IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 519

20th June 2018

Before: **Robert Logan Martin QC, President**
Sir Michael Birt
Deemster David Doyle

In the matter of the Richmond Retirement Plan

Between:	**M**	**Appellant**
	-and-	
	St Anne's Trustees Limited (as Trustee of the Richmond Retirement Plan)	**Respondent**

Advocate A C Williams for the Appellant
Advocate E Gray for the Respondent

Birt JA

This is the judgment of the Court.

1. On 12th January 2018, Her Honour Hazel Marshall QC, Lieutenant Bailiff, rejected an application by the Appellant to set aside, and thereby avoid, a transaction undertaken by the Respondent as trustee of the Richmond Retirement Plan ("the Scheme"). The application was made pursuant to what is commonly (if somewhat inaccurately) referred to as the rule in Hastings-Bass. The Appellant now appeals against that decision.

The background

2. The relevant facts are set out at paragraphs 3 – 8 and 55 – 80 of the Lieutenant Bailiff's judgment. We gratefully draw on her judgment for what follows.

3. The Scheme was established by deed dated 22nd January 2009. The Respondent ("the Trustee") is the trustee. The purpose of the Scheme is to provide superannuation benefits for members and their dependents. Under it, assets are held and administered by the Trustee in accordance with the general rules of the Scheme. However, each member has his or her own separate pool of assets ("a plan") backing his or her individual pension plan.

4. The Appellant lives in Bermuda, having moved there from the United Kingdom in 2007. In 2010, he moved his personal UK pension scheme into the Scheme. This was arranged through a Mr Bhargaw Buddhdev of Barnett Waddingham LLP, financial consultants, who were the Appellant's pension advisers. Barnett Waddingham were accordingly appointed to provide

actuarial services to the Appellant's plan (i.e. the parcel of assets supporting his pension plan). The Scheme is approved under Section 157A(4) of the Income Tax (Guernsey) Law 1975 and is also accepted by Her Majesty's Revenue and Customs (HMRC) as a Qualifying Recognised Overseas Pension Scheme ("QROPS").

5. In 2013, the Appellant borrowed some £2.6m from the Scheme. The loan was required in order to facilitate payments to the Appellant's ex-wife under a divorce settlement. Under the rules of the Scheme, this loan had to be repaid before the Appellant could start to draw a pension, as he wished to do.

6. On 19th November 2013, the Appellant sent to Mr Buddhdev a copy of an article which he had seen in the Daily Telegraph, about people who had transferred commercial properties to their pension funds and were delighted with the situation. He queried whether he could place two investment properties into his pension plan. They were both residential properties; one was in London and one in Miami. Each was owned by a company, the shares of which were in turn owned by the Appellant. The London property was owned by a Bermudian company and the Florida property was owned by a BVI company. He asked Mr Buddhdev; "*what do you think?*"

7. On 25th November he made further enquiries through Mr Buddhdev asking whether he could repay the loan, either by transferring £2.6m of his own share portfolio into the Scheme in lieu of cash or whether he could repay the loan by transferring the two investment properties into the Scheme. Written valuations of the two properties were subsequently provided.

8. On 16th December 2013, the Trustee replied to Mr Buddhdev confirming that, under the local Guernsey pension rules, the Scheme could buy any type of property as an investment but that the rental must be on a commercial basis. The response from the Trustee continued:-

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

9. On 10th March 2014, the Trustee emailed Mr Buddhdev confirming the current value of the Appellant's plan and that receipt of the shares in the companies representing the value of the two properties would result in a balancing payment due to the Appellant of £292,249 after repayment of the loan. Thus the transfer was being treated as, effectively, a sale and purchase.

10. Via his Bermudian solicitors, the Appellant subsequently sought tax advice from English solicitors, Hunters. On 21st March 2014, Hunters responded by email to the Appellant's Bermudian solicitors giving tax advice. That advice concentrated on capital gains tax and inheritance tax and concluded that neither of these would be a problem.

11. Despite what had been said in the email of 16th December 2013, the Trustee did not see (or ask to see) a copy of this advice and indeed was not aware whether or not the Appellant had in fact taken tax advice. Furthermore, the Trustee did not take any tax advice of its own despite having said in the email that it would be doing so.

12. The transaction was completed on 28th May 2014. The Appellant repaid the loan by transferring the shares in the two companies which owned the two properties into the plan and received the balancing payment. Thereafter the Appellant began to receive monthly pension payments out of the plan.

13. The acquisition by the plan of (indirect) ownership of residential property has in fact given rise to a substantial tax charge upon the Appellant. That arises in the following way. The Appellant's QROPS is an 'investment-regulated pension scheme' for the purposes of the Finance Act 2004. Section 174A of the 2004 Act provides that such a pension scheme is to be treated as making an unauthorised payment to a member of the pension scheme if the pension scheme acquires an interest in residential property. Section 208 of the 2004 Act provides that a charge to income tax, to be known as the unauthorised payments charge, arises where an unauthorised payment is made by such a pension scheme and further provides that the person liable to that tax charge is the member to or in respect of whom the payment is made. The rate of charge is 40% of the unauthorised payment. In the case of the acquisition of residential property, this means 40% of the acquisition value of the property. There is an additional potential charge under Section 185A on the value of the actual rent received in respect of the residential property or, if greater, the deemed annual rental income. This too is payable by the scheme member rather than the QROPS itself. Similarly, if and when the scheme disposes of residential property and realises a capital gain, there will be an unauthorised payments charge on the gain. This too will be assessable on the member of the scheme rather than the scheme itself. The various tax charges apply even where the member is not resident in the UK, as is the case for the Appellant.

14. The acquisition by the Trustee of indirect ownership of the two residential properties in London and Miami is therefore treated as an unauthorised payment to the Appellant as the member of his plan and he is therefore liable to the unauthorised payments charge.

15. This all came to light in 2015 when the Appellant engaged PricewaterhouseCoopers to review his financial and tax position generally. As at the date of the hearing before the Royal Court, the Appellant's tax liability under Section 208 in respect of the transaction was about £1.8m.

16. In his affidavit prepared for the hearing, the Appellant stated that, had he been made aware of his potential tax liability, he would not have repaid his loan in this way, but could and would instead have done so by liquidating other assets (his US share portfolio), and this would not have had any such similar tax consequences. The Lieutenant Bailiff accepted his assertion in this respect.

17. In the affidavit sworn on behalf of the Trustee, it was asserted that if the Trustee had been aware of the tax consequences of accepting the transfer of the residential properties to the Appellant's QROPS, it would not have acceded to the Appellant's request to accept shares in the two companies owning the properties in satisfaction of the loan.

18. The Trustee is a member of the Guernsey Association of Pension Providers ("GAPP"). GAPP has issued a 'QROPS Code of Practice'. Section 6.3 is in the following terms:-

> ***"6.3 HMRC Requirements and Taxable Property***
>
> ***Trustees should not normally hold taxable property within a QROPS if the QROPS is an Investment Regulated Pension Scheme.***
>
> ***Whilst a wide choice of investments is permitted under the HMRC rules there are tax charges levied on certain assets under HMRC rules (Finance Act 2004, in particular sections 174 and 185). These tax charges relate to the income and gains of "taxable property" which includes residential property and tangible moveable property such as vintage cars, wine, stamps and fine art.***
>
> ***Where such taxable property is held in an Investment Regulated Pension Scheme the reporting requirements continue indefinitely and do not cease on completion of the Reporting Period."***

19. In summary, the Trustee proceeded to put this transaction into effect (by accepting indirect ownership of two residential properties in repayment of the loan) without seeking any tax advice of its own and without ascertaining whether the Appellant had obtained any tax advice, although it had indicated that he should do so. It did so in circumstances where the code of practice from GAPP alerted its members to the possible tax consequences of a QROPS acquiring residential property.

20. The transaction was not carried out for tax planning purposes. The plan was an approved QROPS and the Appellant was entitled to draw pension payments free of UK tax. The decision was taken purely for the purposes of effecting repayment of the loan so that the Appellant could begin to receive pension payments. If the loan had been repaid by, for example, realisation of the US share portfolio – which it easily could have been - no UK tax would have been payable.

21. It was against this background that the Appellant initiated the present proceedings seeking an order that the court avoid the transaction i.e. the acceptance of the transfer of the shares in the two companies by the Trustee in satisfaction of the loan together with the making of the balancing payment of £292,249. As recorded at para 12 of the Lieutenant Bailiff's judgment, HMRC were twice invited to consider if they wished to be convened to the proceedings but expressly declined to participate.

The Lieutenant Bailiff's Judgment

22. We wish at the outset to pay tribute to the Lieutenant Bailiff's judgment. It contains a penetrating analysis of many of the issues which can arise in relation to the Hastings-Bass principle and repays reading in full. For the purposes of this appeal we would summarise her key findings on the law as follows:-

    (i) Having recorded the chequered history of the development of the Hastings-Bass principle in England and its limitation following the decisions of the Court of Appeal and Supreme Court in Pitt -v- Holt, Futter -v- Futter (which we shall refer to simply as Pitt -v- Holt), [2011] EWCA Civ 197; [2013] UKSC 26, she held (at para 50) that Guernsey law should follow the revised approach of Pitt -v- Holt.

    (ii) This meant that the decision under attack must amount to a breach of [fiduciary] duty by the trustees and that such a decision is voidable rather than void.

    (iii) After discussing at paras 84 – 98 whether the principle required a breach of fiduciary duty or simply a breach of duty by a fiduciary and after indicating that she preferred the latter formulation, she held that it did not make any difference because a breach of fiduciary duty strictly so called (i.e. a breach of a duty of good faith/loyalty) and a breach of a duty of care to the trust/the beneficiaries were both sufficient to engage the jurisdiction (paras 98 and 105).

    (iv) In order for the principle to be engaged, the breach of duty must be causally connected with the actual transaction which it is sought to set aside and the breach must have prejudiced the trust or the beneficiaries of the trust qua beneficiaries (paras 106 and 107).

    (v) Because, on the finding of such a breach, such a transaction is voidable rather than void, the court has a discretion as to whether to grant relief by avoiding the transaction.

    (vi) The test as to whether the court should exercise its discretion to grant such relief is that of unconscionability. Does the court find it unconscionable that the transaction in question should be left to stand? (paras 164 and 186(5)).

23. Having considered the evidence and even though the trustee accepted that it was in breach of duty, she expressed considerable reservations as to whether the Trustee had committed a breach of duty which had a material connection with the loss suffered by the Appellant. She nevertheless proceeded (without expressly so deciding) on the basis that a sufficient breach of trust was made out and that it had a sufficiently direct causal nexus with damage to the trust property or to the interests of a beneficiary of the trust in his capacity as such (see paras 130 and 140).

24. She then went on to consider the question of whether in its discretion the court should grant Hastings-Bass relief. For the reasons set out at paras 169 – 185 of the judgment, she concluded that she did not find it unconscionable to let the transaction stand. She therefore dismissed the application.

Grounds of Appeal

25. The amended grounds of appeal contain six main paragraphs in relation to the substantive judgment, but we would summarise the core points as follows:-

    (i) The Lieutenant Bailiff was wrong not to make a clear finding of a breach of fiduciary duty. She should have found that, on the facts, there was such a breach of the Trustee's fiduciary duty by reason of its failure to take appropriate tax advice.

    (ii) She was also wrong to find that any breach of duty must have caused damage to the trust property or interests of a beneficiary in his capacity as such.

    (iii) The Lieutenant Bailiff wrongly exercised her discretion in refusing relief. In particular;-

        a) She wrongly conflated the doctrine of equitable mistake and the Hastings-Bass jurisdiction by importing into the latter jurisdiction a further pre-condition of unconscionability which must be satisfied in addition to the trustees' breach of duty.

        b) Once a breach of duty was established, the Lieutenant Bailiff ought to only have exercised her discretion to refuse relief if there were exceptional reasons for doing so.

        c) She ought not to have taken into account or she placed excessive reliance on the prospects of success of the Appellant's professional negligence claim against his tax advisors.

        d) She ought not to have taken into account or she placed excessive reliance on the quantum of the tax charge incurred by the Appellant, concluding that it was insufficiently large to justify the granting of relief.

        e) She ought not to have again considered the seriousness of the Trustee's breach of duty or, alternatively, erred in finding it was not a sufficiently serious breach of duty to justify granting relief.

        f) She erred in finding that harm had not been sustained by the Appellant qua beneficiary of the trust.

The Hastings-Bass principle

26. At paras 14 - 44 of her judgment, the Lieutenant Bailiff helpfully describes the history of the Hastings-Bass jurisdiction. It is set out in greater detail in Pitt -v- Holt itself, both in the Court of Appeal and the Supreme Court. For our purposes it is sufficient to summarise the position as follows.

27. Beginning with Mettoy Pension Trustees Limited -v- Evans [1990] 1 WLR 1587 the courts in England and Wales developed a principle (said to be derived from the decision in Re Hastings-Bass (Deceased) [1975] Ch 25) whereby they set aside decisions of trustees where the trustees had failed to take into account relevant considerations or had taken into account considerations which they ought not to have. Many of these related to unexpected adverse tax consequences which arose either because the trustees had not considered the matter of tax or because they had received incorrect tax advice.

28. The principle as it developed was conveniently summarised by Lloyd LJ (sitting at first instance) in Sieff -v- Fox [2005] 1 WLR 3811 at para 119 as follows:

> ***"The best formulation of the principle seems to me to be this. Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account."***

He went on to say that there did not need to be a breach of duty by the trustees for the principle to apply but left open the question of whether the act in question was voidable or void.

29. In Pitt -v- Holt the principle was reviewed for the first time in the Court of Appeal and subsequently the Supreme Court. Both courts held that the law had taken a wrong turn and that Hastings-Bass was not in fact authority for the principle to which it had given its name. Lord Walker of Gestingthorpe explained, at para 60 of his judgment, that there is an important distinction between an error by trustees going beyond the scope of a power (for which he used the traditional term "excessive execution") and an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power (for which he used the term "inadequate deliberation"). We interpose that 'inadequate deliberation' clearly includes both failing to take into account considerations which ought to have be taken into account and taking into account considerations which ought not to have been taken into account. As both courts concluded, Hastings-Bass was in fact a case of excessive execution (linked with an issue of severance), whereas the principle, as it was subsequently developed, is concerned with inadequate deliberation.

30. In a passage, which was essentially approved by the Supreme Court, Lloyd LJ summarised the correct principle in the Court of Appeal at para 127 in the following terms:-

> ***"127. Cases which I am now considering concern acts which are within the powers of the trustees but are said to be vitiated by the failure of the trustees to take into account a relevant factor to which they should have had regard – usually tax consequences – or by their taking into account some irrelevant matter. It seems to me that the principled and correct approach to these cases is, first, that the trustees' act is not void, but that it may be voidable. It will be voidable if, and only if, it can be shown to have been done in breach of fiduciary duty on the part of the trustees. If it is voidable, then it may be capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and to the***

court's discretion. The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable. Fiscal considerations will often be among the relevant matters which ought to be taken into account. However, if the trustees seek advice (in general or in specific terms) from apparently competent advisors as to the implications of the course which they are considering taking, and follow the advice so obtained, then, in the absence of any other basis for a challenge, I would hold that the trustees are not in breach of their fiduciary duty for failure to have regard to relevant matters if the failure occurs because it turns out that the advice given to them was materially wrong. Accordingly, in such a case I would not regard the trustees' act, done in reliance on that advice, as being vitiated by the error and therefore voidable."

31. The three key differences as compared with the principle as it had been previously understood are as follows:-

    (i) The inadequate deliberation on the part of trustees must be of sufficient seriousness to constitute a breach of fiduciary duty. If there is no breach of fiduciary duty, the court cannot intervene. Furthermore, there will not be a breach of such duty where trustees have conscientiously obtained and followed apparently competent professional advice even if such advice turns out to be wrong.

    (ii) Any decision reached in breach of fiduciary duty, is voidable, not void. There is therefore a discretion in the court as to whether to avoid the decision even where the court has found a breach of duty.

    (iii) An application to challenge the exercise of a discretionary power on the basis of the principle should normally be made by beneficiaries, not by the trustees themselves (as had often happened in the past).

32. The question then arises as to whether Guernsey law in relation to the Hastings-Bass principle – like the Supreme Court we shall continue to use the expression for convenience - is as it was previously understood to be in England and Wales (as set out in Sieff -v- Fox) or is in accordance with the revised principle as set out in Pitt -v- Holt.

33. It appears from para 50 of the Lieutenant Bailiff's judgment that counsel in the present case extended a 'relatively lukewarm invitation' to the Royal Court to reject the modified principle set out in Pitt -v- Holt and to maintain the principle in its previously understood form. As already mentioned, the Lieutenant Bailiff rejected this invitation and held that Guernsey law should apply the general effect and reasoning of Pitt -v- Holt. In this connection, she prayed in aid the observation of Sir Richard Collas, Bailiff, in Gresh -v- RBC Trust Company (Guernsey) Limited (Guernsey Judgment 6/2016) para 20 where he said:-

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

34. However, Gresh was concerned solely with the law of mistake. The Bailiff was not considering Pitt -v- Holt in the context of the Hastings-Bass principle and we do not think that his observation can necessarily be applied also to the Hastings-Bass aspect of Lord Walker's judgment.

35. In addition to the present case, the Hastings-Bass principle has been considered on two occasions in this jurisdiction since Pitt -v- Holt.

36. In HCS Trustees Limited and Another -v- Camperio Legal and Fiduciary Services Plc [Unreported 30th June 2015] an application was made under the Hastings-Bass principle to avoid a decision by trustees to transfer certain shares owned by the trust. This gave rise to an unforeseen UK tax liability in circumstances where the trustees had apparently not taken any tax advice. In an ex tempore judgment, Lieutenant Bailiff Hazel Marshall QC granted the relief sought. Having held that there was a clear breach of fiduciary duty by the trustees in failing to consider the UK tax consequences of the transaction she exercised her discretion to grant relief. Because she found a breach of duty, she did not need to consider whether Guernsey law would follow the modified approach in Pitt -v- Holt, but indicated that she thought it likely that this was the case.

37. The decision of the Bailiff in Re The Aylesford Trust [27th February 2018] was given after the judgment of the Lieutenant Bailiff in the present case. Although the matter does not appear to have been the subject of argument (because the applicant argued the case on the basis that there had been a breach of duty) the Bailiff indicated at para 9 of his judgment that Guernsey law should follow Pitt -v- Holt. In doing so, he declined to follow the view expressed by Deemster Doyle in AB -v- CD (2016) 19 ITELR 316 at para 53 where he indicated that it would be a mistake to assume that Manx law would automatically follow English law in respect of the decision in Pitt -v- Holt.

38. On this appeal, neither Advocate Williams nor Advocate Gray has challenged the decision of the Lieutenant Bailiff that Guernsey law should follow the Pitt -v- Holt approach in relation to the Hastings-Bass jurisdiction. They have concentrated their efforts on arguing that there was a breach of fiduciary duty and that the Lieutenant Bailiff should have exercised her discretion to grant relief. In the absence of any adversarial argument, we have therefore proceeded on the assumption (but, we emphasise, without deciding) that Guernsey law in this area is to like effect as the revised approach established in Pitt -v- Holt.

39. It follows that we must consider whether there was a breach of fiduciary duty by the Trustee in this case and, if so, whether the Lieutenant Bailiff's exercise of her discretion is capable of challenge. We shall consider each of these aspects in turn.

Breach of fiduciary duty

(i) Is it a fiduciary duty?

40. At paras 84 – 105, the Lieutenant Bailiff raised the issue of whether a breach of fiduciary duty was necessary and whether inadequate deliberation was a breach of fiduciary duty or a breach by a fiduciary of a duty to exercise reasonable skill and care. Having referred to the observation of Millett LJ in Bristol and West Building Society -v- Mothew [1998] Ch 1 at 16 and having analysed the position, she concluded that the duty of 'adequate deliberation' should be regarded as part of the trustees' duty of care rather than a fiduciary duty.

41. She went on to point out, however, that this made no difference in relation to the Hastings-Bass jurisdiction. Whether a breach was of the duty of good faith/loyalty to the trust (thereby strictly speaking a breach of fiduciary duty) or whether it was a breach of a duty of care owed to the trust/beneficiaries, it was sufficient to engage the Hastings-Bass jurisdiction.

42. The starting point for any discussion of this nature is the well-known observation of Millett LJ in the Bristol and West case where at page 16 he said the following:-

> ***"The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach***

of duty by a fiduciary is a breach of fiduciary duty. I would endorse the observations of Southin J in Girardet –v- Crease & Co. (1987) 11 BCLR (2d) 361, 362:-

> ***"The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth… That a lawyer can commit a breach of the special duties [of a fiduciary] … by entering into a contract with the client without full disclosure … and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words."***

These remarks were approved by La Forest J in LAC Minerals Limited –v- International Corona Resources Limited (1989) 61 DLR (4th) 14, 28 where he said "not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty."

Millett LJ went on specifically to approve the following observation by Ipp J in Permanent Building Society -v- Wheeler (1994) 14 ACSR 109, 157:-

> ***"It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. In particular, a trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty…"***

43. However, it would seem that the courts in Pitt -v- Holt did not use the expression 'fiduciary duty' in this restricted sense. Thus, having referred (at paras 119 and 120) to the duty of trustees to take proper advice on relevant matters as being a duty of skill and care, Lloyd LJ went on at [127] (in the passage quoted at para 30 above) to state specifically that "*The trustees' duty to take relevant matters into account is a fiduciary duty, so an act done as a result of a breach of that duty is voidable."*

44. Lord Walker appears to have used the expression 'fiduciary duty' in the same sense. Thus at para 73 he said:-

> ***"In my view Lightman J was right to hold that for the rule to apply the inadequate deliberation on a part of the trustees must be sufficiently serious as to amount to a breach of fiduciary duty. Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene… It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention."***

45. Although it is not necessary - because, in our judgment, the above extracts from Pitt -v- Holt are clear - the fact that Lord Walker was not using the expression 'fiduciary duty' in the restricted sense articulated by Millett LJ is confirmed by what he said extra-judicially in the annual lecture of the Association of Contentious Trust and Probate Specialists on 1st November 2016 entitled 'The Changing Face of Trust Law'. Having referred to the fact that Millett LJ had suggested in the Bristol and West case that in the case of express trustees holding a trust fund, duties of care were not properly classified as fiduciary, he observed that this was a controversial view that had attracted a good deal of criticism. He went on to say this:-

> ***"But one point made by the critics is that although the obligation of loyalty may be the distinguishing feature of fiduciary duties, not every breach of such duty will display the same degree of disloyalty. Not every breach will evoke the comment "How could a trustee be so disloyal!" For a trustee to enrich himself by taking a secret, unauthorised***

profit at the expense of the trust would be the depth of disloyalty. For a trustee to cause a loss to the trust by persistently neglecting to review its investments is a less grave order of disloyalty, but as the editors of Thomas comment (para 10 – 54):-

> ***"A fiduciary's duty of care is necessarily inherent in the particular 'true fiduciary duty' which that trustee is carrying out. For example, equity imposes a duty on a fiduciary to ensure that the principal's interests are protected; it arises out of the essential duty of loyalty, because true loyalty demands that the fiduciary exercise care in discharging his responsibility for the property."***

I have some personal interest in this point because in Pitt -v- Holt .. I expressed the view, without elaboration, that a trustee's duty to inform himself properly, and to deliberate carefully on the exercise of his fiduciary powers, was itself a fiduciary obligation. It seemed – and it still seems – to me that it is a duty so inextricably linked to the exercise of what are undoubtedly fiduciary powers, that it would be absurd to treat it as anything less."

46. It does not appear from her judgment that the Lieutenant Bailiff was specifically referred to Section 22 of the Trusts (Guernsey) Law 2007 ("the Trusts Law") or to the decision of the Privy Council in Spread Trustee Company Limited -v- Hutcheson [2011] UKPC 13.

47. Section 22 provides as follows:-

> ***"General Fiduciary Duties***
>
> ***22(1) A trustee shall, in the exercise of his functions, observe the utmost good faith and act en bon père de famille.***
>
> ***(2) A trustee shall execute and administer the trust and shall exercise his functions under it:-***
>
> ***(a) in accordance with the provisions of this Law, and***
>
> ***(b) subject to those provisions:-***
>
> ***(i) in accordance with the terms of the trust, and***
>
> ***(ii) only in the interests of the beneficiaries…."***

48. The heading to Section 22 would suggest that the statute categorises the duty to act en bon père de famille as a fiduciary duty.

49. This is consistent with the observation of Lord Kerr in Spread Trustee at para 177:-

> ***"As the respondents have pointed out, in English trust law, the core duties of a trustee are loyality and fidelity… Although a trustee in English law owes a duty of care, it is not fiduciary in nature. By contrast, the essence of the duty to act en bon père de famille is fiduciary. What could the duty to act as a bon père (a good father) be other than to act in a fiduciary capacity? And this duty is central to the relationship between the trustee and the beneficiary. Ultimately, it appears to me that the notion of exempting from liability a trustee's gross negligence is not only inimical to the fiduciary duty that he owes to the beneficiary under Guernsey law, it is wholly destructive of the essential feature of the relationship between the two."***

He elaborated on this point at paras 178 and 179.

50. However it is right to recall that Lord Kerr was in a minority in Spread Trustee. It was common ground in that case that the duty to act en bon père de famille was a duty to act as a prudent man of business and implied a standard of care similar to that required of trustees in England. In short, the duty was to act as a reasonable and prudent trustee would act, that is with reasonable care and skill; see paras 19 and 20 of the judgment of Lord Clarke.

51. At para 61, Lord Clarke said this:-

> ***"In spite of Lord Kerr's conclusions at para 177 that the essence of the duty to act en bon père de famille is fiduciary, two points of relevance to the present case follow from this part of Millett LJ's judgment. First, where, as here, what is alleged against the trustee is a breach of the duty of care owed to the beneficiaries by the trustee, the fiduciary duties of the trustee are of no relevance. Nothing in the fiduciary duties owed by the trustee alter the standard of the duty of care owed by it. In the opinion of the Board, the suggestion that the standard of the duty of care owed by the trustee is somehow elevated by reference to concomitant fiduciary duties elides the fundamental distinction between the fiduciary duties owed by the trustee on the one hand and the duty to exercise care and skill owed by the trustee on the other."***

52. As the above discussion shows, there are differences of view as to whether the duty of adequate deliberation by a trustee (which clearly encompasses a duty to exercise reasonable skill and care) is or is not a fiduciary duty. It is not easy to reconcile the approach in Pitt -v- Holt with that of the majority in Spread Trustee. However, it is clear that the Court of Appeal and the Supreme Court in Pitt -v- Holt were of the view that the duty of adequate deliberation is a fiduciary duty so that a breach of that duty would be a breach of fiduciary duty. So far as the law of Guernsey is concerned, that is consistent with Section 22 of the Trusts Law which, albeit in the heading, suggests that the duty to act en bon père de famille (which certainly includes the duty of adequate deliberation) is a fiduciary duty.

53. Ultimately, for the reasons given by the Lieutenant Bailiff at paras 98 and 105 of her judgment, we do not think anything turns on this discussion for the purposes of the application of the Hastings-Bass principle and it is not necessary therefore to decide the point. Whether inadequate deliberation of sufficient gravity is considered as a breach of fiduciary duty or as a breach of duty by a fiduciary, such a breach is a necessary pre-requisite for exercise of the jurisdiction to avoid a transaction. Nevertheless, whilst acknowledging the force of the points made by the Lieutenant Bailiff, we propose to proceed on the basis (but without deciding) that the duty of adequate deliberation is a fiduciary duty. Accordingly inadequate deliberation which is of sufficient seriousness to amount to a breach of that duty is a breach of fiduciary duty. We will proceed on this basis because we have not had the advantage of any adversarial argument on the point and because we think it preferable, in an area where Pitt -v- Holt is the leading authority, to use expressions in the same sense as they are used in that case.

(ii) Causal connection

54. In her judgment the Lieutenant Bailiff held (see paras 104, 106, 107, 135 and 186(3)) that it is a pre-condition for engaging the Hastings-Bass jurisdiction that not only has there been a breach of duty by the trustee but '*this should have caused damage to a beneficiary qua beneficiary to the extent, at least, that but for that breach of duty the damage in question would probably not have occurred.*' (para 186(3)).

55. We are not aware of any case in which this has previously been suggested or held to be the case. Despite the exhaustive discussion of the Hastings-Bass principle in Pitt -v- Holt at both Court of Appeal and Supreme Court level, there was no suggestion in that case that there was this further pre-condition before a decision which was flawed because of inadequate deliberation of sufficient gravity as to constitute a breach of duty could be set aside and avoided.

56. It may be that the Lieutenant Bailiff was influenced in introducing this requirement by her view that inadequate deliberation was more properly categorised as a breach of the duty of care and that this lead her to consider issues of causation and remoteness; and of course proof of loss is required if equitable compensation or reconstitution of the trust fund is sought. But the court's ability to intervene is based upon the need to protect beneficiaries against decisions by trustees reached in breach of their duty. If trustees fail to consider a relevant matter and as a result make a decision which is flawed to such an extent that it amounts to a breach of their fiduciary duty, that ought to be and, in our judgment, is sufficient to permit the court to intervene, because the whole point of the jurisdiction is to enable the court to protect the beneficiaries against a breach of duty. Once one has a breach of trust, the court has jurisdiction to avoid the transaction if that is felt to be the appropriate form of relief. This is consistent with Lord Walker's observation at [91] of Pitt -v- Holt where he said:-

> ***"The Hastings-Bass rule is centred on the failure of trustees to perform their decision-making function. It is that which founds the court's jurisdiction to intervene if it thinks fit to do so. Whether the court will intervene is another matter."***

57. Of course, if the decision taken in breach of duty has caused loss or prejudice to either the trust fund or to any of the beneficiaries, that is likely to be a material factor when the court comes to decide what, if any, relief to grant in respect of that breach of duty. A court may well decide that there is no need to avoid a transaction taken in breach of duty if no prejudice or loss has been caused. But that would be a matter which goes to the discretion of the court when deciding whether to grant relief, not the existence of the jurisdiction to grant relief in the first place. In our judgment, if trustees commit a breach of trust by making a decision in breach of fiduciary duty (because of inadequate deliberation of sufficient gravity), that is sufficient to give the court jurisdiction to avoid the transaction. Whether it will in fact do so depends upon all the circumstances, which may well include whether the decision has caused prejudice or loss to the trust fund or any of the beneficiaries.

58. It follows that we respectfully disagree with the Lieutenant Bailiff in her assertion that it is a pre-condition for engaging the Court's jurisdiction to avoid a transaction taken by a trustee in breach of trust that the breach must have had a sufficiently direct causal nexus with damage to the trust property or to the interests of a beneficiary of the trust in his capacity as such.

(iii) Was there a breach of fiduciary duty in this case?

59. In our judgment, it is clear that the possible tax consequences of a discretionary decision by trustees will normally be a material factor which the trustees must consider when deciding whether to exercise the discretion in question. If authority were needed for that proposition, we would refer to the following:-

    (i) In Abacus Trust Company (Isle of Man) Limited -v- NSPCC [2001] STC 1344, in a passage subsequently approved by Lloyd LJ in Sieff -v- Fox, Patten J said at para 16:-

    > ***"16… The financial consequences for the beneficiaries of any intended exercise of a fiduciary power cannot be assessed without reference to their fiscal implications. The two seem to me inseparable. Therefore if the effect of an intended appointment is likely to be to expose the fund or its beneficiaries to a significant charge to tax that is something which the trustees have an obligation to consider when deciding whether it is proper to proceed with the appointment…".***

    (ii) In Pitt -v- Holt, Lloyd LJ said at para 115:-

"In Sieff -v- Fox I said that I was in no doubt that "fiscal consequences may be relevant considerations which the trustees ought to take into account"; see paras 85 and 86. I remain of that view. Although it is often said that decisions with regard to the creation and operation of trusts ought not to be dictated by considerations of tax, the structure and development of personal taxation in the UK over the past decades, the use of trusts in order to deflect or defer the impact of taxation, and in turn the development of taxation as it applies to property held by trustees, have been such that there can be few instances in which trustees of a private discretionary trust with assets, trustees or beneficiaries in England and Wales could properly conclude that it was not relevant for them to address the impact of taxation that would or might result from a possible exercise of their discretionary dispositive powers."

Lloyd LJ went on to say at para 119:-

"Where tax matters are relevant (as they often will be), it is likely to be the duty of the trustees, under their duty of skill and care, to take proper advice as to those matters…".

(iii) The observation of Lloyd LJ at para 115 was specifically approved by Lord Walker in the Supreme Court at para 65 of his judgment.

(iv) In Re Onorati Settlement [2013] (2) JLR 324, the trustees appointed capital to two UK resident beneficiaries which gave rise to a substantial tax charge in their hands when the appointment could have been made to their mother (who was non-UK domiciled) without tax consequences. The trustee had taken no tax advice of its own. The Royal Court of Jersey (Birt, Commissioner) held that this was a clear breach of fiduciary duty and said the following at para 40:-

"We have no hesitation in concluding that the trustee was in breach of fiduciary duty by failing to have regard to the tax consequences of the appointment of the trust fund to the representors rather than to the daughter as originally envisaged. We so conclude for the following reasons:-

(i) The appointment of the trust fund to two beneficiaries who are resident and domiciled in the United Kingdom clearly required the trustee to consider the tax consequences of any such appointment.

(ii) The trustee at no stage took any professional advice on the tax consequences of the appointment. It is true that it was informed by the daughter that she had taken advice, but the trustee never asked to see that advice. In some circumstances, provision of written advice obtained by a beneficiary will be sufficient for a trustee to act on the basis of that advice. But the trustee will always need to see the advice in order to satisfy itself that the advice is appropriate and is based upon a correct understanding of the facts. That was not the situation here… It is wholly insufficient and is a breach of duty for a trustee to rely on oral confirmation from a beneficiary that he or she has received appropriate tax advice….".

(v) In AB -v- CD (supra), the trustee of a number of discretionary trusts governed by the law of the Isle of Man granted call options over the assets of the trusts in favour of a company beneficially owned by the settlor, who was also a beneficiary.

The beneficiary was, to the knowledge of the trustee, considering a move back to the United Kingdom prior to the grant of the call options and subsequently did so. Although the trustee (apparently through an individual regarded as its agent) had raised the question of whether there would be any adverse tax consequences of granting the call options, no tax advice was taken by the trustee, who also failed to ascertain whether anyone else had taken tax advice. The grant of the call options gave rise to a substantial charge to capital gains tax on the beneficiary in question and other beneficiaries resident in the UK. Deemster Doyle in the High Court of the Isle of Man held that there had been a plain breach of duty by the trustee in not taking its own tax advice and not taking any steps to ensure that tax advice had been taken by others.

(vi) In the Aylesford Trust case the trustee did not take any tax advice in relation to a decision by the trustee of a Guernsey trust to appoint assets from an existing trust into the Aylesford Trust. This gave rise to a substantial charge to UK tax for one of the beneficiaries of the original settlement who was deemed to have established a new non-UK resident trust on account of the fact that all of the original trust assets were provided by him. The Bailiff held that this failure to take tax advice was a breach of fiduciary duty by the trustees and set the appointment aside.

(vii) In the HCS Trustees Limited case referred to earlier, the Lieutenant Bailiff said this in her ex tempore judgment:-

> ***"…what has happened in this case is that the disposition of the V shares, back to the trustees from D, which was effected by the trustees procuring this in 2009, was, in fact, done without taking any advice about the fiscal consequences at all. That would be a breach of duty, whether or not (as appears to have been the case) the trustees appreciated that this was a point on which advice ought to have been taken.***
>
> ***It is quite plain from both the Pitt -v- Holt decision in the Supreme Court itself, and the commentary on it in the Jersey case of Onorati, that the fiscal consequences of a trustee doing anything are highly serious these days and are of sufficient potential gravity and importance generally that it is obviously more or less one of the first things the trustee should have in mind. If they fail to spot tax consequences or if, through concentrating, with their eyes on one jurisdiction, on what they are doing in relation to that jurisdiction, they then therefore fail to appreciate that they ought to be looking at the consequences in another jurisdiction, then fiscal consequences are the kind of consequences the seriousness of which will, or at least can, give rise to the principle being invoked. The consequences here are indeed very serious from the point of view of the beneficiaries. So on that basis, the rule in Pitt -v- Holt appears to be properly invoked here."***

60. At para 50(7) of her judgment, the Lieutenant Bailiff said this:-

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

61. We agree with this statement to the extent that the court must apply the same standard when deciding if the inadequate deliberation has been of sufficient gravity to constitute a breach of duty (i.e. a breach of trust) whether the beneficiary bringing the proceedings is seeking avoidance of the transaction under the Hastings-Bass principle or is seeking other relief against the trustee, such as an award of equitable compensation or reconstitution of the trust fund. There is not one test for Hastings-Bass applications and a different test for a conventional action for breach of trust.

62. However, we have no hesitation in concluding that the inadequate deliberation by the Trustee in the present case was of sufficient gravity to constitute a breach of fiduciary duty. We would summarise our reasons for so concluding as follows:-

    (i) The plan is a QROPS of which the Appellant is the primary beneficiary during his life. He is the member of the pension scheme in question. The plan is intended to provide benefits for him in circumstances where he is not resident in the UK and therefore, in the ordinary course, would not be liable to UK tax in connection with the plan.

    (ii) The Trustee is a professional trustee and is trustee of the Scheme. It is therefore trustee of a number of different plans for different beneficiaries and must be regarded as holding itself out as experienced in the field of pension plans.

    (iii) The Trustee is a member of GAPP, which in 2011 issued a guidance note to its members specifically alerting them to the relevant provisions of the 2004 Act and the possible tax consequences of a QROPS holding residential property.

    (iv) The tax consequences of a QROPS which is also an investment-regulated pension scheme (as this was) holding residential property are extremely serious. The member of the relevant plan becomes liable to UK tax at the rate of 40% of the value of the residential property acquired by the QROPS.

    (v) In the circumstances, we consider that there was obviously a duty on the Trustee to consider the possible tax consequences of the proposal that it should exercise its discretion by deciding that the plan should acquire residential property in exchange for cancellation of the loan.

    (vi) Despite this and despite initially indicating on 16th December 2013 that it would be taking its own tax advice, the Trustee never took any tax advice. It is true that in the same email it asked whether the Appellant would be taking tax advice and indicated that the Trustee would derive comfort from knowing that he had done so, but the Trustee never followed this up and never ascertained whether the Appellant had in fact taken such advice. Accordingly, when it ultimately made the decision to enter into the transaction, the Trustee had taken no tax advice of its own and did not know whether the Appellant had taken any advice. As a result it completely ignored the tax consequences for the plan's beneficiary.

    (vii) In our judgment, this was an extremely serious failure to consider a relevant matter, namely the tax consequences for the Appellant as the plan beneficiary of the plan acquiring residential property. The failure was clearly of sufficient gravity to constitute a breach of duty.

    (viii) The failure by the Trustee to consider the tax position has led directly to the consequence that the Appellant is liable to UK tax in the sum of approximately £1.8m.

(ix) Even if we are wrong in our rejection of the Lieutenant Bailiff's opinion that the breach of duty must have caused damage to a beneficiary qua beneficiary, we consider that the Lieutenant Bailiff's requirement is met in the present case. The relevant provisions of the 2004 Act (referred to earlier) provide that where a pension scheme acquires an interest in residential property, it is to be treated as making an unauthorised payment to the member of the scheme. It further provides that it is that member who is then liable for the unauthorised payments tax charge. Thus, the Appellant is liable to the tax charge in this case only because he is the member of the plan and because the Trustee has (in breach of duty) caused the plan to acquire residential property. He has therefore incurred the tax liability as the beneficiary of the plan. Quite apart from that, there is the additional point mentioned by the Lieutenant Bailiff to the effect that there will be an annual tax charge of 40% of the deemed annual rental value of the residential property and that this will result in a reduction of the net distribution of pension benefits to the Appellant in the same way that a distribution to a beneficiary of a discretionary trust which leads to a tax charge in the hands of the beneficiary means that the beneficiary receives less than the trustee intended he should receive.

63. In the circumstances, we accept the submission of the Appellant that the Lieutenant Bailiff ought to have found a breach of fiduciary duty in the circumstance of this case (by reason of the Trustee's failure to obtain tax advice or ascertain whether it had been obtained and thereby its failure to consider the tax consequences for the Appellant of its decision to acquire residential property) rather than proceeding (clearly rather reluctantly) on the assumption that such a breach was established.

Exercise of discretion

64. It is clear from Pitt -v- Holt that, once a breach of duty has been found, the decision in question is voidable and it is a matter of discretion as to whether or not the court grants relief by avoiding the transaction resulting from the decision. Thus at [127] Lloyd LJ said:-

> ***"If it is voidable then it may be capable of being set aside at the suit of the beneficiaries, but this is subject to equitable defences and to the court's discretion."***

We turn therefore to consider the manner in which the Lieutenant Bailiff exercised her discretion.

(i) Unconscionability

65. At para 164, the Lieutenant Bailiff observes that none of the cases concerning the Hastings-Bass principle describes the appropriate test for deciding whether to avoid a voidable transaction. She goes on at paras 164 – 167 to state that the test is one of unconscionability. Does the court find it unconscionable to allow the transaction to stand? It is clear that she regarded this as placing a burden on a beneficiary to prove that it would be unconscionable to allow the transaction to stand. Thus at para 163 she stated:-

> ***"The findings of a material breach of trust and relevant resultant damage are only the qualifications for the availability of the jurisdiction. Something more is required to justify its actual exercise and the question is how this should be measured."***

And at para 165:-

> ***"Advocate Williams does not, however, suggest any alternative test, nor, short of the bar of "unconscionability", suggest what is the extra hurdle which a claimant plainly must satisfy beyond merely meeting the qualifying pre-conditions for the availability of the jurisdiction.*** [emphasis added in each case]

66. In our judgment, the Lieutenant Bailiff erred in holding that a transaction which is voidable because of a breach of trust arising out of inadequate deliberation may only be set aside where it is unconscionable not to do so. We would summarise our reasons for so concluding as follows:-

(i) We have not been referred to any previous decision in any jurisdiction which suggests that unconscionability is the test.

(ii) In particular, despite a detailed discussion of unconscionability in the context of rescission on the ground of mistake (e.g. Lord Walker at [124] – [128]), there is no suggestion anywhere in the judgments in Pitt -v- Holt (whether at Court of Appeal or Supreme Court level) that unconscionability is the test for deciding whether to avoid a transaction under the Hastings-Bass principle. Given the exhaustive analysis to which the principle was subjected in that case, this would be a surprising omission if unconscionability were indeed the test.

(iii) There seems to us to be good reason for differentiating between the Hastings-Bass principle and the equitable law of mistake. The most common example of the latter is a gift of property (whether into trust or not) in circumstances where the donor is acting under a mistake. One can well understand that an appropriate test for deciding whether to set aside the gift is whether it would be unconscionable for the donee to retain the gift.

(iv) But the Hastings-Bass jurisdiction has a very different foundation. It arises only where there has been a breach of trust on the part of a trustee by reason of inadequate deliberation of sufficient gravity. If a beneficiary has been prejudiced by such breach of the duty, why should he have additionally to show unconscionability before being able to have the transaction set aside? Rather, one might think that, given that there has been a breach of duty by the trustee which has prejudiced a beneficiary, the starting point might be that the decision should be set aside if that can reasonably be achieved.

67. For these reasons, we decline to import into the Hastings-Bass principle a requirement for unconscionability, which has never previously been suggested and where the underlying circumstances giving rise to the court's discretion are so different, namely a breach of trust in the Hastings-Bass principle and a mistake on the part of the donor in the mistake jurisdiction.

68. The Appellant submitted that the Lieutenant Bailiff had also erred in principle in certain other respects when considering the exercise of her discretion.

69. First, as already stated, she referred to 'something more' beyond a breach of duty being required to justify avoiding a transaction and to there being an 'extra hurdle' to obtain relief. We do not see the matter that way. Once a breach of trust (by breach of duty) is established, the court has a discretion to grant relief by avoiding the transaction and there is no 'extra hurdle' or 'something more' required before the court should grant relief.

70. Secondly, in the summary at para 186(2) of her judgment, the Lieutenant Bailiff described the power to intervene to set aside the transaction as an 'extraordinary' jurisdiction and para 174 was to like effect. At para 157, she stated that the power (to set aside) was intended for use only in the extreme case where the objective of protection was felt to necessitate its exercise. Again, we cannot agree with this categorisation of the discretion. There is nothing in Pitt -v- Holt to that effect and in our judgment the discretion should be exercised in favour of avoidance when the court feels it just to do so. There is no requirement for an '*extreme*' case.

71. Thirdly, in categorising the discretion in this way, it seems probable that the Lieutenant Bailiff was influenced by her view of the word 'aberrant'. This was the word used by Lord Walker in Pitt -v- Holt at [83] where he said:

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

The Lieutenant Bailiff considered '*aberrant*' to be '*an unusual and emphatic word*' which led her to conclude that the power to avoid transactions was intended for use only in an extreme case. In our judgment, that is to read too much into the word '*aberrant*'. It is defined in the Shorter Oxford English Dictionary as '*deviating from*' or '*straying from the right path*'. Conduct which is sufficient to amount to a breach of duty can properly be described as '*aberrant*' and in our judgment that was the sense in which Lord Walker was using the word. It does not imply some heightened misconduct beyond that required to find a breach of trust. Accordingly it does not imply that the power to set aside transactions reached in breach of duty should only be used in extreme or extraordinary cases.

72. Fourthly, at paras 156 – 162, the Lieutenant Bailiff specifically took into account, when deciding how to exercise her discretion, what she described as four policy grounds identified by Lord Walker at [83] and [88] of his judgment in Pitt -v- Holt. However, we think this was to take those observations out of context. Lord Walker was making those points in support of his decision that the Hastings-Bass principle should be reined in by imposing a requirement for a breach of fiduciary duty. But having used them for that purpose, we do not interpret his judgment as suggesting they should be used a second time when deciding how to exercise the court's discretion where a breach of fiduciary duty has been found.

73. For example, he referred at [8] to the comment of Professor Charles Mitchell, Reining in the Rule in Re Hastings-Bass (2006) 122 LQR 35, 41 – 42, where he said:-

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

At [88], when dealing with the argument that there would be a breach of duty even where trustees had taken professional advice but it turned out to be incorrect, Lord Walker said:-

> ***"It would tip the balance much too far in making beneficiaries a special favoured class, at the expense of both legal certainty and fairness."***

74. However, it is inherent in the decision of the Supreme Court that, where there has been a breach of duty, a beneficiary of a trust may well be in a better position than an ordinary individual. That is an inevitable consequence of the existence of the Hastings-Bass jurisdiction because it is not a jurisdiction which is available to persons other than beneficiaries of trusts. In our judgment, the fact that, where there is a breach of trust, a beneficiary may be in a better position than an ordinary individual, is not a reason for exercising the discretion against setting aside a transaction. On that argument, the court would never exercise its discretion in favour of beneficiaries because it would always be treating them in a more favourable manner than ordinary individuals. Accordingly, we think that this point has been fully taken into account when reining in the Hastings-Bass principle by imposing the requirement for a breach of duty and it should not be taken into account a second time when deciding how to exercise the discretion.

75. Fifthly, the Lieutenant Bailiff held at para 181 that the issue of whether the breach of duty was 'sufficiently serious' was a matter to be taken into account when deciding how to exercise the court's discretion because, amongst other matters, the grant of relief was for the purpose of protecting beneficiaries from conduct which was reasonably described as 'aberrant'. Again, we respectfully disagree. The issue is whether the inadequate deliberation has been of sufficient gravity to amount to a breach of duty. As Lord Walker makes clear, trustees are not under a duty to be right on every occasion. They may often be guilty of inadequate deliberation (by failing to take into account a relevant matter etc.) but in circumstances where it is not sufficiently serious to amount to a breach of duty. However, once that threshold of seriousness is reached, jurisdiction to grant relief arises. We do not think it right – and there is nothing in Pitt -v- Holt to suggest – that the court should revisit the seriousness of the breach when deciding whether to set aside the transaction. That is to elide the jurisdiction to grant relief with the discretion as to whether to do so.

76. Sixthly, at [90] of his judgment in Pitt -v- Holt, Lord Walker said:-

> ***"As a second footnote, there was some discussion in the course of argument as to the significance, in situations of this sort, of a possible claim for damages against professional advisers for financial loss caused by incorrect advice….In principle the possibility that trustees may have a claim for damages should have no effect on the operation of the Hastings-Bass rule. In practice it would be rare for trustees to have so strong a claim that they can be confident of obtaining a full indemnity for their beneficiaries' loss and their own costs."***

At para 152 of her judgment, the Lieutenant Bailiff drew a distinction with the present case, pointing out that Lord Walker referred to the possibility of '*the trustees*' having a claim against professional advisers whereas the question in this case was whether the Appellant would have such a claim. She went on to say:-

> ***"The question in this case, though, is rather whether any need to protect [the appellant] from aberrant conduct by his Trustees can only be met, or even reasonably be met, by setting the transaction aside, or whether such extraordinary protection is not necessary."***

77. The Lieutenant Bailiff went on to consider the nature of a possible claim against Hunters by the Appellant in some detail and concluded at para 175 that, on an immediate review of the position, it seemed to her that the Appellant had a virtually unanswerable claim against Hunters. The Appellant argued in this case that taking this factor into account was inconsistent with the observation of Lord Walker referred to above.

78. We would not go so far as to say that the possibility of a claim against professional advisers could never have any relevance when considering the exercise of discretion, but we think it will be very rare that this is the case and the weight to be given to it should, even in those circumstances, be small. We accept that Lord Walker refers specifically to possible claims by trustees but it seems to us that his reasons for saying that the possibility of the trustees having a claim should have no effect on the operation of the Hastings-Bass rule must be equally applicable to possible claims by beneficiaries. They are likely to face all the same difficulties as trustees. We think therefore that the Lieutenant Bailiff fell into error in placing weight on the availability of a claim against Hunters and in seeking to assess its strength.

New exercise of discretion

79. It is well established that the circumstances in which an appellate court can interfere with an exercise of discretion by a first instance court are strictly limited. A helpful summary is to be found in the judgment of Beloff JA in the Court of Appeal in Carlyle Capital Corporation

Limited (in liquidation) and Others -v- Conway and Others (Guernsey Judgment 11/2012) where at paragraph 35 he said:-

> ***"35. Where the discretionary decision of a lower court is involved, the limits of the appellate court are the correction of error of principle, of the taking into account of an irrelevant matter, the failure to take into account a relevant matter or the interference with a decision plainly wrong; e.g. the Abidin Daver [1984] AC 398, at 420."***

80. However, for the reasons given above, we are of the view that the Lieutenant Bailiff erred in principle in applying a test of unconscionability and in the other respects discussed at paras 69 – 78 above. It is therefore open to this Court to exercise its own discretion.

81. In our judgment, that discretion should be exercised in favour of avoiding the transaction. We would summarise briefly our reasons for so concluding as follows:-

    (i) The prejudice to the Appellant as beneficiary of the plan is a direct result of the Trustee's breach of duty and is substantial. The Lieutenant Bailiff found that the amount of tax payable was not '*ruinous*' but a tax liability of £1.8m is on any view very substantial.

    (ii) The charge was wholly avoidable. No charge to tax would have arisen had repayment of the loan been effected by, for example, realising the US share portfolio, as it easily could have been. Indeed, the Appellant raised this as a possibility when communicating (via Mr Buddhdev) with the Trustee prior to its decision. Although the Lieutenant Bailiff made no specific finding to this effect – which failure was criticised by Advocate Williams – it is clear from the evidence (see para 17 above) that the Trustee would not have accepted indirect ownership of the two residential properties if it had been aware of the tax consequences for the Appellant of doing so.

    (iii) The tax charge has arisen as a direct result of the Trustee's breach of trust in failing to have regard to the tax consequences of acquiring residential property, because it failed to take its own tax advice and did not enquire whether the Appellant had taken tax advice; all this in circumstances where consideration of the possible tax consequences was clearly called for.

    (iv) Whilst the acquisition of the residential property was effected because of a request to that effect by the Appellant, unlike the Lieutenant Bailiff we do not consider that to be a material factor pointing against the granting of relief. Distributions of capital out of a discretionary trust are often made following a request for such payment by a beneficiary but this does not relieve the trustee of its duty of adequate deliberation in relation to the request. As stated in Onorati at para 41:-

        > ***"Whilst the trustee's decision ultimately to appoint directly to the children may have been contributed to by the daughter's errors and misunderstandings, responsibility for deciding on the appointment and considering the tax consequences of any such appointment rested firmly with the trustee."***

    (v) We do not consider that the possible claim which the Appellant may have against Hunters points towards a refusal of the application to avoid the transaction. We respectfully adopt Lord Walker's observation at [90] in Pitt -v- Holt referred to earlier to the effect "*in principle the possibility that trustees may have a claim for damages should have no effect on the operation of the Hastings-Bass rule.*" As

already stated, we regard this observation as being equally applicable to possible claims by beneficiaries.

(vi) In that respect, we agree with the views expressed in Onorati at para 44 to the effect:-

> ***"More generally, we are not attracted by the proposition that beneficiaries should be left to a remedy of bringing litigation against trustees or professional advisers. The beneficiaries are usually not at fault and have already incurred loss by reason of the unnecessary tax charges. To force them to incur further expense in what may be uncertain litigation when the law allows for the avoidance of a decision made in breach of the trustees' duties seems unnecessary, undesirable and unjust."***

(vii) As described at para 20 above, this was not a transaction carried out for tax planning purposes. It was simply a choice as to how the repayment of the loan could be effected and no tax consequences would have arisen had the loan been repaid with other assets, as it easily could have been. We are not to be taken as suggesting that carrying out a transaction for tax planning purposes militates against exercising a discretion to avoid the transaction if it has been reached in breach of duty, but the fact remains that the tax liability of the Appellant in this case is a windfall for HMRC which would not have arisen in the ordinary course of events.

82. We are conscious that we have not articulated any overriding test for the exercise of discretion under the Hastings-Bass principle as the Lieutenant Bailiff sought to do. However, we do not think this would be a practicable or indeed desirable exercise. Inevitably, the exercise of discretion is likely to be fact specific. We do not accept the Appellant's submission in this case that, once a breach of fiduciary duty is found, relief by way of avoidance should be granted unless there is some exceptional circumstance which militates against it. On the other hand, as we have already stated we do not consider that it is essential that '*something more*' than the breach of duty is required to justify avoidance. Ultimately, it must be a decision for the court as to the outcome which it considers fair and reasonable but always bearing in mind that the beneficiaries will have incurred a loss or damage which will have been caused by a breach of duty by the trustees in circumstances where, if relief is not granted by the court, the beneficiaries will be left to seek a remedy by way of legal action against the trustees and/or professional advisers, as the case may be.

Conclusion

83. We therefore exercise our discretion in this case by setting aside (avoiding) the acquisition of the shares in the two companies and the accompanying repayment of the loan and balancing payment to the Appellant.

84. It follows that these transactions are to be treated as never having occurred. As Lord Walker said in Pitt -v- Holt at [129] – [130]:-

> ***"129. In this court Mr Jones applied for and obtained permission to raise two points which had not been raised below. The first … was that a mistake which relates exclusively to tax cannot in any circumstances be relieved. This submission, for which no direct authority was cited, was said to be based on Parliament's general intention, in enacting tax statutes, that tax should be paid on some transaction of a specified type, whether or not the taxpayer is aware of the tax liability. Mistake of law is not a defence, Mr Jones submitted, to tax lawfully due and payable.***

> ***130. In my opinion that submission begs the question, since if a transaction is set aside the court is in effect deciding that a transaction of the specified description is not to be treated as having occurred."***

85. To like effect is the decision of Mostyn J in AC -v- DC [2012] EWHC 2032 (Fam) at para 31:-

> ***"The law of tax is not an island entire of itself. Unless a taxing statute says to the contrary the right of the state to charge tax in relation to a given transaction is subject to the effect of that transaction as defined by the general law. In the specific context with which I am concerned there is long-standing authority from the Court of Session (First Division) in Scotland, IRC -v- Spence (1941) 24 TC 312, never doubted in subsequent tax cases in the English Courts, which says that the tax effects of a transaction will be annulled retrospectively if it is subsequently found to be avoidable, and is declared void."***

86. For the reasons given, the appeal is allowed, and the transaction avoided as described above.

87. We direct that any consequential applications (such as applications for orders in respect of costs) should be made in writing within the next seven days and any written submissions in response should be filed within seven days thereafter. The court will consider and determine any such applications without the necessity of a further oral hearing.