

In defence of the rule in *Re Hastings-Bass*

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Abstract

The so-called rule in *Re Hastings-Bass* has developed rapidly in the courts in recent years, but the true basis for the rule has not yet been properly explored. This article seeks to demonstrate that whilst the application of the rule in the courts may well have gone too far, it does have a legitimate foundation in some of the core principles of English trust law. Once its doctrinal nature is understood, the worst excesses of the rule can be curbed in a manner which is both pragmatic and principled.

The so-called rule in *Re Hastings-Bass*¹ continues to trouble lawyers—practitioners, judges, and academics alike—as the growing volume of the decided cases appears further to entrench into the law a principle with which many feel wholly uncomfortable and which some doubt should exist at all in anything like its current form.² The purpose of this article, though, is to address the present reality, and to try to make some sense of it. With a notable lack of guidance thus far from the appellate courts,³ we are now confronted with a mass of conflicting judgments. Starting from the assumption that the judges deciding

these cases felt that there was some merit in the arguments before them, whatever view commentators might subsequently have taken, this article seeks to articulate that merit by identifying a version of the rule which can stand up to scrutiny as a matter of principle, as well as explaining the outcome in many of the decided cases—at least up to *Sieff v Fox*.⁴ Since then, most reported judicial considerations of the rule have adopted the *Sieff* formulation without critically considering the underlying issues⁵ which makes the most recent decisions much less susceptible to useful analysis than those earlier cases in which the very nature of the *Re Hastings-Bass* rule was in issue.

This article therefore considers the two basic forms the rule could take,⁶ one based on flawed decision-making, the other on unexpected outcomes, and makes the case for preferring the flawed decision-making model: first, by a detailed examination of the *Re Hastings-Bass* line of cases; secondly, by reference to the duties of trustees of discretionary trusts and donees of fiduciary powers of appointment as exemplified in the well-known case of *McPhail v Doulton*;⁷ and thirdly by consideration of the well-established doctrine of judicial non-intervention

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1. *Re Hastings-Bass (deceased)* [1975] Ch 25 (CA).

2. See, *inter alia*: T Hang Wu, 'Rationalising Re Hastings-Bass: A Duty to Act on Proper Bases' (2007) 21 TLI 62; A Molloy, 'What Really is the Rule in *Hastings-Bass*?' (2009) 15 T&T 200; N Stallworthy, 'Rationalising Mistake in the Law of Trusts: *Smithson v Hamilton*' (2009) 23 TLI 51; GW Thomas, 'Challenging the Exercise of a Trustee's Discretion' (2005) 12 JTCP 139.

3. The only case directly concerning the *Re Hastings-Bass* rule to be decided by an appellate court is *Re Hastings-Bass* itself. There are Court of Appeal decisions on analogous principles: *Stannard v Fisons Pension Trust Ltd* [1992] IRLR 27 (CA); *Edge v Pensions Ombudsman* [1998] Ch 512 (Ch).

4. *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811.

5. *Pierce v Wood* [2009] EWHC 3225 (Ch), [2010] WTLR 253 [46]–[47]; *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] 1 WLR 1199 [18]; *Futter v Futter* [2010] EWHC 449 (Ch), [2010] STC 982 [5]; *Jiggins v Low* [2010] EWHC 1566 (Ch), [2010] STC 1899 [13]. A notable exception is *Smithson v Hamilton* [2007] EWHC 2900 (Ch), [2008] 1 WLR 1453 where the *Re Hastings-Bass* principle was carefully examined by Park J. See Molloy (n 2) 200.

6. The *Re Hastings-Bass* rule could of course take many forms, but the two addressed in this article (and their variations) are those suggested by, and to some degree consistent with, the case law.

7. *McPhail v Doulton* [1971] AC 424 (HL).

in trustee decision-making, the apotheosis of which is found in *Gisborne v Gisborne*.⁸

The foundations of the 'rule'

The first model, which will be referred to as the 'weak' rule, says that the rule in *Re Hastings-Bass* is a rule governing decision-making by trustees. When trustees decide to exercise a power or discretion vested in them, or decide in what manner to exercise it, they have an obligation to consider the appropriateness of the exercise. To satisfy this obligation they must take into account matters relevant to their decision, and must exclude from consideration irrelevant matters. In determining what matters are relevant, and what weight to attribute to each such matter, the trustees must act responsibly. Accordingly, a matter is only treated as legally 'relevant' if a responsible trustee would have taken it into account. A breach of this duty to consider is a breach of trust which will invalidate the purported exercise of the power. The can be viewed simply as an aspect of the beneficiaries' entitlement to proper performance of the trusts.⁹ Beneficiaries are often peculiarly vulnerable in their relationship with their trustees.¹⁰ As such, it is proper for the law to require trustees to act with integrity and responsibility. The beneficiaries have no entitlement to a particular outcome, but they are entitled to proper conduct on the part of their trustees.¹¹

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

The second model will be referred to as the 'strong' rule. This version of the rule is concerned with whether the trustees' actions achieve their intended outcome. So according to the 'strong' rule, if trustees purport to exercise a power with a view to achieving a particular outcome, and that outcome is not achieved, the purported exercise of the power is invalid. No breach of trust on the part of the trustee is necessary or sufficient to invoke the rule. A variant of the 'strong' rule is to put the rule in terms of an obligation to take into account relevant considerations, whilst mandating the true effect of the exercise of the power as a relevant consideration.¹² This produces exactly the same effect as the strong rule: if the outcome was unforeseen then it was not considered, and the purported exercise of the power is invalid.

8. *Gisborne v Gisborne* (1877) 2 App Cas 300 (HL).

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

10. L Smith, 'The Motive, Not the Deed' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK, London 2003) 61.

11. A trustee's performance of his trusts 'is to be judged not so much by success as by absence of proven default'. *Nestle v National Westminster Bank Plc* [1993] 1 WLR 1260 (CA) 1284 (Legatt LJ).

12. Counsel for the Commissioners of Inland Revenue argued for this understanding in *Re Hastings-Bass* itself: *Re Hastings-Bass* (n 1) 37.

The *Re Hastings-Bass* cases

The 'weak' rule is clearly to be seen in many of the *Re Hastings-Bass* cases. However, given the ambiguity of many of the cases, which do not expressly consider the distinction between the 'weak' and 'strong' formulations, it is not sufficient simply to draw general conclusions. What is required instead is a detailed analysis of the case law. Of the two dozen or so reported cases in which *Re Hastings-Bass* is mentioned in at least one judgment, five in particular provide the basis for the 'weak' approach.¹³

Mettoy Pension Trustees Ltd v Evans

*Mettoy*¹⁴ concerned the purported exercise by the trustees of a pension scheme of an express power of amendment contained in the scheme rules. The exercise of that power of amendment in 1983 changed, among other things, the rule governing the winding up of the scheme. When the scheme was in fact wound up, an issue arose as to whether the exercise of the power of amendment was valid, and therefore whether the scheme's assets were to be dealt with according to the old rules or the new rules.¹⁵ The difficulty arose because none of the trustees who agreed to the 1983 amendment had read and understood the effects of the deed of amendment. They had relied instead on a summary provided by the scheme's solicitor.¹⁶ Warner J expressed the *Re Hastings-Bass* rule issue here in purely 'weak' rule terms, saying that *Re Hastings-Bass* mandates that:

where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he

did had he not failed to take into account considerations which he ought to have taken into account.¹⁷

He consequently put the test for applying the rule in 'weak' terms too:

- (1) What were the trustees under a duty to consider?
- (2) Did they fail to consider it? (3) If so, what would they have done if they had considered it?¹⁸

Applying this test, Warner J held that the trustees were under a duty, in deciding to exercise the power of amendment to implement new scheme rules, to consider what those new rules were, and that they had failed in this duty.¹⁹ However, Warner J also held under limb (3) of his test that the trustees, had they fully understood the new rules, would have exercised the power of amendment to implement them nevertheless.²⁰ *Mettoy* works perfectly well as a 'weak' rule case. A responsible trustee would not exercise a power of amendment without at least reading the proposed amendments, and seeking clarification where they were not straightforward to understand. Accordingly the trustees breached their duty, and the exercise of the power is saved from invalidity only by the exception in (3), which might be characterized as primarily pragmatic—the court will not intervene when in spite of the deficiency in decision-making, no negative consequences for the beneficiaries have ensued. To make this work as a 'strong' rule case, we would have to say that the trustees did not achieve the result they intended. But since it is absolutely clear that they intended to amend the scheme rules in accordance with the deed of amendment, it is difficult to find any mismatch between intention and outcome. Accordingly, if the 'strong' rule were correct,

13. The five are: *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587 (Ch); *Breadner v Granville-Grossman* [2000] EWHC 224 (Ch), [2001] Ch 523; *Abacus Trust Co v Barr* (n 9); *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] OPLR 57; *Smithson v Hamilton* (n 5).

14. *Mettoy Pension Trustees Ltd v Evans* (n 13).

15. *Ibid* 1607–8.

16. *Ibid* 1606–7.

17. *Ibid* 1621.

18. *Ibid* 1625.

19. *Ibid* 1625–6.

20. *Ibid* 1629–30.

Warner J should have held the *Re Hastings-Bass* rule to be simply inapplicable, with no need to rely on the pragmatic exception. To apply the 'variant strong' rule would require saying that the trustees failed to take into account the true legal effect of their action. But unlike in *Re Hastings-Bass*, where the effect of the rule against perpetuity meant that the outcome of the exercise of the power was not precisely what the trustees had anticipated, in this case the 'true legal effect' of the deed of amendment was simply its ordinary legal effect. Had the trustees read it and sought advice they would have understood it. The 'strong' rule thereby collapses in this context into the 'weak' rule. That Warner J put the *Re Hastings-Bass* rule in 'weak' terms, that the 'strong' rule would produce a different result on these facts²¹ and that the 'variant strong' rule does not work at all should all be taken as powerful indicators that *Mettoy* stands for the correctness of the 'weak' rule.

Breadner v Granville-Grossman

More than a decade after Warner J's judgment in *Mettoy*, during which time no attempt was made to exploit the full scope of the *Re Hastings-Bass* rule as expounded in that case, two cases were heard in the High Court. *Green v Cobham*²² is considered later in this article as a case supporting the 'strong' rule approach to *Re Hastings-Bass*. The other was *Breadner v Granville-Grossman*,²³ in which Park J had to consider the *Re Hastings-Bass* rule in the context of a challenge to the validity of the purported exercise of a special power of appointment in 1976. Park J stated his understanding of the rule in entirely 'weak' form:

If trustees, in exercise of one of their express powers, take an action which on the face of it falls within the

letter of the power, the action may nevertheless be held to have been ineffective if (1) the trustees fail to take into account something which they ought to have taken into account; or (2) the trustees take into account something which they ought not to have taken into account . . .²⁴

More important were his reasons for rejecting the challenge to the 1976 appointment. An issue arose as to whether the 1976 appointment fell within the scope of paragraph 15 of schedule 5 to the 1975 Finance Act, which conferred privileged treatment for capital transfer tax purposes.²⁵ It had always been assumed that the 1976 appointment was within the scope of paragraph 15, and in light of the new argument that in fact it was not, it was further argued that the appointment was invalid on *Re Hastings-Bass* grounds, since had the trustees realized that the appointment would not be within paragraph 15, they would not have so exercised the power.²⁶ Park J rejected this on the basis that whilst this argument

might be seen now to have had some technical force . . . it had no merits of a more general nature. It was certainly abstruse and recondite.²⁷

Neither the trustees' advisors nor the Revenue appreciated the problem, and 22 years had passed without the issue being raised, during which time all had relied on the validity of the appointment.²⁸ This must be an application of the 'weak' rule. A responsible trustee cannot be criticized for failing to appreciate the relevance of 'abstruse and recondite' matters and consequently for failing to take them into account. There is no breach of the duty to consider, and no application for the *Re Hastings-Bass* rule. Whereas applying the 'strong' rule, there is no

21. Apart from the application of the pragmatic exception.

22. *Green v Cobham* [2000] EWHC 1564 (Ch), [2002] STC 820.

23. *Breadner v Granville-Grossman* (n 13).

24. *Ibid* [58].

25. *Ibid* [88]–[92].

26. *Ibid* [93].

27. *Ibid* [94].

28. *Ibid* [94].

real doubt that the trustees failed to understand the true legal consequences of their actions when they executed the 1976 appointment; they intended to make an appointment which would attract the privileged treatment of paragraph 15, and failed to do so. Calling the argument 'abstruse and recondite' does not affect the conclusion that the legal effect of their decision was not what they expected or intended it to be. On the 'strong' approach the *Re Hastings-Bass* rule would invalidate this decision and this aspect of *Breadner* would have to be considered wrongly decided.

A responsible trustee cannot be criticized for failing to appreciate the relevance of 'abstruse and recondite' matters and consequently for failing to take them into account

Abacus Trust Co (Isle of Man) Ltd v Barr

Breadner was followed by *Abacus Trust Co (Isle of Man) Ltd v Barr*,²⁹ perhaps the leading case on the 'weak' rule. An agent acting for the trustee misunderstood the settlor's wishes as regards the exercise of an overriding power of appointment by the trustee, with the result that the trustee received incorrect information about those wishes. This caused the trustee to exercise the power so that 60 per cent of the fund was appointed on trusts for the settlor's sons, rather than 40 per cent as the settlor wished.³⁰ The mistake was discovered within a few months, but no action was taken until almost a decade later.³¹ In analysing the *Re Hastings-Bass* rule, Lightman J considered what it is that trustees, as fiduciaries, have to do when they

exercise a power. He considered in particular three cases on decision-making by trustees, *Scott v National Trust*,³² *Edge v Pensions Ombudsman*,³³ and *Hearn v Younger*,³⁴ and concluded that trustees must 'inform themselves of the matters which are relevant to the decision',³⁵ must 'take into account all relevant but no irrelevant factors'³⁶ and must 'follow a correct procedure in the decision-making process'.³⁷

According to the judge,

This duty lies at the heart of the rule, which is directed at ensuring for the protection of the beneficiaries under the trust that they are not prejudiced by any breach of such duty.³⁸

Furthermore, Lightman J held that the trustee must have, in Warner J's language in *Mettoy*, 'failed to consider what he was under a duty to consider',³⁹ and thereby have committed a breach of duty, that is to say, a breach of trust.⁴⁰ Summarizing, Lightman J concluded that:

the rule affords to the beneficiaries the protection of a requirement that the trustee performs its duty in exercising of its discretion, and a remedy in case of a default. In the absence of any such breach of duty the rule does not afford the right to the trustee or any beneficiary to have a decision declared invalid because the trustee's decision was in some way mistaken or has unforeseen and unpalatable consequences.⁴¹

This makes clear the desirability and mechanism of the weak approach. One must first establish what the

29. *Abacus Trust Co v Barr* (n 9).

30. *Ibid* [6]–[7].

31. *Ibid* [8]–[12].

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

33. *Edge v Pensions Ombudsman* [2000] Ch 602 (CA).

34. *Hearn v Younger* [2002] EWHC 963 (Ch), [2002] WTLR 1317.

35. *Abacus Trust Co v Barr* (n 9) [16].

36. *Ibid*.

37. *Ibid*.

38. *Ibid*.

39. *Ibid* [23], referring to *Mettoy Pension Trustees Ltd v Evans* (n 13) 1625 (Warner J).

40. *Abacus Trust Co v Barr* (n 9) [23].

41. *Ibid* [24].

trustee's duty to consider requires, then whether the trustee has breached that duty. It is clear from Lightman J's approach that the 'true consequences' of an action are not necessarily matters falling within the duty to consider. He says that where the trustee has used

all proper care and diligence in obtaining the relevant information and advice relating to those considerations⁴²

then there is no breach of duty simply because the information is incorrect, as it was in this case. This has been construed by some as an unwarranted intrusion of the duty of care,⁴³ but it should rather be seen as emphasizing an approach to trustees' duties founded on what it was practically possible and desirable for the trustees to do in the circumstances in which they acted. That is to say, if the trustees, in ascertaining what matters they ought to take into account, and in determining what weight to give to such matters, have acted reasonably and responsibly, then they have done their duty and have committed no breach of trust, and their decision therefore cannot be impugned on *Re Hastings-Bass* grounds.

Gallaher Ltd v Gallaher Pensions Ltd

The lead given by Lightman J in *Barr* was followed by Etherton J in *Gallaher Ltd v Gallaher Pensions Ltd*.⁴⁴ The case concerned a pension scheme of which Gallaher Pensions Ltd (GPL) was trustee. GPL exercised an express power of amendment contained in

the scheme rules to change the scheme to augment pensions. GPL meant to increase by 2 per cent (or the Retail Price Index (RPI) at that time, if lower) only that part of the pensions in excess of the guaranteed minimum pension,⁴⁵ but the words used in the deed of amendment were wide enough to increase the whole pension by 2 per cent or RPI, which would be a much more significant burden for the fund to bear.⁴⁶ Gallaher Ltd, as principal employer,⁴⁷ sued for rectification of the deed of amendment, and succeeded in this claim.⁴⁸ Although Etherton J's analysis on *Re Hastings-Bass* is therefore strictly *obiter*, this was a case in which there had been extensive argument on the *Re Hastings-Bass* issue⁴⁹ between (unusually) parties with a real interest in the outcome. Although GPL adopted a neutral approach, both the principal employer (who would have to fund the increase in pension benefits) and various classes of scheme member were represented.⁵⁰ *Gallaher* is analysed by Etherton J very much in terms of the model established by Lightman J in *Barr*.⁵¹ The judge held that the trustee did not take steps to establish the cost of the increase in pension benefits under the proposed amendment, because the trustee did not appreciate the effect that the proposed amendment would have.⁵² He found that there was 'plainly' a breach of duty committed by the trustee in its 'failure to obtain proper costings'.⁵³ Etherton J found that none of the relevant documents (the board resolutions and the deeds) were 'difficult to understand'.⁵⁴ He concluded that there was:

culpability, amounting to breach of duty, on the part of...GPL as a trustee body, in failing to ensure that

42. *Ibid* [23].

43. C Mitchell, 'Reining in the Rule in *Re Hastings-Bass*' (2006) 122 LQR 35, 38.

44. *Gallaher v Gallaher* (n 13).

45. See Pension Schemes Act 1993, part III.

46. *Gallaher v Gallaher* (n 13) [1]–[10].

47. *Ibid* [2].

48. *Ibid* [149].

49. *Ibid*.

50. *Ibid* [2]–[10].

51. *Abacus Trust Co v Barr* (n 9).

52. *Gallaher v Gallaher* (n 13) [173].

53. *Ibid* [176].

54. *Ibid* [177].

the resolutions gave proper effect to the intention not to change the previous policy.⁵⁵

So the trustee did not simply fail to understand the true legal consequences of its action. Rather, it failed to take adequate steps to inform itself of what the documents said. On the ‘strong’ view this would not matter—it would be enough to show that the result intended by the trustee was not achieved by its action. The consideration of the trustee’s failure to inform itself adequately as to the content of the relevant documents shows the weak rule in action. The distinction here may appear to be a fine one. Under the weak rule, a trustee who acts responsibly to ensure that he understands the action he is proposing to take does not commit a breach of duty if the consequences of the action are unexpected, and that action is therefore not invalidated on *Re Hastings-Bass* grounds. There is no relevant matter that he has failed to take into account. Whereas a trustee who simply fails to inform himself of the content of the document before signing has failed to take into account the content of the document, which is manifestly a relevant consideration.⁵⁶ Whilst the distinction is a fine one, it fits perfectly with the underlying view that the ‘weak’ *Re Hastings-Bass* rule is about the beneficiaries’ entitlement to responsible behaviour by their trustees.⁵⁷ If a trustee misunderstands a legal document, he does not necessarily thereby act irresponsibly. But it is irresponsible to fail to take simple steps to ensure that the document matches his intentions, and the beneficiaries are in that case entitled to the protection of the rule.

Smithson v Hamilton

Finally, the case of *Smithson v Hamilton*⁵⁸ provides yet another indication that the courts will adopt the ‘weak’ rule. *Smithson* is not a conventional *Re Hastings-Bass* case, in that it turns not on the usual detailed questions of the rule’s application but rather on the basic scope of the rule. The case concerns a pension scheme which was established by interim deed in 1990. The trustees and the principal employer jointly executed a ‘definitive deed’ in 1992. This ‘definitive deed’ contained an error, the consequence of which was that deferred members⁵⁹ were able to retire early without actuarial deduction.⁶⁰ The trustees did not seek rectification of the deed,⁶¹ but sought to rely on the rule in *Re Hastings-Bass* to have the mistaken rule in the definitive deed declared void.⁶² Park J rejected this claim for several reasons. Most importantly for the purpose of establishing the ‘weak’ nature of the *Re Hastings-Bass* rule, Park J held that the rule applies only to the actions of trustees, not settlors or employers (in pension trusts),⁶³ and furthermore only to actions of trustees ‘as respects which they have a fiduciary duty or responsibility to the beneficiaries’ such that an element of that duty was to take into account relevant considerations or to exclude irrelevant considerations.⁶⁴ In this case the trustees did have fiduciary duties towards the scheme members, but nothing in the deed was disadvantageous to scheme members—only to the employer, who would have to provide all the extra funding needed to facilitate early retirement without actuarial deduction.⁶⁵ Put in terms of ‘weak’ and

55. *Ibid.*

56. As was also the case in *Mettoy Pension Trustees Ltd v Evans* (n 13).

57. See text to n 9 and following.

58. *Smithson v Hamilton* (n 5).

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

60. *Smithson v Hamilton* (n 5) [24]–[26], [54]–[55].

61. *Ibid* [48].

62. *Ibid* [56].

63. *Ibid* [82].

64. *Ibid* [97].

65. *Ibid* [99]–[102].

‘strong’ approaches to the rule, this was a case where the trustees did not achieve the result they intended—the 1992 ‘definitive deed’ did not have the intended effects. So on the strong view the trustees should succeed. But it is clear that the reason that they do not is that the trustees had not breached any duty owed to the beneficiaries, the scheme members. The scheme members suffered no disadvantage—there was not even any question of the employer being unable to afford the increased contributions it would have to make to fund the early retirement pensions⁶⁶—and were entitled to say, as against the trustees, that they were happy with the scheme as it was. Park J can therefore be seen to make a firm choice of the ‘weak’ rule, which in the light of his judgment in *Breadner*⁶⁷ and his concern there to keep *Hastings-Bass* within reasonable bounds⁶⁸ is perhaps unsurprising.

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

From this review of the principal ‘weak’ rule cases it is apparent that the ‘weak’ rule is a good fit with much of the case law, and that some of the cases are explicable *only* on the ‘weak’ rule basis.⁶⁹ But there are also important arguments in favour of the ‘weak’ rule to be found outside of the *Re Hastings-Bass* cases.

In the 1970s and 1980s it fell to the courts, and especially the House of Lords, to determine the tests which govern the validity of discretionary trusts and powers of appointment vested in trustees. From this body of case law, not traditionally associated with the rule in *Re Hastings-Bass*, can be discerned three principles which provide support for the ‘weak’ approach. First, the courts’ analyses of the duties of a trustee holding a power of appointment expressly identify a

duty to consider when and how to exercise the power. This duty to consider forms the true doctrinal basis of the *Re Hastings-Bass* rule, and mandates a ‘weak’ approach focused on responsible consideration. Secondly, the scope of the duty to consider must be limited to responsible consideration, rather than consideration of all factually relevant matters, since it would otherwise conflict with authoritative statements as to the limits of the trustees’ duties. Thirdly, only the ‘weak’ *Re Hastings-Bass* rule is compatible with the courts’ view of the nature of the ‘control’ that the court must be able to exercise over trustees.

The scope of the duty to consider must be limited to responsible consideration, rather than consideration of all factually relevant matters

*Only the ‘weak’ *Re Hastings-Bass* rule is compatible with the courts’ view of the nature of the ‘control’ that the court must be able to exercise over trustees*

The case law is replete with statements of the duties of trustees who hold powers of appointment. In *McPhail v Doulton*,⁷⁰ Lord Upjohn stated that where a trustee holds a power of appointment it is not the case that the court can only intervene if he acts *ultra vires* or capriciously,⁷¹ but rather that the trustee:

would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.⁷²

66. *Ibid* [59].

67. *Breadner v Granville-Grossman* (n 13).

68. *Ibid* [61], [63] (Park J).

69. Perhaps especially *Smithson v Hamilton* (n 5) and *Breadner v Granville-Grossman* (n 13).

70. *McPhail v Doulton* (n 7).

71. *Ibid* 449.

72. *Ibid*.

In *Re Hay's Settlement Trusts*,⁷³ Sir Robert Megarry V-C held that a trustee holding a power must exercise it 'in a responsible manner'.⁷⁴ This means that:

the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments.⁷⁵

This statement was adopted by Mervyn Davies J in *Turner v Turner*,⁷⁶ where the trustees exercised a power of appointment without directing their minds to consider at all the nature of what they were doing. The judge held that the trustees were obliged to "consider" before appointing' and did not, and that accordingly the appointments would be set aside.⁷⁷ In essence, the case law requires a trustee holding a power of appointment to consider responsibly both whether and how to exercise it. This is a perfect fit for the 'weak' conception of the *Re Hastings-Bass* rule, which requires trustees to act responsibly in exercising powers by taking into account matters which would appear to a responsible trustee to be relevant. The natural doctrinal home of the 'weak' *Re Hastings-Bass* rule is in the trustee's duty responsibly to consider exercising, and how to exercise, a power. This duty to consider exercising the power is at the heart of the case law on the validity of discretionary trusts and powers. In *McPhail*, Lord Wilberforce implicitly took the view that it was the nature of the trustees' duties which determined the correct certainty of objects test:⁷⁸ a trust can only be valid if it is capable of execution

by its trustees⁷⁹ and the court.⁸⁰ Accordingly, some degree of meaningful effect must be able to be given to this duty. It follows that there should be consequences if the trustees fail to comply with this duty and therefore that the beneficiaries must be able to enforce the duty against a recalcitrant trustee.⁸¹ It does not necessarily follow that this should result in the validity of the appointment being called into question rather than mere personal liability attaching, although, as Nolan demonstrates, it is commonly the case that decisions by trustees made in breach of trust are invalid.⁸² But if the *Re Hastings-Bass* rule is not grounded in the breach by a trustee of the duty to consider, then it does not appear that the duty to consider has any practical effect; or at any rate, there are no reported decisions (other than *Re Hastings-Bass* cases and closely related cases) in which the duty to consider is put in issue. And if the *Re Hastings-Bass* rule were truly oriented around results rather than proper decision-making, it would be a very poor fit with the duty to consider, since trustees could consider all matters responsibly but nevertheless fail to achieve a particular result; or could fail to consider any relevant matter but still achieve the intended result. If the *Re Hastings-Bass* rule is grounded in the duty to consider exposed in *McPhail*, *Re Hay's Settlement Trusts* and *Turner v Turner* then both the obligation responsibly to consider the circumstances and the need for a breach of trust by the trustees are correctly seen as inevitable features of the doctrine. The invalidity of the exercise of the power arises from its exercise in breach of the duty to consider.

73. *Re Hay's Settlement Trusts* [1982] 1 WLR 202 (Ch).

74. *Ibid* 209.

75. *Ibid* 210.

76. *Turner v Turner* [1984] Ch 100 (Ch).

77. *Ibid* 109–111.

78. 'But just as, in the case of a power, it is possible to underestimate the fiduciary obligation of the trustee to whom it is given, so, in the case of a trust (trust power), the danger lies in overstating what the trustee requires to know or to inquire into before he can properly execute his trust.' *McPhail v Doulton* (n 7) 449 (Lord Wilberforce).

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

80. The dispute in *McPhail* focused in part on whether it was necessary for the court to be able to order equal division of the fund in discretionary trust cases. But the view that the court should be able to control the operation of the trust was not challenged: *McPhail v Doulton* (n 7) 451 (Lord Wilberforce).

81. This article adopts an avowedly Hohfeldian analysis of trustees' duties. See WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 Yale LJ 710. For an approach which does not accept that all duties of trustees are Hohfeldian see: JW Harris, 'Trust, Power and Duty' (1971) 87 LQR 31, 47–63.

82. R Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 316–323.

If the Re Hastings-Bass rule is not grounded in the breach by a trustee of the duty to consider, then it does not appear that the duty to consider has any practical effect

The restriction of the weak view to a duty of 'responsible consideration', rather than consideration of every conceivably relevant matter, is also mandated by this line of cases. In *McPhail* Lord Wilberforce makes clear that the trustee of a discretionary trust would not be required to consider every possible object of the discretion.⁸³ Given the effective assimilation of discretionary trusts and powers held by trustees in *McPhail* it would be surprising if this were not also true of the duty to consider in relation to a power of appointment held by a trustee. If the weak view of *Re Hastings-Bass* were adopted without any limitation on the obligation to take relevant matters into account, it would be possible for a beneficiary to have the exercise of a power of appointment by a trustee set aside on the basis that some characteristic of a particular object was factually relevant. For example, a beneficiary might argue that the trustees acted on the basis that no object of the power was in particular financial need, having considered the circumstances of those objects close to hand. If they could show that some remoter object did have such need, and that the policy or practice of the trustees was such that this would have been likely to affect their decision, then the exercise of the power could be set aside under the *Re Hastings-Bass* rule. But the consequences of such an approach to the 'weak' rule prove to be impermissible. On the view adopted here that the duty to consider the exercise of the power is

the basis of the *Re Hastings-Bass* rule, and that it requires a breach of that duty, to allow the *Re Hastings-Bass* rule to be invoked in the circumstances described would be to imply that the trustees had breached their duty to consider the exercise of the power. The breach would consist in failing to take into account the financial situation of the remote object. But it is clear from *McPhail* that the trustees do *not* have a duty to consider every object,⁸⁴ and that this may not even be possible.⁸⁵ This conundrum is avoided when the 'weak' rule is put in the terms argued for here, of the responsible consideration mentioned in *McPhail* itself⁸⁶ on the basis of which the trustees are under a duty to consider those matters which a responsible trustee would consider. On the authority of *McPhail* such matters would not necessarily include the identity and interests of all objects of the power.⁸⁷

Finally, the rejection of the 'strong' approach can be seen in the importance attached in these cases to the ability of the court to supervise trustees. In *McPhail* Lord Wilberforce assumes that 'the test of validity is whether the trust can be executed by the court'⁸⁸ in order to consider whether it is further necessary that the court be able to order equal division of the trust fund if the trustees refuse to act. Lord Hodson and Lord Guest's dissents are firmly grounded⁸⁹ in Lord Eldon's statement in *Morice v Bishop of Durham* that:

As it is a maxim, that the execution of a trust shall be under the controul of the court, it must be of such a nature, that is can be under that controul; so that the administration of it can be renewed by the court.⁹⁰

83. Given the decision in *McPhail* that there is no requirement that the trustees should be able to make a 'complete list' of beneficiaries (*McPhail v Doulton* (n 7) 456) it would not in any case be practically possible where the trust was valid on the 'is or is not' test but no complete list could be made.

84. And the settlor would in all likelihood not expect that the trustees would consider every object: Y Grbich, 'Baden: Awakening the Conceptually Moribund Trust' (1974) 37 MLR 643, 647. Harris takes this further by arguing that the very existence of the duty to consider is based on the settlor's intention that the trustee should consider whether and how to exercise a power granted to him: Harris (n 81) 51–52.

85. See n 83.

86. *McPhail v Doulton* (n 7) 449.

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

88. *McPhail v Doulton* (n 7) 451.

89. *Ibid* 440, 443, 446.

90. *Morice v Bishop of Durham* (1805) 10 Ves Jun 522, 539; 32 ER 947, 954.

Whilst the precise implications of this view are in dispute in *McPhail*,⁹¹ the elementary principle that the court must be able to control the trust and trustees is not.⁹² In *Re Hay* it is made clear that fiduciary holders of powers are also subject to this requirement of control, although the extent of the control is necessarily more limited, since the court cannot order the exercise of the power (although it can replace the trustee, or order him to do his duty).⁹³ If the 'strong' approach to the *Re Hastings-Bass* rule were to be adopted, such that the exercise of a power could be invalidated by its unforeseen outcome, this would create serious difficulties for the court in exercising its supervision and control over the trustees. In particular, the trustees may wish to seek the court's approval for the exercise of a power of appointment in a particular fashion.⁹⁴ If the court approves the exercise of the power, then the trustee is protected from any challenge to his action in accordance with the court's approval.⁹⁵ But if the exercise of the power produced an unintended result, unforeseen by trustee or court, then on the 'strong' view of *Re Hastings-Bass* it is invalid. There is no authority on this precise situation, but the logical alternatives are either that the appointment is invalid, and therefore the court's approval (and therefore also the value of the process of trustees seeking the court's approval) is undermined; or, more likely, the appointment is valid because approved by the court, but the court is then in the position of having rendered valid an appointment which in the natural course of things ought to have been invalid. This outcome may satisfy the trustees in the instant case, but it distorts entirely the

process of seeking the court's approval. The court cannot generally consent on behalf of beneficiaries to trustees acting outside their powers or in breach of their duties⁹⁶ and it will not knowingly permit the trustees to make an invalid exercise of a power.⁹⁷ Rather, it determines how the trustees ought to act in order to comply with their duties. The difficulty therefore is that the 'strong' approach leaves the court with no way of properly exercising this jurisdiction to approve trustees' actions. Since there is no way to determine conclusively in advance of exercising a power whether it will produce the intended result, there is no way in which the court can rule out the possibility of invalidity based on matters which only become known afterwards. A similar approach can be taken to the 'unlimited weak' view, of requiring all factually relevant matters to be taken into account. If this were the case, it would be impossible for the court to know whether all such matters had been taken into account and accordingly whether approval ought to be denied. If the court is not able to give or withhold approval to the proposed exercise of a power by a trustee, because the *Re Hastings-Bass* rule makes the validity of the exercise highly unpredictable, then the court is not able adequately to supervise and control the performance by the trustee of his duties. The court cannot order the trustee to do his duty⁹⁸ if it cannot identify with certainty what his duty is. The 'weak' approach, on the other hand, causes no such difficulties of supervision and control. The court is able to ascertain whether the trustees have acted responsibly in taking matters which appear to be relevant into account, and can verify

91. Lord Wilberforce, Lord Reid, and Viscount Dilhorne took the view that the trust could be sufficiently controlled without there being any possibility of ordering equal division of the fund, since the court could replace the trustees, or have a scheme of distribution drawn up by the beneficiaries (*McPhail v Doulton* (n 7) 457). Lord Hodson and Lord Guest (dissenting) argued that there could only be proper control if a complete list of beneficiaries could be drawn up (*McPhail v Doulton* (n 7) 440, 443, 446).

92. And this requirement of control is seen in the other cases, *inter alia*: *Re Gulbenkian's Settlement Trusts* (n 79) 524; *Re Manisty's Settlement* [1974] Ch 17 (Ch) 27–28; *Re Hay's Settlement Trusts* (n 73) 208.

93. *Re Hay's Settlement Trusts* (n 73) 208. See also *Re Manisty's Settlement* *ibid*.

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

95. *Halsbury's Laws of England* 2007 reissue, vol 48 [1057] and cases cited at n 7 thereto: *Underwood v Hatton* (1842) 5 Beav 36; *Foster v M'Mahon* (1847) 11 I Eq R 287; *Rowland v Morgan* (1848) 13 Jur 23; *Smith v Smith* (1861) 1 Drew & Sm 384; *Re Earl of Radnor's Will Trusts* (1890) 45 Ch D 402.

96. Except where authorized to do so by statute eg Variation of Trusts Act 1958.

97. *Re Pilkington's Will Trusts* (n 94). Discussing *Re Pilkington* in *Re Hastings-Bass*, Buckley LJ stated that 'in *Re Pilkington's Will Trusts* the trustees were seeking the directions of the court before taking action. The court would of course not authorize trustees to set up a sub-settlement many of the trusts of which would be void'. *Re Hastings-Bass* (n 1) 38.

98. As envisaged by Templeman J in *Re Manisty's Settlement* (n 92).

that the trustee has omitted consideration of no matter which a responsible trustee would, in the circumstances, have considered. It can accordingly give approval to the exercise of the power in the certain knowledge that the rule in *Re Hastings-Bass* will not cast doubt on that approval.

The court cannot order the trustee to do his duty if it cannot identify with certainty what his duty is

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

Just as these important connections between the *McPhail v Douulton* case law and the nature of the *Re Hastings-Bass* rule have not been identified or explored in the *Re Hastings-Bass* cases, so too has been largely omitted any consideration of another critically important decision of the House of Lords, in *Gisborne v Gisborne*.⁹⁹ The doctrine which has developed from *Gisborne* imposes important limits on the courts' ability to interfere with the exercise of powers and discretions by trustees. Whilst the 'weak' approach to *Re Hastings-Bass* is consistent with those limits, the strong approach must be rejected as fundamentally incompatible with the *Gisborne* principle.

In *Gisborne v Gisborne* a testator left his personal property on trust, and granted to his trustees an 'uncontrollable authority'¹⁰⁰ to decide what proportion of the trust income should be paid to the testator's wife for her maintenance.¹⁰¹ A dispute arose as to the amount to be paid to the wife, and the House of Lords held unanimously that the court should not

interfere with the decision of the trustees. Lord Cairns LC said that:

Their discretion and authority, always supposing that there is no *mala fides* with regard to its exercise, is to be without any check or control from any superior tribunal.¹⁰²

Lord Penzance noted that whilst the trustees were required to support the testator's wife, it was for the trustees, and not the court, to decide how to achieve the prescribed end.¹⁰³ The conclusion that the courts will not interfere with the exercise of powers or discretions by trustees unless there is a problem with the decision-making process itself is confirmed by a long line of cases following *Gisborne*. In *Re Beloved Wilkes*.¹⁰⁴ Lord Truro LC held that since the settlor has put the execution of the trust in the hands of the trustees, not the court, the court will limit its supervision to

the question of the honesty, integrity and fairness with which the deliberation has been conducted.¹⁰⁵

In *Tabor v Brooks*,¹⁰⁶ Sir Richard Malins V-C held that the court would intervene only in cases of *mala fides*; a discretion fairly and honestly exercised would not be impugned by the court.¹⁰⁷ This was a particularly strong case for the application of the *Gisborne* rule, since the trustees appeared to be acting unfairly and unreasonably by paying the available sum of £300 per annum to Mr Tabor, rather than splitting it between Mr and Mrs Tabor, apparently in order to pressure her to resume living with him,¹⁰⁸ even though the judge found that he was 'of such confirmed drunken habits as to justify his wife in not

99. *Gisborne v Gisborne* (n 8).

100. *Ibid* 302.

101. *Ibid* 302.

102. *Ibid* 305.

103. *Ibid* 309.

104. *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 42 ER 330.

105. *Re Beloved Wilkes's Charity* (1851) 3 Mac & G 440, 448; 42 ER 330, 334.

106. *Tabor v Brooks* (1878–79) LR 10 Ch D 273 (Ch).

107. *Ibid* 278.

108. *Ibid* 277.

continuing to live with him'.¹⁰⁹ In spite of this, the judge considered himself bound by *Gisborne* to allow the trustees' decision to stand.

There are many more recent statements of the *Gisborne* doctrine.¹¹⁰ What all have in common is the clear underlying principle that where a power or discretion has been conferred upon a trustee, the court will not interfere with its exercise in good faith by the trustee. As Cullity has convincingly argued, the *Gisborne* doctrine is not limited to powers expressed to be 'uncontrollable',¹¹¹ but rather is concerned with the express conferral of a discretion which permits the trustees to act without reference to rules or standards which would otherwise govern the exercise of the discretion.¹¹² In the context of a dispositive power, its very grant to trustees confers upon them a discretion to prefer the interests of the objects of the power to those of the default beneficiaries, and to prefer the interests of some objects to others.¹¹³ This reflects an important distinction between allowing trustees to make a judgment and to make a choice.¹¹⁴ Where the settlor confers on his trustees the authority to make choices, it is not for the court to deny the trustees' decisions.

Where a power or discretion has been conferred upon a trustee, the court will not interfere with its exercise in good faith by the trustee

This conclusion is of enormous importance in analysing the legitimacy of the various approaches to

Re Hastings-Bass. In *Green GLG Trust* Birt, Deputy Bailiff, applying in Jersey the English law on *Re Hastings-Bass* concluded that the rule is:

but a manifestation of the general principle that a trustee must act in good faith, responsibly and reasonably.¹¹⁵

This was premised on Lord Reid's view in the Scottish case of *Board of Management for Dundee General Hospitals v Bell's Trustees* that the court will only interfere in trustee decision-making where the trustees:

considered the wrong question... did not really apply their minds to it... [or]... did not act honestly or in good faith.¹¹⁶

The same approach was taken by Lord Normand, who held that trustees' decisions could only be challenged where they acted unreasonably—and if they perform their duty 'carefully, seriously, and impartially' then they do not act unreasonably.¹¹⁷

The statement of the Deputy Bailiff in *Re Green GLG Trust* may overestimate the significance of the *Gisborne* principle, since it has already been shown how the *Re Hastings-Bass* rule depends upon the trustees' duty to consider. But it also shows that it is easy to underestimate the importance of the *Gisborne* doctrine in the *Re Hastings-Bass* context. It follows from the foregoing discussion of *Gisborne* that the exercise by trustees of a power is only challengeable where the

109. *Ibid.*

110. See *inter alia*: *Tempest v Lord Camoys* (1882) LR 21 Ch D 571 (CA) 578; *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78, 92 (Lord Reid) 94 (Lord Tucker); *Re Allen-Meyrick's Will Trusts* [1966] 1 WLR 499 (Ch) 503; *Re Londonderry's Settlement* [1965] Ch 918 (CA) 936; *Sieff v Fox* (n 4) [37].

111. M Cullity, 'Judicial Control of Trustees' Discretions' (1975) 25 UTLJ 99, 113.

112. *Ibid.* 114.

113. In the context of an administrative power expressly granted, no such implication is possible, so a secondary issue arises as to the extent to which the terms of the grant of the power exclude duties to exercise the power in a particular manner or according to prescribed rules. See *ibid.* 107–112; Law Commission, 'Trustee Exemption Clauses' (Law Com No 301 Cm 6874, 2006) [5.81].

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

115. *Re Green GLG Trust* [2002] JLR 571 (Royal Ct of Jersey) [25].

116. *Board of Management v Bell's Trustees* (n 111) 92.

117. *Ibid.* 87.

trustees 'did not act honestly or in good faith'¹¹⁸ or where the 'honesty, integrity, and fairness'¹¹⁹ of the decision-making is impugned. As such, it is difficult to see how many *Re Hastings-Bass* challenges could succeed, since in none of the cases are the trustees alleged to have acted in bad faith or dishonestly in making the challenged decision. The answer is that *mala fides* in this context has a wider meaning than simply dishonesty. Whilst dishonesty includes deliberately acting otherwise than in the beneficiaries' interests,¹²⁰ in the context of a dispositive power the trustees are entitled to prefer some beneficiaries over others. Accordingly their duty is to carry out the purpose for which the settlor conferred the power upon them¹²¹ and they act dishonestly if they deliberately act contrary to this purpose.¹²² But Cullity has argued for a still wider approach, which brings not only improper purposes, but also unreasonable decision-making and failure properly to consider within the scope of the *mala fides* exception.¹²³

Most important, given the explanation of the *Hastings-Bass* rule as premised on the duty of consideration, is the extent to which 'failure to consider' can constitute *mala fides* for this purpose. Cullity argues that where the donee of a power is a trustee, he must

take into account all relevant matters which the donor might reasonably have expected the trustee to consider.¹²⁴

However, Cullity further notes the limitation previously described, that in the case of a discretionary trust or power with a large class of objects, the trustee will not be required to consider all of them.¹²⁵ The conclusion for the rule in *Re Hastings-Bass* is

therefore that as long the trustee acts as described by Lord Normand and Lord Reid in *Board of Management for Dundee General Hospitals*¹²⁶ and responsibly considers whether and how to exercise a power, the exercise should be immune from challenge. A simple mistake, for instance, does not invalidate their decision-making.¹²⁷

What then of the various models of the *Re Hastings-Bass* rule? The 'weak' model, which requires trustees to consider responsibly when and how to exercise a power conferred on them, and which permits the exercise of a power to be invalidated only when such responsible consideration is lacking, is partly premised upon the *Gisborne* doctrine, and is a perfect fit with its concerns. Since the *mala fides* exception to *Gisborne* extends to failure to consider only in so far as the trustees fail to consider matters which the settlor could reasonably have expected them to consider,¹²⁸ it is clear that the 'unlimited' weak approach is impermissible. It would allow the court to interfere with the exercise of a power on the basis that the trustees failed to take into account factually relevant matters even though the trustees acted honestly and fairly, and that on the view proposed by Cullity and adopted here, this failure would not amount to *mala fides*. Thus to invalidate the exercise of a power on this basis would be contrary to the doctrine in *Gisborne* and *Dundee Hospitals*. The same analysis applies *a fortiori* to the 'strong' approach. If the trustees' decision can be retrospectively invalidated because, although it was made with all possible propriety and responsibility and with no failure to consider relevant matters, it produced an unintended result, then the *Gisborne* doctrine is wholly denied, since no question of *mala fides*

118. *Ibid* 92 (Lord Reid).

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

120. *Armitage v Nurse* [1998] Ch 241 (CA) 251.

121. L Smith, 'The Motive, Not the Deed' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis UK, London 2003) 69–70.

122. And commit a fraud on the power: *Vatcher v Paull* [1915] AC 372 (PC) 378.

123. Cullity (n 112) 114–17.

124. *Ibid* 116. This statement is based on the Canadian case of *Re Sayers and Philip* (1973) 38 DLR (3d) 602 (Sask CA) 606 (Hall JA); and the Australian case of *Cock v Smith* (1909) 9 CLR 773 (HCA) 798 (Griffith CJ).

125. *Ibid* 116 n 80. See text to n 84, above.

126. *Board of Management v Bell's Trustees* (n 111).

127. *Ibid* 87 (Lord Normand).

128. See text to n 124, above.

arises. Accordingly, the *Gisborne* doctrine provides yet another reason to prefer the weak approach to the *Re Hastings-Bass* rule, and as a decision of the House of Lords gives a degree of legitimacy to the necessary rejection of some first instance decisions on *Re Hastings-Bass* which simply cannot be reconciled with the weak approach.

Judicial support for the ‘strong’ rule

It would, however, be a mistake to see the cases as speaking with one voice. Whilst many of the most significant cases on the *Re Hastings-Bass* rule¹²⁹ do undoubtedly point to the ‘weak’ approach,¹³⁰ there are also significant judicial decisions which point in the opposite direction and due respect must be accorded to these. Whilst, in the light of the arguments made here on the consequences of the doctrines in *McPhail v Doulton*¹³¹ and *Gisborne v Gisborne*,¹³² it might be legitimate simply to treat these cases as wrongly decided, it is more useful to understand why they were decided as they were and whether, in spite of their apparent support for the ‘strong’ rule, they can properly be analysed as ‘weak’ rule decisions.

Re Hastings-Bass and Re Abrahams’ Will Trusts

Both of these cases could be seen as supporting the ‘strong’ rule, because on their face each is concerned with whether the trustees’ actions—purported exercises of the statutory power of advancement¹³³—brought about the outcome intended by the trustees.¹³⁴ If they did not, the purported advancements would be invalid.¹³⁵

But correctly understood these cases are not really cases on the *Re Hastings-Bass* rule at all—which is therefore entirely inaptly named. Rather, *Re Hastings-Bass* simply decided: first, that an exercise of the power of advancement is *ultra vires* section 32 of the Trustee Act 1925 if the trustees do not consider the exercise of the power to be for the benefit of the beneficiary;¹³⁶ secondly, that where some of the trusts purported to be created by the exercise of the power are void for perpetuity, this raises the question of whether the trustees consider the remaining, putatively valid, trusts to be beneficial; thirdly, that in *Re Hastings-Bass* there is no doubt that either the trustees did consider the modified exercise of the power¹³⁷ to be for the beneficiary’s benefit, or that if they did not consider it they could not, had they considered it, reasonably have reached any other conclusion. All the discussion of whether the trustees would have so acted had they known the true legal consequences of the exercise of the power (ie had they appreciated the effect of the rule against perpetuities¹³⁸) is directed to the section 32 issue, because it goes to whether the ‘benefit’ requirement is satisfied. If it is not, the trustees’ actions are not within the section 32 power.¹³⁹

*Re Abrahams’ WT*¹⁴⁰ is very similar. In *Re Hastings-Bass* it was not viewed as authority for anything other than the consequences for the section 32 issue of the rule against perpetuity causing the effects of the exercise of the power to have been so drastically altered that:

the trustees cannot reasonably be supposed to have addressed their minds to the questions relevant to the true effect of the transaction.¹⁴¹

129. ‘Significant’ in that there was both argument and reasoned judicial consideration on *Re Hastings-Bass* issues.

130. See n 13, above.

131. *McPhail v Doulton* (n 7).

132. *Gisborne v Gisborne* (n 8).

133. Trustee Act 1925, s 32.

134. *Re Abrahams’ Will Trusts* [1969] 1 Ch 463 (Ch) 485; *Re Hastings-Bass* (n 1) 39–40.

135. *Re Abrahams’ Will Trusts*, 485.

136. See A Molloy, ‘Hastings-Bass: The True and the Spurious’ (2008) 14 T&T 26, 47–48; Molloy (n 2) 203.

137. That is, the true effect of the exercise of the power of advancement, taking into account the invalidity of some of the trusts for perpetuity.

138. *Re Hastings-Bass* (n 1) 40.

139. E Nugee, ‘Re Hastings-Bass Again—Void or Voidable? And Further Reflections’ [2003] PCB 173, 183.

140. *Re Abrahams’ Will Trusts* (n 135).

141. *Re Hastings-Bass* (n 1) 41.

The effect of the perpetuity problem was ‘wholly to alter the character of the settlement’¹⁴² and the modified advancement was simply not beneficial to the supposed beneficiaries, and so was not within the section 32 power.¹⁴³

Green v Cobham

Even without the support of *Re Hastings-Bass*¹⁴⁴ and *Re Abrahams’ WT*,¹⁴⁵ there is some apparently significant support in the case law for the ‘strong’ *Re Hastings-Bass* rule. The first such case is *Green v Cobham*¹⁴⁶ in which the claimant trustees sought a declaration that their exercise of a power to appoint funds to the testator’s granddaughter, Camilla, on accumulation and maintenance trusts was void, on the basis that the appointment gave rise to an entirely unforeseen liability to capital gains tax, that the trustees would not have exercised the power had they appreciated the tax consequences of doing so, and that in these circumstances the *Re Hastings-Bass* rule applied to render void the purported exercise of the power.¹⁴⁷ Parker J concluded that this was a case where capital gains tax was not considered at all, rather than one where the trustees received incorrect advice¹⁴⁸ and noted that:

everyone concerned proceeded throughout on the footing that the two accumulation and maintenance settlements would fall to be treated as separate settlements for capital gains tax purposes . . .¹⁴⁹

That in fact the two settlements in issue would be treated as a single settlement for tax purposes was the cause of the unforeseen tax liability.¹⁵⁰ However, on

the evidence before the court it appears in substance more likely that capital gains tax was a matter always under consideration, but that the trustees simply failed to appreciate the legal possibility of Camilla’s appointment having capital gains tax consequences for the fund.¹⁵¹ So in substance there was no failure to consider capital gains tax at all, but rather a mere failure to appreciate the legal consequences of the appointment from a capital gains tax perspective. Counsel for the trustees made the then novel claim that the rule in *Re Hastings-Bass* applied to cases where the trustees failed to understand the legal consequences of their actions, even though they understood what they were doing. To bring this argument within the ‘weak’ rule would require saying that the trustees were required to take into account, in deciding whether to appoint, the true capital gains tax consequences consequences of making the appointment. This would collapse the supposed ‘weak’ rule into the ‘strong’ rule, since it would invalidate the transaction on the basis that its outcome was not what the trustees intended. Hence *Green v Cobham* looks at first glance very much like a ‘strong rule’ case.

There are serious difficulties, however, with that view. As well as the usual problem in these cases of there being no party opposed to the relief sought to mount a real argument against it,¹⁵² the reasoning of the judgment proceeded on the foundation of an unwise concession by counsel, that:

before executing the 1990 deed the trustees of the will trust ought to have taken into account the possible capital gains tax consequences of the contemplated appointment for the benefit of Camilla.¹⁵³

142. *Re Abrahams’ Will Trusts* (n 135) 485.

143. *Ibid* 484–5.

144. *Re Hastings-Bass* (n 1).

145. *Re Abrahams’ Will Trusts* (n 135).

146. *Green v Cobham* (n 22).

147. *Ibid* 822–6.

148. *Ibid* 824.

149. *Ibid*.

150. *Ibid*.

151. *Ibid* 825.

152. *Ibid*. Molloy correctly identifies as a major problem in the whole line of *Re Hastings-Bass* cases ‘a routine lack of critical opposing submissions’: Molloy (n 2) 218.

153. *Green v Cobham* (n 22) 827.

Once it is accepted that the trustees had a duty to take into account the capital gains tax consequences of the appointment and that they did not, then the case is all but concluded, without proper argument on the crucial issue. The case was then argued on the issue of whether it could be shown that the trustees would have acted differently had they taken the tax consequences into account.¹⁵⁴ But this argument was surely doomed to failure, since it was virtually certain that the trustees would have acted differently. No trustee would knowingly incur such a tax liability where it is avoidable. The real counter-argument would of course have been that the *Re Hastings-Bass* rule did not bite on these facts, because it had not been shown that the trustees had failed to take into account a relevant consideration, judging 'relevant consideration' by the standard of the 'weak' rule. But this was not put to the court.

Of course, if Parker J's doubtful finding of fact, that the trustees totally failed to consider the possibility of capital gains tax,¹⁵⁵ is accepted, then *Green* can be explained simply as a 'weak' rule case. A responsible trustee might be unaware of some of the subtleties of tax law¹⁵⁶ but even the least capable and diligent would surely appreciate that the exercise of a power to transfer assets out of the trust fund might give rise to tax consequences, and that such consequences should be ascertained and considered in the decision-making process. Thus, the failure to consider even the possibility of capital gains tax issues would be a breach of trust which would invalidate the appointment on a purely 'weak' rule basis.

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

Eighteen months after Parker J's decision in *Green* it fell to Patten J to apply that decision in the context of a *Re Hastings-Bass* claim by trustees who exercised a power of appointment during the 1997–98 fiscal year, after receiving clear and correct legal advice that under no circumstances should they make the appointment until the 1998–99 fiscal year had begun. The consequence of this failure was a capital gains tax liability of £1.2 million.¹⁵⁷ Patten J held that the trustees had failed to take into account the fiscal consequences of making the appointment before the new fiscal year began¹⁵⁸ and that *Green v Cobham* is authority that when trustees decide to exercise a power, they must have regard to the fiscal consequences of the exercise. If they do not, and would not have made the appointment if they had, the purported exercise of the power is void.¹⁵⁹ This simply does not work as a 'weak' rule case. The trustees acted responsibly and properly, in that when they executed the deed of appointment on 3rd April 1998, they did so in reliance on their solicitor's advice to execute the deed of appointment then. This advice was erroneous but the trustees acted on it believing that they were doing what was necessary to make the tax saving scheme work. They undoubtedly took fiscal matters into account in making their decision, and there was no flaw in the decision-making process. On the 'weak' rule, the appointment should be unimpeachable. Yet the trustees' *Re Hastings-Bass* claim succeeded, and the appointment was held to be invalid.¹⁶⁰

154. *Ibid* 827.

155. *Ibid* 824.

156. See text to n 25 and following.

157. *Abacus Trust Company (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] STC 1344 (Ch) [1]–[8].

158. *Ibid* [15].

159. *Green v Cobham* (n 22) 828.

160. *Abacus Trust Co v NSPCC* (n 158) [19].

The 'strong' rule explains the outcome simply. The trustees acted on the basis that they were engaged in successful tax mitigation, whereas the true consequence of the trustees' decision to execute the deed of appointment on 3rd April was to bring about a liability to capital gains tax of £1.2 million.¹⁶¹ On the 'strong' rule approach, the appointment should be invalid, as Patten J found it to be.

It may therefore be that that to support the 'weak' rule requires this case to be treated as wrongly decided. But it is possible to make some criticisms of the case as authority. First, it seems to follow *Green v Cobham*¹⁶² without detailed consideration¹⁶³ and without reference to any argument that *Green* went well beyond both *Re Hastings-Bass*¹⁶⁴ and *Mettoy Pension Trustees Ltd v Evans*¹⁶⁵ without proper consideration. Secondly, Patten J takes the view that once it is established that a matter is 'relevant', then the *Re Hastings-Bass* rule is engaged by a failure to consider it.¹⁶⁶ This inevitably leads to the conclusion in the case, without mandating the 'weak' or 'strong' view, since neither approach necessarily requires every factually relevant issue to be taken into account. By overlooking the need for reasoned analysis of what the trustees are obliged to take into account, Patten J renders the outcome a foregone conclusion. Thirdly, this is a troubling case because it simply does not look like a typical *Re Hastings-Bass* case. The trustees had considered the tax issue, and the attendant legal issues, in some detail, with the benefit of advice from eminent counsel.¹⁶⁷ To some degree therefore the trustees had considered all relevant matters and formed an entirely proper conclusion—that they should not make the appointment to the NSPCC before 6th April 1998. Yet they went

ahead with it anyway. So there is no factual matter which they ought to have considered but did not, to invoke the weak rule, nor did their action produced an unintended, or even unanticipated, outcome, to invoke the strong rule. Rather this looks more like either a straightforward mistake, based on having forgotten what they had previously known (as was the case in *Lady Hood of Avalon v Mackinnon*¹⁶⁸) or a *Turner v Turner* case of executing the deed simply on the instructions of another (in this case the solicitor, Mr Jenkins) without giving independent consideration to what they were doing.¹⁶⁹ Either could potentially justifying setting aside the appointment,¹⁷⁰ so the outcome may not necessarily be in doubt. But it makes it difficult to argue that *Abacus Trust Co v NSPCC* is necessarily authority for the strong approach, when that approach so ill fits the circumstances of the case.

Burrell v Burrell

In *Burrell v Burrell*¹⁷¹ shares in a family company, MBE, were held on accumulation and maintenance trusts for Dennis Burrell's son, Charles. Concerned that Charles would receive too much wealth on his 18th birthday, the trustees (of which Dennis was one) took legal advice on the possibility of exercising an overriding power of appointment to settle the fund on discretionary trusts until Charles was 35 (at which time he had to become absolutely entitled under the terms of the original trust).¹⁷² Both Dennis Burrell as trustee, and Mrs Gardner and Miss Shaw, solicitors of Allen & Overy consulted on this matter, addressed their minds to the question of inheritance tax liability and whether the MBE shares qualified for business

161. *Ibid* [2].

162. *Green v Cobham* (n 22).

163. *Abacus Trust Co v NSPCC* (n 158) [16].

164. *Re Hastings-Bass* (n 1).

165. *Mettoy Pension Trustees Ltd v Evans* (n 13).

166. *Abacus Trust Co v NSPCC* (n 158) [16].

167. *Ibid* [8].

168. *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 (Ch) 484.

169. *Turner v Turner* (n 76) 110.

170. *Lady Hood of Avalon v Mackinnon* (n 169) 484; *Turner v Turner* (n 76) 111.

171. *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569.

172. *Ibid* [1]–[4].

property relief under sections 105 and 122 of the Inheritance Tax Act 1984.¹⁷³ But the solicitors and trustees were in error about the availability of business property relief; they overlooked the requirement in section 106 of the Act that the transferred property be held by the transferor for 2 years prior to the transfer.¹⁷⁴

The trustees brought a *Hastings-Bass* claim to have the exercise of the power of appointment set aside.¹⁷⁵ Mann J granted the relief sought on the basis of the trustees' evidence that they would not have exercised the power of appointment as they did had they known of the tax consequences.¹⁷⁶ Mann J considered *Green v Cobham*¹⁷⁷ and *Abacus Trust Co v NSPCC*¹⁷⁸ and held that they decided that a failure to take account of tax consequences could lead to the application of the *Re Hastings-Bass* principle.¹⁷⁹ This appears to work only as an application of the 'strong' rule. On the weak approach one might say that Mr Burrell and his co-trustee Mrs Sharman did what they were supposed to do. Mr Burrell was aware that there might be tax implications, so he took the advice of a reputable firm of solicitors. He followed their advice. This advice turned out to be mistaken; Mann J called it negligent.¹⁸⁰ But there was no identifiable matter which the trustees ought to have taken into account but did not—unless the true legal consequences of the transaction as they subsequently emerged count, which simply collapses the 'weak' rule into the 'strong' rule in any case.

However, there are two reasons for rejecting *Burrell* as authority for the 'strong' rule. First, it relies on an inaccurate understanding of *Green v Cobham*¹⁸¹ and

Abacus Trust v NSPCC.¹⁸² Mann J said that *Green* was a case:

which, like the case before me, was one in which the trustees were said to have failed to take proper account of the tax consequences of their acts.¹⁸³

The vagueness of the words 'failed to take proper account of the tax consequences' conceals an important distinction. In *Green* the trustees failed to have any regard to tax issues at all—they were wholly overlooked.¹⁸⁴ Whereas in *Burrell* the tax issues were recognized and considered¹⁸⁵ but a mistake was made as to the technicalities of inheritance tax law.¹⁸⁶ From the perspective of the 'weak' rule, this is an important distinction, since a total failure to consider tax issues looks like a failure on the part of the trustees to take into account matters which a responsible trustee would have considered, whereas considering the tax issues and then relying on legal advice which turns out to have been erroneous may have been a perfectly proper course of action for the trustees to take. Furthermore, Mann J held that *Abacus Trust Co v NSPCC* was

clear authority... for the proposition that trustees must consider the fiscal consequences of their acts.¹⁸⁷

But once again, *Abacus Trust Co v NSPCC* was a very different case to *Burrell*. The trustees did consider the fiscal consequences. They acted as they did following legal advice, in the belief that they were acting as required to make the tax saving scheme work.

173. *Ibid* [3]–[5].

174. *Ibid* [9].

175. *Ibid* [13].

176. *Ibid* [12].

177. *Green v Cobham* (n 22).

178. *Abacus Trust Co v NSPCC* (n 158).

179. *Burrell v Burrell* (n 172) [18]–[19].

180. *Ibid* [11].

181. *Green v Cobham* (n 22).

182. *Abacus Trust Co v NSPCC* (n 158).

183. *Burrell v Burrell* (n 172) [17].

184. *Green v Cobham* (n 22) 824.

185. *Burrell v Burrell* (n 172) [5], [11].

186. *Ibid* [9], [11].

187. *Ibid* [19].

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

Secondly, it may be that *Burrell* can in any event be analysed as a ‘weak’ rule case. Mann J held that Mr Burrell knew that there was a tax issue here but:

failed to give clear instructions to his solicitors (or anyone else) to consider the matter, and failed to appreciate that he had not asked for, and was not in possession of, a full picture of the tax consequences of what was proposed.¹⁸⁸

Mrs Sharman ‘never really addressed fiscal matters; she relied on others to do so’.¹⁸⁹ Trustees who are aware that their actions may give rise to adverse tax consequences, and that it may be possible to mitigate those consequences, ought, simply as a matter of acting responsibly as a trustee, to take appropriate advice. If the trustees failed to do this—Mrs Sharman simply leaving the matter to Mr Burrell, and Mr Burrell not asking the solicitors for appropriate advice—then it may be legitimate to conclude that they failed to do what a responsible trustee would have done to ensure that they made an adequately informed decision.

Sieff v Fox

The final case is *Sieff v Fox*¹⁹⁰ in which Lloyd LJ¹⁹¹ reviewed the *Re Hastings-Bass* case law and decided

that the ‘strong’ approach represented the current law.

Under the terms of what were known as the 1971 trusts, trustees held Woburn Abbey, the ancestral home of the Dukes of Bedford, and various valuable chattels. The trustees held a discretionary power of appointment under these trusts¹⁹² with the consequence that the assets held on trust were subject to 10 yearly inheritance tax charges. Such a charge was due in 2001.¹⁹³ Despite coming to the problem too late to do anything about the 2001 charge, the trustees decided to consider how they might mitigate the future tax liabilities of the 1971 trust assets.¹⁹⁴ They took legal advice from Miss Kate Howe, a solicitor in the firm of Boodle Hatfield. Miss Howe advised, among other possible courses of action open to the trustees, that they could exercise the power of appointment in favour of the Duke’s grandson, Lord Howland, on the understanding that Lord Howland would settle the appointed property on the trusts of the already existing 1987 accumulation and maintenance trusts. Crucially, Miss Howe further advised, having sought the advice of counsel,¹⁹⁵ that ‘hold-over relief’ under section 260 of the Taxation of Chargeable Gains Act 1992 would be available, so that no capital gains tax would be payable, and there would be no inheritance tax liability either.¹⁹⁶ On the basis of this advice, the appointment was made to Lord Howland in 2001, who then assigned his interest to the 1987 trustees on the existing trusts.¹⁹⁷ The tax advice proved to be erroneous. An interaction between section 65(4) of the Inheritance Tax Act 1984 and section 260 had been overlooked, with the result that ‘hold-over relief’ was unavailable and a capital gains tax liability of around one million pounds accrued.¹⁹⁸ Unsurprisingly in the circumstances, the

188. *Ibid* [23].

189. *Ibid* [23].

190. *Sieff v Fox* (n 4).

191. Sitting as a judge of the Chancery division, but after his elevation to the Court of Appeal.

192. *Sieff v Fox* (n 4) [4].

193. *Ibid* [14].

194. *Ibid* [14].

195. *Ibid* [18].

196. *Ibid* [16].

197. *Ibid* [20].

198. *Ibid* [23]–[24].

trustees brought a claim relying on the *Re Hastings-Bass* principle, asserting that had they been aware that the 2001 appointment would give rise to this tax liability they would not have made the appointment.¹⁹⁹

Lloyd LJ carried out an extensive review of the case law, much of which was not strictly necessary for his decision in *Sieff* itself. He noted that the *Re Hastings-Bass* formulation based on:

whether the trustees took into account matters which they ought not to have done, or failed to take into account matters which they ought to have . . . respects the traditional view, that it is for the trustees to exercise the power, and to decide whether or not to do so.²⁰⁰

However, in spite of this apparent nod to the weak formulation of the rule, he went on to hold that trustees must, in exercising a power, take into account the true fiscal consequences of their action.²⁰¹ Acknowledging that the trustees ‘did in fact consider’²⁰² the fiscal consequences of the appointment, Lloyd LJ nonetheless held that ‘they failed to give proper consideration’²⁰³ because their legal advice was wrong.²⁰⁴ This necessarily leads to Lloyd LJ’s conclusion, that had the trustees had accurate advice, they would not have made the appointment. The appointment was therefore invalid.²⁰⁵

This is simply unsupportable except as a ‘strong’ rule case. The trustees did in fact, as Lloyd LJ acknowledged,²⁰⁶ carefully consider the tax consequences of the appointment. There was no criticism in the case of their choice of legal advisors, nor any suggestion that the trustees ought to have sought the directions of the court. This was simply a case of trustees acting in good faith on the strength of

erroneous legal advice, in circumstances where they had no way of knowing that the advice was erroneous, and in which any reasonable and responsible trustee would likely have acted in the same manner. Furthermore, although Lloyd LJ made repeated reference to the ‘relevant considerations’ basis for the rule,²⁰⁷ he also emphasized the requirement that when the trustee exercises a power ‘the effect of the exercise is different from that which he intended’.²⁰⁸ On the ‘weak’ approach this would simply be irrelevant. This added requirement of an unintended effect was not decisive in *Sieff*, since there was no doubt that what the trustees achieved—a huge capital gains tax liability—was unintended. But it provides additional support for the view that *Sieff* is firmly grounded in the strong approach.

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

First, in relation to the obligation of the trustees to take into account the true fiscal consequences of their decision, there is no doubt that Lloyd LJ decides that

199. *Ibid* [27].

200. *Ibid* [76].

201. *Ibid* [86].

202. *Ibid* [114].

203. *Ibid*.

204. *Ibid*.

205. *Ibid*.

206. *Ibid*.

207. *Ibid* [38], [76], [86], [114], [119].

208. *Ibid* [49].

they are so obliged.²⁰⁹ However, the only reason given for this is that ‘trustees do have regard to the fiscal treatment of the trust property’.²¹⁰ This is undoubtedly true, and it is undoubtedly proper that trustees should do this, and that in cases where tax matters arise, the trustees should be *obliged* to do this. But as Lloyd LJ himself notes

It does not follow that they need to know every detail of the tax consequences of acting as they propose²¹¹

In essence, Lloyd LJ tries to chart a very difficult course, by arguing that whilst trustees are in general obliged to take into account the true fiscal consequences of their actions, they might not be obliged fully to take account of tax matters where they are ‘too subtle and arcane’²¹² for it to be reasonable to expect that of the trustees. If this means that trustees’ decisions can be impugned for failure to consider ‘simple’ tax matters, but not ‘complex’ ones, then it is not only unprincipled, but impossible to give meaningful effect to in practice, since trustees are likely to take expert advice on tax matters and to rely on such advice, as they did in *Sieff*. Except perhaps in a truly exceptional case where the advice given to the trustees was patently incorrect, it is very difficult to see how a distinction between ‘simple’ and ‘complex’ tax matters could be relevant. If the judge meant simply that trustees must act responsibly in regard to tax matters, but do not necessarily have to get it right (albeit that getting it wrong in a simple case *might* suggest that the trustees acted irresponsibly) then he is in accordance with the ‘weak’ approach, and should have decided this case differently.

Secondly, in relation to the requirement that ‘the effect of the exercise [of the power] is different from that which [the trustees] intended’,²¹³ it is notable that again, Lloyd LJ puts great weight on the inclusion of this test in *Re Hastings-Bass*²¹⁴ itself, rather than in any of the subsequent cases. It has already been seen that *Re Hastings-Bass* is not in fact a decision on this rule at all.²¹⁵ Even if it were, its context is very peculiar since it was a case in which the central issue was whether the trustees had achieved what they intended to achieve by their actions, that is, conferring a benefit on William Hastings-Bass. But even there the Court of Appeal did not require the test to be satisfied. Rather, the *Re Hastings-Bass* rule was expressed negatively, as the proposition that:

the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless . . .²¹⁶

It does not logically follow that the court may not interfere unless the effect of the trustees’ action does not have the effect intended. Given that *Re Hastings-Bass*²¹⁷ does not mandate this requirement, that Warner J in *Mettoy Pension Trustees Ltd v Evans*²¹⁸ did not include it in his formulation of the *Re Hastings-Bass* rule, and that none of the cases after *Mettoy* until *Sieff*²¹⁹ reintroduced it, it must be questionable whether it was legitimate for Lloyd LJ to assert a requirement of unintended consequences. As such, it might be thought that the analysis in *Sieff v Fox* is less compelling than it might at first glance appear, and accordingly that less weight should be accorded to it as authority for the ‘strong’ approach.

209. *Ibid* [86].

210. *Ibid*.

211. *Ibid*.

212. *Ibid*.

213. *Ibid* [49].

214. *Re Hastings-Bass* (n 1).

215. See text to n 137 and following.

216. *Re Hastings-Bass* (n 1) 41.

217. *Ibid*.

218. *Mettoy Pension Trustees Ltd v Evans* (n 13).

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

Consequences of adopting the 'weak' rule

In the light of the limitations of these cases which purportedly support the 'strong' approach, the 'weak' model of the *Re Hastings-Bass* rule should now be considered to be the correct one. Not only is it consistent with most of the *Re Hastings-Bass* case law (including some of the cases which at first sight appear to support the 'strong rule'²²⁰), but it is also consistent with important principles of trust law of much greater longevity, exemplified in *McPhail v Doulton*²²¹ and *Gisborne v Gisborne*.²²² *Sieff v Fox*,²²³ as important a case as it is, simply cannot bear the weight of standing alone against the many arguments which have been made for the 'weak' approach.

Of course, the question which must now be answered is: so what? If the 'weak' model is the correct way of understanding the *Hastings-Bass* rule, then what does this tell us about how the rule should function? Considerations of space prevent any detailed consideration of these issues here, but some tentative suggestions may be made. First, that the question of what counts as a 'relevant consideration' should be answered by reference to the concept of responsible trusteeship which is core to the 'weak' approach. Likewise the issue of whether pension trusts should be treated in the same manner as private trusts generally—they should be, but the obligations of

responsible trusteeship may be more onerous where the beneficiaries are not volunteers.²²⁴

Secondly, once it is understood that the function of the rule is to protect the beneficiaries' entitlement to proper performance by trustees of their duty to consider, then it would seem more appropriate to require the beneficiaries to establish merely that, had the trustees considered all the matters that a responsible trustee would have considered, they *might* have acted differently, not that they *would* have done so. A 'would have acted differently' requirement would impose an artificial limitation on the beneficiaries' right to proper administration of the trust.

Thirdly, the question of whether the effect of the rule is to render the purported exercise of a power void or voidable remains open. The cases and voluminous literature have canvassed the many reasons to prefer one to the other. Nolan has demonstrated that breach of trust generally renders the exercise of a power voidable, not void, but also that this is not always the case.²²⁵ The author's present view is that whilst a correct understanding of the nature and scope of the rule should inform this debate, nudging it firmly in the direction of 'voidable', it will not conclude it; there will always be competing arguments of policy and doctrine. Ultimately, any decision on this issue may need to be pragmatic as much as principled.

220. *Green v Cobham* (n 22); *Burrell v Burrell* (n 172).

221. *McPhail v Doulton* (n 7).

222. *Gisborne v Gisborne* (n 8).

223. *Sieff v Fox* (n 4).

224. *Stevens v Bell* [2002] EWCA Civ 672, [2002] OPLR 207 [27].

225. Nolan (n 82).