CHAPTER 29

POWERS GENERALLY

2. CLASSIFICATION AND TERMINOLOGY OF POWERS

Legal powers and equitable powers

29–06 NOTE 7. DELETE AND REPLACE BY: *Donaldson v Smith* [2006] EWHC B9 (Ch); [2007] W.T.L.R. 421 at [12].

Beneficial powers, limited powers and fiduciary powers

Fiduciary powers

29–17 AT THE END OF THE SIXTH SENTENCE INSERT: Such a power remains fiduciary but subject to the qualification that the donee is not debarred from exercising it in a way which confers some benefit on himself; the precise constraints on the donee depend on the particular trust instrument.[32a]

4. THIRD PARTY POWERS AND CONSENTS

Third parties generally

29–35 NOTE 92. AT THE END ADD: For a case in which the person whose consent was required was also the trustee, see *Bestrustees v Stuart* [2001] EWHC 549 (Ch); [2001] P.L.R. 283.

Classification of third party powers—general factors

Express terms of settlement

29–37 AT THE END OF THE SECOND SENTENCE INSERT A NEW NOTE 95a: See, e.g., *Centre Trustees Ltd v Pabst* [2009] JRC 109; (2009–10) 12 I.T.E.L.R. 720.

[32a] *Re Z Trust* [1997] C.I.L.R. 248 at 265, Cayman GC; *Re Internine Trust and Intertraders Trust* [2005] JRC 072; [2010] W.T.L.R. 443 at [56].

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Nature of donee

29–40 AT THE END ADD: The power of an income beneficiary (whether conferred by the trust instrument or by statute[2a]) to withhold consent to the exercise of a power of advancement of capital is plainly likewise given for the beneficiary's own protection and so is a beneficial power.[2b]

29–41 NOTE 4. THE CORRECT CITATION OF *Re Papadimitriou* IS [2004] W.T.L.R. 1141, Manx HC. AT THE END ADD: *Centre Trustees Ltd v Pabst* [2009] JRC 109; (2009–10) 12 I.T.E.L.R. 720.

NOTE 6. AT THE END ADD: *Re Bird Charitable Trust* [2008] JRC 013; (2008) 11 I.T.E.L.R. 157.

Third party powers requiring consent of trustees

29–49 AT THE END ADD: Where a power of appointment or any other power is exercisable only with the consent of the trustees, the consent of all of them is required.[28a]

Dispensing with consent

29–50 NOTE 32. AT THE END ADD: But a requirement of consent was dispensed with in *Page v West* [2010] EWHC 504 (Ch); [2010] W.T.L.R. 1811.

5. WHO CAN EXERCISE A POWER

Whether all donees must act

Unanimity

AFTER § 29–62 INSERT THE FOLLOWING NEW PARAGRAPH:

29–62A The act of one trustee done with the sanction and approval of a co-trustee will be regarded as the act of both,[70a] so that a contract entered into by one trustee as such will bind a co-trustee

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[2a] Trustee Act 1925, s.32, for which see Chap.32.

[2b] *PJC v ADC* [2009] EWHC 1491 (Fam); [2009] W.T.L.R. 1419 at [15].

[28a] See § 29–70.

[70a] *Messeena v Carr* (1870) L.R. 9 Eq. 260; *Edwards v Proprius Holdings Ltd* [2009] NZHC 597; and see *Brazier v Camp* (1894) 63 L.J.Q.B. 257.

who sanctions his doing so.[70b] We deal elsewhere with the question how far trustees exercising a power need to do so simultaneously.[70c] It is not necessary that the actual implementation of any exercise of a power should be effected by all of the trustees, unless that is required (as, *e.g.*, in the case of a transfer of land) by the nature of the act to be done.

29–63 DELETE THE FIRST SENTENCE AND REPLACE BY: The general rule requiring unanimity in the exercise of a power has exceptions.

Landlord and tenant

29–69 AT THE END ADD: A secure tenancy within the Housing Act 1988 in favour of two or more joint tenants, if determined by notice given by only one of them, will be succeeded by a statutory periodic tenancy in favour of all of them as long as, when the notice took effect, any one of them occupied the property as his sole or principal home.[92a]

Capacity

29–74 IN THE LAST SENTENCE DELETE and so an enduring power of attorney AND REPLACE BY: and so an attorney holding a lasting or an enduring power.

Bankruptcy of donee

29–79 INSERT AFTER THE FOURTH SENTENCE: A power of revocation of settlement vested in the settlor, being a beneficial power, will also do so.[36a]

INSERT AFTER THE FIFTH SENTENCE: Nor does a power to remove or appoint new trustees of the trust, even when the bankrupt is himself a discretionary beneficiary, since such powers are fiduciary.[37a]

[70b] *Edwards v Proprius Holdings Ltd*, above.

[70c] § 29–209. See too § 29–166 (how far all trustees must comply with legal formalities).

[92a] Housing Act 1988, ss.1(1), 5(2), (3), 45(3).

[36a] Cf. *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co. (Cayman) Ltd* [2011] UKPC 17; (2011–12) 14 I.T.E.L.R. 102, on appeal from the Cayman Islands, where the settlor was not bankrupt in that jurisdiction and it was held that the court could appoint a receiver over the power to exercise it for the benefit of a judgment creditor.

[37a] *Wily v Burton* [1994] FCA 1146; (1994) 126 A.L.R. 557 on comparable Australian legislation.

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No one capable of exercising a power

29–82 AT THE END OF THE LAST SENTENCE INSERT A NEW NOTE 48A: A view adopted in *Bridge Trustees Ltd v Noel Penny (Turbines) Ltd* [2008] EWHC 2054 (Ch) (where the power was imperative).

7. DUTIES OF DONEES—PRELIMINARY MATTERS

Judgment as to state of facts

Duty of consideration

29–123 NOTE 12. ADD: *Stuart v Armourguard Security Ltd* [1996] 1 N.Z.L.R. 484, NZ HC; *McNulty v McNulty* [2011] NZHC 1173; (2011–12) 14 I.T.E.L.R. 361 at [97], [105].

Duty (4)—Taking matters into account

29–130 IN THE FIFTH SENTENCE DELETE cat AND REPLACE BY: act.

8. DUTIES OF DONEES—CONSIDERING EXERCISE OF POWERS

Duty (1)—To act responsibly and in good faith

29–140 NOTE 52. INSERT AT THE END (WITHIN THE FINAL BRACKET): and [2008] NZSC 61.

29–141 NOTE 54. INSERT AT THE END (WITHIN THE FINAL BRACKET): and [2008] NZSC 61.

29–143 NOTE 63. AFTER THE FIRST SENTENCE INSERT: Reference to principles of public law in the context of trusts was deprecated in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA at [77]. AT THE END ADD: See too *Dever v Knobloch* [2009] NZHC 2013 at [55]–[64]; *McNulty v McNulty* [2011] NZHC 1173; (2011–12) 14 I.T.E.L.R. 361 at [115]–[116].

Duty (2)—To take only relevant matters into account

General

29–146 AFTER THE LAST SENTENCE INSERT: Time and quantum may play a part, in the sense that a decision to release a modest part of the trust fund to meet an urgent need of one of several

beneficiaries may not require the same degree of enquiry and examination as would be required if there was no urgency or the proposed distribution affected a large part of the trust fund.[81a]

29–147 AT THE END OF THE FIRST SENTENCE INSERT A NEW NOTE 81a: For fraud on the power, see §§ 29–255 *et seq*.

IN THE SECOND SENTENCE AFTER when exercising a power INSERT: or that they wrongly took account of an irrelevant matter when making only a provisional decision to exercise the power, for which they are seeking the approval of the court.[81b]

29–148 AT THE END OF THE FIRST SENTENCE INSERT A NEW NOTE 81c: *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA at [114]; and *cf*. the argument in *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch); [2009] All E.R. (D) 234 (Nov) at [108(1)].

INSERT AFTER THE SIXTH SENTENCE: Public policy may place constraints on the matters which the trustees may take into account.[83a]

Settlor's wishes

29–150 NOTE 85. DELETE THE REFERENCE TO *Kain v Hutton* AND INSERT: *Kain v Hutton* [2005] W.T.L.R. 1024 at [301], NZ HC; on appeal [2007] NZCA 199; (2007) 10 I.T.E.L.R. 287 at [272]; and on further appeal [2008] NZSC 61.

NOTE 86. INSERT AFTER THE REFERENCE TO *Schmidt v Rosewood Trustees Ltd*: *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [114] ("may well be one thing that trustees should take into account").

NOTE 87. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 56.49, 56.57.

NOTE 88. DELETE AND REPLACE BY: *Kain v Hutton* [2007] NZCA 199; (2007) 10 I.T.E.L.R. 287 at [272] (on further appeal [2008] NZSC 61).

[81a] *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, at [117].
[81b] As in *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch); [2008] All E.R. (D) 175 (Oct) at [280].
[83a] *Independent Trustee Services Ltd v Hope*, above, at [118]–[120].

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NOTE 90. INSERT AT THE END: Approved on this point in *Pitt v Holt*, above, at [114].

29–151 NOTE 93. INSERT AT THE END (WITHIN THE FINAL BRACKET): and [2008] NZSC 61.

NOTE 94. DELETE AND REPLACE BY: *Power v Ekstein* [2000] NSWSC 905.

Beneficiaries' wishes and needs

29–153 NOTE 97. AT THE END ADD: *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA at [114] ("so far as made known to the trustees"); *Whaley v Whaley* [2011] EWCA Civ 617; (2011–12) 14 I.T.E.L.R. 1 at [112] (citing this passage).

29–155 NOTE 6. AT THE END ADD: *Stuart v Armourguard Security Ltd* [1996] 1 N.Z.L.R. 484, NZ HC; *McNulty v McNulty* [2011] NZHC 1173; (2011–12) 14 I.T.E.L.R. 361 at [97], [105].

IN THE LAST SENTENCE DELETE any previous indications that have given AND REPLACE BY: any previous indications that they have given.

AT THE END OF THE TEXT ADD: It is at least arguable that trustees may need on the particular facts of a given case to make enquiries as to the respective positions of the class of beneficiaries.[9a]

Judicious encouragement

29–157 IN THE SECOND SENTENCE DELETE not they might like them AND REPLACE BY: not as they might like them.

NOTE 20. AT THE END ADD: *SR v CR* [2008] EWHC 2329 (Fam); (2008–09) 11 I.T.E.L.R. 395. But where the beneficial interests under the trust are fixed, or the trustees have no relevant power which they can exercise without the consent of someone unlikely to give it, there is no scope for judicious encouragement: *PJC v ADC* [2009] EWHC 1491 (Fam); [2009] W.T.L.R. 1419.

NOTE 23. AT THE END ADD: (a passage approved in *A v A* [2007] EWHC 99 (Fam); [2007] 2 F.L.R. 467 at [91]).

[9a] *McNulty v McNulty* [2011] NZHC 1173; (2011–12) 14 I.T.E.L.R. 361 at [118]–[128].

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NOTE 24. AT THE END ADD: Where a dispositive power is exercisable by the trustees only with the consent of a third party, the court has to consider what the third party would be likely to do: *Whaley v Whaley* [2011] EWCA Civ 617; (2011–12) 14 I.T.E.L.R. 1 (where the court inferred that the trustees would be likely to make the assets of the trust available to the husband, though to do so they would have first to add him as a beneficiary and then to resolve to distribute capital to him, both steps for which they would require the consent of protectors).

INSERT AT THE END OF THE LAST SENTENCE A NEW NOTE 24a: *A v A*, above, at [97]. See too *Whaley v Whaley*, above.

AFTER § 29–159 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Facts disputed

29–159A A source of difficulty for trustees from time to time is that matters material for them to take into account are disputed in point of fact. It is when the exercise of dispositive powers is under consideration that the difficulty usually arises, particularly if the beneficiaries are already at loggerheads. The extent of the means of a given beneficiary, or his financial responsibility, are frequent subjects of controversy; but there may be other disputes, such as the nature of the settlor's wishes, sometimes left in a state of uncertainty at his death, or the source of funds put into settlement.[24a] Though trustees are expected to make enquiries and not to act merely on the information to hand,[24b] they are not detectives and they lack the resources to resolve such differences; beneficiaries do not have the right to a hearing from them.[24c] Nor can the trustees be expected to approach the court whenever such a controversy exists, since the costs of doing so would be prohibitive, though there is no doubt that they may do so if the proposed exercise of their discretionary power will be sufficiently momentous;[24d] indeed, it is not clear that the court can make declarations of fact which do not determine legal rights, merely because trustees would find it convenient to have an authoritative decision to take into account, though it seems that applications for such a

[24a] As in *S v L* [2005] JRC 109.

[24b] See §§ 29–130, 29–146.

[24c] See § 29–155.

[24d] See §§ 29–296 *et seq.* for applying to the court for the court's blessing for a provisional decision taken by trustees and for surrendering their discretion.

determination as part of an application for directions have been entertained.[24e] We consider that, where the matter is not sufficiently momentous to warrant an application to the court, the trustees will have done their duty if they seek the comments of any antagonists and do their best on the material so disclosed. Whether a decision then taken, even in the absence of a breach of duty on the part of the trustees, can be upset at the instance of a beneficiary alleging that the trustees based themselves on a view of the facts which was incorrect depends on the scope of the principle in *Re Hastings-Bass*[24f] and whether its application requires such a breach.[24g]

Other fiduciaries

29–165 IN THE THIRD SENTENCE DELETE he remains under to consider AND REPLACE BY: he remains under a duty to consider.

9. MANNER OF EXERCISE OF POWERS

Formalities

Formalities required by statute

29–168 NOTE 45. For the reference to Megarry and Wade, *The Law of Real Property*, see now (7th edn), § 11–047 and n.286.

NOTE 48. DELETE *ibid*. AND REPLACE BY: Wills Act 1837.

Formalities required by settlor

29–170 NOTE 57. INSERT AT THE END (WITHIN THE FINAL BRACKET): and [2008] NZSC 61.

[24e] *S v L*, above (where the trustees acknowledged that their decision on a distribution would be influenced by the answer to the question whether one of the beneficiaries was the source of some of the settled funds). In *X v A* [2005] EWHC 2706 (Ch); [2006] 1 W.L.R. 741 at [30], [50] the court said that where trustees applied for the court's blessing, cross-examination and disclosure were not usual, but did not rule them out. Both took place in *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) but there the trustees' application for the court's blessing had been met with a counterclaim from two of the beneficiaries for a variety of other relief, including the removal of the trustees. The Jersey court in *Re A Settlement* [2010] JRC 085 asserted a jurisdiction (relying on Jersey legislation) to require a beneficiary to make disclosure material to a decision to be taken by trustees (reversed [2010] JCA 231); see § 23–64A (online supplement).

[24f] [1975] Ch. 25, CA.

[24g] See § 29–247.

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AFTER § 29–171 INSERT A NEW HEADING AND PARAGRAPH:

Preconditions to exercise

29–171A The donor of a power may impose preconditions on its exercise. Cases in which the donee must first form a judgment as to a given state of facts have already been mentioned,[60a] as have cases in which the consent of another person to the exercise is required.[60b] Other preconditions may be imposed, such as the obtaining of professional advice before the power is exercised. If such a precondition is imposed, any purported exercise of the power without obtaining the advice is void;[60c] and it makes no difference that the advice would necessarily have been in favour of the proposed exercise.[60d]

Intention to exercise

Other indications—implied exercise

29–176 AT THE END OF THE PENULTIMATE SENTENCE INSERT: Nor will trustees be treated as having exercised a power of accumulation over a given receipt when they incorrectly thought that it already was capital[85a] or as having exercised a power of appointment when they set out to exercise a power of advancement.[85b]

NOTE 86. AT THE END ADD: But a rather narrower view was taken in *Kain v Hutton*, above.

29–177 NOTE 87. THE CORRECT NEUTRAL CITATION OF *Betafence Ltd v Veys* IS [2006] EWHC 999 (Ch).

NOTE 89. INSERT AT THE END (WITHIN THE FINAL BRACKET): on further appeal [2008] NZSC 61.

[60a] See §§ 29–122 *et seq.*
[60b] See §§ 29–35 *et seq.*
[60c] *Walker Morris Trustees Ltd v Masterson* [2009] EWHC 1955 (Ch); [2009] P.L.R. 307 (power to amend pension trust subject to written actuarial advice that existing rights not prejudiced).
[60d] *ibid.*, at [38], [54].
[85a] *Pierce v Wood* [2009] EWHC 325 (Ch); [2010] W.T.L.R. 253.
[85b] *Kain v Hutton* [2008] NZSC 61; (2008) 11 I.T.E.L.R. 130. See § 32–22A (online supplement).

10. Defective Execution of Powers

Entitlement of beneficiaries of trust to a formal exercise

29–183 NOTE 16. INSERT AT THE END (WITHIN THE FINAL BRACKET): and [2008] NZSC 61.

Persons able to invoke the jurisdiction

29–188 Note 34. INSERT AT THE END (WITHIN THE FINAL BRACKET): and [2008] NZSC 61.

Children and other dependants

29–189 NOTE 40. INSERT AT THE END (WITHIN THE MISSING FINAL BRACKET): and [2008] NZSC 61.

11. Time for Exercise of Powers

Time limits

29–196 INSERT AFTER THE THIRD SENTENCE: But where a power of appointment is expressed to be exercisable during a prescribed time, the power may be exercised within that time so as to override the trusts in default of appointment even after the vesting, expressed to be "absolutely", of an interest under those trusts.[61a]

Fettering the exercise of a power

Fiduciary power

29–205 AT THE END OF THE THIRD SENTENCE INSERT: Similarly, trustees selling shares which give a controlling interest in a company may, if necessary to obtain the best price, give warranties common in such agreements and contract not to distribute the consideration within the period of the warranties (not least because in the absence of such a restriction they would have been entitled to retain part or all of the trust fund[95a] to protect their entitlement to be indemnified in respect of the liability on the warranties).[95b]

[61a] *Howell v Lees-Millais* [2009] EWHC 1754 (Ch); [2009] W.T.L.R. 1163.
[95a] For trustees' entitlement to an indemnity against contractual liabilities, see § 21–13.
[95b] *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch); [2008] All E.R. (D) 175 (Oct) at [213].

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29–206 AT THE END ADD: Note that if an agreement alleged to be a fetter is made with a third party, and the agreement is said to be ineffective (and not merely a breach of trust), it is necessary to join the third party to any proceedings in which its effectiveness is challenged.[98a]

More than one donee—simultaneous exercise

29–209 NOTE 7. AT THE END ADD: and [2008] NZSC 61.

12. GIVING REASONS FOR DECISIONS

No general duty to give reasons

29–210 NOTE 15. INSERT AT THE END OF THE FIRST SENTENCE: *Breakspear v Ackland* [2008] EWHC 220; [2009] Ch. 32.

NOTE 22. DELETE THE LAST SENTENCE.

13. EXCESSIVE EXECUTION

General

29–217 AFTER THE PENULTIMATE SENTENCE INSERT: Severance is possible if, as a conceptual matter, it is possible to distinguish the boundary between the valid and the invalid; but in the case of a fiduciary power it is also material to enquire whether the trustees would not have exercised the power at all, or would have exercised it differently, if they had been properly instructed as to the limits on the power, for otherwise the principle in *Re Hastings-Bass*[38a] would vitiate the exercise.[38b]

14. MISTAKE, MISAPPREHENSION AND INADVERTENCE

General

DELETE §§ 29–229 AND 29–230 AND REPLACE BY THE FOLLOWING:

[98a] *Jones v Firkin-Flood*, above, at [216].
[38a] [1975] Ch. 25, CA. For the principle in *Re Hastings-Bass*, see §§ 29–238 *et seq.*
[38b] *Bestrustees v Stuart* [2001] EWHC 549 (Ch); [2001] O.P.L.R. 341.

29–229 Trustees and other donees may exercise a power while labouring to some extent under a mistake or misapprehension, whether as to the nature of the exercise or the facts on which their decision is based or the effect of what they are doing. Relief is available in various circumstances which are described here. The grounds on which relief is available may be divided into those dependent on the duties owed by fiduciaries and those not so dependent. The primary point of distinction is that in the latter case it is necessary to show that the mistake was a mistake as to the nature or legal effect of the transaction and not merely as to its consequences;[80] in the former that is not necessary and relief may be available in wider circumstances.

29–230 In the former class of case, the jurisdiction of the court became prominent in recent years, especially when the fiscal treatment of a proposed exercise had been misunderstood. Decisions of trustees who had exercised a power in a way which proved expensive in tax came to be set aside on the ground that they had not understood the consequences of what they were doing, under what became known as the principle in *Re Hastings-Bass*.[81] Other taxpayers did not have the benefit of revisiting their decisions to the same extent and disquiet was expressed that the principles on which the court was acting was unduly indulgent.[82] The disquiet was shared by the revenue authorities,[83] which began to take part in and oppose applications for relief under that principle, both in England and elsewhere.[83a] The Court of Appeal, in *Pitt v Holt*,[83b] has now re-stated the relevant principles in both classes of case, that is, those dependent on the duties owed by fiduciaries and those not so dependent. We begin with the latter.

Circumstances not dependent on duties owed by fiduciaries

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80 See § 29–232.

81 [1975] Ch. 25, CA.

82 Walker, 'The Limits of the Principle in *In Re Hastings-Bass*' [2002] P.C.B. 226 (an extra-judicial view expressed by Lord Walker of Gestingthorpe). Neuberger, *Aspects of the law of mistake: Re Hastings-Bass* (2009) Trusts & Trustees, Vol.15(4), 189 (an extra-judicial view expressed by Lord Neuberger of Abbotsbury, M.R.).

83 H.M. Revenue & Customs' *Tax Bulletin*, issue 83, at 1292–1294 (June 2006), setting out criticisms of decisions developing the principle in *Re Hastings-Bass*, for which see §§ 29–238 *et seq.*

83a See, in England, *Pitt v Holt* [2010] EWHC 236 (Ch); [2010] S.T.C. 901 and *Re Futter* [2010] EWHC 449 (Ch); [2010] S.T.C. 982, appeals in which were heard together, [2011] EWCA Civ 197; [2011] 3 W.L.R. 19. H.M.R.C. successfully sought to be joined in proceedings in Guernsey in *H.M.R.C. v Gresh* [2010] W.T.L.R. 1303, Guernsey CA.

83b Above.

Rescission

29–231 NOTE 84. INSERT AT THE END: and in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA at [165]–[210].

NOTE 85. DELETE AND REPLACE BY: See §§ 4–56 *et seq*. (including online supplement).

AFTER THE END OF THE PARAGRAPH INSERT: In summary, there must be a mistake on the part of the disponor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction.[92a]

29–232 DELETE THE WHOLE PARAGRAPH AND THE ASSOCIATED FOOTNOTES AND REPLACE BY: The seriousness of the mistake is an additional element in the jurisdiction. There is the authority of the House of Lords for saying (in the case of a gift) that a donor "can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him".[93] Before the jurisdiction can be invoked, the mistake must both satisfy that test and must be a mistake as to the legal effect of the disposition or as to a basic existing fact.[94]

29–233 INSERT AT THE END OF THE THIRD SENTENCE OF THE TEXT: and it has recently been confirmed that the unforeseen fiscal effects of a transaction will not bring the jurisdiction into play.[97] DELETE THE REMAINING SENTENCES OF THE TEXT AND THE ASSOCIATED FOOTNOTES.

[92a] *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, at [210]. See § 4–58 (online supplement).

[93] *Ogilvie v Littleboy* (1897) 13 T.L.R. 399 at 400, CA, *per* Lindley L.J.; approved in HL *sub nom*. *Ogilvie v Allen* (1899) 15 T.L.R. 294 *per* Lord Halsbury L.C. and Lord Macnaghten.

[94] *Pitt v Holt*, above, at [167], [203], [210].

[97] *Pitt v Holt*, above, at [210].

Circumstances dependent on duties owed by fiduciaries—*Re Hastings-Bass*[20]

DELETE §§ 29–238 TO 29–254 AND REPLACE BY THE FOLLOWING:

General

29–238 A principle has been developed dependent on the duty of trustees (or, seemingly, other fiduciary donees) to have regard to relevant considerations, and only relevant considerations, when exercising powers vested in them. The duty extends to considering the consequences of a proposed exercise of a power in a particular way and not merely its nature or legal effect. If the exercise has effects or consequences not apprehended by the trustees, when they ought to have been, it may be vitiated. This is the so-called principle in *Re Hastings-Bass*;[21] and though, as will appear, the name has become inapposite it is likely to continue in use.

29–239 As it now stands, the principle takes the form enunciated by the Court of Appeal in *Pitt v Holt*[22] in 2011, when the authorities were exhaustively discussed. Its main features are as follows:[23]

(1) Trustees are bound to take relevant matters into account and to ignore irrelevant matters when exercising a discretionary power.

(2) Relevant matters include the fiscal consequences, if any, of any proposed exercise.

(3) If there is a breach of their fiduciary duty in failing to take into account relevant matters, or to ignore irrelevant matters, but only if there is such a breach, then the exercise of the power will be open to challenge,

(4) In such a case the exercise is not void but voidable and relief is both discretionary and subject to any available equitable defences.

(5) The exercise is not open to challenge in the absence of fault on the part of the trustees, as where their failure to take a given matter into account (for instance, adverse tax consequences) was the result of incorrect professional advice.

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20 [1975] Ch. 25, CA.

21 Above.

22 [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA. The decision disposed of two appeals, heard together, that in *Pitt v Holt* and another in *Re Futter*.

23 *ibid*., at [126]–[131], especially [127].

The Supreme Court, however, has given permission to appeal against the decision of the Court of Appeal and so the exposition of the principle in this work must be treated as provisional until the Supreme Court has given judgment.

History of the principle

29–240 In decisions preceding *Pitt v Holt*, the principle had been thought to take a different and much wider form, by which any decision of trustees was vitiated if taken in ignorance of material considerations or taking into account immaterial considerations, the general view, though not the universal view, being that that was so whether or not the trustees had been at fault and that the exercise was then void rather than voidable.[24] The principle was attributed to the decision of the Court of Appeal in 1975 in *Re Hasting-Bass*, as understood and applied in *Mettoy Pension Trustees Ltd v Evans*[25] in 1989, and so went under the name 'the principle in *Re Hastings-Bass*'. In *Pitt v Holt*, however, it was held that *Re Hasting-Bass* had been misinterpreted in *Mettoy* and was not authority for the wide principle until then attributed to it.[26]

29–241 The problem in *Re Hastings-Bass* arose out of the exercise of a power of advancement by way of sub-settlement, effected by a transfer to another settlement for the benefit of the object of the power. A life interest so created in favour of the object did not breach the rule against perpetuities but the remaining trusts did so and hence were void.[27] The question arose

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24 English decisions before *Pitt v Holt* included *Green v Cobham* [2000] W.T.L.R. 1101; *Abacus Trust Co. (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] S.T.C. 1344; *AMP (UK) Ltd v Barker* [2001] P.L.R. 77 (*obiter*); *Hearn v Younger* [2002] EWHC 963 (Ch); [2002] All E.R. (D) 223 (May); *Abacus Trust Co. (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch); [2003] Ch. 409; *Sieff v Fox* [2005] EWHC 1312 (Ch); [2005] 1 W.L.R. 3811; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch); [2005] O.P.L.R. 57 (*obiter*); *Burrell v Burrell* [2005] EWHC 245 (Ch); [2005] S.T.C. 569; *Smithson v Hamilton* [2007] EWHC 2900 (Ch); [2008] 1 W.L.R. 1453; *Jiggens v Low* [2010] EWHC 1566 (Ch); [2010] S.T.C. 1899; *Wyantt v Tyrrell* [2010] EWHC 3633 (Ch), together with the decisions at first instance reversed in *Pitt v Holt* itself, namely *Pitt v Holt* [2010] EWHC 236 (Ch); [2010] S.T.C. 901 and *Re Futter* [2010] EWHC 449 (Ch); [2010] S.T.C. 982. *Abacus Trust Co. (Isle of Man) Ltd v Barr* was alone in holding (i) that there had to be a breach of duty on the part of the trustees and (ii) that the exercise was then voidable, not void, though other decisions left one or other point open.

25 [1990] 1 W.L.R. 1587 at 1621.

26 *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [72], [131].

27 Under the rule that the exercise of a power of advancement had to be read back into the original settlement for the purpose of the rule against perpetuities, see § 5–90 (including online supplement).

whether the whole advancement was ineffective.[28] The Court of Appeal upheld the life interest, holding that the exercise of the power could be upset only if the exercise could not reasonably be regarded as being for the benefit of the beneficiary intended to be advanced.[29] In words much quoted in later decisions, however, the court said,[30]

> "... [W]here by the terms of a trust ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account."

That passage was relied on in *Mettoy* and later decisions to support a principle expressed in positive terms, to the effect that where a trustee acts under a discretion given to him by the terms of the trust but the effect of the exercise is different from that which he intended, the court will interfere if he would not have acted as he did but for failing to take into account considerations which he ought to have taken into account or taking into account considerations which he ought not to have taken into account.[31] The wording quoted from *Re Hastings-Bass* is in fact to the effect that the court will not interfere in the absence of certain circumstances and it does not follow that it will interfere wherever those circumstances are present. Indeed, in *Re Hastings-Bass* the court expressly rejected a submission that the trustees could not have exercised their power validly unless they had had a proper understanding of the effect of the sub-settlement.[32]

29–242 The court in *Pitt v Holt* drew attention to that rejection and held that the passage quoted had to be understood consistently with it: the fact that the trustees had misunderstood the effect of

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28 The question arose between the trustees and the Inland Revenue, the Inland Revenue contending that the purported advancement was entirely void; no beneficiary sought to set the advancement aside.

29 [1975] Ch. 25 at 41B–C. See § 32–21.

30 [1975] Ch. 25 at 41F–H.

31 The formulation in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1621H, as modified and adopted in *Sieff v Fox* [2005] EWHC 1312; [2005] 1 W.L.R. 3811 at [46]–[49], [114], [119].

32 [1975] Ch. 25 at 41E, referring to a submission summarised at 35G–H.

the advancement did not make it void.[33] *Mettoy* and the later authorities following it were wrong in holding that a misapprehension or similar failing on the part of trustees would do so.[34] It was only if the exercise of the power, once its effects were examined, could not reasonably have been regarded as being for the benefit of the beneficiary being advanced that the exercise would have been void, for then it would have been outside the scope of the power.[35] Otherwise the exercise might be voidable at the instance of a beneficiary but it would be valid until set aside; and it would be voidable only if the trustees had been in breach of duty.[36] No such question had arisen in *Re Hastings-Bass*, for no beneficiary had sought to set the decision aside and the contest was between the Inland Revenue, concerned to argue that the exercise was wholly void, and the trustees.

29–243 In future, therefore, attention will usually focus on the question whether the trustees were in breach of duty in exercising the power as they did and, if so, whether it should be avoided at the instance of a beneficiary. That is so at least in England. In a number of jurisdictions abroad the principle in *Re Hastings-Bass* in its wider form was adopted before *Pitt v Holt*.[37] Whether those jurisdictions will now adopt the narrowing of the principle effected in *Pitt v Holt* remains to be seen.[38]

Examples

29–244 Examples of the application of the principle in its re-stated form may be given as follows:

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33 *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [58], [62], [63]–[67].

34 *Ibid*., at [72], [94], [122].

35 *Re Hastings-Bass*, above, at 41B–C; *Pitt v Holt*, above, at [58], [66], [96], [222].

36 *Pitt v Holt*, above, at [99], [222].

37 *Re Green GLG Trust* [2002] JRC 235; (2002–03) 5 I.T.E.L.R. 590; *Barclays Private Bank & Trust (Cayman) Ltd v Chamberlain* (2006–07) 9 I.T.E.L.R. 302, Cayman GC; *Irish Pensions Trust Ltd v Central Remedial Clinic* [2005] O.P.L.R. 137, Ir HC; *A v Rothschild Trust Cayman Ltd* (2006–07) 9 I.T.E.L.R. 307, Cayman GC; *Re RAS I Trust* [2006] JRC 187; (2006–07) 9 I.T.E.L.R. 798; *Re Winton Investment Trust* [2007] JRC 206; [2008] W.T.L.R. 553; *Re Howe Family No.1 Trust* [2007] JRC 248; *Re Seaton Trustees Ltd* [2009] JRC 050; [2010] W.T.L.R. 105; *Re Ta-Ming Wang Trust* (2010-11) 13 I.T.E.L.R. 854, Cayman GC; *Re R Trust* [2011] JRC 85.

38 In *Re S Trust* [2011] JRC 117 the Jersey RC declined to follow *Pitt v Holt* in so far as it re-stated in a narrow form the grounds on which a gift into trust could be set aside so as to exclude a misapprehension of the consequences of the gift (notably the fiscal consequences), for which see § 4–58 (including online supplement). The Jersey RC did not consider the *Hastings-Bass* principle in that case, though it is notable that, in considering *Pitt v Holt*, the Jersey RC took a less sympathetic view of the weight to be attached to the interests of the tax authority than did the CA in *Pitt v Holt*, see [2011] JRC 117 at [39] (“Leviathan can look after itself”).

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(1) Where the rule against perpetuities rendered void much of an exercise of a power of advancement but the residue could still be regarded as being for the benefit of the object of the power, the exercise was not void but might be voidable at the instance of a beneficiary.[39]

(2) Where the trustees of a pension scheme did not properly inform themselves as to the value of the fund and the consequences of that value when exercising an imperative power to fix an amount to be transferred to another scheme on a sale by the employer of part of its business, their decision fixing the amount was held to be flawed.[40]

(3) Where trustees were held to be at fault in exercising a power of appointment as to 60 per cent. of the fund, under the impression that in so doing they were acting in accordance with the settlor's wishes, when in fact his wishes were that they should exercise the power as to 40 per cent. of the fund only, the exercise was liable to be avoided.[41]

Cases of voidability and voidness

29–245 Since it is now clear that the application of the narrowed principle in *Re Hastings-Bass* leaves the exercise of a power voidable and not void, it will be necessary to draw a sharp distinction between cases within the principle and cases within other rules which may render the exercise void, particularly rules having some resemblance to the principle:

(1) Where the misapprehension on the part of the trustees is such that the exercise cannot properly be regarded as being for the benefit of the beneficiary intended to be benefited, as where the limitations have been largely struck down by the rule against perpetuities, the exercise is void. (The test is an objective one, not requiring an investigation of what the trustees would have done if they had known

[39] *Re Hastings-Bass*, above, itself, as explained in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 see §§ 29–241, 29–242.

[40] *Stannard v Fisons Pensions Trust Ltd* [1992] I.R.L.R. 27, CA, as commented on in *Pitt v Holt*, above, at [73]–[74]. It is not in fact clear from the report of *Stannard* what relief was sought or whether the decision was treated only as voidable.

[41] *Abacus Trust Co. (Isle of Man) v Barr* [2003] Ch. 409, as commented on in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA at [81]–[89], [129]. The decision anticipated *Pitt v Holt* in that it was held that under the principle in *Re Hastings-Bass* the exercise of a power was voidable rather than void. The case was adjourned for consideration whether the exercise should be avoided.

of the problem.[42]) In such a case, the exercise is not within the terms of the power at all.[43] But such cases will be infrequent.

(2) A somewhat different failure to take relevant matters into account occurs where trustees have given no independent consideration to an exercise of their powers but have merely acted on the prompting of others. Appointments have been held void where the trustees executed documents prepared on the instructions of the settlor and never applied their minds at all to the exercise of the discretion entrusted to them.[44] In such cases there is undoubtedly a breach of the duty recognised in *Re Hastings-Bass* to take relevant matters into account and that authority has been relied on when holding the purported exercise void;[45] but they turn rather on the absence of any real decision by the trustees than on the taking of a decision vitiated by mistake or misapprehension.[46] *Pitt v Holt* does not suggest that they should be subsumed into the narrow principle that it recognises or that such a purported exercise should be treated as only voidable.[47] Hence they are considered elsewhere.[48]

(3) Where there is a fraud on the power, the exercise is also void and not voidable,[49] a rule acknowledged in *Pitt v Holt*.[50]

(4) There are other defects in the exercise of a power rendering the exercise void, some of them mentioned in *Pitt v Holt*,[51] such as the want of a requisite

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42 *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, at [66].

43 *Re Abrahams' Will Trusts* [1969] 1 Ch. 463, as explained in *Re Hastings-Bass*, above, at 41; *Pitt v Holt*, above, at [57]–[58], [96], [222]. See §§ 5–90, 32–21 (including online supplement).

44 *Turner v Turner* [1984] Ch. 100. See too *Betafence Ltd v Veys* [2006] EWHC 999 (Ch); [2006] W.T.L.R. 941 at [73]–[74].

45 *Turner v Turner*, above, at 111A–C.

46 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1624G–H.

47 See *Pitt v Holt*, above, at [88], citing *Turner v Turner*, above, and the comment on it in *Abacus Trust Co. (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch); [2003] Ch. 409 at [32]–[33], to the effect that in such cases the purported exercise is void.

48 § 29–144.

49 See §§ 29–277 to 29–279.

50 See *Pitt v Holt*, above, at [97]–[98].

51 Above, at [96].

formality,[52] the failure to obtain a necessary prior consent,[53] an unauthorised delegation[54] and an excessive appointment.[55]

Scope of trustees' duty

29–246 The decision in *Pitt v Holt* that there must be a breach of the trustees' fiduciary duty before the exercise of a power can be avoided will necessarily focus attention on the precise scope of the trustees' duty to have regard to relevant matters and to disregard irrelevant matters. As the principal judgment acknowledges, however, the decisions do not give a great deal of guidance in detail as to what ought to be taken into account in the case of ordinary discretionary trusts.[56] We have tried to expound what are and what are not relevant matters elsewhere.[57]

29–247 It is clear, however, that the fiscal consequences of a proposed exercise of a power are matters which the trustees are bound to take into account.[58] If they fail to do so, then they will be in breach of their duty and it will be open to a beneficiary to seek the setting-aside of the exercise. It seems that, in general, if a voidable exercise of a power is in fact avoided on an application to the court the exercise will be treated for tax purposes as if it had not occurred; that is specifically provided for inheritance tax[59] and the same appears to apply to other taxes.[60] Hence a beneficiary can be expected to challenge the exercise if, through the fault of the trustees, there are unforeseen fiscal consequences which are adverse for the trust as a whole or for himself. On such a challenge the revenue authorities will seemingly have no standing to appear and so none to object.[61] Before *Pitt v Holt*, applications under the principle in *Re Hastings-Bass* were commonly, though not invariably, prompted by the adverse fiscal

52 See §§ 29–166 to 29–171.
53 See §§ 29–35 *et seq.*, especially § 29–50.
54 See §§ 29–90, 29–225.
55 See §§ 29–216 *et seq.*
56 *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [114]–[118].
57 §§ 29–146 *et seq.*
58 *Pitt v Holt*, above, at [115]–[116], [222].
59 Inheritance Tax Act 1984, s.150.
60 *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [91].
61 *Cf. ibid.*, at [92].

consequences of an exercise of the trustees' powers[62] and the decision in *Pitt v Holt* has not closed the door on challenges to such an exercise.

29–248 Nonetheless, in one common set of circumstances no challenge will be possible. The trustees will have performed their duty if they take apparently competent professional advice even when the advice is wrong. Put another way, if it is said that the trustees failed to have regard to a relevant matter but the reason why they did not do so is that they obtained and acted on such advice, which turned out to be incorrect, there will be no breach of duty on their part and hence no ground for challenging the exercise of the powers based on it.[63] The remedy, if any, will lie against the professional advisers. This was the actual decision in *Pitt v Holt* itself and in the appeal heard with it, in both of which professional advice had been taken that was incorrect; the exercise of the powers had unfavourable fiscal consequences which were overlooked by the advisers. It was held that there was no breach of fiduciary duty and so the exercise in each case could not be avoided.[64]

29–249 There will be other situations in which the trustees fail to take a relevant matter into account without fault on their part. An instance is an appointment of quoted shares to a particular value to a beneficiary when the shares subsequently turn out at the date of the appointment to have been markedly more or less valuable than their quoted price by reason of a fact not reasonably ascertainable at the time, such as an imminent take-over bid or a massive fraud perpetrated on the quoted company.[65] In such cases there will be no breach of duty on the part of the trustees and no jurisdiction to avoid the appointment.

Nature and seriousness of mistake or misapprehension

29–250 The distinction between the legal effect of the transaction, or an existing fact basic to it, on the one hand and its consequences on the other, though important under the general jurisdiction to relieve against the consequences of a mistake,[66] are without significance for the

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[62] As in *Green v Cobham* [2000] W.T.L.R. 1101.
[63] *Pitt v Holt*, above, at [119]–[125], [222].
[64] *ibid.*, at [139], [143]–[144], [162]–[163]. It made no difference that in one case one of the trustees was a partner in the firm of solicitors giving the advice: *ibid.*, at [140]–[142].
[65] An instance given in *Abacus Trust Co. (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch); [2003] Ch. 409 at [23], the only decision before *Pitt v Holt* to require a breach of duty on the part of the trustees.
[66] See §§ 29–231 *et seq*.

purpose of the principle re-stated in *Pitt v Holt*. A mistake as to consequences only, leading to a failure to take them into account, will suffice. That follows from the fact that fiscal consequences were recognised in *Pitt v Holt* as capable of attracting the operation of the principle.[67]

29–250A Before *Pitt v Holt* there had been some controversy whether it was necessary to show that the trustees would have taken a different decision if properly apprised of the relevant considerations or whether it was sufficient merely that they might have done so. The authorities were largely reconciled by a decision that the test was indeed whether the trustees would have acted differently where the power was wholly discretionary; but where the trustees were bound to act, the power being what we have called an imperative power[68] and any discretion being confined to the manner or timing of the exercise, then the test was only whether they might have acted differently.[69] It is not clear whether that distinction has any role to play in the principle re-stated in *Pitt v Holt*; the point is not discussed. A complaining beneficiary who establishes only that the trustees might have acted differently will not have established any loss caused by the breach of duty; but that is not conclusive for present purposes, as the question is whether the challenged exercise of the power is to be avoided, not whether compensation should be paid. It may be that the answer is to be found in the fact that the court's intervention is now discretionary; an exercise is unlikely to be set aside unless the trustees' decision would have been different.

Standing to challenge

29–250B Since it is now necessary to prove a breach of duty on the part of the trustees in order to invoke the principle re-stated in *Pitt v Holt*, it will usually be a beneficiary who does so.[70] Previously it was not uncommon for the trustees to approach the court to overturn a decision of their own once it was realised that it had unintended consequences.[71] The trustees at fault

67 See § 29–247.
68 See §§ 29–22, 29–112 to 29–116.
69 *Sieff v Fox* [2005] EWHC 1312 (Ch); [2005] 1 W.L.R. 3811 at [50]–[56], [77], adopted obiter in *St Mary and St Michael Parish Advisory Co. Ltd. v The Westminster Roman Catholic Diocese Trustee* [2006] EWHC 762 (Ch); [2006] W.T.L.R. 881 at [167].
70 *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [130], saying also that proceedings ought to be by a Part 7 claim form, since there may be a substantial dispute of fact to be resolved.
71 See, *e.g.*, *Abacus Trust Co. (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2001] S.T.C. 1344.

will not generally wish to acknowledge a breach of duty; nor is it obvious that they, or indeed successor trustees, can invoke the jurisdiction of the court to avoid the exercise of the power. But it was recognised in *Pitt v Holt* that trustees might seek directions from the court if a beneficiary alleged a breach of trust but did not bring his own proceedings;[72] and when trustees identify a problem promptly it would be unfair not to allow them go to court themselves, if need be, since delay might increase the adverse financial consequences for which they would be liable.

Discretion and equitable defences

29–250C Where there is a case for challenging the exercise of a power, the court's intervention is discretionary and is subject to available equitable defences.[73] How far the discretion adds to the available defences is not yet clear. We have already suggested that the seriousness of the mistake or other failing on the part of the trustees will be a material factor.[74]

29–250D As between those interested in the trust, the principal equitable defence likely to be invoked is laches. A beneficiary who stands by once he knows of the possibility of a challenge is unlikely to succeed in upsetting the exercise of a power.[75] Supervening equitable interests created by later exercises of dispositive powers will not have an automatic priority, even though the right to seek an avoidance of the prior exercise of the power is a mere equity, but will be an important factor in the exercise of the court's discretion.

29–250E As to third parties, they may have dealings either with a beneficiary or with the trustees. In the former case, a gratuitous assignee of a supervening equitable interest will be in the same position as the assignor. But if the third party gives value for the assignment, and has no notice of the defect in the prior exercise of the trustees' discretion, his interest, though equitable, will on ordinary principles have priority over the right to seek an avoidance of the prior exercise.[76] If the third party deals with the trustees and the subject of the assignment is

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72 *Pitt v Holt*, above, *loc. cit.*

73 *Pitt v Holt*, above, at [127], [222].

74 See § 29–250A (online supplement).

75 For laches generally, see §§ 44–15 to 44–16. In *Abacus Trust Co. (Isle of Man) Ltd v Barr* [2003] EWHC 114 (Ch); [2003] Ch. 409, the only decision before *Pitt v Holt* to hold that the exercise was voidable rather than void, the life tenant (and settlor) had known of the problem for nearly ten years before proceedings were issued and the case was adjourned for consideration whether the exercise should be avoided.

76 *Snell's Equity* (32nd edn), § 4–023.

the trust property itself, of which he takes a legal assignment, for value and without notice, then again on ordinary principles he will take free of the right to seek an avoidance, though the right will attach to the proceeds of sale.[77]

Relief

29–250F The relief to be sought when invoking the principle re-stated in *Pitt v Holt* will ordinarily be the setting-aside of the whole exercise of the power under challenge and the consequent reversal of any steps taken under it, such as the transfer of trust funds. Under the broader principle that was understood to exist before that decision, the question arose whether only part of the exercise could be treated as bad; and it was held that it could.[78] Hence, so it was said, if on a proper consideration of relevant matters trustees would still have executed the deed they did execute but with the omission of a particular provision, the court might declare only that provision ineffective;[79] similarly, if trustees given proper tax advice would have omitted some assets from an appointment but not others, the appointment might be held ineffective only as to the assets which would have been omitted.[80] But a single provision in an instrument could not be omitted if the omission would leave the remainder unworkable or would amount to rectification of the instrument rather than a partial undoing of the exercise of a power.[81] Whether a partial avoidance remains possible after *Pitt v Holt* was left open in that case[82] but there seems to be no reason why not: it must be easier to avoid part of the exercise of a power if the exercise is only voidable.

29–251 Since an application to avoid the exercise of a power must now be based on a breach of duty on the part of trustees, it will be common to combine it with a claim for compensation to the extent that an order avoiding the exercise is refused or such an order does not fully restore the trust fund. Consequential orders may also be claimed against the recipients of dispositions

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77 *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [99]. The same applies to a contract with a third party: *Donaldson v Smith* [2007] W.T.L.R. 421 at [51]–[55]. (The passage is omitted in [2006] EWHC B9 (Ch).) It may perhaps be different where the third party is agreeable to the setting-aside of the contract or disposition: *Re Winton Investment Trust* [2007] JRC 206; [2008] W.T.L.R. 553 at [12], [19].

78 *Mettoy Pension Trustees Ltd v Evans* [1990] 1 W.L.R. 1587 at 1624H–1625B; *Burrell v Burrell* [2005] EWHC 245 (Ch); [2005] S.T.C. 569 at [25].

79 *Mettoy Pension Trustees Ltd v Evans*, above, *loc. cit.*

80 *Burrell v Burrell*, above, at [25].

81 *Smithson v Hamilton* [2007] EWHC 2900 (Ch); [2008] 1 W.L.R. 1453.

82 *Pitt v Holt*, above, at [72].

sought to be avoided. Where trustees exercised a power to pay to a widow "generous and appropriate sums" out of both income and capital without making any enquiry as to her other means, though directed by the trust instrument to do so, her estate was held liable to refund the entirety of the sums so paid.[83]

No positive effect of principle

29–252 The principle re-stated in *Pitt v Holt* is negative only. It is invoked where the trustees have not given proper consideration to relevant matters and if in consequence the exercise of a power is avoided the power is treated as not having been exercised. It does not apply in the converse case, so as to permit the court to treat the trustees as having exercised a power which they have not in fact exercised on the ground that the failure to exercise it was caused by a misapprehension and that they would have done so if properly informed.[83a] Hence if trustees fail to exercise a power before it has expired there can be no recourse to the principle.[83b]

Third parties

29–253 The cases of a power vested in trustees but subject to the consent of a third party and of a power vested in a third party but vested in trustees have already been mentioned in the discussion of the general jurisdiction to give relief for mistake.[83c] We consider that if the trustees have exercised the power under a mistake which would otherwise attract the operation of the principle re-stated in *Pitt v Holt,* the fact that a requisite consent is forthcoming from a third party who is not mistaken should not be a bar to relief; and that if the trustees have consented to an exercise under such a mistake, that similarly should ground relief even though the donee was not mistaken.[83d]

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[83] *Sinclair v Moss* [2006] VSC 130. The trustees' decisions were held void in consequence of the failure to make enquiries. It was held on the facts that the trustees would have made different decisions if they had made those enquiries.

[83a] *Breadner v Granville-Grossman* [2001] Ch. 523, decided before *Pitt v Holt* but there can be no doubt that it remains good law.

[83b] *ibid*. As to the possibility of a claim for damages by a disappointed beneficiary, see § 43–09.

[83c] See § 29–236.

[83d] But in *Smithson v Hamilton* [2007] EWHC 2900 (Ch); [2008] 1 W.L.R. 1453 relief was refused where a definitive pension deed had been entered into under a misapprehension, on the ground that it had been devised by the employer, though accepted by the trustees, and so the adoption of the deed was "essentially", "predominantly" or "overwhelmingly" the act of the employer, not the trustees (*ibid*., at [81], [92]). An appeal was compromised: see [2008] EWCA Civ 996.

Other fiduciaries

29–254 The principle re-stated in *Pitt v Holt* may apply to other fiduciaries, at any rate those holding a discretionary power which obliges them to consider relevant matters and ignore irrelevant ones. The Court of Appeal was prepared to assume in that case that the principle did apply to a receiver of another's property appointed under the Mental Health Act 1983 (now a deputy appointed under the Mental Capacity Act 2005).[83e] In Jersey the former principle in *Re Hastings-Bass* has been applied to a protector when deciding on the appointment of new trustees.[83f] Directors have been said to fall within the principle.[83g] We consider that such fiduciaries should be treated as being on the same footing as trustees.

15. Fraud on a Power—Ulterior Purposes

General principle

29–256 NOTE 85. AT THE END ADD: *Kain v Hutton* [2008] NZSC 61 at [18].

Categories of fraud on a power

Division (2)—Bargain to benefit non-object

29–260 IN THE FOURTH SENTENCE DELETE to make him liable AND REPLACE BY: to make the donee liable.

29–261 NOTE 5. AT THE END ADD: (on appeal at [2008] NZSC 61).

29–262 NOTE 7. INSERT AT THE END (WITHIN THE FINAL BRACKET): and [2008] NZSC 61.

29–263 NOTE 8. AT THE END ADD: (and see on appeal [2008] NZSC 61).

NOTE 10. AT THE END ADD: *Kain v Hutton* [2008] NZSC 61; (2001) 11 I.T.E.L.R. 130 at [21], [52]–[53].

[83e] *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19 at [162]. The court at first instance had decided that a receiver did attract the operation of the former principle in *Re Hastings-Bass*, see [2010] EWHC 236 (Ch); [2010] S.T.C. 901.

[83f] *Re R Trust* [2011] JRC 085.

[83g] *Re Ta-Ming Wang Trust* (2010) 13 I.T.E.L.R. 854, Cayman GC. See too *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch); [2005] 1 B.C.L.C. 175 at [172] *et seq.*

Division (3)—Other foreign purpose

29–264 NOTE 13. AFTER THE REFERENCE TO *Re Cohen* INSERT: *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) at [262]–[264], [280].

Who can complain

Powers of appointment and other dispositive powers

29–269 IN THE FIRST SENTENCE DELETE any those interested AND REPLACE BY: any of those interested.

Powers within the principle

29–272 NOTE 43. AT THE END ADD: Seemingly it applies also to a power to change the proper law of a trust (for which see § 11–74): see *Oakley v Osiris Trustees Ltd* [2008] UKPC 2; (2007–08) 10 I.T.E.L.R. 789.

NOTE 44. THE CORRECT CITATION OF *Re Papadimitriou* IS [2004] W.T.L.R. 1141, Manx HC. AT THE END ADD: *Re Bird Charitable Trust* [2008] JRC 013; (2008) 11 I.T.E.L.R. 157 at [75].

Consequences where exercise is a fraud on a power

29–277 NOTE 56. INSERT AT THE END OF THE FIRST SENTENCE: *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA at [97]–[98] (expressed with some reservation). DELETE THE SECOND SENTENCE AND REPLACE BY: Contrast the consequences of an exercise of a power vitiated by the principle of *Re Hastings-Bass* [1975] Ch. 25, CA restated in *Pitt v Holt*; see §§ 29–239 *et seq*. (online supplement).

16. DISCLAIMER AND RELEASE OF POWERS

Release

29–285 NOTE 86. DELETE THE FIRST FIVE WORDS AND REPLACE BY: See cases cited in n.83.

29–287 NOTE 95. DELETE AND REPLACE BY: See cases cited in n.92.

POWERS GENERALLY

17. CONTROL BY THE COURT

Category (1)—Extent of trustees' powers

29–293 IN THE SECOND SENTENCE DELETE rely on AND REPLACE BY: ascertain.

Category (2) and (3)—"Blessing" and surrender of discretion

Application without surrendering discretion

29–299 NOTE 32. AT THE END ADD: *Re V Settlement* [2007–08] G.L.R. 240; (2009–10) 12 I.T.E.L.R. 360; *NBPF Pension Trustees Ltd v Warnock-Smith* [2008] EWHC 455 (Ch); [2008] 2 All E.R. (Comm) 740.

NOTE 33. AT THE END OF THE FIRST SENTENCE INSERT: *NBPF Pension Trustees Ltd v Warnock-Smith*, above, at [21]; *A Trustees Ltd v W* [2008] JRC 097 at [18].

AT THE END OF THE FIFTH SENTENCE INSERT A NEW N.35a: But it has been held in Jersey that if the court refuses approval of a decision taken by trustees as being unreasonable it may direct a different exercise of the trustees' powers: *A Trustees Ltd v W*, above (where, however, the trustee was also affected by a conflict with its duty as trustee of a separate fund).

INSERT AFTER THE FIFTH SENTENCE: The court may also withhold approval where the trustees have demonstrated a general unfitness to act, by conduct before the taking of the decision in question.[35b]

NOTE 37: INSERT AT THE BEGINNING OF THE NOTE: *Thommessen v Butterfield Trust (Guernsey) Ltd* 2009–10 G.L.R. 102, Guernsey RC.

AT THE END OF THE LAST SENTENCE OF THE TEXT INSERT A NEW N.38a: This paragraph was quoted with approval in *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch); [2008] All E.R. (D) 175 (Oct) at [257].

AT THE END OF THE TEXT ADD: The trustees must also demonstrate that they have concluded how best to exercise their discretion and that they intend, subject to the approval of the court,

[35b] *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) at [281].

forthwith to act on that conclusion, since they are not entitled to raise hypothetical questions.[38b]

Application surrendering discretion

29–300 NOTE 49. INSERT AT THE END: *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) at [254]–[255], approving what was said in *Public Trustee v Cooper* about managing conflicts of interest.

Category (4)—Attack on actual exercise

29–302 NOTE 54. AT THE END OF THE FIRST SENTENCE ADD: *McNulty v McNulty* [2011] NZHC 1173; (2011–12) 14 I.T.E.L.R. 361 at [108]–[112].

29–302(5) NOTE 61. DELETE THE SECOND SENTENCE AND REPLACE BY: See §§ 29–238 *et seq*.

29–303 NOTE 70. INSERT A STOP AT THE END AND ADD: But as to applications under the principle in *Re Hastings-Bass*, as re-stated in *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA, see now § 29–250B (online supplement).

Principle of non-intervention

Where power permissive

29–305 NOTE 72. AT THE END ADD: *Pitt v Holt* [2011] EWCA Civ 197; [2011] 3 W.L.R. 19, CA at [108]–[113].

29–306 AT THE END ADD. The court has refused to overturn a trustee's reasonable decision to sell the sole asset of the trust, even when the settlor was opposed to the decision.[78a] Decisions in the exercise of administrative powers, such as a decision not to commence proceedings, are similarly left to the discretion of the trustees.[78b]

[38b] *Berman v SPF CDO I Ltd* (2011) 13 I.T.E.L.R. 831, HK CFI. For hypothetical questions, see § 27–21.

[78a] *MM v S.G. Hambros Trust Co. (Channel Islands) Ltd* [2010] JRC 037.

[78b] *Satinland Finance SARL v BNP Paribas Trust Corp UK Ltd* [2010] EWHC 3062 (Ch); [2010] All E.R. (D) 287 (Nov) at [50]–[57].

29–308 NOTE 85. AT THE END ADD: *AN v Barclays Private Bank and Trust (Cayman) Ltd* (2006–07) 9 I.T.E.L.R. 630 at [19], Cayman GC.

Exceptions to principle of non-intervention

Disclosure to beneficiaries

29–314 DELETE THE LAST THREE SENTENCES AND N.3 AND REPLACE BY: The trustees' decision to withhold disclosure may no doubt be impugned on one of the conventional grounds for challenging their decisions; such a decision may not be the exercise of a power in the ordinary sense but the trustees cannot be under a duty to give disclosure in response to every request and hence, except in circumstances where they have no real choice,[3] they must have a discretion to withhold disclosure. The court, however, may also intervene in the exercise of its supervisory jurisdiction, though if not persuaded to do so only the conventional grounds of challenge will be available.[3a]

Appointment of trustees

29–315 NOTE 8. AT THE END ADD: (and on further appeal [2008] NZSC 61).

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3 See § 23–24.
3a See § 23–20 (online supplement).