disposition in such circumstances is a breach of the trustees' duties to the beneficiary *qua beneficiary* appears to me to be that the trustees exercised their discretion to make the distribution in the belief that its value to the beneficiary (a matter which, particularly in a discretionary trust situation, they would be obliged to consider) was higher than it in fact was, because the tax liability had not been taken into account and had reduced it. In the situation in this case, since the notional income from the property was factored into the calculations of the pension which M was able to draw and did draw from the Plan after the transaction had been effected, it might therefore be argued (i) that the effect of the *annual* tax charge would have the like effect to that noted above, namely of reducing the value to M of the pension benefits being provided for him by the Plan, (ii) that this was a consideration which was not taken into account by the Trustees in making the decision to accept property of that nature into the Plan, (iii) that it should rightly have affected that decision because it was a factor which impinged on the Trustees' obligation and ability to seek to provide M with the best pension benefits reasonably attainable, and (iv) that this was, therefore, damage to M's interests *qua beneficiary*.

139. This point is abstruse, it may well be open to contrary arguments and in any event it does not take account the fact that it seems to have been an accepted part of the trustee/client beneficiary relationship that M could advise and express wishes as to the investments to be held in the Plan. It was also not actually argued in the case. As at present advised, it does seem to me, though, to be the only means by which a sufficient link might even arguably arise on the facts between the Trustees' acts in accepting these properties into the Plan, and the failure of the Trustees to consider some factor which was material for affecting the interests of M *as a beneficiary of the Plan*, in contradistinction to his separate personal interests only.

140. The upshot of all of the above is that I will, therefore, proceed not only on the assumption that (i) the requirement for a breach of duty on the part of the Trustees is made out, but also that (ii) the requirement, which I find also to exist, for that breach of duty to have had a sufficiently direct causal nexus with damage to the trust property or to the interests of a beneficiary of the trust *in his capacity as such*, has also been made out. (I repeat here that I have not considered the position, or the equivalent analysis, of inadvertent damage to a settlor, such as in *Re Seatons Trustees* [2009] JRC 050, because I am not concerned with such a situation.)

Stage (2) - Will the court grant *Hastings-Bass* relief?

(1) Is *Hastings-Bass* relief barred by any considerations in the nature of equitable defences?

141. In my judgment the answer to this question is: no.

142. There has been no inequitable delay nor intervention of innocent third party rights which would make it unjust to avoid the transaction in question. The only aspect of the matter which would require dealing with, if I were to exercise my discretion in favour of setting aside the transaction, would be the financial adjustments necessary to restore the situation between M and the Plan to the exact financial equivalent of what it would have been if M had never repaid the loan as he did, and it had remained outstanding. This would require M both to repay the loan with appropriate interest up to the present day, and to restore to the Plan the pension payments which he has in fact received, and which he could not lawfully have received whilst these loans were still outstanding. Whilst the Guernsey Income Tax authority may not require this – it has no interest in doing so – I have no doubt but that the court should require this as a condition of willingness to assist M. It would not be right as a matter of principle that he should both gain the benefit of having the transaction set aside and retain benefits as if it had not been.

143. The situation created by the receipt of rent from the investment properties would also have to be adjusted to reflect what the position would have been if they had never been transferred into the Plan, but how this would correctly be effected is a matter to be worked out later, if necessary.

(2) Should the court exercise its discretion to avoid the transaction?

(i) Specific considerations

144. My findings up to now have dealt with the qualifying conditions for engaging the jurisdiction to grant *Hastings-Bass* relief at all, and I have indicated that I will assume that a sufficient breach of duty took place. The final question is, therefore, whether I consider, as a matter of my discretion, that it is right and proper to grant the relief sought by M and avoid this transaction. An initial question here is what factors I can, or cannot, or should or should not, take into account. Ultimately there then comes the general question what test I should apply in deciding whether or not to exercise my discretion in M's favour.

145. With regard to specific points, Advocate Williams first submits that it would be wrong for me to give any weight to any suggestion that exercising my discretion in M's favour would be futile because it will not ensure that the relevant tax charges will then fall away. This is a reference to HMRC's argument, in their letter of 18th September 2017, that in their opinion a decision of the Guernsey court avoiding the transfer of the shares into the Plan has no effect on the incidence of tax, which was triggered when the actual transfer took place. He argues that the authorities cited by HMRC in support of this argument (*Re Gareth Clark* TC/2014/05909 and *Venables v Hornby* [2002] STC 1260) do not, in fact, support it, and that their argument is misconceived.

146. I accept this point; I give no weight to such an argument. It is not appropriate for me to try to second guess the effects of HMRC's contentions, not least because any opinions I may hold will carry no weight in any future contest between M and HMRC. It seems to me that in circumstances such as these, if I take the view that the transaction ought to be set aside because of its unanticipated consequences, then the right course is to make that order and to provide at least the opportunity for the effects of the transaction to be reversed in practical terms, if that possibility is available in the relevant jurisdiction.

147. Advocate Williams next prayed in aid the position of M's two adult children and ex-wife who were the beneficiaries of his current letter of wishes to the Trustees with regard to the distribution of any surplus remaining in the Plan after his death. For that reason, they can be regarded as future contingent beneficiaries. He argued that the whole policy of the *Hastings-Bass* jurisdiction was that of protecting innocent beneficiaries from aberrant trustees, and that this consideration applied all the more strongly (indeed it seemed to me that he virtually went so far as to suggest, decisively) to beneficiaries who were entirely innocent in respect of damage to their interests caused by a trustee's breach of duty over which they had no control or influence. He submitted that this was the position with regard to these three contingent beneficiaries, and he produced letters from them confirming that they supported M's application (but that, of course, is hardly surprising).

148. I do not, though, think it right to give any weight to this consideration in the particular circumstances of this case. The three persons in question are not in the same position, nor even a reasonably analogous one, to beneficiaries who are the objects, or the discretionary objects, of a settlement the value of which to them has been depleted through a breach of duty by its trustees, as, for example, in *Onerati* (above). The principal, and for all practical purposes the sole, beneficiary of the Plan is M, and it is really he, and only he, who has been affected.

149. Moreover, the future contingent interests of the former Mrs M and the two children in any surplus which may ultimately remain in the Plan have not been affected by the transaction in question at all. The fund itself has at all times maintained its value; what has been depleted is M's other resources. In effect, therefore, any damage suffered by these three beneficiaries is not damage to their interests in the Plan, but damage to their potential inheritance from M. That is not, in my judgment, anything sufficiently close to an interest in the trust to carry any weight in my consideration whether it is appropriate to set aside the relevant transaction, and I think it inappropriate to treat it as material. Once again, the purpose of the *Hastings-Bass* jurisdiction is to protect beneficiaries, and not persons affected in other interests which are not part of the trust.

150. I have already referred to the obvious, and central, submission by Advocate Williams that the effects on M of the tax charge which has been incurred are very great, and that this, on its own, militates strongly in favour of enabling the transaction to be avoided. I do of course accept that £1.8M is a significant sum of anyone's money. I also accept the evidence that M would have repaid his loan from the Plan by some other means if he had realised what the tax effects for him of doing it this way would be. He relies on the fact that he had other resources which he could have utilised. This seems to me to be Advocate Williams' strongest point. I come back to it later.

151. Advocate Williams further submits that I cannot or should not take into account any prospect of M's having a potential claim for damages for professional negligence against either the Trustees, or Hunters or any other of his other professional advisers. In support of this he cites Lord Walker's speech in *Pitt v Holt* at [90].

152. What is actually there said is that

> *"In principle the possibility that <u>the trustees</u> may have a claim for damages should have no effect on the operation of the Hastings-Bass rule"* (emphasis added).

Lord Walker was thus there considering the possibility that the trustees might be able to make good damage which has occurred to the trust, very possibly despite their not being in breach of trust themselves, by making such a claim and thereby arguably obviating any "necessity" to undo the transaction in question. First, that is not this case. Second, it is easy to imagine that the calculation of damage in such a case could well be extremely problematic, making that possibility intrinsically unattractive. The question in this case, though, is rather whether any need to protect M from aberrant conduct by his Trustees can only be met, or even reasonably be met, by setting the transaction aside, or whether such extraordinary protection is not necessary. The point is rather, therefore, whether any possibility that <u>he</u> (M) may have a claim or claims for damages should have any influence on whether it is appropriate to grant *Hastings-Bass* relief.

153. Advocate Williams argues that the possibility of such claims should be ignored because it is consistent with the principle behind Lord Walker's dictum that the Court will not refuse *Hastings-Bass* relief so as (he submits) "needlessly to preserve a loss claimable against" a defendant in professional negligence. I am not sure that Lord Walker's dictum goes quite as far as justifying "needlessly" as this rather begs the question of the purpose of the relief at all. In any event, though, the cases which he cites in support of this submission are the Cayman Islands cases of *Megerisi v Protec Trust Management* (2012) 16 ITELR 665 and *Schroder Cayman Bank v Schroder Trust AG* (2015) ITELR 567. The former is in the very different area of a claim for rectification of a drafting mistake in a settlement, and the latter concerned rescission for mistake, and once again, concerned the question of a claim for negligent advice and drafting to be made by the trustees themselves. I do not find these cases of any assistance or real relevance. They are yet more examples of fact specific decisions.

154. As to the general proposition that the possibility of M's having claims against professional advisers is a matter simply to be ignored, I have difficulty with this proposition on two levels. First, if the grant of relief is dependent on the facts of the case, then the apparent existence of a potential claim is such a fact, and I cannot see on what principled basis it can be singled out for complete exclusion. Second, the reasoning behind this suggested approach is that it is hard and unfair on beneficiaries who have, *ex hypothesi*, already had their interests damaged by their trustees' breach of duty, to be then forced into bringing proceedings against professional advisers, with the inevitable uncertainties and costs of such proceedings, and (as was apparently thought to be a major consideration in *Pitt v Holt)* in a situation where it is all too likely that they will be met with defences of exoneration or limit of liability clauses. However, this rationale, again, does not seem to me to justify ignoring the prospects of a claim against professional advisers completely. Rather, in my judgment, and on both counts, the appropriate and better approach is to treat the possible availability of such proceedings as another matter to be weighed, for what it is worth and on its particular facts, in the balance of "all the circumstances".

155. I add here, though, that I think that it is questionable whether the general use of limit of liability/exculpation or exclusion clauses governing the terms of engagement of professional advisers, whether legal, financial or trustees, is a matter the effects of which ought to reduce the weight to be accorded to any potential claim against a third party for professional negligence, whether by the trustees or by the individual beneficiary concerned. Such clauses are commercial terms, entered into as a matter of contract. Although obviating the effects of such exclusions may, at first sight feel like a reasonable response to the plight of a damaged beneficiary applicant, it does not seem to me to be the proper function of the court, to be over-ready to use its powers in order to redress and upset such effects in an indirect way. This is principally because, once again, it would

> *"tip the balance much too far in making beneficiaries a specially favoured class at the expense of both certainty and fairness",*

see Pitt v Holt at [88]. I would, though, regard this, once again, as a fact-specific consideration.

(ii) Policy considerations

156. Proceeding, therefore, on the basis that there has been a breach of duty in this case, and that it has the necessary causal connection to damage which M has suffered as beneficiary of the trust, and there are no relevant equitable defences, the final and crucial question is whether I ought to exercise the discretion which I therefore have to set aside the Trustees' actions, as claimed in the Application. This is a decision which falls to be made having regard to all the facts and circumstances of the case, most of which I have probably referred to already, but also taking account of policy aspects, of which Lord Walker in *Pitt v Holt* expressly identifies four (see [83] and [88]).

157. The first and foremost of these is that of the basic policy of the *Hastings-Bass* doctrine. It is described as "*the need to protect beneficiaries against aberrant conduct by trustees*" (see [83]). I have drawn attention already to the delimitation of the scope of relevant conduct and the necessary relevance of it to the damage, which, in my judgment, this purpose imports, but the important further point here is that the word "aberrant" is an unusual and emphatic word. Its use seems to me to underline that the power is intended for use only in the extreme case where the objective of protection is felt to necessitate its exercise.

158. Whilst the foregoing policy provides the impetus for the availability of the jurisdiction, two further policy matters identified by Lord Walker tend to militate in favour of some restraint. The first is the need not to put beneficiaries of trusts in a stronger position than other ordinary

individuals (as noted by Professor Mitchell) (see [88]). The second is the interests of not imposing too stringent a test in judging trustees' decision making (see [83]).

159. The former is simply a principle of common fairness, which, it seems to me, had rather been lost sight of in the case law between *Mettoy* and *Pitt v Holt*, as specialist trust practitioners took advantage of the jurisdiction. It suggests that the court should not be over-willing to exercise its power to set aside acts or transactions just because an arguable case for a breach of trust can be made and beneficiaries or others would now like to have second thoughts and have the transaction unwound.

160. The counter-argument often made to this is that those remedies will all too often be barred or impeded by exoneration, exculpation or limit of liability clauses. However, and as already intimated, I do not find that argument convincing. Such clauses are a commercial commonplace, and they have application because the relationship between beneficiary and trustee is frequently contractual or commercial. It does not seem to me to be the court's function to set about "remedying" a situation created by the terms of such relationships, however prevalent they may be, except perhaps in extreme circumstances. To proceed differently would be to reintroduce a tenderness towards beneficiaries as a class, by conferring on them a privileged position as to available remedies for misfortune, which is not available to ordinary individuals whose affairs are not being managed through trust structures. It suggests, therefore, that the discretion should be deployed with caution.

161. The other noted policy consideration, that of not imposing too stringent a test on trustees' decision-making, might be thought to be more appropriately considered in the context of the earlier stage of whether relevant conduct should be held to disclose a breach of [fiduciary] duty at all. However, it does seem to me to merit constant recollection at all stages, because of the tendency which has been shown in this area of the law, to slide into searching for grounds to justify the engagement of the jurisdiction out of sympathy for the case in question, and often without the tempering influence of opposing argument, as in this case. This tendency would all too easily lead to the apparent endorsement of ever higher standards of conduct to be imposed on trustees.

162. The fourth policy consideration is stated to be that of promoting legal certainty, but that seems to me to be dealt with by recalling that the court's discretion must be exercised on the basis of established principles and not capriciously (see *Pitt v Holt* at [93]), rather than by laying down prescriptive rules as to what classes of facts can or cannot be taken into account.

(iii) The proper test

163. This leads conveniently to the question, what <u>is</u> the appropriate test for the court to apply when having regard to all the facts and circumstances, in order to decide whether or not to exercise its discretion to set the relevant act, disposition or transaction aside? The findings of a material breach of trust and relevant resultant damage are only the qualifications for the availability of the jurisdiction. Something more is required to justify its actual exercise and the question is how this should be measured.

164. I have looked through the authorities cited to me, and others, to try to find some description of a benchmark test for this, but in vain. I have therefore gone back to first principles. As a result I have come to the conclusion that the appropriate test is whether or not the court finds it unconscionable that the transaction in question, caused to some degree as it was by the trustee's breach of duty, should be left to stand. In *Gresh,* Collas B paraphrased "unconscionable" as meaning "unjust or unfair", see 6/2016 at [30]. I respectfully agree and will follow this.

165. Advocate Williams asserts, although only in a footnote in his skeleton argument, that there is no separate requirement of "unconscionability" which falls to be satisfied for *Hastings-Bass* relief, and he uses this as grounds for not only distinguishing the *Gresh* case, with which the facts of this case bear some similarity, but also for suggesting that that decision might be seen as "out of line with authority". It seems to me, however, that *Gresh* can be said to be "out of line" only in the sense that it is a case which is notable because the court in that instance did not think fit to exercise its discretion to grant relief. Advocate Williams does not, however, suggest any alternative test, nor, short of the bar of "unconscionability", suggest what is the extra hurdle which a claimant plainly must satisfy beyond merely meeting the qualifying pre-conditions for the availability of the jurisdiction.

166. In fact, when one considers the dictates of the two main specific policy considerations, namely a need amounting (it seems to me) to a perceived necessity of using the jurisdiction in order to "protect" beneficiaries from "aberrant" conduct by their trustees, and the need amounting to common fairness not to place beneficiaries as a class in an unduly privileged position with regard to the court's willingness to save them from the consequences of mistakes or misconduct by others, the general test of "unconscionability in all the particular circumstances" seems to me even to describe reasonably well the reactions which have brought about the decisions favourable to beneficiaries which have been made.

167. I am reassured in my conclusion that unconscionability is the proper and appropriate test by the fact that it is a common and well-recognised test for the granting of equitable remedies generally, and thus has the merit of consistency. I note, for example, that it is applied in the case of equitable relief to set aside a voluntary disposition on grounds of mistake: see *Pitt v Holt* and also *Gresh* (above). That jurisdiction has obvious parallels with the operation of the *Hastings-Bass* doctrine, albeit it rests on mistake, rather than on the commission of a breach of trust. The test of unconscionability also appears to me to enable both the consideration, and the appropriate weighting, of any and all factors which may seem relevant to the court. These include, it must not be overlooked, that the effect of refusing to exercise the court's power merely confines the applicant to any <u>other</u> remedies which may be, and almost by definition will be, available.

Discussion and decision

168. Applying this test in the present case, the question is therefore: do I think it unconscionable, or "unjust or unfair" in all the circumstances, that the transaction whereby M transferred the shares in the two relevant companies to his pension trustees to hold in his pension Plan should be allowed to stand?

169. The answer is that I simply do not find it unconscionable. In reaching this conclusion I have had regard to all the points mentioned in argument and in this judgment, but the following are those which have weighed with me most.

170. First the circumstances in this case are unusual. Rather than being the common case of an administrative act, or a distribution of assets by the trustees, or the case of the actual settlement of property into a trust (although this more usually gives rise to an application based on mistake), the impugned transaction here was a sale and purchase, transaction between M and his Trustees at full value. As such, and as I discussed in some detail above, it did not even affect the interests of any beneficiary in the trust itself - except possibly in the abstruse and indirect way which I suggested at paragraph 138 above might conceivably be argued.

171. Moreover, a striking thing about this case is that the Application itself is not really aimed at the essence of what "went wrong", but at an ancillary aspect. M has brought this application against his Trustees, claiming that they were in breach of trust in accepting the relevant shares into his Plan, (at any rate without "adequate deliberation" of the tax consequences, for him, of

so doing) but the essence of what he is really wishing to do is to procure the setting aside of his own action in transferring his shares into his pension Plan. The Trustees' "acceptance" of the shares could only happen because of his own prior decision and implementation of such a transfer. Success in this application as framed will, of course, bring about the setting aside of his own action by a side wind.

172. Given the essence of the problem, it does seem to me that the more natural thing to do would have been to apply to have the transfer of the shares set aside (on condition that the equality money was repaid) rather than aiming an application at the Trustees' acceptance of the shares and their payment of the equality money. The fact that this more obvious and more direct way of attempting to remedy the position was not taken seems to me to be telling, and to suggest that it was thought that such a claim was unlikely to succeed. If so, I question whether the court ought to enable it to do so by a different, back-door, route.

173. However, and leaving that point aside because I accept that I have heard no argument on it, the clear facts are that this was a transaction which was initiated by M himself, presumably because he assessed it as being in his own better financial interests than the alternative of liquidating other shares. Since M himself instigated, and consented to, the transaction, it seems to me to be unreal to consider him as the hapless victim of some inept conduct by his Trustees, which is the usual result which the courts find to cry out for the indulgence of judicial remedial magic. On the evidence, M did not enter into the transaction in any reliance on anything done or not done by his Trustees, but, rather, on the basis of the strikingly incorrect tax advice which he received.

174. I have already indicated, above, that in my judgment this last fact cannot be dismissed as irrelevant as a matter of general approach, but should be considered for its weight in the particular context. This does not mean that the court should embark on an exercise akin to trying any apparent case in professional negligence within the *Hastings-Bass* application itself, but simply, in my judgment, that the court both can and should take a view as to whether the extent of the prospects of success in such a claim or claims suggest that it is not necessary, and therefore not appropriate, to exercise the extraordinary jurisdiction of the *Hastings-Bass* doctrine to undo an otherwise valid act, disposition or transaction, rather than simply leave any disappointed beneficiary to pursue other means of redress.

175. The ordinary person who made an investment with bad tax consequences on the basis of incorrect advice - which is really all that has happened here - would be obliged to take what action he could to obtain compensation from his adviser. I accept the concern mentioned by Lord Walker, that beneficiaries should not be consigned to uncertain and expensive claims against advisers by way of satellite litigation, but that does not seem to me to be a rule, but rather to entail the question whether it is "unjust or unfair" that this should have to be their course on the particular facts of a case. In this case, such a claim hardly appears to be "satellite" litigation, but is pretty well central to the situation which has arisen. Moreover, on an immediate review of the position it seems to me that M has a virtually unanswerable claim against Hunters.

176. No evidence about this was volunteered to the court, and so I asked about it. I was told that although such a claim had, of course, been notified, it was being defended on a two-fold basis. The first was the existence of a limitation of liability clause in the terms of Hunters' retainer from M. When I asked how much this was I was told, although Advocate Williams had to make enquiries, that this limit was £3M per matter. This would thus appear to be well above the amount of any claim by M, even placing this at £2.1M and including further sums for costs. The second basis of defence is, I was told, an argument being made that Hunters' terms of engagement exclude liability for the acts or omissions of any third party, and it was being argued that the negligence of the Trustees in this case in failing to take tax advice was an omission by a third party so that Hunters were not liable. This seems to me to be barely

arguable, let alone compelling. Advocate Williams said that there might be yet other defences. It does not seem to me, though, that I can accord much weight to this, in the absence of it having been thought material to provide me with any evidence about this.

177. I can see that there are phrases in the advice given by Hunters which could be said to reveal that the advice given was not warranted to be complete or accurate, and therefore perhaps argued to provide a defence. The first is the reference to the two taxes which were discussed as being only the "main" taxes of relevance, and the second is that the writer expressly stated that he was not an expert in the rules applicable to QROPS. However, it seems to me that, on examination, these statements make no material difference to the merits of the situation. Either they were adequate to warn M of the risk of yet other disadvantageous tax consequences not having been flagged up, despite the tenor of the advice being proffered, or they were not. If they were not adequate, then the position is unchanged and Hunters were at fault. If they were adequate, then M should have appreciated this, reducing still further the strength of his claim to the court's assistance to save him from the consequences, and/or his Bermudian solicitor, who received the deficient advice, should also have appreciated this, which suggests yet another available remedy for M. This is all in addition to any claim which M may be able to make against the Trustees, in the light of their admission of being in breach of trust of some sort. (There may even be the possibility of claims against yet others of M's advisers, but I leave those entirely out of account in the absence of any evidence material to the real likelihood of this.)

178. The upshot, therefore, is that it seems to me that the very real possibility of a solid claim by M against, at least, Hunters, whose acts are, standing back, the real cause of the damage to him in this case, is a matter which I am entitled to take into account, and should not ignore.

179. The next point is one the other way, and the one which I have said I do accept as, potentially, Advocate Williams' strongest point, namely the very significant size of the tax charge which has been incurred, and which could (I accept) have been avoided. I have given this anxious consideration; £1.8M is certainly a great deal of money. I am aware, though, that I have been given no evidence as to M's overall financial circumstances. I do know that his pension fund assets were worth about £5.7M in 2010, and I think about £5.9M at the relevant time in 2013-14. I also know that from these he expected to receive a substantial pension income of at least £325,000 a year, and hopefully more like £400,000, in 2014, and that it appears that the Plan in fact gave him a pension of even more than that, being the equivalent of £35,500 pcm, which would be £426,000 per year. I also know that, in addition, he held other investments either directly or in a managed portfolio, including US$ denominated stocks worth at least the amount of the loan which he took from his pension Plan, ie £2.6M. I have no other information about M's financial position. However, I find that a reasonable deduction is that the tax charge in question, even though substantial and obviously unpalatable, is not ruinous for M.

180. Next, as already mentioned, this is not a case where the balance of obvious injustice or unfairness to beneficiaries is tipped by the fact that there are innocent third party beneficiaries who have suffered significant and avoidable damage consequent upon an unfortunate transaction which they had nothing to do with, no control over, and no power to do anything about it. It is in that kind of situation where allowing the transaction to stand, to their prejudice, may most easily be viewed as sufficiently unjust and unfair, such that the exercise of an extraordinary power is justified to give appropriate protection. However, that is not this case. M is not that class of beneficiary, and despite the valiant attempts of Advocate Williams to pray in aid the positions of the former Mrs M and the two adult children as beneficiaries of M's letter of wishes, I have already found, as indicated, that their interests in the Plan itself have not been prejudiced, and that I do not find any indirect prejudice which they may be said to have suffered to be of either a quality or a sufficient magnitude to make it unfair to them that the transaction should stand.

181. Lastly, there is the question of the nature and extent of the Trustees' (here assumed) breach of duty. I have discussed above the place of this in the general analysis of the availability of *Hastings-Bass* relief, and indicated the difficulties which I find with the formulations appearing in some of the cases, and I have said that whilst authorities frequently suggest the test of a "sufficiently serious" breach of duty as a qualifying condition for the availability of *Hastings-Bass* relief at all, I find this unsatisfactorily uncertain for that test. However, it plainly and reasonably plays a part in the courts' deliberations upon whether or not to grant relief as a matter of discretion, and if it is not used as a test at the outset, it certainly seems to me that it is appropriate for it to enter on the scene, to some extent, at this final stage. This is, once again, because the grant of relief is for the purpose of needing to protect beneficiaries from conduct which is reasonably described as "aberrant".

182. At the end of the day, I do not find the Trustees' conduct in this case, assuming that it discloses a breach of duty, to be particularly striking as such a breach. The only perhaps striking thing, which I suppose might arguably be described as "aberrant", is that the Trustees seem to have been quite largely unaware of the UK tax treatment of "taxable property" in such schemes, or to hear the sound of any significant warning bells. In this they seem to have been in the company of several of M's other advisers who might have been expected to have some general knowledge of the principles of Investment Regulated Pension Schemes and QROPS which had then been in operation for several years, but in the Trustees' case this is especially remarkable, given their membership of GAPP and the contents of their published code of "Best Practice". I have discussed this earlier in this judgment, and confirm that I have taken it into account. However, in evaluating this critically, it nonetheless seems to me that the Trustees did fulfil the rather important and potentially fundamental aspect of any duty which they had to M, in that they did draw his attention to, and advise him, to take his own tax advice. They thereby, in effect, warned him that they were not accepting responsibility for any personal consequences to him, in agreeing that, in principle, there was nothing to prevent the Plan from holding the assets in question.

183. Whilst it may be possible to construct some other breach of duty from their other omissions, doing so seems to me to be a somewhat strained and unnatural exercise, in all the circumstances. It is not suggested that the Trustees owed a duty to M not to let him place such property in his Plan at all; the highest it is put is that they owed him a duty not to let him do so without satisfying themselves, to the point of actually insisting on seeing it, that he had taken *favourable* personal tax advice, but in my judgment even this is going too far. I could accept that they owed M a duty not to let him put these assets in the Plan without having proper opportunity to take personal tax advice as to any tax consequences, but that is, in effect, what they actually did, by warning him to do so. It does not seem to me that this extended to a duty to *ensure* that he had done, as contrasted with ensuring that he had been warned to do so. Checking up that he had done so might have been "best practice" but a failure to do so does not render it a breach of duty or, at any rate, a sufficiently serious breach of duty, to militate in support of the actual grant of the *Hastings-Bass* remedy. I therefore do not find that the Trustees' conduct, even if it could be fairly described as "aberrant" was such to any major extent. I make these points mainly, however, because of the warning in *Pitt v Holt* that operation of the *Hastings-Bass* jurisdiction should not impose too stringent requirements on the Trustees' decision-making process.

184. I was, quite rightly, not asked to take into account any submissions as to the apparent reasonableness or otherwise of the policy behind the foreign tax charge in question. This seems to me to be a matter which this court should treat as being entirely neutral, at any rate in the circumstances of a case such as this.

185. I make just one more comment. Much of the policy considerations put forward in the cases on this topic refer to the undesirability of proliferating litigation. However, whilst that is a reasonable consideration it cannot, in my judgment, be pushed too far, or it tends to under-

mine proper legal principle. In this context, it is regrettable, but I think inevitable, that *Hastings-Bass* applications come to be pursued, either because the professional indemnity insurers of parties who might be vulnerable to claims against them insist upon it, or because a party who may have a professional negligence (or other) claim against either trustees or third parties is concerned that if he does not attempt a *Hastings-Bass* application, he will be faced with an argument that he has not made reasonable attempts to mitigate his loss. I detect that this is highly likely to have been the position in this case. I cannot see any way in which that kind of potential proliferation of litigation can be effectively discouraged, but, on the other hand, it does seem to me that its potential should be recognised, and be resisted, as a factor which might cause the court to be more ready than it otherwise should be to grant *Hastings-Bass* relief.

Summary and conclusion

186. This has been a regrettably long judgment, arising from the unfortunate, but inevitable fact of the one-sided representation in this case, and my consequent need to explain in more detail why I do not feel able to accept the arguments advanced. I therefore think it appropriate to summarise as succinctly as possible the substance of my findings and the result.

    (1) The Royal Court has the power to intervene, in an appropriate case, to set aside an act, disposition or transaction made by a trustee in breach of trust, as part of its jurisdiction to supervise the proper administration of trusts.

    (2) This power is an extraordinary jurisdiction, as it provides a remedy beyond the normal remedies of damages or restitution. The justification for it is the need to protect beneficiaries against aberrant conduct by their trustees.

    (3) Arising from the above it is a pre-condition for engaging the jurisdiction that (a) there should have been a breach of duty by the trustee, and (b) this should have caused damage to a beneficiary qua beneficiary to the extent, at least, that but for that breach of duty the damage in question would probably not have occurred.

    (4) The jurisdiction is subject to the usual equitable defences.

    (5) Whether or not to exercise its power is then a matter of the court's discretion, having regard to all the circumstances of the case, including any availability of alternative remedies. The test by which the court will exercise its discretion is whether it considers it unconscionable that the impugned act, disposition or transaction should be allowed to stand.

    (6) In this case, even assuming in favour of the beneficiary that the pre-conditions at (3) are satisfied, the claim fails at the final stage as the court does not find it unconscionable that the impugned transaction should stand. M does not require the court to exercise a special jurisdiction to protect him against the consequences of his Trustees' failing to take tax advice about a transaction which he instigated, because he had such protection; the Trustees advised him that he should take his own tax advice (and he did so). He also has other potential remedies for the damage he has suffered. This is not a case of any wholly innocent and unconnected beneficiaries suffering major prejudice. The very size of the tax imposition naturally provokes sympathy for M, but in all the circumstances of this case, that is not enough.

    (7) The application therefore fails and is dismissed.

Costs

187. I have not heard any argument about costs, but I give my provisional views.

188. The two parties concerned with costs in this case are M and the Trustees. In respect of M's costs, I would not think it appropriate to order the Trustees to pay these, and there appears to be little practical difference between his paying these personally or their being paid out of the Plan. However, if I give permission for M to recover his reasonable costs of and incidental to this application out of the trust assets, M will be able to decide whether or not it is in his interests to implement that permission.

189. As regards the Trustees' costs, the only question seems to me to be whether they should be entitled to recover their costs out of the Plan or not. Given their attitude of general support for M, they did not cause any undue increase in the overall costs, and it was clearly reasonable for them, as Trustees, to take part in the application in order to assist the court. I am therefore minded to order that they should be entitled to payment of their reasonable costs of and incidental to this application out of the Plan funds on the indemnity basis, as would be usual.

190. As I have heard no argument, I will order that both parties shall be entitled to have their reasonable costs of and incidental to this application paid out of the trust assets on the indemnity basis, but with permission to either party to apply to the court on paper, if so advised, for such order to be amended or set aside, any such application to be made within 21 days of receipt of the act of court made pursuant to this judgment.

Her Honour Hazel Marshall QC
Lieutenant Bailiff

12th January 2018