Trustees' Mistakes: England and Elsewhere

by

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The complexity and instability characteristic of modern trust law, trust practice, and especially trusts taxation, exacerbate the natural human tendency towards error. When a settlement of property on trust, a distribution or appointment of trust property to beneficiaries, or an administrative transaction by trustees, are found to have unwelcome consequences, beneficiaries and trustees try to have the offending settlement, appointment or transaction reversed. A key doctrinal tool courts use to reverse unfortunate trustee choices is the doctrine of mistake. In time-honoured common law fashion, the application of this doctrine to trustee actions has developed in three parallel doctrinal channels: mistake at law, mistake in equity and the so-called "Rule in *Re Hastings-Bass*". Following two decades of growth, the last-mentioned "Rule" was recently restrained in the U.K. Supreme Court decision in *Pitt v. Holt*. The restraint imposed in England on the *Hastings-Bass* line of cases has already resulted in a resurgence of English cases applying the doctrine of equitable mistake, while outside England, offshore jurisdictions are straining to attract and retain trusts by adopting broad statutory versions of the Rule.

1. English Law Applicable to Trustees’ Mistakes
2. Setting Mistakes Aside: Law and Equity

As holders of rights to property, on which trusts governed by English Law have been imposed, trustees have as complete an authority to transact in the property they hold as any other property owner. Unless provided otherwise in the trust instrument, trustees may sell trust property, lease it, encumber it, create an easement over it and take any other action respecting it.[[1]](#footnote-1) An attempt to set aside a mistaken exercise of such administrative powers is subject to the general common law of mistake. Contracts created through the exercise of such powers may be set aside based on the conventional grounds for setting aside contracts – common, mutual or unilateral mistake, *non est factum* etc.; the fact that a mistaken party happens to be a trustee is, so far as the common law is concerned, legally meaningless.[[2]](#footnote-2)

Mistaken exercises of trustees' dispositive powers – *inter alia*, their powers of appointment and advancement – are subject to the doctrine of equitable mistake. Equitable mistake is not a doctrine unique to the law of trusts; it applies to the voluntary disposition of assets generally, as by way of gift. Though the nature and boundaries of this doctrine have been disputed during the last few decades, the axiom remains that the tests for applying the doctrine of equitable mistake are not as strict as those governing common law mistake.[[3]](#footnote-3) The tests generally accepted in England for setting aside an exercise of trustees' dispositive powers on the ground of mistake were, until recently, the following two: the older, relatively permissive testin *Ogilvie v. Littleboy*, according to which “a donor can only obtain back property […] by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property”,[[4]](#footnote-4) and the more stringent test in *Gibbon v. Mitchell*, under which a voluntary disposition could be set aside for mistake where the disponor was mistaken regarding “the effect of the transaction itself and not merely as to its consequences”.[[5]](#footnote-5) The present law of equitable mistake, as laid down in 2013 in the U.K. Supreme Court decision in *Pitt v. Holt*, requires, less clearly, that in order for a disposition to be reversed due to mistake on the part of the disponor, there needs exist “a causative mistake of sufficient gravity” to make it unconscionable on the part of the donee to retain the property, which will usually consist of “a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction”.[[6]](#footnote-6)

1. The “Rule in *Re Hastings-Bass*” after *Pitt v. Holt*

The Rule in *Re Hastings-Bass*[[7]](#footnote-7) (hereinafter: the Rule) was an equitable doctrine developed through the 1990’s and the first decade of the 21st century, until its official demise in English Law in the Supreme Court decision in *Pitt v. Holt.*[[8]](#footnote-8) According to the most recent formulation of the Rule prior to its demise, a fiduciary[[9]](#footnote-9) could apply to the court and ask for an order declaring its exercise of a discretionary dispositive power void *ab initio* if it was clear that he, she or it would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they should not have.[[10]](#footnote-10) The grounds for setting aside fiduciary dispositions under the Rule were much broader than the relatively narrow grounds available under the doctrine of either common law or equitable mistake: the Rule was founded on the sense that fiduciaries who fail to apply reasonable skill and care in their decision making process do not act in their beneficiaries' best interests. The Rule applied whether the flaw in fiduciaries' decision making process would make the impugned disposition void under the common law of mistake, voidable under the doctrine of equitable mistake, or neither.[[11]](#footnote-11) A successful application of the Rule was never made conditional on the existence of any “mistake” in the colloquial sense: the fiduciary is not required to hold a *mistaken* belief about anything. A fiduciary's exercise of a dispositive power may be set aside for the very fact that a certain relevant consideration has never crossed his, her or its mind. One of the most well-known (and controversial[[12]](#footnote-12)) contexts in which the Rule was successfully used was setting aside trustees’ exercises of dispositive powers from which resulted tax liabilities the trustees failed to foresee or accurately assess.[[13]](#footnote-13) Other successful invocations of the Rule allowed trustees to retrospectively render void badly drafted pension scheme clauses, which came out far more generous than the employers intended;[[14]](#footnote-14) gave trustees a second chance to accurately perform transactions which should have been, but were not, carried out at a specific date and time;[[15]](#footnote-15) and allowed trustees to rectify, years after the creation of a trust, clerical or accounting errors made when it was first drafted.[[16]](#footnote-16) The Rule’s distinctive capacity for turning back the clock on trustees’ careless or hasty decision making was expressed in nicknames such as “Get out of Jail Free card” and “Morning After Pill”.[[17]](#footnote-17)

Both the common law doctrine of mistake and its equitable cousin are as available, each within its sphere of application, for setting aside trustees' dispositions for mistake as for setting aside dispositions undertaken with non-fiduciary, beneficially owned property. The remarkable ability of applicants under the Rule in *Re Hastings-Bass* to apply for the setting aside of a transaction merely because it followed a flawed decision making process is not, on the other hand, available to non-fiduciaries. And although never expressly limited to trustees, the fact is that successful applications for orders under the Rule have, under English law, at least, been concerned with trustees almost without exception.[[18]](#footnote-18)

The last few years have seen the Rule's scope narrowed by decisions of, first, the Court of Appeal, and, later, the U.K. Supreme Court in the combined cases of *Pitt v. Holt* and *Futter v. Futter.* Under the Rule as reformulated in these decisions, to render a trustee’s exercise of a discretionary power void *ab initio* due to his, her or its flawed decision making process, one must show that the trustee's failure to consider relevant considerations or ignore irrelevant considerations was such as to render the consequent disposition an act *ultra vires*, outside the scope of the power the trustee purported to exercise.[[19]](#footnote-19) Such a showing could be based on procedural defects – for instance, where the trust deed requires that the trustee obtain the advice of an accounting firm before making any fiscally significant decisions, but the trustee had failed to do so. It could also be based on substantive grounds – e.g., where trust principal was dedicated in the trust instrument for the sole purpose of financing a specific beneficiary’s undergraduate studies, and the trustee has then proceeded to use that principal to support the young entrepreneur's attempts at starting a business venture.

A flawed decision making process *within* the scope of trustees’ powers may, however, still render trustees’ consequent dispositions *voidable*, should the court be satisfied that their ill-judged decision making process amounted to a breach of one or more of their duties, such as their duty to act with such skill and care as are reasonable in the circumstances.[[20]](#footnote-20) Neither the Court of Appeal nor the U.K. Supreme Court had made it clear what flaws in the trustees’ decision making process would amount to such a breach of duty. Both Courts preferred a case-by-case approach. However it is apparent from the Court of Appeal decision that the Court’s vision for the future of the Rule involves narrowing its ambit of application, so that fewer types of flawed trustee decision making will be seen as breaching a duty so as to render the consequent disposition voidable.[[21]](#footnote-21) The Court of Appeal contributed to the accretion of precedent on the application of the Rule in specific contexts by ruling on what was a highly disputed issue, the possibility of applying the Rule where a trustee had, before coming to a final decision regarding the exercise of its discretion, invited and received the advice of a professional, such as an accountant or tax specialist. The Court held receipt of such advice to remove trustees' consequent actions from the Rule's ambit of application.[[22]](#footnote-22)

Another much-debated question of law regarding the Rule's mode of application was not addressed by the Court of Appeal, but rather by the U.K. Supreme Court: the precise causative nexus trustees must prove to obtain an order under the Rule. Must applicant trustees convince the court that had they considered all the relevant considerations and ignored all those which were irrelevant, they *would* not have exercised their discretion as they did, or is it sufficient to show that a better decision making process *might* have led them to act otherwise? Up until the Supreme Court's decision in *Pitt*, the dominant approach on this point of law distinguished dispositions which were voluntary, in the sense that trustees were at liberty to refrain from carrying them out, from such involuntary dispositions as trustees were obliged to carry out under their trust instrument. To set aside voluntary dispositions, trustees had to show that given a proper decision making process they *would* not have exercised their discretion as they did, while setting aside involuntary dispositions merely required a showing that absent the processual flaw in trustees' decision making, they *might* have exercised their discretion differently.[[23]](#footnote-23) The Supreme Court rejected this dichotomous rule of thumb, holding that Courts must decide whether to apply the Rule according to the unique circumstances of each case.[[24]](#footnote-24)

How much weaker has the Rule in fact become in post*-Pitt* English law, and does it still provide trustees with a valuable tool for mending ill-judged exercises of discretion? Despite the rhetoric of curtailment which characterized the decisions in *Pitt*, the answer to the latter question appears positive. At the very least, transactions by trustees may still be declared voidable under the Rule where it is successfully shown that they amounted to a breach of duty. Notably, the apparent retreat of the Rule from a void to a voidable result may under some circumstances lack practical significance: an application of the Rule to an exercise of trustee discretion which produced an unexpected liability to Inheritance Tax would still bring about the hoped-for refund, despite the application of the Rule rendering the exercise, post *Pitt*, voidable rather than void *ab initio*.[[25]](#footnote-25) Further, as pointed out in some critiques of the decision in *Pitt*, there seem to be at least a couple of ways to bypass the Court’s attempts at reining in the Rule and render an exercise of power by trustees void rather than merely voidable. For one, as a trustee's act *ultra vires* may still be declared void, all that a trustee must do to enjoy the application of a full-scale, pre-*Pitt* version of the Rule is include a clause in the trust instrument to the effect that the trustee must consider all relevant considerations and ignore all irrelevant considerations before exercising one or more of its powers and discretions. A disposition consequent on a failure to do so would then arguably amount to an act *ultra vires*, rendering the exercise of power void.[[26]](#footnote-26) In fact, such a drafted version of the Rule is likely to prove even stronger than the judicial Rule in its pre-*Pitt* form: as noted above, for an application for an order under the judicial Rule to succeed, its proponents had to show both a flaw in trustees' decision making process and some causal connection between that flaw and the consequent disposition, be that connection of the “would have” or the “might have” variety. On the other hand, a trust instrument clause restricting one or more of the trustees' powers to exercises which follow a taking into account of all relevant considerations and none that are irrelevant would make *any* trustee disposition following a flawed decision making process void, regardless of the causal connection between the flaw and the disposition. Another way around the decision in *Pitt* which has been pointed out in the literature involves an application of the fraud on a power doctrine. Under this view, where proponents could show trustees' decision making process to have been not merely careless or negligent, but rather deliberately targeted at serving not beneficiaries’ best interests, but those of their trustees, trustees’ consequent exercise of their powers would arguably amount to a fraud on those powers, and would thus be rendered void.[[27]](#footnote-27)

1. Recent Applications of Equitable Mistake Doctrine

Time will tell whether these ways around the apparently restrictive approach of the *Pitt* courts will be taken advantage of. In the meantime, recent cases show Chancery division judges being generous in their application of the doctrine of equitable mistake to cases where assets were settled on trust, or appointed out of trust, based on erroneous professional advice concerning the tax implications of the settlement or appointment. In *Kennedy v. Kennedy*, an appointment of trust assets to Mr. Kennedy, the settlor, productive of a large liability to capital gains tax was set aside for equitable mistake, the court reasoning that

[t]he mistakes made by the three trustees were causative and very serious. It was a fundamental feature of the … planning, as instructed by Mr Kennedy and understood by his professional advisers, that the October 2008 Appointment should not give rise to a charge to CGT. Had the trustees not been mistaken they would not have executed the October 2008 Appointment with the terms it contained. In particular, they would not have executed it with clause 2.1(c) included. The effect of the inclusion of clause 2.1(c) was to deprive the other beneficiaries of the Settlement, namely (subject to any future appointment) Mr and Mrs Kennedy's children, of the relevant assets and to diminish the value of the remaining assets in the Settlement by the amount of the substantial charge to CGT payable by the trustees of the Settlement."[[28]](#footnote-28)

In *Freedman v. Freedman*, the very settlement of a family trust was set aside by an application of the doctrine of equitable mistake. Melanie Freedman, the settlor, settled her two houses on trust based on advice by her father's solicitors, who failed to consider the large inheritance tax liabilities consequent on the settlement's creation. While the settlement was created to prevent Melanie's various suitors from acquiring rights in the houses, it was also intended that one of the houses be sold, and the proceeds used to pay back a large part of a loan Melanie's father provided to enable her to purchase her second house. Given the tax liabilities consequent on the settlement's creation, however, Melanie was not going to have enough of the proceeds left to cover much of the loan, and was likely, on the evidence, to be forced to sell her second house, where she currently lived with her son. The Court saw the mistake by Melanie, her father and his solicitors concerning the tax consequences of the settlement as serious enough to justify setting it aside, noting that "the fact that the tax charge means that the loan cannot be repaid makes all the difference".[[29]](#footnote-29)

1. U.S. Law Applicable to Trustees’ Mistakes

Unlike English trust law, U.S. trust law does not include a line of cases permitting trustees to avoid decisions they have taken which are found to have unexpected and undesirable consequences by alleging that they have themselves reached those decisions by exercising a power or discretion in a manner infringing one or more duties they owe their beneficiaries. The U.S. law of trustees' mistakes is focused on more conventional challenges by beneficiaries to decisions taken by their trustees.[[30]](#footnote-30) U.S. law certainly contains doctrinal infrastructure which could potentially serve to support *Hastings-Bass*-style claims: under U.S. law, "[a] court will not interfere with a trustee's exercise of a discretionary power when that exercise is reasonable and not based on an improper interpretation of the terms of the trust. … Court intervention may be obtained … to correct errors resulting from mistakes of interpretation. … When judicial intervention is required, a court may … rescind the trustee's payment decisions, usually directing the trustee to recover amounts improperly distributed…".[[31]](#footnote-31) Trustees could potentially support an application for an order rescinding a disposition they have made consequent on an exercise of a discretionary power with arguments describing their exercise of the power as unreasonable, or as based on an improper interpretation of the terms of the trust. Scott and Ascher emphasize that the court may disturb decisions taken by trustees who fail to exercise a discretion they have been given, who exercise it in an unreasonable manner, as by tossing a coin, or who fail to inquire into beneficiaries' circumstances as necessary to properly exercise the discretion. They add that "the court may interpose if the trustee has failed to act because of a mistake of law or fact as to the extent of the trustee's powers or duties".[[32]](#footnote-32)

1. Trustees' Mistakes under Offshore Law

The apparent reining-in of the English Rule in *Pitt* raised concerns among offshore jurisdictions. Several such jurisdictions have for years embraced the Rule, due to its obvious attractions for their trust management and estate planning industries.[[33]](#footnote-33) The Rule’s offshore versions, developed as part of the trust regimes of such permissive jurisdictions as Jersey and the Cayman Islands, extended its boundaries on numerous fronts, expanding its application, *inter alia*, to dispositions undertaken by settlors rather than trustees,[[34]](#footnote-34) to trustees' exercises of their administrative, rather than their dispositive, powers,[[35]](#footnote-35) and to transactions undertaken by other kinds of fiduciaries, such as company directors.[[36]](#footnote-36) Shortly after the U.K. Supreme Court decision in *Pitt*, two offshore jurisdictions reacted to the vague state to which the Rule has been reduced by amending their trust legislation to include explicit *Hastings-Bass*-influenced mechanisms: Jersey did so in 2013,[[37]](#footnote-37) and Bermuda in the following year.[[38]](#footnote-38)

The Jersey regime gives the court large powers to hold voidable and correct, based either on a broad conception of mistake or on a *Hastings-Bass*-type concern with considerations taken into and omitted from account, non-testamentary dispositions of property on trust and power exercises in relation to trusts. The Jersey (Trusts) Law gives the court a power to declare, on the application of "any settlor or any of his or her personal representatives or successors in title",[[39]](#footnote-39) that "a transfer [inter vivos] or other [non-testamentary] disposition of property to a trust"[[40]](#footnote-40) by a settlor or "a person exercise[ing] a power [or discretion] to transfer or make other disposition of property to a trust on behalf of a settlor"[[41]](#footnote-41) is voidable and either has no effect from the time of its exercise, or has such effect as the court may determine.[[42]](#footnote-42) The court will exercise this power where the disponor "made a mistake in relation to the transfer or other disposition of property to a trust, would not have made that transfer or other disposition but for that mistake, and the mistake is of so serious a character as to render it just for the court to exercise its power".[[43]](#footnote-43) The Jersey statute defines "mistake" to embrace mistakes as to "the effects of, any consequences of, or any of the advantages to be gained by, a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property", mistakes "as to a fact existing either before or at the time of, a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property"; and mistakes "of law including a law of a foreign jurisdiction", as well as other mistakes.[[44]](#footnote-44) Another provision gives the court a similar power to hold voidable, and as either of no effect from the time of its exercise, or of such effect as the court may determine, an exercise of a power over, or in relation to, a trust, or trust property, by a trustee or another powerholder, where that exercise was consequent on a similarly causative and serious mistake, subject to the same capacious definition of that term.[[45]](#footnote-45) The court can be invited to exercise this power by the trustee or powerholder who made the mistaken exercise, by another trustee, by a beneficiary, a non-beneficiary enforcer, (where the trust includes any charitable trust, power or provision) by the Attorney General, or, with leave of the court, by any other person.[[46]](#footnote-46)

The statute then gives the court a power to declare voidable and either of no effect from the time of the exercise, or of such effect as the court may determine, transfers or other dispositions of property to a trust made, other than by will, by a settlor through a person who owes the settlor a fiduciary duty in relation to the disposition, where that person failed, in exercising his, her or its power, "to take into account any relevant considerations or took into account irrelevant considerations; and would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations or that taking into account of irrelevant considerations".[[47]](#footnote-47) Finally, the court is given a power to declare voidable, with similar results, exercises of powers in relation to a trust by trustees and other powerholders who "owe… a fiduciary duty to a beneficiary in relation to the exercise of the… power", where the exercise resulted from or was influenced by a failure to take into account relevant considerations or a taking into account of irrelevant considerations.[[48]](#footnote-48) This power of the court is again exercisable at the invitation of the person who exercised a power following a flawed decision making process, a(nother) trustee, beneficiary, enforcer, the Attorney General (where appropriate) and, with leave of the court, any other person. As to both the last-mentioned powers, the statute clarifies that "[i]t does not matter whether or not [the flaw in the fiduciary's decision making] occurred as a result of any lack of care or other fault on the part of the person exercising a power, or on the part of any person giving advice in relation to the exercise of the power".[[49]](#footnote-49)

The Bermudian statutory mechanism is more narrowly tailored to circumstances where the pre-*Pitt* English rule in *Hastings-Bass* might have applied. According to the Bermudian statute, "[i]f the court, in relation to the exercise of a fiduciary power [or discretion as to how an obligation is performed], is satisfied on an application … that in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power would not have exercised the power, would have exercised the power, but on a different occasion to that on which it was exercised, or would have exercised the power, but in a different manner to that in which it was exercised … the court may set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and make such order consequent upon the setting aside of the exercise of the power as it thinks fit".[[50]](#footnote-50) The statute makes clear that "[i]f and to the extent that the exercise of a power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred",[[51]](#footnote-51) and that to have an exercise of a power set aside it is not necessary to allege or prove that the person exercising the power, or an adviser to such person, acted in breach of trust or duty.[[52]](#footnote-52) Applications to have an exercise of a power set aside under the Bermudian *Hastings-Bass* clone may be made by the person who exercised the power, a trustee, a beneficiary, a person appointed to enforce a purpose trust, the Attorney General (where the power is conferred "in respect of a charitable trust or otherwise for a charitable purpose"), and with the leave of the court, by any other person.[[53]](#footnote-53)

These recent offshore versions of the Rule arguably point out its future course, as some other jurisdictions are reported to similarly react to the contraction of the English Rule by preparing draft legislation setting out broad versions of the Rule. These jurisdictions include the Isle of Man[[54]](#footnote-54) and Scotland.[[55]](#footnote-55)

1. [↑](#footnote-ref-1)
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1 Trustee Act 2000, c. 29, §§ 3, 8.

 On the common law doctrine of mistake see The Law of Contract 633–690 (Andrew Grubb & Michael Furmston ed., Butterworth, 1999); on the consequences of trustees' common law mistakes see *Donaldson v. Smith*, [2006] All E.R. (D) 293, ¶ 54; Richard Nolan & Matthew Conaglen, *Hastings-Bass and Third Parties*, 65 Cambridge L.J. 499, 500 (2006). [↑](#footnote-ref-2)
3. See Michael J. Ashdown, Trustee Decision Making: The Rule in *Re Hastings-Bass* 183, 196 (2015). [↑](#footnote-ref-3)
4. (1897) 13 T.L.R. 399, 400 (CA). [↑](#footnote-ref-4)
5. [1990] 1 W.L.R. 1304, 1309. Also see Ashdown, *supra* note 3, at 184–185. [↑](#footnote-ref-5)
6. [2013] UKSC 26 [hereinafter: *Pitt* (SC)]. While the *Pitt* court declared that the legal transaction at issue in that case was in fact performed under a mistake of “sufficient gravity”, it did not provide useful criteria for identifying such mistakes, creating a pressing need for further clarification of the issue. See Francis Ng, *Pitt v Holt and Futter v Futter: the Rule in Hastings-Bass, Mistake, and Tax Avoidance*, 4 Brit. Tax Rev. 566, 575 (2013). [↑](#footnote-ref-6)
7. [1975] Ch. 25. [↑](#footnote-ref-7)
8. *supra* note 6. [↑](#footnote-ref-8)
9. Although usually exercised in response to mistaken dispositions by trustees, the Rule has been applied to one other type of fiduciary, receivers appointed by the Court of Protection (see *Pitt* (SC), at ¶ 2). The Rule’s application to other kinds of fiduciaries has been further extended in the offshore world: see *infra* note 34ff and accompanying text. [↑](#footnote-ref-9)
10. *Sieff v. Fox*, [2005] EWHC 1312 (Ch). [↑](#footnote-ref-10)
11. Mistake has been explicitly rejected as a possible doctrinal basis for the Rule in *Futter v. Futter*, [2010] EWHC 449 (Ch), ¶ 21–22. See also Hang Wu Tang, *Rationalising Re Hastings-Bass: A Duty to Act on Proper Bases*, 21 Trust L. Int’l 62, 70–73 (2007). [↑](#footnote-ref-11)
12. See Walker J.’s remark on that matter in *Pitt* (SC), *supra* note 8, at ¶ 135. [↑](#footnote-ref-12)
13. See *Re Hastings-Bass*, *supra* note 7; *Green v. Cobham*, [2002] S.T.C. 820; *Abacus Trust Co. (Is. Man) Ltd. v. N.S.P.C.C.*, [2001] W.T.L.R. 953; *Burrell v. Burrell*, [2005] EWHC 245 (Ch); *Sieff*, *supra* note 10; *Pitt v. Holt*, [2010] EWHC 45 (Ch); *Futter*, *supra* note 11. [↑](#footnote-ref-13)
14. *AMP (UK) plc v. Barker*, [2001] W.T.L.R. 1237; *Hearn v. Younger*, [2002] EWHC 964 (Ch); *Gallaher Ltd. v. Gallaher Pensions Ltd.*, [2005] EWHC 42 (Ch). [↑](#footnote-ref-14)
15. *Abacus v. N.S.P.C.C*, *supra* note 13. [↑](#footnote-ref-15)
16. *Abacus v. Barr*, [2003] EWHC 114 (Ch). [↑](#footnote-ref-16)
17. See e.g. Lord Neuberger, *Aspects of the Law of Mistake: Re Hastings-Bass*, 15 Trusts & Trustees 189 (2009). [↑](#footnote-ref-17)
18. On a single occasion, the Rule has also been applied to transactions undertaken by a receiver appointed by the Court of Protection. See *Pitt* (SC), *supra* note 6, at ¶ 2. [↑](#footnote-ref-18)
19. *Pitt v. Holt*, [2011] EWCA Civ 197, ¶ 96 [hereinafter: *Pitt* (CA)]. As Lloyd J. emphasized, setting aside an *ultra vires* transaction by a trustee is not, in fact, an application of the Rule in *Re Hastings-Bass* but of a well established and undisputed common law tradition prior to the Rule. [↑](#footnote-ref-19)
20. *Pitt* (CA), *supra* note 19, at ¶ 99–107. [↑](#footnote-ref-20)
21. Id., at ¶ 129; also see Simon Kerry, *Control of Trustee Discretion: The Rule in Re Hastings-Bass* 1 U.C.L.L.J. & Jurisprudence 46. 63–68 (2012). [↑](#footnote-ref-21)
22. *Pitt* (CA), *supra* note 19, at ¶ 125. For the pre-*Pitt* debate on the matter see *Abacus v. Barr*, *supra* note 16, at ¶ 23–25. [↑](#footnote-ref-22)
23. *Sieff*, *supra* note 10, at ¶ 77. The would/might debate produced an outpouring of literature. See, for example, Richard Nolan & Matthew Conaglen, *Trustee (In)discretion*, 65 Cambridge L.J. 15 (2006); Jonathan Hilliard, *Limiting Re Hastings-Bass?* May/Jun. 2004, Conv. & Prop. Lawyer 208, 222 – 223; Charles Mitchell, *Reining in the Rule in Re Hastings-Bass*, 122 L.Q. Rev. 35, 37–39 (2006). [↑](#footnote-ref-23)
24. *Pitt* (SC), *supra* note 6, at ¶ 93. [↑](#footnote-ref-24)
25. Inheritance Tax Act 1984, c. 51, § 150. [↑](#footnote-ref-25)
26. Kerry, *supra* note 21, at 76–78. [↑](#footnote-ref-26)
27. Id., at 59–63. The fraud on a power doctrine was specifically mentioned in *Pitt* (CA) as capable of rendering a trustee disposition void rather than voidable: see *Pitt* (CA) at ¶ 96. [↑](#footnote-ref-27)
28. *Brian Kennedy & ors v. Patrick Kennedy & ors*. [2014] EWHC 4129 (Ch), [2014] WLR(D) 524, ¶ 38. [↑](#footnote-ref-28)
29. *Freedman v Freedman & ors.* [2015] EWHC 1457 (Ch); [2015] W.T.L.R. 1187; [2015] S.T.I. 1735; [2015] 2 P. & C.R. DG19, ¶ 41. [↑](#footnote-ref-29)
30. See, e.g., *Conkright v. Frommert*, 559 U.S. 506, [130 S. Ct. 1640](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=d2c3bd00-698b-4e2e-b14b-9d07481ec00e&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A7Y91-K550-YB0V-9000-00000-00&pdcomponentid=6443&ecomp=7tmk&earg=sr0&prid=309caff6-f87a-4603-81af-7082f58d7ee8), [176 L. Ed. 2d 469](https://advance.lexis.com/document/midlinetitle/?pdmfid=1000516&crid=d2c3bd00-698b-4e2e-b14b-9d07481ec00e&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A7Y91-K550-YB0V-9000-00000-00&pdcomponentid=6443&ecomp=7tmk&earg=sr0&prid=309caff6-f87a-4603-81af-7082f58d7ee8) (2010); *O'Riley v. United States Bank, N.A.*, 412 S.W.3d 400 (Mo. Ct. App. 2013); *Griffin v. Griffin*, 463 So. 2d 569 (Fla. App. 1985) (appeal by beneficiary's guardian); *Brown's Appeal*, 345 Pa. 373, 29 A.2d 52 (Pa. 1942) (same). See discussion in Ivan Taback & David Pratt, *When the Rubber Meets the Road: a Discussion Regarding a Trustee's Exercise of Discretion*, 49 Real Prop. Tr. & Est. L.J. 491 (2015). [↑](#footnote-ref-30)
31. Restatement (Third) of Trusts § 50 cmt. b (2001); see also ibid., § 87 (2007); Mark Ascher & Austin Wakeman Scott, Scott and Ascher on Trusts, 5th ed (New York: Aspen Publishers, 2010) § 18.2.1 [hereinafter: *Scott and Ascher*]. [↑](#footnote-ref-31)
32. *Scott and Ascher*, § 18.2.2. [↑](#footnote-ref-32)
33. For the concern expressed in Jersey see Harriet Brown, *The Development of Hastings-Bass in Jersey*, STEP (May 2010), <http://www.step.org/development-hastings-bass-jersey>; William Redgrave, *Leviathan Can Look After Himself: Jersey Legislated on Mistake and Hastings-Bass*, 2 Private Client Bus. 92, 92–93 (2014)*.* [↑](#footnote-ref-33)
34. *Re the Winton Investment*, [2007] J.R.C. 206 (Jersey). Attempts to expand the ambit of the English Rule to dispositions undertaken by a settlor who did not also serve as trustee were ruled out by English courts: *Smithson v. Hamilton*, [2008] 1 W.L.R. 1453. [↑](#footnote-ref-34)
35. *Re Seaton Trustees Ltd.,* [2009] J.R.C. 50 (Jersey). [↑](#footnote-ref-35)
36. *In the Matter of the Ta-Ming Wang Trust*, [2010] 1 C.I.L.R. 541 (Cayman Islands); Christopher Russell and Rachael Reynolds, *Applicability of the Hastings-Bass Principle to the Payment of Dividends by a Trust Company into the Trust*, 16 Trusts & Trustees 595, 596 (2010). [↑](#footnote-ref-36)
37. Trusts (Amendment No. 6) (Jersey) Law 2013. [↑](#footnote-ref-37)
38. Trustee Amendment Act 2014 (Berm.). [↑](#footnote-ref-38)
39. Trusts (Jersey) Law 1984 (as amended 2015), s. 47I(1). [↑](#footnote-ref-39)
40. Id., s. 47E(2); the additions in square brackets reflect the contents of s. 47B(1)(a). [↑](#footnote-ref-40)
41. Id., s. 47E(1); s. 47B(1)(b) provides that "“power” includes a discretion as to the way in which an obligation is performed". [↑](#footnote-ref-41)
42. Id., s. 47E(2). [↑](#footnote-ref-42)
43. Id., s. 47E(3). [↑](#footnote-ref-43)
44. Id., s. 47B(2). [↑](#footnote-ref-44)
45. Id., s. 47G. [↑](#footnote-ref-45)
46. Id., s. 47 [↑](#footnote-ref-46)
47. Id., s. 47F(3). [↑](#footnote-ref-47)
48. Id., s. 47H; the quote is from s. 47H(1). [↑](#footnote-ref-48)
49. Id., s. 47F(4). [↑](#footnote-ref-49)
50. Trustee Act 1975 (Bermuda) (as amended 2014) s. 47A(1)-(2). [↑](#footnote-ref-50)
51. Id., s. 47A(3). [↑](#footnote-ref-51)
52. Id., s. 47A(4). [↑](#footnote-ref-52)
53. Id., s. 47A(5). [↑](#footnote-ref-53)
54. Michael Furness & Tiffany Scott, *In the Post-Pitt World…* 20 Trusts & Trustees 871, 879 (2014). [↑](#footnote-ref-54)
55. Scot. Law Com. No. 239 (2014). [↑](#footnote-ref-55)