# Taxing decisions

*Examining the reception of HMRC's arguments in* Pitt v Holt *and* Re Futter, *Matthew Morrison explores the issues that will arise on appeal*

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'Whenever discretionary powers are conferred on a fiduciary which require relevant considerations to be taken into account, an operative failure so to do means that the fiduciary has not validly exercised the power at all. There can be no principled difference in this regard between a trustee and a fiduciary in the position of Mrs Pitt.'

In *Sieff & ors v Fox & ors* [2005] Lloyd LJ (sitting as a judge at first instance) reviewed a number of first instance decisions subsequent to the judgment of the Court of Appeal in *Re Hastings-Bass (dec'd)* [1975]. In Lloyd LJ's view (expressed at paragraph 119(i)) the scope of the eponymous rule is that:

> 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.

Lloyd LJ added (at paragraph 119(v)) that:

> I am in no doubt that, as a general proposition, fiscal consequences are among the matters which may be relevant for the purposes of the principle.

The Inland Revenue had declined to be a party to the proceedings in *Sieff*. Given that in such cases the revenue-gathering arm of the Crown will often have the principal, if not the sole, countervailing financial interest, this was to be regretted. As Lloyd LJ stated at paragraph 83:

> The court's task might be easier in some cases if the Inland Revenue did not always decline the invitation to take part in cases of this kind, but there are no doubt policy reasons of one kind or another for that attitude, of which the court is not aware.

Spurred by this criticism, HMRC published Tax Bulletin 83 (April 2006), in which it expressed its intention:

> ... to give active consideration to participating in future cases where large amounts of tax are at stake and/or where it is felt that we could make a useful contribution to the elucidation and development of the principle.

Tax Bulletin 83 goes on to set out a non-exhaustive list of arguments directed towards limiting the scope of the rule in *Hastings-Bass* which HMRC would seek to advance in such proceedings.

In the recent first instance decisions of *Pitt & anr v Holt & anr* [2010] and *Re Futter, Futter & anr v Futter & ors* [2010] HMRC deployed a number of these arguments with very limited success. Leave to appeal to the Court of Appeal has been granted in both cases.

This article:

- sets out a précis of the facts and issues in *Pitt* and *Futter*;
- analyses the treatment of HMRC's contentions by Robert Englehart QC (sitting as a judge of the Chancery Division) and Norris J in *Pitt* and *Futter* respectively; and
- in so doing, highlights the issues that will need to be considered by the Court of Appeal and discusses how they may be determined.

## Facts and issues in *Pitt* and *Futter*

### *Pitt*

Mr Pitt had been in a road accident and thereby sustained serious head injuries. As a consequence Mrs Pitt was appointed his receiver under the

Mental Health Act 1983. It was common ground that as such she was a fiduciary.

As a result of the compromise of Mr Pitt's damages claim for compensation in respect of the injuries he had suffered, he received a lump sum and an annuity. After receiving advice from solicitors and a financial adviser, and having obtained authorisation from the Court of Protection, Mrs Pitt (acting *qua* Mr Pitt's receiver) decided to create a discretionary trust into which the lump sum was settled and the annuity assigned. Mr and Mrs Pitt, their children and remoter issue were named as beneficiaries. On Mr Pitt's death the balance of the trust fund was to form part of his estate.

Although consideration was given by the advisers to the income and capital gains tax implications of the settlement, no regard was had to the inheritance tax position. This was regrettable because, as drafted, a full charge to inheritance tax arose. Conversely, if a provision had been inserted to the effect that at least half of the trust fund was to be applied for Mr Pitt's benefit during his life, it would have been exempt from inheritance tax as a discretionary trust for a disabled person under s89 of the Inheritance Tax Act 1984.

In so far as the rule in *Hastings-Bass* was concerned, Englehart QC found that inheritance tax was a relevant consideration that ought to have been taken into account, that it was not addressed by any of Mrs Pitt's advisers nor by Mrs Pitt herself, and that had Mrs Pitt appreciated at the time that the creation of the discretionary trust would give rise to large, avoidable inheritance tax liabilities she would not have acted in this way.

*Prima facie*, then, the case fell squarely within the principles set out by Lloyd LJ in *Sieff*. Against this (see paragraph 31):

- HMRC launched a 'fundamental attack' on the rule in *Hastings-Bass*, as developed in the subsequent first instance decisions, which were said to have taken a 'wrong turn'. On the back of this attack, HMRC urged the court to restrict the rule to circumstances where 'the immediate purpose of the act in question was not achieved', adding that '[f]iscal consequences [are] always irrelevant'.

- HMRC submitted that the rule in *Hastings-Bass* had only ever been applied in the context of discretionary decisions by trustees and that, although Mrs Pitt was acting in a fiduciary capacity, the court should nonetheless regard Mrs Pitt's actions as equivalent to acts carried out by Mr Pitt himself.

***Futter***

In 1985 Mr Mark Futter created two settlements, the Futter (No 3) Life Interest Settlement and the Futter (No 5) Life Interest Settlement. Mr Futter and a Mr Cutbill were the trustees. From the outset Mr Futter retained a life interest in both settlements, and each settlement contained powers of enlargement and powers of appointment. On 24 November 1993 the powers of appointment under both settlements were used to create trusts to take effect after Mr Futter's death, pursuant to which his wife was to have a life interest under each settlement, subject to which the trust funds of each settlement were held on trust for his children.

*In* Re Futter *Norris J rejected the proposition that* Hastings-Bass *is derived from the law of mistake.*

In 2008 Mr Futter was considering methods by which the settlements could be wound up without incurring capital gains tax on 'stockpiled gains' in each settlement.

As regards the No 3 settlement, at the end of March 2008 the ultimate decision, reached with the benefit of advice from Withers solicitors, was that the funds should be distributed to Mr Futter, because he could trigger losses on his own personal portfolio that would absorb the stockpiled gains. The distribution to Mr Futter took effect by way of a deed executed on 31 March 2008, pursuant to which Mr Futter and Mr Cutbill used the power of enlargement to make the entire capital of the No 3 settlement payable to Mr Futter. Mr Futter had informed Withers, prior to the execution of the deed, that he had sufficient losses to offset the gains from the No 3 settlement.

As regards the No 5 settlement, the decision was reached (again with the benefit of advice from Withers) to use the annual exemption and losses of Mr Futter's children to offset the stockpiled gains. This was effected on 3 April 2008 by the execution of a deed exercising the statutory power of advancement in favour of Mr Futter's children.

In September 2008 Withers realised that the losses could not be used to offset the stockpiled gains as a consequence of s2(4) of the Taxation of Capital Gains Act 1992. This had been overlooked by Withers at the time the deeds of 31 March 2008 and 3 April 2008 were executed. The amounts of tax in question were £90,849 in respect of the No 3 settlement and £1,792 for each of Mr Futter's children (a total of £5,376) in respect of the No 5 settlement.

Mr Futter and Mr Cutbill claimed that they had exercised their discretionary powers of enlargement and advancement in respect of the No 3 settlement and the No 5 settlement respectively without considering the true fiscal consequences.

The argument was advanced by their counsel so as to track the test laid down by Lloyd LJ in *Sieff*:

> The claimants failed to consider the true fiscal consequences, and had they done so would not have acted as they did because minimising the CGT payable on the extraction of funds from the settlements was a priority, and it was the perceived tax consequences which determined the form of the advancements.

Against this:

- HMRC repeated the submission made in *Pitt* that the rule in *Hastings-Bass* has gone too far, and again argued that it is not sufficient if trustees simply fail to appreciate the true tax consequences of a decision, so long as it has the legal effect that was intended. In this regard, HMRC specifically argued that the law relating to equitable relief from the consequences of a unilateral voluntary mistake and the rule in *Hastings-Bass* ought to be consistent (paragraph 20).

- HMRC's second argument was that for *Hastings-Bass* relief to be available, the adverse consequence must be objectively significant, and that this was not so in relation to the small tax liabilities of the children in relation to the No 5 settlement (paragraph 25).

- Thirdly, HMRC submitted that there is a distinction between failing to take into account a consideration, and taking it into account by seeking advice that turned out to be erroneous (paragraph 28).

- Finally, HMRC submitted that even if the rule in *Hastings-Bass* did apply, it ought only to make the decision voidable, not void (paragraph 31).

**Questions raised by *Pitt* and *Futter***

The issues explored in *Pitt* and *Futter*, summarised above, are discussed below by reference to the following questions:

**(1)** Has the jurisprudential development of the rule in *Hastings-Bass* taken a wrong turn?

**(2)** Is the relief afforded by the rule in *Hastings-Bass* only available to trustees?

**(3)** What is the significance of a decision-maker receiving incorrect advice in respect of a relevant consideration, as opposed to failing to take it into account at all?

**(4)** Does the successful invocation of the rule in *Hastings-Bass* render the impugned decision void or voidable?

**(1) Has the jurisprudential development of the rule in *Hastings-Bass* taken a wrong turn?**

*Academic material adduced in* Pitt *and* Futter

In both *Pitt* and *Futter* HMRC drew the attention of the court to a number of articles which critically considered the scope of the rule in *Hastings-Bass*. These had been written not only by practitioners and academics, but also extra-curially by senior judges (in particular by Lord Walker (as Sir Robert Walker) in 'The Limits of the Principle of Hastings-Bass', *Private Client Business*, 26 February 2002, pp226-240; and Lord Neuberger in 'Aspects of the Law of Mistake', *Trusts and Trustees*, vol 15(4), June 2009, pp189-199).

*Elision of the rule in* Hastings-Bass *with mistake*

There is not space in this article to do justice to the numerous points raised in these articles. However, what may be seen from *Pitt* and *Futter* is that HMRC used this material to bolster its argument that the scope of the rule in *Hastings-Bass* ought to be brought in line with the circumstances in which equity will relieve an individual of the consequences of a voluntary unilateral mistake.

In particular, HMRC relied on the judgment of Davis J in *Anker-Petersen v Christensen* [2002] (drawing on the judgment of Millett J in *Gibbon v Mitchell & ors* [1990]), in which Davis J held at paragraph 38 that:

> If a party enters into a deed (with a view to saving tax) on terms which are fully understood and where the effect of such terms is fully appreciated and if for whatever reason the anticipated desirable tax consequences thereafter do not flow, it would really not be open, in the ordinary way at least, to such a person to seek to set aside that deed on the ground that he had not understood its nature or effect.

Although this has been doubted (see the Isle of Man cases of *Clarkson & anr v Barclays* [2007] and *Re Betsam Trust* [2009]), and rests on what at first sight appears to be a distinction without a difference drawn by Millett J in *Gibbon* between the consequences and effects of a decision, it is tolerably clear that as a matter of English law Davis J's judgment summarises the true position (see also *Wolff v Wolff* [2004]). Indeed, this was affirmed by Englehart QC in *Pitt* itself: Mrs Pitt's alternative argument based on mistake was rejected (at paragraph 51) because:

> ... the settlement and assignment achieved exactly what Mrs Pitt intended they should by way of legal effect.

The question is whether the availability of relief under the rule in *Hastings-Bass* ought also to be limited in this way.

*The binding effect of* Sieff

Both Englehart QC (*Pitt*) and Norris J (*Futter*) considered that, as judges at first instance and having regard to the guidance in *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986], they ought not to depart from the decisions in *Sieff* and the line of authorities that preceded it. These had made it clear that, where tax is a relevant consideration, a failure to take into account the true tax consequences in the exercise of a discretionary power would justify the invocation of the rule in *Hastings-Bass*.

Save for expressing the view that the time may well be ripe for the Court of Appeal to consider the rule in *Hastings-Bass*, Englehart QC (*Pitt*) went no further.

*The distinction between the validity of an exercise of a power and the law of mistake is readily defensible.*

*Invalid exercise of a power contrasted with mistake*

However, Norris J (*Futter*) rejected the proposition that *Hastings-Bass* is derived from the law of mistake. In Norris J's view the decision in *Hastings-Bass* itself clearly concerned the question whether or not the power was validly exercised, not whether a mistake had been made in its exercise.

In this regard Norris J's views concord with those of Lloyd LJ in *Sieff*. In *Sieff* similar submissions to those of HMRC in *Futter* advocating the elision of the rule in *Hastings-Bass* with the law of mistake had been advanced on behalf of a beneficiary who stood to benefit if the transfers in question were valid. In rejecting these submissions Lloyd LJ explicitly drew a distinction between the various species of mistake (summarised at paragraphs 33-37) and the circumstances where exercises of a power are invalid (summarised at paragraph 38). The rule in *Hastings-Bass* was placed firmly in the latter category (paragraph 76).

Thus, according to Norris J (*Futter*) (paragraph 26), rather than looking to

see whether the trustees were mistaken in a manner which justifies equity's intervention:

> ... the approach adopted in [*Sieff*] requires the court first to decide (on a reasonable basis) what factors the trustees ought to have taken into account. In deciding that question it is clear on the authorities as they stand that the tax consequences for the trust estate or for the beneficiaries are, in principle, factors to be taken into account (though not if the tax consequences are subtle or detailed). Then the court must ask whether a failure to take account of the identified factor made any real difference to the decision.

It should be noted in passing that, according to Norris J, it was only in considering whether the trustees would have acted differently that the size of the liability to tax comes into play. Given that in *Futter* the whole point of deciding to proceed in the way that the trustees did in respect of the No 5 settlement was to minimise the tax liability, this clearly would have made a difference to their decision, although the tax liabilities of each child were relatively small.

For this reason submission (2) of HMRC in *Futter* (that the adverse consequence must be 'objectively significant') was rejected.

*Issues for the Court of Appeal*

Whether or not the rule in *Hastings-Bass* is a subset of the law of mistake or a principle concerned with the validity of an exercise of a power will, in my view, be a key question for the Court of Appeal.

The thesis of this article is that the distinction between the validity of an exercise of a power, and the law of mistake is readily defensible.

As is stated by the editors of *Underhill and Hayton* (17th ed, 2006) at 61.22 (using the example of a power of appointment), trustees exercising discretionary powers have a duty to take into account relevant considerations (*Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] and *Edge v Pensions Ombudsman* [2000]). Accordingly, it would be absurd to suggest:

> ... that the settlor intended the powers he conferred on trustees to be properly exercised even where the trustee-appointor took into account irrelevant considerations or failed to take into account relevant ones.

*Properly viewed, the rule in* Hastings-Bass *can only operate where fiduciaries are exercising discretionary powers that entail them taking into account certain relevant considerations.*

If this is right then the significance of a failure to take into account a relevant consideration (which, depending on the context, may include the tax consequences of a decision) is not that the trustee is mistaken, but that it is acting outside of the ambit of the power conferred on it.

Conversely, individuals making decisions about their own affairs may do as they please and need not take into account relevant considerations for their actions to be valid (a point made by Lloyd LJ in *Sieff* at paragraph 85).

As a result there can never be any question of the decision of an individual (as opposed to that of a trustee) being an invalid exercise of powers. Accordingly, individuals may only seek to resile from the consequences of their voluntary unilaterally mistaken acts in circumstances where equity is willing to intervene. As the law stands (in England at least), mistaken apprehensions about tax consequences do not justify such equitable intervention.

**(2) Is the relief afforded by the rule in *Hastings-Bass* only available to trustees?**

As noted above, in *Pitt* HMRC submitted that even if the rule in *Hastings-Bass* rendered void decisions of trustees that failed to take into account the true tax consequences, the same could not be said of those acting in other fiduciary roles, such as Mrs Pitt.

*The rule in* Hastings-Bass *as a common theme in trust, public and company law*

Counsel for Mrs Pitt submitted that it was a common theme in public law and company law, as well as the law of trusts, that a decision may be set aside if the decision-maker failed to take into account a consideration that ought to have been taken into account. From this counsel argued that:

> ... whenever the law impose[s] a duty to take all material considerations into account, a decision reached without doing so could be susceptible to being set aside under the rule in *Hastings-Bass*.

Englehart QC (*Pitt*) was not prepared to go this far. In his view, although those exercising public law powers or making decisions in their capacity as company directors may be in an analogous position to trustees, the principles developed in these areas can only ever be analogies (paragraph 35).

*Extension of the rule to certain species of fiduciaries*

However, Englehart QC (Pitt) did accept that the rule in *Hastings-Bass* ought to be available to a fiduciary in Mrs Pitt's position because:

> ... there is no material distinction between a trustee exercising a power for the benefit of a beneficiary under a trust instrument and a receiver exercising a power for the benefit of a patient pursuant to the Mental Health Act 1983. In each case the power is, as is common ground, a fiduciary one. In each case, the person exercising the power is doing so in the interests of another but is not acting on the instructions of that other. The critical point in the present circumstances is that it was for Mrs Pitt to decide whether or not it was in Mr Pitt's interest for her to dispose of his property to trustees under the settlement.

In my view, this is clearly right. Whenever discretionary powers are conferred on a fiduciary which require relevant considerations to be taken into

account, an operative failure so to do means that the fiduciary has not validly exercised the power at all. There can be no principled difference in this regard between a trustee and a fiduciary in the position of Mrs Pitt.

Counsel for HMRC cautioned that this could lead to an opening of the floodgates. However, as Englehart QC (*Pitt*) remarked at paragraph 38, applying the rule to a fiduciary in the position of Mrs Pitt in relation to this exercise of her discretion does not amount to extending the rule automatically to all acts carried out by fiduciaries.

This must also be right. Properly viewed, the rule in *Hastings-Bass* can only operate where fiduciaries are exercising discretionary powers that entail them taking into account certain relevant considerations.

*Relevant considerations depend on context*
To this it may be added that these relevant considerations will not always involve having regard to tax consequences. However, as Mrs Pitt was deciding how best to invest sums to maximise the benefit to Mr Pitt (or more accurately his estate), it is obvious that tax consequences were a relevant consideration.

**(3) What is the significance of a decision-maker receiving incorrect advice in respect of a relevant consideration, as opposed to failing to take it into account at all?**
A further argument advanced by HMRC in *Futter* is that the rule in *Hastings-Bass* should not apply where trustees have considered a relevant consideration, in the sense of receiving advice on it, but have received the wrong advice.

*Casting the burden back on the advisers*
This submission was foreshadowed in Tax Bulletin 83, where it was added that the *Hastings-Bass* rule should also be unavailable where the trustees had received the correct advice but failed to put it into effect properly. This argument was also alluded to by Lord Walker in 'The Limits of the Principle of Hastings-Bass', where he stated:

> One's instinctive reaction (not necessarily a satisfactory substitute for legal analysis) is to ask why the Chancery division, rather than the party's professional indemnity insurers, should have to pick up the pieces.

The answer, according to Norris J (*Futter*), is that there is no distinction between a total failure to take into account a relevant consideration such as tax consequences, and a failure on the part of a trustee to take proper account of a relevant consideration, such as tax consequences, because of inaccurate tax advice (paragraph 29).

This finding is consistent with a number of first instance decisions in which it was held that trustees' decisions could be set aside where they had considered an issue, but on the basis of incorrect advice (see *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] and *Burrell v Burrell* [2005]) and echoes the conclusion of Lloyd LJ in paragraph 114 of *Sieff*:

> In my judgment the consequences of the appointment as regards tax (in particular inheritance tax and capital gains tax) were matters which the trustees were under a duty to consider, which they did in fact consider, and to which they failed to give proper consideration because they were provided by their advisers with wrong advice on the point. I find that if they had had the correct advice, they would not have made the [appointment in question].

This conclusion has also been reached in a number of offshore jurisdictions (see *A & ors v Rothschild Trust Cayman Ltd* [2006] (Grand Court of the Cayman Islands); *Re the RAS I Trust* (2006-07) (Royal Court (Samedi Division), Jersey, applying the law of the Cook Islands); *Re Winton Investment Trust, Seaton Trustees Ltd v Morgan* [2008] and *Re Seaton Trustees* [2010] (Royal Court (Samedi Division), Jersey)).

*Issues for the Court of Appeal*
Again, this is an important question for the Court of the Appeal. It arises not only in *Futter* but also in *Pitt*, where the evidence demonstrates that financial advisers had opined on the tax consequences and given a (false) green light because of the advisers' failure to take into account inheritance tax implications.

In my view, this point is finely balanced. Where a trustee takes a factor into account (and therefore can be said to have exercised the discretion afforded to it), but gets the answer wrong because it is misadvised, the situation appears to be closer to that of a mistake than to an invalid exercise of a discretionary power.

*Where a trustee takes a factor into account but gets the answer wrong because it is misadvised, the situation appears to be closer to that of a mistake than to an invalid exercise of a discretionary power.*

Indeed, that there is a distinction between the two situations was specifically identified in a passage of Lord Walker's article dealing with the two pre-*Sieff* first instance decisions of *Green v Cobham* [2000] and *Abacus Trust Company (Isle of Man) v NSPCC*. Both involved transactions concerning offshore trusts which had resulted in unintended capital gains tax consequences. However, Lord Walker noted that:

> In *Green v Cobham* no thought of capital gains tax had ever crossed the minds of the BVI trustees. In *Abacus* on the other hand, capital gains tax was in the forefront of everyone's mind; all the well-remunerated professionals were consciously engaged on an artificial tax-avoidance scheme; they simply failed to get the timetable right.

In light of this, his Lordship considered that:

> ... the *Abacus* case seems to me to be a further and debatable step in the extension of the principle.

Whether it is a step that the Court of Appeal in *Pitt* or *Futter* will endorse remains to be seen.

**(4) Does the successful invocation of the rule in *Hastings–Bass* render the impugned decision void or voidable?**

*Invalid exercises of discretionary powers are void*

This question arose only in *Futter*. Norris J's answer (in line with *Sieff*) is that it is void. His primary reason (given at paragraph 34(a)) was that:

> ... if the origins of 'the Rule' lie in the law relating to invalid exercise of a power (rather than in the law of mistake) then in principle an invalid exercise of a power should result in a void transaction. The trustees have not made a decision within the ambit of the power.

*Voidness will not cause unduly disruptive consequences*

In the opinion of Norris J (*Futter*) the conclusion that a decision is void will not necessarily lead to 'dramatic and unfair disruptive consequences', (paragraph 33) as predicted by HMRC and some commentators. It may be that those who have received property pursuant to a void exercise of the power would have a change of position defence. Further, the equitable doctrines of *laches* and acquiescence may prevent relief from being granted. And it may also be possible to give partial or total effect to the exercises of discretion by virtue of the doctrines of severance and election respectively. To this, it may be added that Lloyd LJ himself said in *Sieff* that the court can prevent the over-use of the principle by requiring stringent application of the tests, taking a reasonable and not over-exigent view of what the trustees ought to have taken into account, and adopting a critical approach to contentions that the trustees would have acted differently if they had realised the true position (paragraph 82).

Whether these safeguards are sufficient, or whether instead there needs to be a fundamental reappraisal of the rule in *Hastings-Bass*, is something that will fall to be determined by the Court of Appeal.

*In the opinion of Norris J in* Re Futter, *the conclusion that a decision is void will not necessarily lead to 'dramatic and unfair disruptive consequences'.*

Norris J also noted that this conclusion is supported in the vast majority of decisions on the rule in *Hastings-Bass* and in the leading academic texts.

*If the rule in* Hastings-Bass *is elided with mistake/breach of trust, decisions will be voidable*

Although this appears to be plainly right if the rule in *Hastings-Bass* is properly understood as being concerned with an invalid exercise of a power, it should be noted that if the Court of Appeal in *Pitt* or *Futter* were to elide the rule in *Hastings-Bass* with the law of unilateral voluntary mistake, its effect on decisions should be to make them voidable.

A further alternative which would lead to the conclusion that decisions affected by the rule in *Hastings-Bass* are voidable is if the Court of Appeal were to hold that the rule simply delimits a particular circumstance in which trustees will be found to have acted in breach of trust.

This was how the decision of Lightman J in *Abacus Trust Co (Isle of Man) v Barr* [2003] was explained by Lloyd LJ in *Sieff*. According to Lloyd LJ, Lightman J fell into error both in considering that there had to be a breach of duty to bring the rule in *Hastings-Bass* into play, and also in holding that decisions falling foul of the rule would be voidable in accordance with the ordinary principle of equity that a decision challenged on grounds of breach of fiduciary duty is voidable not void.

In line with the central thesis of this article, I share Lloyd LJ's view that this approach is wrong, and that the rule in *Hastings-Bass* is concerned with the invalidity of the exercise of a discretion, not a simple breach of trust.

## Conclusion

Consideration of the nature and extent of the rule in *Hastings-Bass* by an appellate court has long been awaited. *Pitt* and *Futter* will provide the opportunity for the Court of Appeal to consider whether the rule is part of the law of mistake, or (as I believe) concerned with the valid exercise of powers. Further, it will be necessary for the Court of Appeal to determine whether the rule in *Hastings-Bass* may be prayed in aid by all fiduciaries exercising discretionary powers, and whether a distinction is to be drawn between a situation where a decision is reached with no regard to a relevant consideration, and where the consideration is taken into account but on the basis of flawed advice. ■

*A & ors v Rothschild Trust Cayman Ltd* [2006] WTLR 1129
*Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409
*Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] WTLR 953
*Anker-Petersen v Christensen* [2002] WTLR 313
*Re Betsam Trust* [2009] WTLR 1489
*Burrell v Burrell* [2005] WTLR 313
*Clarkson & anr v Barclays* [2007] WTLR 1703
*Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch 80
*Edge v Pensions Ombudsman* [2000] Ch 602
*Re Futter, Futter & anr v Futter & ors* [2010] WTLR 609
*Gibbon v Mitchell & ors* [1990] 1 WLR 1304
*Green v Cobham* [2000] WTLR 1101
*Re Hastings-Bass, dec'd* [1975] 1 Ch 25
*Pitt & anr v Holt & anr* [2010] WTLR 269
*Re the RAS I Trust* (2006-07) 9 ITELR 798
*Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705
*Re Seaton Trustees* [2010] WTLR 105
*Sieff & ors v Fox & ors* [2005] WTLR 891
*Re Winton Investment Trust, Seaton Trustees Ltd v Morgan* [2008] WTLR 553
*Wolff v Wolff* [2004] WTLR 1349