THE JUDICIAL CONTROL OF THE EXERCISE OF DISCRETIONARY POWERS BY CHARITABLE TRUSTEES

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A. Introduction

This article considers the extent to which the courts will seek to control the exercise of discretionary powers by trustees of charitable trusts,[2] the principles upon which that control will be exercised and the wider policy, if any, which underlies those principles generally.

The primary relevance of such questions lies in the manner in which what may be termed "internal" disputes arising in relation to the control and management of charities will be approached by the courts. Such disputes will usually arise from decisions taken by those who are the "charity trustees" for the purposes of s.97(1) of the Charities Act 1993 in exercise of their discretionary powers of either

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2 Although this article will primarily be concerned with the judicial control of powers exercised by trustees of charitable trusts, charitable bodies may, and do, adopt a variety of legal structures other than that of a trust. For the purposes of the Charities Act 1993, a "charity" is at present defined as embracing any institution, corporate or not and including any trust or undertaking, which is established for charitable purposes and is subject to the control of the High Court in the exercise of the court's jurisdiction with respect to charities - see Charities Act 1993, ss.96(1) and 97(1) in which "charity trustees" are defined as meaning "… the persons having the general control and management of the administration of a charity."

distribution[3] or management[4] in administering the charity in question. Those disputes may not necessarily be based on any of the grounds (such as misconduct or mismanagement in the administration of the charity) which would entitle the Charity Commission[5] to exercise its statutory powers of intervention under ss.18 to 19B (inclusive) of the Charities Act 1993 (as amended by the Charities Act 2006)[6] and may arise from challenges to such decisions by a section of the membership or disappointed potential objects which are simply made on the grounds of disagreement with the merits of the decision.

At present the Charity Commissioners are precluded by s.1(4) of the 1993 Act from acting in the administration of a charity and the new Charity Commission will operate under a similar statutory prohibition.[7] In the absence of any grounds for exercising their statutory powers of intervention or regulation, the only role of the Charity Commission will usually be to decide whether or not to give its consent under s.33(2) of that Act to any proposed legal proceedings which may be intended to resolve the dispute, since such proceedings will usually fall within the definition of "charity proceedings" contained in s.33(8) of the 1993 Act.[8]

Under the Charities Act 2006 a new Charity Tribunal will be established.[9] The purpose of the Charity Tribunal will be to hear applications and appeals from the decisions of the new Charity Commission on the matters which are set out in column 1 of the Table to Schedule 1C of the 1993 Act, as amended by Schedule 4 to the Charities Act 2006. Again, these matters essentially relate to the exercise by the

3 See *Re Beloved Wilkes' Charity* (1851) 3 Mac & G 440

4 See *Muman v Nagasena* [2000] 1 WLR 299 and *Re Manchester New College* (1853) 16 Beav 610

5 Under the Charities Act 2006, s. 6, the functions, property, rights and liabilities of the Charity Commissioners will be transferred to a new statutory body, the Charity Commission of England and Wales

6 See Charities Act 2006, ss.19 to 21 (inclusive)

7 See Charities Act 2006, s.7 which will add a new s.1E to the Charities Act 1993.

8 Such proceedings are defined in s.33(8) as "proceedings in any court in England and Wales brought under the court's jurisdiction with respect to charities, or brought under the court's jurisdiction with respect to trusts in relation to the administration of a trust for charitable purposes", while "trusts" are widely defined in s.97(1) of the 1993 Act as meaning "the provisions establishing it as a charity 6and regulating its purposes and administration, whether those provisions take effect by way of trust or not, and in relation to other institutions has a similar meaning." For further details of the Charity Commission's role, see James Kilby "Charity proceedings", CL&PR 9/1 [2006] 23-37.

9 See Charities Act 2006, s.8, and Schedules 3 and 4, adding new ss.2A, 2B, 2C, 2D and Schedules 1B and 1C to the Charities Act 1993.

Charity Commission of its statutory powers of intervention under s.18 of the 1993 Act in pursuance of its general objectives in identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in respect of the same[10] and thus to the regulation and governance of charities. Such matters will therefore fall outside the scope of this article, which is concerned with the rather different question as to when a court may seek to overturn a decision of charity trustees in exercise of their discretionary powers.

B. Current Controversies surrounding the Judicial Control of Trustees' Discretions

It has traditionally been assumed that the principles upon which the courts will intervene in the exercise of discretionary powers by charitable trustees are mainly to be found in, and derived from, what may be termed general or private trust law, as applied in relation to family trusts or settlements, in particular the nineteenth century House of Lords decision in *Gisborne v Gisborne*,[11] which established a general principle of non-intervention in the absence of *mala fides*. Indeed, one of the leading cases which is also traditionally cited in relation to such private trust law principles is *Re Beloved Wilkes Charity*,[12] which concerned the exercise by charitable trustees of their discretionary powers to select a candidate to be educated at Oxford in preparation to become a Minister of the Church of England.[13] These principles are considered in Sections C, D and F below.

Modern developments in this field which are considered below, however, raise the question whether the principles which govern the basis on which the courts will intervene in the exercise by trustees of charitable trusts of their discretionary powers should diverge from those which are applied by the courts in relation to traditional private or family trusts, since charitable trusts are by their very nature public trusts for the promotion of purposes beneficial to the community as opposed to trusts for the benefit of private individuals.[14] Indeed, it has been argued that charitable trusts operate in a sufficiently different legal, fiscal and social environment and have such differences in internal law that they should now be considered to be a unique form of trust.[15]

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10 See the general functions of the new Charity Commission as specified in Charities Act 2006, s.7, which will insert a new s.1C in the Charities Act 1993

11 (1877) LR 2 App Cas 300

12 (1851) 3 Mac & G 440

13 See also *Re Manchester New College* (1853) 16 Beav 610

14 *Gaudia Mission v.Brahmchary* [1997] 4 All ER 957 at 963 *per* Mummery LJ

15 J. Warburton, "Charitable Trusts – Unique?" 1999] 63 Conv 20. Hudson has gone so far as to argue that charitable trusts are not properly trusts at all, but rather a form of quasi-public body in

In addition to such questions, two current issues have been raised by recent case law relating to the judicial control of trustees' discretions in general or private trust generally. The first concerns the application of the rule or principle in *Re Hastings-Bass*,[16] which specifies the circumstances in which a the exercise of a discretion will be overturned where the trustees have failed to take account of relevant considerations or have taken into account irrelevant considerations. The second issue concerns the attempt by the courts to introduce into this area of trust law new principles akin to public law principles, such as the doctrine of unreasonableness in the sense used in *Associated Picture House v Wednesbury Corp*.[17] and the recognition of a legitimate expectation, as seen in such decisions as *Edge v. Pensions Ombudsman*[18] and *Scott v. National Trust*.[19]

This case law will be considered in Sections K and M below while its implications in relation to charity trustees will be considered in Section N below. The plethora of recently reported cases concerning the scope and application of the rule or principle in *Re Hastings-Bass* has, however, also tended to obscure or overshadow the wider and more fundamental controversy which surrounds the general principles which govern the basis on which the courts will intervene in the exercise of discretionary powers by trustees in private trust law (and the decision in *Gisborne*, in particular) and may create the impression that the more general principles which govern the

basis of the court's supervisory jurisdiction over the exercise of discretionary powers by trustees (including the general principle of non-intervention advanced in *Gisborne*) are well established.[20] In fact those general principles have been described as

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which the officers have fiduciary duties which are overseen by a regulatory structure made up of the Attorney-General and the Charity Commissioners - see A. Hudson, *Equity and Trusts*, 4th ed., London: Cavendish Publishing Limited (2005) at 862. Similarly, it has been argued that pension trusts should now be recognized as a *sui generis* species of trust on the basis that pension trusts principles have diverged from traditional trust principles and ought to diverge further from those principles since the entitlement of members to benefits under occupational pension schemes has been earned as deferred remuneration by services pursuant to contract so that a member of a scheme is also in the position of a settlor by virtue of his contributions so that the expectations of such members to benefits under the scheme deserve a higher and more serious consideration in the exercise by trustees of their distributive discretions than do those of objects of a discretionary powers under a traditional family trust or settlement– see D.J. Hayton, "Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts", [2005] Conv 229.

16 [1975] Ch 25, CA

17 [1948] 1 KB 223

18 [1998] Ch. 512, affd [2000] Ch 602, CA

19 [1998] 2 All ER 705

20 See, for example the general statements of principle in *Lewin on Trusts*, 17th ed, London: Sweet & Maxwell (2000), at 29-87 and Underhill and Hayton, *Law Relating to Trust and Trustees*, 16th ed,. London : Butterworths Lexis Nexis at 702 and the assertion that the principles

"surprisingly unclear"[21] and "'obscure".[22] It has been asserted that "[i]n no other area of the law relating to trusts and trustees are judicial statements so inconsistent"[23] and the development of those principles has been described as "a history of well-meaning sloppiness of thought".[24] This controversy, which has been ascribed to inconsistent judicial statements arising from linguistic differences in the terms used from time to time by the court in the reported cases when impugning the exercise of the discretion or power in individual instances and the fact that the degree of control asserted by the court over discretions and powers has tended to vary considerably at different periods of time,[25] is explored in Sections E and G to J (inclusive) below.

The central contention of this article is that the answer to the question whether different principles should govern the basis on which the courts will intervene in the exercise by trustees of charitable trusts of their discretionary powers, as opposed to non-charitable trusts, is itself to be found from an examination of the true basis of the relevant private trust law principles and the resolution of the controversies surrounding the underlying principles of intervention in that field. It is argued below that the answer to the latter controversies is to be found in (a) the application of the duty of trustees properly to consider the exercise of their discretionary powers which was adumbrated by Lord Wilberforce in *McPhail v Doulton*[26] which is considered in Sections H and I below and (b) the overriding principle that the court has a discretionary power to intervene in disputes which will be exercised only where it is necessary to do so in order to secure the primary and overriding object of the due execution and administration of the trust, as described by Lord Walker in the decision of the Privy Council in *Schmidt v Rosewood Trust Ltd*, which is considered in Section L below.[27] Both *McPhail* and *Rosewood* are, of course, prominent decisions in the field of private trust law.

Once the overall context in which these concepts should be applied is properly understood, it is submitted that they supply a coherent and universal basis upon which the courts can and will decide to intervene in and control the exercise by trustees of their discretionary powers in any given case, whether the trust is charitable or non-

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governing the exercise of such discretionary powers are "well settled" by D. Oliver in, *Common Values and the Public-Private Divide*, Butterworths: London (1999) at 189

21 N.D.M. Parry, "Control of Trustee Discretions", [1989] Conv 244

22 M. Cullity, "Judicial Control of Trustees' Discretions", (1975) UTLJ 99

23 *Ibid*

24 IJ Hardingham, "Controlling Discretionary Trustees", (1975-6) 12 UWAL Rev 91

25 See n.22 above

26 [1971] AC 424, HL

27 [2003] 2 AC 709, PC

charitable in nature. It will therefore be argued that there is no need for the courts to develop separate principles of judicial intervention in the separate spheres of charitable and non-charitable trusts, although some divergence may inevitably be expected to be found in the precise manner in which the courts will apply these principles in any given case to charitable and non-charitable trusts respectively simply because charitable and non-charitable trusts serve different types of purposes.

For these reasons it will be necessary to analyse the historical development of the relevant private trust law principles in some depth and accordingly what follows will largely concentrate on this aspect. It should also be noted that this article does not consider the role which judicial review under Part 54 of the CPR may have to play in relation to such disputes,[28] as opposed to the separate and distinct question of how far the introduction of public law considerations into the field of judicial control of trustees' discretions in relation to both charitable and non-charitable trusts may be justified, which is considered below. It is intended that the role which judicial review under Part 54 of the CPR has to play in this area will be considered in a future article.

C. Traditional Private Trust Principles

The traditional assumption that the principles upon which the courts will intervene in the exercise of discretionary powers by charitable trustees are mainly to be found in, and derived from, what may be termed general or private trust law is exemplified by the nineteenth century decisions in *Re Beloved Wilkes Charity*[29] and *Re Manchester New College*.[30] Private trust law principles traditionally emphasize the autonomy of trustees in the exercise by the court of its supervisory jurisdiction over decisions made by trustees under their discretionary powers. Accordingly, the 'balance of power' in a trust was regarded as resting with the trustees, particularly where the discretion was stated in terms in the trust instrument to be 'absolute and uncontrollable', with the courts being regarded as reluctant to interfere with the exercise of such powers provided that that the trustees acted in what was described as 'good faith.' This approach became particularly marked after the decision in *Gisborne v Gisborne*.[31]

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28 A decision of the Charity Commission to institute an inquiry under s.8 of the Charities Act 1993 with regard to a particular institution or class of institutions cannot be the subject an appeal to the new Charity Tribunal but instead may be the subject of an application to the Tribunal for review and, in determining the application, the Tribunal shall apply the principles which would be applied by the High Court on an application for judicial review – see Charities Act 1993, Schedule 1C, paras.1,3 and 4 as added by the Charities Act 2006, Schedule 4.

29 (1851) 3 Mac & G 440

30 (1853) 16 Beav 610

31 (1877) LR 2 App Cas 300

Apart from the principle of non-intervention enunciated in *Gisborne*, the primary doctrine which has been developed by the courts in controlling the exercise of discretions and powers is that of 'a fraud on a power'. As stated in *Snell*,[32] that term is commonly used to describe "the exercise of a special power of appointment for an unjustified purpose or with an unjustified intention"[33] or "an improper use of the power for a collateral purpose."[34] Thus the donee of a power must exercise that power (a) in good faith (b) only in favour of the objects of the power and (c) only in furtherance of the purpose for which the power was conferred. Although the doctrine is usually considered in the context of special powers of appointment, it will also extend to powers of advancement and any power conferred on trustees as such, including powers of investment.[35]

Examples of a fraudulent execution will include (a) the exercise of a power for a corrupt purpose, as where the donee of the power is bribed or paid to exercise the power in a particular way or, exercises the power with the ultimate intention of benefiting himself as a non-object of the power;[36] and (b) the exercise of a power for a foreign purpose, as where a discretion or power is exercised with the intention of benefiting a person who is not an object of the discretion or power and is thus outside the scope of the power.[37]

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32 *Snell's Equity*, 31st ed, Thomson: Sweet & Maxwell (2005), at 9-12

33 *Walker v Stones* [2001] QB 902 at 934H *per* Sir Christopher Slade

34 *Hillsdown Holdings plc v Pensions Ombudsman* [1997]1 All ER 862 at 883H *per* Knox J

35 See *Cowan v Scargill* [1985] Ch 270 at 288, *Re Smith* [1896] 1 Ch 71 and also Thomas and Hudson, *The Law of Trusts*, Oxford: Oxford University Press (2004) at 19.05

36 See, for example, *Re Wright* [1920] 1 Ch 108 at 118 and *Henty v Wray* (1882) 21 Ch D 332

37 *Vatcher v Paull* [1915] AC 372

The exercise of a power may also be set aside if that exercise is excessive. The execution of a power will be excessive if a disposition which has been made by a donee of a power is beyond or outside the scope of the power which has been conferred upon the donee or is in some way in breach of the general law applying to such a disposition, such as the rules against perpetuities and/or excessive accumulations. Examples of excessive execution include (a) an appointment in favour of a class which includes a person who does not fall within the objects of the power and is a therefore a stranger to the power[38] and (b) the exercise of a power by the donee in some other way which is not consistent with the terms and scope of the power, such as by annexing to the appointment conditions which are not authorised by the terms of the power.[39]

The doctrine of excessive execution is concerned with the effect of the exercise of a power and whether, on the true construction of that power, it has been exercised in such a way as to fall within the scope of the power.[40] Although both a fraud on the power and an excessive execution will usually involve the exercise of a power in manner which falls outside the scope of the power, an excessive execution of a power will involve no element of fraud or bad faith. An excessive execution will usually arise because a donee has misconstrued the scope or ambit of the power in question or has failed to take into account the effect of the application of relevant rules of law but nevertheless has acted in good faith in that he did not deliberately intend to exceed his powers.

The distinction[41] between a fraud on the power and an excessive execution will therefore depend upon the intention or purpose with which the donee of the power has exercised the power, although the dividing line may at times be a very fine one.[42] The execution of the power will not only be excessive but also a fraud on the power if it is exercised by the donee not in good faith but deliberately for an ulterior purpose which is beyond the scope of the instrument which creates the power or which

38 See, for example, *Re Hoff* [1942] Ch 298 and *Re Brinkley's Will Trusts* [1968] Ch 407

39 See *Re Holland* [1914] 2 Ch 595

40 See *Snell's Equity*, *supra* , at 9-12

41 A fraudulent execution of a power will be wholly void – see *Cloutte v Storey* [1911] Ch 18; cf *Abacus Trust Company (Isle of Man) v Barr* [2003] Ch 409 at 420-1 and *Snell's Equity*, 31st ed, Thomson: Sweet & Maxwell (2005), at 9-16, nn.96-98. An excessive execution of a power will not necessarily render the execution void; the execution of the power may be held to be good and bad in part, provided that the part of the appointment which is good is distinct and absolute and is not so tied up with the part of the appointment which is bad so as to render both parts indistinguishable or inseparable, in which case there will have been no execution of the power at all – see Thomas, *op cit*, at para 8-02

42 G.Thomas and A.Hudson, *The Law of Trusts*, Oxford: Oxford Oxford University Press (2004) at 18.04

is not justified by the instrument. The meaning of 'fraud' in this context was considered by Lord Parker in *Vatcher v Paull*[43] who stated that:

> "*The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term, or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of, or not justified by, the instrument creating the power*"[44]

The requirement that a power must be exercised in such a manner so as not to defeat the intention of the donor (and thus not in a fraudulent manner) has often been expressed in the alternative as a requirement that the donee of a power must exercise the power "fairly", "honestly" and/or "in good faith".[45] As will be seen in Section E below, a similar variety of terms has also been used in describing the requirement of "good faith" under the principle of non-intervention established by *Gisborne*. The use of such similar terms in this context therefore raises the initial question whether the requirement in *Gisborne* that a discretion must be exercised in "good faith" if the court is not to intervene in the exercise of that discretion is simply intended to refer to the doctrine of fraud on a power or bears a wider scope or meaning.[46] For the reasons which are set out in Section I below, it will be contended that the reference to "good faith" in *Gisborne* bears a wider meaning than the doctrine of fraud on the power and encompasses the need to observe all the various separate heads of duties which are set out in Section F below. The additional and separate question as to whether the rule or principle in *Re Hastings-Bass* may simply be explained as an application of the doctrine of excessive application is considered in Section K below.

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43 [1915] AC 372

44 *Ibid* at 378. This statement was reinforced by the observation of Scott V-C in *Medforth v Blake* [2000] Ch D 86 that "the equitable doctrine of 'fraud on a power' has little, if anything to do with fraud." (at 103).

45 See, for example, *Cowan v Scargill* [1985] Ch 270, where Megarry V-C commented (at 288D) that "Powers must be exercised fairly and honestly for the purposes for which they are given and not so as to accomplish any ulterior purpose whether for the benefit of the trustees or otherwise". Similar statements have also been made by academic commenators – see, for example, I.J. Hardingham, "Controlling Discretionary Trustees", (1975-76) 12 UWAL Rev 91 at 101, where it is stated that "The trustee must act honestly and not in fraud on the power committed to him" and G.Thomas, *Thomas on Powers*, London : Sweet & Maxwell (1998) *supra*, at 6-201, where it is stated that "The exercise by trustees of their powers and discretions is invariably required to be "honest" or "*bona fide"*."

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46 See, for example, *Sieff v Fox* [2005] 3 All ER 693 at 704h *per* Lloyd LJ

D. *Gisborne* and the principle of non-intervention

The basis upon which the court exercises its general supervisory jurisdiction over decisions made by trustees under their discretionary powers is often described in terms of a general requirement that trustees must act "in good faith", sometimes in conjunction with the requirements that the trustees must take into account all relevant considerations (as embodied in the rule in *Re Hastings-Bass*) and sometimes in the context of an "absolute" or "uncontrollable" discretion.[47] The use of the latter terms derives from the decision in *Gisborne* where the relevant principles were described by the House of Lords in the context of a power which was a power or discretion which was stated in express terms in the trust instrument to be "absolute" and "uncontrolled". Such powers are commonly referred to as 'enlarged discretions' while those which are not described as absolute or uncontrolled in the trust instrument are referred to as 'unenlarged discretions'.

The decision in *Gisborne* has been respectively described as "the foundation of the law relating judicial review of discretionary decisions of trustees",[48] "the starting point for any attempt to state the principles upon which the courts will assert their control over discretions which have been conferred in express terms"[49] and as "the high-watermark of judicial non-interventionism".[50]

In *Gisborne* the court considered a power given by a testator to the trustees of his estate "in their absolute discretion and uncontrollable authority" to pay and apply the whole, or such portion, of the income of his estate as they should think expedient to or for (amongst other things) the maintenance and support of his widow, who was of unsound mind. The widow, through her next friend, sought a declaration that the income of the estate should be treated as the primary fund to which resort should be had for her maintenance or support in an asylum. The trustees had proposed to apply only such income of the estate as would be required after primary provision for these purposes had been made out of the funds of the widow's own marriage settlement so that only any deficiency remaining after the application of the latter funds would be made up out of the income of the estate. The House of Lords, affirming the decision of the Court of Appeal[51] which had in turn overturned the decision of Hall V-C at

47 Compare the general statements of principle in *Lewin* and *Underhill and Hayton* referred to in n.20 above

48 See G Thomas, *Thomas on Powers*, London: Sweet & Maxwell (1998) at 6-215

49 See M. Cullity, "Judicial Control of Trustees' Discretions", (1975) UTLJ 99

50 G. Moffat, *Trusts Law Text and Materials*, 4th ed, Cambridge University Press: Cambridge (2005) at 525

51 (1875) 32 LT 46

first instance[52] granting the declaration sought by the widow, held that the court had no power to interfere with the decision of the trustees and thus that only such an amount should be provided out of the income of the estate as would, when taken together with other funds available to her, be sufficient for the widow's maintenance and support.

Referring to the words "in their absolute discretion and uncontrollable authority" which prefaced the grant of the power or discretion, Lord Cairns LC made the following oft-quoted observation:

> "*My Lords, larger words than those, it appears to me, it would be impossible to introduce into a will. The trustees are not merely to have discretion, but they are to have "uncontrollable", that is, uncontrolled, "authority". Their discretion and authority, always supposing that there is no mala fides with regard to its exercise, is to be without any check or control from any superior tribunal.*"[53]

Gisborne also illustrates the fundamental principle that the court will not generally[54] exercise a personal discretion connected with a trustee's personality or experience or substitute its opinion of the advisability of some step for the opinion of the trustees. This principle is best encapsulated in the decision in *Re Beloved Wilkes's Charity*,[55] where trustees had a duty from time to time to select a candidate to be sent to the University of Oxford to be trained as a minister of the Church of England. The trustees were obliged to select any suitable candidate who came forward from certain nominated parishes but in default had a more general discretion. The court as asked to set aside a decision under which the trustees had selected a candidate who did not come from one those parishes but Lord Truro LC declined to interfere with this decision, stating:

> "*... it is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this Court will thus be confined to the question of honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular circumstances*."[56]

52 (1875) 31 LT 472

53 1877) 2 AC 300 at 305

54 See *Re Locker's Settlement* [1977] 1 WLR 1323, distinguishing *Re Allen-Meyrick's Will Trusts* [1966] 1 WLR 499 and *Re Gulbenkian's Settlements (No 2)* [1970] Ch 408

55 (1851) 3 Mac 7 G 440

56 *Ibid* at 448

The principle set out by Lord Cairns LC in *Gisborne* may therefore perhaps be more accurately described as one of 'non-intervention', in so far as the court will not intervene at the instance of a beneficiary once the trustees have made a considered and *bona fide* decision as to the manner in which the power or discretion is to be exercised.[57] It was applied in *Re Schneider*[58] and has often been repeated in more modern cases.[59]

E. Difficulties arising in the application of *Gisborne*

Notwithstanding the apparent obeisance to the principle in *Gisborne* over this very long period of time, commentators have observed that a close examination of the authorities reveals that the courts have used a considerable variety of terms to describe the requirements which must be met if the exercise of a discretionary power (whether enlarged by the use of such terms as 'absolute' or 'uncontrolled' or unenlarged through the absence of the use of such terms) by trustees is not to be overturned.

Prior to the decision in *Gisborne*, Wigram V-C had expressed the view in *Costabadie v Costabadie*,[60] that an enlarged discretion had to be exercised variously in a "sound", "honest", "proper" and "reasonable" manner and suggested that the court would intervene in the exercise where the trustees had exercised their discretion unreasonably. Indeed, in *Gisborne* itself, Lord Penzance held that the trustees had exercised "a reasonable discretion"[61] while Lord O'Hagan held that the trustees' decision on a "reasonable question of expediency" which had arisen "had not been at all unreasonable".[62] It has been observed[63] that the basis on which the

exercise of discretion was upheld in the judgments of Lord Penzance and Lord O'Hagan therefore appears to differ from that stated by Lord Cairns LC, and suggests, at first sight at least, that the relevant basis upon which the court would intervene in exercise of its supervisory jurisdiction was the principle of 'unreasonableness', which is potentially a much wider concept than that of *mala fides* adopted by Lord Cairns LC.

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57 *Re Steed's Will Trusts* [1960] Ch 407, CA

58 (1906) 22 TLR 223 at 226 *per* Warrington J

59 See the classic exposition of the principle by Salmon LJ in *Re Londonderry's Settlement* [1965] Ch 918, CA at 936-7 and also *Sieff v Fox* [2005] 3 All ER 693 at 704a-b *per* Lloyd LJ

60 (1847) 6 Hare 410 at 414

61 (1877) 2 App Cas 300 at 309

62 *Ibid* at 311

63 Parry, "Control of Trustee Discretions", [1989] Conv 244, at 245

Similar linguistic variations have also appeared in the cases concerning unenlarged discretions.[64]

The references to the concept of unreasonableness by Lords Penzance and O'Hagan in *Gisborne* were echoed in a number of subsequent cases which were decided shortly after *Gisborne*.[65] The concept of reasonableness was also further considered in the much later decision of the House of Lords in *Dundee General Hospitals v Walker*.[66] There the testator had bequeathed a legacy to the Dundee Royal Infirmary, subject to the proviso that it should be payable "only if my trustees shall in their sole and absolute discretion be satisfied" that, at the testator's death, the Infirmary had not been taken over, wholly or partly, by or placed under the control of the State or of a local authority. The trustees decided that they were not so satisfied and the Infirmary challenged their decision not to pay the legacy on the ground that the trustees had acted unreasonably in arriving at their conclusion. There was no allegation of bad faith or dishonesty.

64 In *Re Hodges* (1878) 7Ch D 754, Malins V-C stated that the court would not interfere in the exercise of an enlarged discretion but would do so where an unenlarged discretion had not been 'honestly' and 'properly' exercised by trustees, while, in *Brophy v Bellamy* (1873) LR 8 Ch App 798 the Court of Appeal in Chancery applied the principle in *Gisborne*, expressing the view that the court could only interfere in cases of bad faith. Chitty J also appeared to apply the principle in *Gisborne* to unenlarged discretions in both *Re Bryant* [1894] 1 Ch 324 and *Re Boys* (1896) 41 Sol Jo 111, holding that he would refuse to overrule the exercise of an unenlarged discretion where the trustees had acted honestly and prudently or reasonably.

65 See, for example, *Tabor v Brooks* (1878) 10 Ch D 273 and *Tempest v Lord Camoys (No.3)* (1882) 21 Ch D 571, CA. In *Tabor v Brooks*, Malins V-C stated at 277-8 "As a general rule, the Court will not interfere with the discretion of trustees where it is fairly and honestly exercised….But if they exercise their discretionary power in an arbitrary and unreasonable manner, the Court will control them ….". In *Tempest v Lord Camoys*, the Court of Appeal held that where an absolute discretion had been given to the trustees the court would not compel the trustees to exercise it and thus would not intervene on the ground of its non-exercise. Cotton LJ stated (at 580) that the court would intervene where the trustee had exercised the relevant discretion or power discretion "in any way which is wrong or unreasonable"65 while Jessel MR stated (at 578) that "It is settled law that when a testator has given a pure discretion as to the exercise of a power, the Court does not enforce the power against the wish of the trustees, but it does prevent them from exercising it improperly."

66 [1952] 1 All ER 896

The House of Lords were prepared to proceed on the assumption that the appropriate test of the validity of the trustee's decision was whether that decision was unreasonable in the sense that no reasonable person could have come to that decision, as was apparently conceded by counsel for the trustees,[67] although Lord Normand, Lord Morton, Lord Reid and Lord Tucker all expressed some doubt as to whether the reasonableness of the course which the trustees had adopted was the proper test of the validity of the trustees' decision.[68] It was held that, on the true construction of the will, the testator intended the trustees to be the sole judges of all the matters which they had to consider in deciding whether they were satisfied that, at the testator's death, the Infirmary had not been taken over by, or placed under the control of, the State or of a local authority[69] and that the appellants had failed to show that the conclusion which the trustees had reached was one which no reasonable man, fairly considering the facts, could have reached.

Commentators have questioned[70] how far *Dundee* may be regarded as authority for any general principle in relation to the judicial review of the exercise of trustees'

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67 *Ibid* at 905 *per* Lord Reid

68 [1952] 1 All ER 896 at 901, *per* Lord Normand; at 903, *per* Lord Morton; at 905, *per* Lord Reid; at 906, *per* Lord Tucker. Parry, *supra*, at 246 observes that, in the court below, Lord Cooper, the Lord President, expressly referred, without disapproval, to the statement by Lord Kyllachy in *MacTavish v Reid's Trustees* 12 SLT 404 at 405 that, in the absence of *mala fides*, the court cannot review the exercise of a trustee's discretion. This statement would seem to equate the position under Scottish Law to that accepted by several authors as applicable in England after *Gisborne*, notwithstanding Lord Cooper's prior observation that the Scottish Courts did not possess the same jurisdiction over trusts which the Court of Chancery enjoyed in England.

69 See [1952] 1 All ER 896 at 901 at 903-4 *per* Lord Reid

70 Se[illegible]

discretions on the basis that, firstly, the House of Lords did not consider the appropriate test to be applied in such a review of the exercise of trustee's discretions and, secondly, the nature of the discretion in question fell to be distinguished from the usual type of dispositive or administrative discretion referred to above, in so far as the discretion which was considered in *Dundee* was a discretion as to a state of fact.[71]

[illegible]ot exercised in accordance with the objective test of that standard of reasonableness expected of a prudent business man. I.J. Hardingham ((1975-6) 12 UWAL Rev 91 (at 112-7) also adopted the view that an enlarged discretion will be unreviewable if exercised *bona fide* but contended that an unenlarged discretion will be subject to review by the court on the grounds of unreasonableness judged by an external factual standard appropriate to the purposes of the relevant trust in question.

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Two comments may be made in relation to this distinction, however. The first is that a

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dispositive discretion may validly require the trustees to make decisions on a state of fact as the persons in whom the settlor has reposed confidence to determine

the relevant question.[72] Secondly, although the court cannot exercise a personal discretion connected with a trustee's personality or experience or substitute its opinion for the advisability of some step for the opinion of the trustees, the court will not permit a usurpation of its jurisdiction to construe a trust document.[73]

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The dividing line between the relevant authorities has been described as "very obscure"[74] and the view has been expressed[75] that, had *Dundee* been a decision under

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English law, the decision would not have been the same. Nevertheless, it has been argued[76] that the approach adopted by the House of Lords in *Dundee* is entirely consistent with principles which may be derived from the other English authorities. The judgments recognized the overriding importance of ascertaining the intention of the settlor in the context of reviewing the exercise of trustees' discretions and the general observations in *Dundee* seem to have been directed generally to all powers and discretions, including enlarged discretions.

The linguistic differences in the various cases referred to above have produced considerable confusion over the question whether different principles are to be applied in respect of judicial intervention in the exercise of enlarged and unenlarged discretions as is reflected in the widespread variance in the views expressed by

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commentators.[77] A similar controversy exists as to the meaning of 'good faith', which has been described as "notoriously elastic",[78] although the general balance of academic commentary would, in this context, appear to favour the view that *mala fides* should be given a broad meaning so as to include within its ambit not only the doctrine of a fraud on the power but a breach of any of the well-recognized heads of duty which are referred to in Section F below.[79]

F. Duties of Trustees

A number of well-recognized 'duties' which trustees must follow when exercising their discretionary powers can be derived from the cases in which the courts have held that trustees have failed to exercise a discretionary power either properly or at all.

The first such duty is the duty to exercise an active discretion in the sense that a trustee must apply his own mind by giving a real and genuine consideration to the actual exercise of the power or discretion. Thus in *Wilson v Turner* [80] trustees were held not have exercised their discretion to apply income by way of maintenance for a child because they paid all the income to the father during the child's infancy. The father's estate was held liable to repay the payments of income which the father had received. On the same basis, a purported exercise of a power of appointment was

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78 Cullity, *op.cit*, at 103

79 *Ibid* at 114-9, Thomas, *op.cit*, at 6-211, n.45 and 6-233 and Hardingham, *op.cit.*, at pp.92-112

80 (1883) 22 Ch.D 521

held to be a nullity in *Turner v Turner*,[81] where the trustees had never applied their minds to the exercise of the discretion and simply executed various deeds purporting to exercise that power placed before them by another without reading or understanding the effect of those deeds.[82]

Similarly, trustees will be under the duty, when exercising a power or discretion, to exercise that power or discretion personally and not to act under the dictation or instructions of another, thereby leaving the decision to that other person without the donee or trustee exercising his own discretion or judgment.[83] Thus in *Williams v Holland* [84] it was held that a beneficiary under a will was not entitled to restrain the personal representatives from selling an asset in the estate in a *bona fide* exercise of their powers of sale.[85] Further, trustees should exercise the discretion only after a full consideration of the relevant circumstances as they exist from time and should not have previously fettered[86] the exercise of that discretion.[87]. This duty applies, as a general principle, not only to the exercise of dispositive powers or discretions but also to the exercise of administrative and managerial powers[88] and precludes trustees from surrendering their discretion as to a future exercise of the power.[89]

In exercising their discretionary powers, trustees must act impartially and even-handedly between the parties interested under the trust when exercising powers or

81 [1984] Ch 100.

82 See also *Klug v Klug* [1918] 2 Ch 67, where the Court directed the trustees to exercise a power of advancement where one of the trustees had refused to do so but had failed to consider whether the advancement would be for the welfare of the beneficiary

83 See, for example, *Turner v Turner* [1984] Ch 100

84 [1965] 1 WLR 739

85 See also *Re Brockbank* [1948] Ch 206. This duty does not, however, prevent a trustee or other donee of a power or discretion from seeking advice from others, such as the settlor or objects of the trust, before exercising the power or discretion provided the trustee or donee exercises his own judgment or discretion in exercising the power - see *Re Pauling's Settlement Trusts* [1964] Ch 303

86 For example, by entering into any covenant, undertaking or agreement or adopting an inflexible policy or premature and irrevocable view as to the manner of the future exercise of the power or discretion

87 See *Weller v Ker* (1866) LR 1 HL Sc 11 and *Re Gibson's Settlement Trusts* [1981] Ch 179

88 *Moore v Clench* (1875) 1 Ch D 447

89 *Re Allen-Meyrick's Will Trusts* [1966] 1 WLR 499

discretions.[90] This duty is the core duty which gives rise to the rules in *Howe v Earl of Dartmouth*[91] and *Re Earl of Chesterfield's Trusts*.[92] This duty will clearly apply to managerial or administrative powers and discretions[93] but its application to the exercise of dispositive powers or discretions was questioned by Scott V-C, at first instance, and by the Court of Appeal in *Edge v Pensions Ombudsman*.[94] At first instance, Scott V-C observed that it was meaningless to speak of a duty on trustees to act impartially in relation to a discretionary power to choose which beneficiaries, or class of beneficiaries, should be the recipients of trust benefits where the trustees are *ex hypothesi* entitled to choose and to prefer some beneficiaries over others.[95]

One of the most important duties which has been recognized is the duty not to act capriciously.[96] Thus, in *Re Manisty's Settlement*, Templeman J stated[97] that trustees must not act capriciously, that is to say, "for reasons which could be said to be irrational, perverse, or irrelevant to any sensible expectation of the settlor."[98] The concept of capriciousness would appear to bear a close similarity to that of "unreasonableness" in the sense in which the latter was used in *Dundee General Hospitals v Walker*[99] as considered in Section E above. This is illustrated by the earlier decision in *Re Chapman*,[100] where the concept of 'reasonableness' was invoked by the Court of Appeal to explain the ambit of the duty not to act capriciously. At first instance, the trustee was found to have acted capriciously but the judgments in the Court of Appeal treated the issue in terms of whether the trustee had acted 'reasonably' and Lord Herschell[101] accepted the submission by the trustee

90 See *Cowan v Scargill* [1985] Ch 270

91 (1802) 7 Ves Jr 137

92 (1883) 24 Ch D 643

93 See *Re Sandys* [1916] 1 Ch 511

94 [1998] Ch 512, affirmed [2000] Ch 602

95 [1998] Ch 512 at 534

96 See also *Re Pauling's Settlement Trusts* [1964] Ch 303 at 333 and *Re Hay's Will Trusts* [1982] 1 WLR 202 at 209

97 [1974] Ch 17 at 26

98 See also *Re Chapman* (1895) 72 LT 66, *Re Pauling's Settlement Trusts*, *supra*, 333 and *Re Hay's Will Trusts*, *supra*, at 209

99 [1952] 1 All ER 896

100 (1895) 72 LT 66

101 *Ibid*, at 67-8

that "what is reasonable must be measured by the responsibility which the law imposes on the trustee". Lindley LJ stated:

> *"A trustee may be honest, and yet, from over-caution or some other cause, he may act unreasonably; and if, as in this case, his conduct is so unreasonable as to be vexatious, oppressive, or otherwise, wholly unjustifiable, and he thereby causes his* ***cestuis que trust*** *expense which would not otherwise have been incurred, the trustee must bear such expense, and it ought not to be thrown on the trust estate or on his* ***cestuis que trust****."*[102]

The textbooks[103] also include, when listing the above duties, the duty to take account of relevant considerations and to ignore irrelevant considerations, which is also described as the duty to exercise a power or discretion in such a way that the intended result is achieved (or an unintended result is not achieved). This duty comprises the rule in *Re Hastings-Bass*, which is considered in Section K below. It has been argued that a breach of the duty not to act capriciously may be indistinguishable from a failure to take into account relevant considerations or an insistence on taking into account irrelevant ones.[104] The inter-relationship of these duties and their similarity to the public law concept of *Wednesbury* 'unreasonableness'[105] is considered in Section L below.

In the form in which they are set out above, these various categories of duties constitute obligations of either a positive or negative nature which must be observed by a trustee or donee in the exercise of a discretionary power and they afford useful practical criteria which the courts may use to review the exercise by trustees in any given instance. Those criteria are not, however, exhaustive or self-contained by themselves and may overlap as illustrated by *Re Chapman*.[106] This degree of overlap may be explained by the variation in the terminology, even in the same case, which has been used by the courts from time to time in describing the basis upon which the exercise of a discretion or power may be reviewed but it is suggested that the better explanation is that these duties all fall to be considered as one part of the duty to consider which is explained in Section H below.

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102 *Ibid* at 68

103 Underhill and Hayton, *supra* at 694-9, *Lewin on Trusts*, *supra*, at para. 29-100 and Thomas and Hudson, *op.cit.*, at 11.43 – 11.78

104 Thomas, at.6-183

105 See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

106 See, for example, Thomas, *op cit*, at 6-128, n57 and 6-183

G. The Equitable Duty of Prudence

The statutory duty of care under s.1 of the Trustees Act 2000 will apply[107] to trustees in the exercise of the powers of investment, acquisition of land, the appointment of agents, nominees and custodians and insurance, whether those powers are those conferred under Act or are conferred by the trust instrument, unless the duty of care is excluded by the trust instrument.[108] Where the statutory duty of care does not apply and the trust instrument does not otherwise so provide,[109] a trustee will generally remain under a duty in the discharge of his functions as trustee and in the management of the affairs of the trust to act with the same degree of care and skill which an ordinary prudent man of business would take in managing the affairs of other people for whom he felt morally bound to provide.[110] The duty of prudence or care may be excluded by an appropriately worded exemption clause.[111]

There is some authority for the suggestion that this equitable duty of prudence will also apply to the exercise of discretionary powers notwithstanding the presence of such words as 'as the trustees think fit' indicating that the power is exercisable at the absolute discretion of the trustee. Thus in *Bishop v Bonham*, [112] which concerned the exercise of the power of sale by a mortgagee, Slade LJ stated:

> "*…the natural construction of words authorising a person to carry out such a transaction in such manner and upon such terms and for such consideration 'as you may think fit' is as authorising that person to carry out the transaction in such manner (and so on) as he thinks fit within the limits of the duty of reasonable care imposed by the general law – no more, no less*."[113]

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107 TA 2000, s.2 and Sched.1, paras.1,2,3 and 5

108 TA 2000, Sched.1, para. 7

109 *Armitage v Nurse* [1998] Ch 241 and *Walker v Stone* [2001] QB 902

110 See *Speight v Gaunt* (1883) 9 App Cas 1, *Learoyd v Whiteley* (1887) 12 App Cas 727, *Re Lucking's Will Trusts* [1968] 1 WLR 866 and *Bartlett v Barclays Bank Trust Co Ltd* [1980] Ch 515 at 531 *per* Brightman J

111 See *Armitage v Nurse* [1998] Ch 241

112 [1988] 1 WLR 742

113 *Ibid* at 753E

This statement echoed sentiments expressed in an earlier observation which was made in the different context of variation of trusts in *Richards v The Hon AB Mackay*,[114] by Millet J, who stated:

> "*[The court] is concerned to ensure that the reported exercise of the trustees' power is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries in the trust estate. In my judgment, where the trustees retain their discretion, as they do in the present case, the court should need to be satisfied only that the proposed transaction is not so inappropriate that no reasonable trustee could entertain it*."

The opinions of commentators have varied as to the relevance which the duty of care may have to the basis upon which the court will exercise its supervisory jurisdiction over the exercise of discretionary powers. It has been argued[115] that the general duty of care will apply to the exercise of an administrative or managerial discretion but not to the exercise of a dispositive discretion, on the basis that the administrative function of the trustee is essentially different from that of a dispositive discretion where the trustee decides how to exercise his or her freedom of choice, within the terms of the trust, as to the application of the trust property. Some administrative discretions come very close to dispositive discretions,[116] however, and it has been stated that it is hard to justify drawing any distinction between administrative powers and dispositive powers in applying the general duty by reference to "the prudent man of business" test. Another commentator has concluded[117] that the exercise of a discretionary powers is generally governed by the equitable standards of prudence and reasonableness and that the principle in *Gisborne* applies to both distributive and administrative discretions only to the extent that the trust instrument indicates an

114 (1987) reported in (1997) 11 TLI (1) 22.

115 See NDM Parry, "Control of Trustee Discretions", [1989] Conv 244 at 250-1. In support of that view, Parry cites the majority of the decision of the High Court of Australia in *Elder's Trustee and Executor Co Ltd v Higgins* (1965) 113 CLR 426, where the majority (Dixon CJ, McTiernan and Windeyer JJ) rejected the argument that even if the trustee had exercised its discretion unwisely, it was not liable for any loss as it had considered whether to exercise the option and reached its decision not to do so honestly and in good faith. In reaching this decision the majority held that the general principle of non-intervention or interference in the absence of *mala fides* which was established in *Gisborne* applied to an express grant of a dispositive power of maintenance exercisable at the absolute and uncontrollable authority of the trustees but not to an administrative discretion implied by law.

116 A. Kiralfy, "A Limitation on The Discretionary Powers of Trustees", (1953) 17 Conv 285 at 290

117 M. Cullity, , "Judicial Control of Trustees' Discretions", (1975) UTLJ 99 , at 112-4

intention to exclude the application those ordinary standards of prudence and reasonableness.[118]

Difficulties arise, however, if it is sought to rely upon the duty of prudence or care as an explanation of the general basis for the supervisory jurisdiction over the exercise of discretionary powers by trustees. The duty of care[119] has as its main purpose or objective the compensation of beneficiaries if the conduct of one or more of the trustees causes loss to the trust; the duty arises because the beneficiaries under the trust have a corresponding affirmative right by way of an enforceable claim for equitable compensation for any loss which has been suffered by the trust fund as a result of the failure of the trustees to exercise the requisite degree of care which the court requires them to apply in administering the trust fund. The term "equitable compensation" is used in this context to denote what Edelman and Elliott[120] describe as "compensatory damages" or "reparative compensation".[121] The imposition of the duty of prudence provides an easily applicable criterion to decide when the liability of a trustee to make good any such loss to the trust fund by way of compensation arises. If the trustees have not acted imprudently or, if the trustees have acted imprudently but their imprudence has caused no loss to the trust fund, the right to compensation will not arise.[122]

The use of the duty of prudence as a general basis of the court' supervisory jurisdiction over the exercise of discretionary powers by trustees will not suffice to explain the basis upon which the court will intervene where the exercise of a discretionary power has occasioned no loss to the trust fund but one or more beneficiaries wish to complain because the trustees have exercised that discretionary power (whether administrative or dispositive) in a manner which is disadvantageous to them. The beneficiaries may have suffered a loss in the sense that they have not received individually what they might otherwise have done had the trustees made a

different decision, but that loss does not give normally rise to any claim for compensation because, by the very nature of the power granted to the trustees, a beneficiary has no entitlement or right to have that discretion exercised in their individual favour but merely a *spes*. The purposes and scope of the duty of prudence

118 *Ibid*, 112-4 and 118

119 Which falls within the classification of a Hohfeldian "relational concept duty" as used by Harris – see n. 144 below.

120 J. Edelman and S. Elliott, "Money Remedies against Trustees", (2004) 18(3) TLI 116

121 In contrast to "substitutive compensation" (liability to which arises where the trustees have misapplied the trust fund) and "disgorgement damages"(liability to which arises where a trustee has made a secret profit). Edelman and Elliott argue that the use of the term "equitable compensation" should be avoided and replaced by the above terms in order to distinguish between the different types of remedies which are available for different types of breach of trust

122 See *Nestlé v National Westminster Bank Ltd* [1993] 1 WLR 1260 and *Target Holdings v Redfern* [1996] AC 421

or care must therefore inevitably differ from the purposes and scope of any general duty or principle which underlies the exercise of a trustee's discretion.

In particular, it is hard to see how the imposition of any single objective standard of prudence or reasonable care can afford any basis for the court to intervene in the exercise of, in particular, the exercise of a dispositive discretionary power under which a trustee must choose which beneficiaries out of a specified class of beneficiaries should be the recipients of trust benefits. Not only (as noted by Scott V-C at first instance in *Edge v Pensions Ombudsman*)[123] would the duty of trustees in executing the trust to exercise to act impartially and even-handedly between the parties interested seem to have little role to play in the exercise of a dispositive power as the trustees are *ex hypothesi* entitled to choose and to prefer some beneficiaries over others but also, in exercising its supervisory jurisdiction over the exercise of that power, the courts will pay heed to the cardinal principle that, in granting discretionary powers to trustees, the settlor has sought to grant a degree of autonomy to the trustees in the way in which they exercise those powers.[124] For these and other reasons which are given in Section I below, it is contended that the equitable duty of prudence or care cannot by itself supply the underlying general basis of the supervisory jurisdiction over the exercise of discretionary powers by trustees.

H. The Fiduciary Duty to Consider

The more modern authorities demonstrate a change in emphasis in the approach to the court's supervisory jurisdiction over the exercise of trustees' discretionary powers.[125] It is submitted that the foundations of this change lie in the explanation of what Lord Wilberforce stated in *McPhail v Doulton*[126] to be a fiduciary duty[127] to consider whether and how to exercise their powers. This duty was used by Lord Wilberforce in *McPhail* to underpin the assimilation of the test for certainty of objects in determining the validity of both a discretionary trust and a power. It has

also been used to provide the basis of the distinction which the courts have drawn between a fiduciary power and a non-fiduciary power in *Re Hay's Settlement Trusts*[128] and *Mettoy Pensions Trustees Ltd v Evans.*[129]

123 [1998] Ch 512 at 534

124 See Section D above

125 See, for example, *Turner v Turner* [1984] Ch 100 and *Sieff vFox* [2005] 3 All ER 693

126 [1971] AC 424, HL

127 *Ibid* at 456

128 [1982] 1 WLR 202

129 [1990] 1 WLR 1587

That latter distinction concerns the capacity in which the donee of a mere or bare power, as opposed to a discretionary trust,[130] holds that power. If the donee of a mere or power holds that the power in the capacity of a trustee or other fiduciary, the power will be a "fiduciary power" and the donee, as a fiduciary, will be under a duty to consider whether or not to exercise the power, even though the donee may not be under any ultimate obligation to exercise the power at all;[131] if, on the other hand, the donee of a power does not hold the power in the capacity of a trustee or as a fiduciary, then he will owe no obligation to the objects of the power to consider exercising the power.[132]

It was held by Megarry V-C in *Re Hay's Settlement Trusts*[133] that the duty to consider exercising a fiduciary power imports a number of subsidiary obligations towards the objects of the power. After emphasizing that a trustee is not normally bound to exercise a mere power and the court will not compel him to do so, Megarry V-C stated:

> "*Whereas a person who is not in a fiduciary position is free to exercise the power in any way that he wishes, unhampered by fiduciary duties, a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose. It is not enough for him to refrain from acting capriciously he must do more. 'He must make such a survey of the range of objects or possible*

130 The term 'discretionary trust' is used in this context here as a modern description of a specific dispositive power or authority (formerly classified as a trust power or a power in the nature of a trust) which the donee will be under a duty to exercise rather than in the wider sense of the description of a general structure or form of settlement which is commonly referred to as a discretionary trust or settlement in the context of private or family fiscal planning – see *Re Baden's Trust Deed (No. 2)* [1973] Ch 9, CA. The term 'trust power' was used interchangeably with trust in *McPhail*. A donee of a discretionary trust will have no discretion as to whether or not to execute the discretionary trust; he must execute the discretionary trust and will merely have a discretion as to which of the objects of the power are to benefit and the manner or time in or at which the trust will be executed; if he fails to execute the trust the court may compel its execution by ordering an equal division of the fund unless some other basis appears more appropriate - see *McPhail, supra,* at 457. If, on the other hand, the trustees or other donee(s) of a dispositive power or authority are under no obligation to exercise that dispositive power, the power will be classified as a mere or bare power (sometimes referred to as a power collateral); for ease of reference, such a power is for the remainder of this Section simply referred to as "a power" by way of contrast with a discretionary trust. In that event, the donee of a mere or bare power will have a discretion whether or not to exercise the power in the first place and the court will not be able to compel its exercise - See, generally, *McPhail, supra,* at 456-7 per Lord Wilberforce and also *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 210 *per* Megarry V-C.

131 See *Mettoy Pensions Trustees Ltd v Evans* [1990] 1 WLR 1587 at 1614, where Warner J adopted a fourfold classification of what he termed "fiduciary discretions"

132 See *Re Hay's Settlement Trusts*, [1982] 1 WLR 202.

133 *Ibid*

> *beneficiaries' as will enable him to carry out his fiduciary duty. He must find out 'the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether in relation to the possible claimants, a particular grant was appropriate'* " [134]

Megarry V-C then described the duties of a trustee under a fiduciary power of appointment as threefold:

> "*Apart from the obvious duty of obeying the trust instrument, and in particular of making no appointment that is not authorised by it, the trustee must, first, consider periodically whether or not he should exercise the power; second, consider the range of objects of the power; and third, consider the appropriateness of individual appointments.*"[135]

As to the ambit of the duty to consider itself, in formulating the relevant test for certainty of objects in relation to discretionary trusts in *McPhail* Lord Wilberforce stated that the distinction between a discretionary trust and a mere power was strikingly narrow and artificial and emphasized that the distinction appeared even less significant if one considered how in practice a reasonable and competent trustee would act in both cases, stating:

> "*To say that there is no obligation to exercise a mere power and that no court will intervene to compel it, whereas a trust is mandatory and its execution must be compelled, may be legally correct enough, but the proposition does not contain an exhaustive comparison of the duties of the persons who are trustees in the two cases*."[136]

134 See *Re Hay's Settlement Trust* (*supra*) at 209-10 *per* Megarry V-C, quoting passages from the opinion of Lord Wilberforce in *McPhail*, *supra*, at 449 and 457

135 *Ibid*

136 [1971] AC 424 at 457

Lord Wilberforce went on to observe[137] that a trustee of an employer's benefit fund (which was the fund considered in *McPhail*), whether given a discretionary trust or a trust power, would surely consider in either case that he has a fiduciary duty on the basis he is most likely to have been selected as a suitable person to administer it from his knowledge and experience and would consider that he has a responsibility to do so according to its purpose. Even if the trustee has a only a power, unaccompanied by an imperative trust to distribute, Lord Wilberforce considered that it would be a complete misdescription of the trustee's position to say that he cannot be controlled by the court unless he exercised it capriciously, or outside the field permitted by the trust,[138] stating:

> "*Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.*"[139]

Lord Wilberforce concluded that trustees who have been given a power may, and normally will, be under a fiduciary duty to consider whether or in what way they should exercise that power.[140] This conclusion echoed the statement by Lord Reid in *Re Gulbenkian's Settlement*[141] that:

> "*It may be true to say that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether to exercise it. But when a power is given to trustees as, it appears to me that the situation must be different. A settlor or testator who entrusts a power to his trustees must be relying on them in their fiduciary capacity so they cannot simply push aside the power and refuse to consider whether it ought in their power to be exercised.*"[142]

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137 *Ibid* at 449

138 See Sir George Farwell, *A Concise Treatise on Powers*, (3rd ed. C.J.W. Farwell and F.K. Archer) , 1916, at 524

139 [1971] AC 424 at 449

140 *Ibid* at 456

141 [1970] AC 508

142 *Ibid* at 571

I. The Wider Significance of the Duty to Consider

Harris[143] has criticised the importation by Lord Wilberforce in *McPhail* of the additional duties of the "duty of inquiry and ascertainment", the "duty to survey" and the duty "to select and distribute" in the case of discretionary trusts over and above the "duty to consider" which is owed by trustees in the case of powers as being based on a conceptual confusion in the use by the courts of the term "duty" in this context.[144] The central premise which underlies this criticism is that all those additional duties should, in so far as they may be said to exist as duties in the first place, simply be regarded as part of the one "generic trust-defining duty" of a trustee, as the legal owner of the trust property, to hold property for persons or purposes, subject to rules of equity which are designed to give effect to the confidence which the settlor has reposed in the trustee in any given instance,[145]

143 JW Harris, "Trust, Power and Duty", (1971) 87 LQR 31 at 59-60.

144 Harris contends that neither the duty to "consider" or the duty "to select and distribute" fall within the Hohfeldian relational concept of duty (under which a duty is said to exist because a specific individual has the right to bring an affirmative claim if the duty is breached) in the sense that neither a beneficiary under a discretionary trust nor an object of a power has any corresponding affirmative right to be selected to have a distribution made in his favour but merely a "*spes*" (*ibid* at 65). Accordingly both the "duty to consider" and the "duty to select and distribute" should be understood as a duty only in the sense of the "will concept" of duty, namely, in this context, as a duty to a trustee to comply with, and to give effect to, the will or intention of the settlor even though neither the settlor nor any individual beneficiary can claim performance of that duty. The duty to consider is a "will concept" of duty because the courts "recognise that those who set up settlements and confer discretionary powers on trustees intend that those that those trustees should take their roles seriously, should make decisions in the exercise their discretion after due consideration and not thoughtlessly." (*ibid*, at 56, in the context of fiduciary powers, and see also 59-60 in the context of discretionary trusts).

145 *Ibid*,, at 61-2. Whether or not the distinction which Harris draws in this context between a relational concept of duty in the Hohfeldian sense, on the one hand, and a "rule or will concept of duty" on the other is entirely appropriate in this context may be open to question. If trustees fail to execute a discretionary trust, they would undoubtedly be held by the court to have acted in breach of trust and the court could then enforce or compel the execution of the trust by employing any of the methods which were set out by Lord Wilberforce in *McPhail*. Further both the beneficiaries under a discretionary trust or the objects of a power could undoubtedly be regarded as having some form of rights against the trustees in so far as they could apply to the court, for example, to prevent or challenge the exercise of a discretionary trust or a power by trustees in such a manner as would constitute a fraud on a power in an individual instance or, if circumstances so demand, to seek the execution of the trusts through the intervention of the court – see *Re Pauling's Settlement* [1964] Ch 303, CA. Nevertheless, some justification for this distinction may be drawn from such cases as *Re Brockbank* [1948] Ch 206, where Vaisey J refused to compel a trustee to exercise the statutory power to appoint new trustees under s.36 of the Trustee Act 1925 in the manner demanded by the beneficiaries and by the other trustees on the basis that the statutory power was a discretionary power and would no longer be exercisable or be capable of existing if it became a power the exercise of which could be dictated by others.

including the rule that, within the limits imposed by the general law, the intention of the settlor is the paramount "local law" of the trust.[146]

This conceptual criticism of *McPhail v Doulton* was advanced solely in the context of considering whether any residual distinction should be drawn between powers and discretionary trusts. It is suggested, however, that Harris's arguments are capable of bearing a much wider significance beyond this narrow context and may also be used to afford an explanation of the fundamental basis of the court's supervisory jurisdiction over the exercise of trustees' powers, whether in relation to charitable or non-charitable trusts. The reason for this is that such arguments highlight that the "duty to consider" should be regarded as forming part of what Harris describes as the "generic-trust defining duty," namely the duty of a trustee as a duty to hold the trust property not for his own purposes but for those persons or purposes specified in the trust instrument.[147] This is so because the duty of a trustee to consider whether and how to exercise his powers must be performed or carried into effect if the trustee is to execute the trust in accordance with the wishes and intention of the settlor as specified in the trust instrument. To this extent, the duty to consider whether and how to exercise discretionary powers may appropriately be described as a "fiduciary" duty as it is intrinsic to the fiduciary office of trustee in the sense that the court will restrain a trustee from exercising his powers in such a way as is incompatible with the office in which he holds the property and also in the sense that trustees will be expected to exercise discretionary powers conferred by the trust instrument in such a manner as will secure the due execution of the trust.

Invoking the duty to consider in this way also affords a justification for the assertion that "good faith" in this context bears a wide meaning which embraces all the separate duties which are referred to in Section F above (namely the duties to exercise an active discretion, to exercise the power or discretion personally and not act under the dictation or instructions of another, to exercise the discretion only after a full consideration of the relevant circumstances as they exist from time, not to fetter the exercise of the discretion, to act impartially, not to act capriciously and the duty to take account of relevant considerations and to ignore irrelevant considerations) as well as the doctrines of fraud on the power and excessive execution.[148] It is submitted that the contrary suggestion[149] that the references to "good faith" in both *Gisborne* and *Hastings-Bass* were only intended to encompass

the doctrine of a fraud on the power is to give too limited a meaning to the concept of good faith. It may be observed in this context, that the doctrine of fraud on the power

146 *Ibid*, at 50-51.

147 *Ibid*, at 56

148 See M. Cullity, *supra*, at 114 and also I.J. Hardingham, "Controlling Discretionary Trustees", (1975-6) 12 UWAL Rev 91 at 92-112

149 See *Sieff v Fox* [2005] 3 All ER 693 at 704h *per* Lloyd LJ

applies to both fiduciary and non-fiduciary powers alike so that the donee of the power need not be a trustee or other fiduciary in order for the doctrine to apply.[150] Accordingly, it is suggested that that the term "good faith", when used in the context of the doctrine, will probably not refer to the fiduciary duty of good faith,[151] in the sense that that latter term is commonly used.

Looked at in this light, the duty to consider can therefore be considered as a convenient criterion to denote that, where discretionary powers are conferred under the terms of the relevant trust, the trustees will be expected to exercise those powers in such a manner as will secure the due execution and administration of the trust. Such an analysis highlighting the importation of the duty to consider as part of the generic trust-defining duty also, it is contended, demonstrates that the duty of prudence referred to in Section F above is too narrow in its scope to provide an adequate explanation of the general basis on which the court will interfere with or review the exercise of discretionary powers by trustees in the exercise of its supervisory jurisdiction.

Neither the statutory duty of care nor the general equitable obligation of prudence would appear to be a fiduciary duty following the decision in *Bristol and West Building Society v Mothew*,[152] in which Millett LJ emphasized[153] that the distinguishing obligation of a fiduciary is the core obligation of loyalty to his principal, which includes the obligation not to place himself in a position where the personal interests of the fiduciary conflict with the interests of the principal and the obligation not make a secret profit. It was held in *Bristol and West Building Society v Mothew*, however, that this core duty does not extend to a duty of prudence or a duty to use reasonable care so that a breach of the duty of care will not constitute a breach of fiduciary duty:

> "*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*
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> *breach of fiduciary duty … It is similarly inappropriate to apply the expression ['fiduciary'] to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties. If it is confined to cases where the fiduciary nature of the duty has special legal consequences, then*

150 See Thomas and Hudson, *supra*, at 19.06, citing *Re Crawshay* [1948] Ch 123, *Re Dick* [1953] Ch 343 and *Re Brook's Settlement* [1968] 1 WLR 1661

151 See *Bristol and West Building Society v Mothew* [1998] Ch 1 at 18 *per* Millet LJ

152 [1998] Ch 1

153 *Ibid* at 18

> *the fact that the source of the duty is to be found in equity rather than the common law does not make it a fiduciary duty*."[154]

This emphasis upon the core obligation of loyalty reinforces the observation by Harris[155] that the concepts of both the generic trust-defining duty and fiduciary duty may also be regarded as a duty of "confidence" or loyalty" because the attribute of confidence which the settlor has placed in the trustees indicates the ways in which the constraints imposed by the applicable rules of equity on the exercise of powers are likely to be developed in different cases.[156] The fiduciary obligations referred to above formed part of what Millet LJ described in *Armitage v Nurse*[157] as "an irreducible core of obligations"[158] owed by trustees to the beneficiaries of a trust. Millet LJ held, however, that this irreducible core of obligations did not include the obligation to act without negligence:

> "*But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence. The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary to give substance to the trusts, but in my opinion it is sufficient*."[159]

The statements of Millet LJ in *Armitage v Nurse* must be seen as part of the wider debate which is now taking place as to whether a fiduciary be regarded as owing a duty of care towards his principal and remains unresolved.[160] A similar question also

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154 *Ibid* at 16

155 JW Harris, "Trust, Power and Duty", (1971) 87 LQR 31 at 57

156 This process is illustrated, according to Harris by the decision in *McPhail* as an example of the development of the rules of equity to accommodate new kinds of confidence which settlors, under changing social conditions, impose upon trustees, thus making it possible, in that case, to give effect to modern employees' trusts (*ibid* at *57*)

157 [1998] Ch 241. It was held in that case that an exemption clause which purported to exclude all liability except for actual fraud on the part of trustees was effective to exclude a trustee's liability for loss or damage to the trust property provided the trustee had not acted dishonestly

158 *Ibid*, at 253. See also D.J. Hayton, "The Irreducible Core Content of Trusteeship", in *Trends in Contemporary Trust Law*, AJ Oakley (ed), Clarendon: Oxford (1996), 47

159 *Ibid*, at 253

160 See, for example, R.P. Austin, "Moulding the Content of Fiduciary Duties", *Trends in Contemporary Trust Law*, AJ Oakley (ed) , Clarendon Press: Oxford (1996), 153. It may be noted, however, that in *Wight v Olswang* [2001] 3 Lloyd's Rep PN 269, the Court of Appeal allowed a claim for damages for breach of the fiduciary duty to consider to proceed to trial in allowing an appeal dismissing the action under Part 24 of the CPR 1998

arises in the current debate which surrounds the application of the rule or principle in *Re Hastings-Bass* which is considered in section K below. Whether or not the duty of prudence or reasonable care should be regarded as a fiduciary duty, it is suggested that the true role of such a duty is compensatory and entitles a beneficiary to compensatory or reparative damages if he or she has suffered loss from a breach of the duty by the trustees. Such a duty cannot provide the wider basis of the supervisory jurisdiction of the courts in controlling the exercise of trustees' discretionary powers and instead it is necessary to turn to the duty to consider as part of the generic trust-defining duty and/or a fiduciary duty of confidence as described above to supply this basis.[161]

This new emphasis upon the duty to consider is illustrated by the decision in *Turner v Turner*,[162] where three appointments were set aside on the basis that the trustees had failed to exercise an active discretion. Mervyn Davies J held that the trustees had acted in breach of their fiduciary duty, citing the statement of Lord Wilberforce in *McPhail v Doulton* that a trustee to whom, as such, a power is given is bound by the duties of his office in exercising that power to do so in a responsible manner according to its purpose.[163] Mervyn Davies J stated:

> "*Accordingly the trustees exercising a power come under a duty to consider. It is plain on the evidence that the trustees did not in any way "consider" in the course of signing the three deeds in question. They did not know they had any discretion during the settlor's lifetime, they did not read or understand the effect of the documents they were signing and what they were doing was not preceded by any decision. They merely signed when requested. The trustees therefore made the appointments in breach of their duty in that it was their duty to "consider" before appointing and this they did not do*."[164]

161 See Section H above.

162 [1984] Ch 100

163 [1971] AC 424 at 449

164 [1984] Ch 100 at 110

J. The Decision-Making Process

The emphasis upon the duty to consider has in turn lead to an increasing tendency to concentrate upon the soundness of what has been referred to as "the decision-making process"[165] reviewing the exercise of a power or discretion by intervening where there has been a flaw in the decision-making process itself but not by questioning the merits of the decision itself where that decision is a considered decision which has been reached in good faith. Such an approach was apparent, even before the decision in *McPhail*, as is illustrated by the comments which were made in the judgments in *Dundee*[166] in relation to the degree of consideration which the courts would look to trustees to give towards the exercise of their discretionary powers but has been enhanced by the subsequent development of the rule or principle in *Re Hastings-Bass*,[167] which is considered in Section K below.

Although the opinions in *Dundee* contain many references to the requirements of good faith and honesty in the exercise of discretionary powers, comments made in those opinions (and, in particular, that of Lord Reid) presaged the increasing trend of the courts to concentrate upon the evidence of the process by which the trustees reached their decision. This was expressed in varying ways in the opinions. Lord Normand stated[168] that the evidence showed that the trustees had addressed themselves to their duty "carefully, seriously and impartially and with a real desire to perform their duty to the best of their ability" and had behaved as reasonable men would be expected to behave, observing that reasonable people often differ about what is reasonable so that to impose a criterion that a decision could be impugned on the ground of errors which others might regard as unreasonableness was to impose a requirement of a different latitude from a requirement that trustees must honestly discharge their trust and keep within the bounds of their powers.

Lord Morton[169] could see no evidence that the trustees had not applied their minds to the proper question, while Lord Tucker[170] considered that the court would intervene if the trustees have perversely failed or refused to consider the question committed to them or have determined matter which was never left to them or have acted in bad faith. Lord Tucker could find no such considerations on the evidence in *Dundee* and,

assuming that unreasonableness would suffice, found it impossible to say that there

165 G.Thomas, *Thomas on Powers*, London: Sweet & Maxwell (1998) at 6-240-6-243

166 [1952] 1 All ER 896

167 [1975] Ch 25, CA

168 *Ibid* at 901

169 *Ibid* at 903

170 *Ibid* at 906

was not material which could reasonably raise a doubt in the minds of the trustees whether the Infirmary had been placed under some degree of state control. Lord Reid stated[171]:

> "*But by making his trustees the sole judges of a question a testator does not entirely exclude recourse to the Court by persons aggrieved by the trustees' decision. If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the Court will intervene, but nothing of that kind is alleged in this case.*"

On this basis it can be argued that the use of the concept of reasonableness in *Dundee* was not inappropriate, as the judgments show that that term simply refers to a well recognized duties actively to consider the exercise of a power and not to exercise the power capriciously which the courts have already imposed on trustees in the exercise of their discretionary powers in private trust law as described in section F above. The decision in *Dundee* can therefore be regarded as a good illustration of the principle that the court will control the exercise of a power or discretion by intervening where there has been a flaw in the decision-making process itself but not by questioning the merits of the decision itself, where that decision is a considered decision which has been reached in good faith in exercise of the duty to consider.

K. Re Hastings-Bass

This concentration on this process of "decision-making" has become most apparent in the development of the rule or principle in *Re Hastings-Bass* and has also led to the increasing importation of principles akin to those adopted in administrative or public law in the judicial review of public bodies into the supervisory jurisdiction of trustees' discretionary powers.

That rule or principle was described by Buckley LJ in *Re Hastings-Bass* in the following terms:

> "*… where by the terms of a trust (as under s.32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the*
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> *full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he*

171 *Ibid* at 904

> *should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account*." [172]

It is the second limb of that statement which has become known as the rule or doctrine in *Re Hastings-Bass*. As set out in that limb, the rule took the form of a negative formulation. The rule was reformulated in positive terms by Warner J in *Mettoy Pensions Trustees Ltd v Evans*[173] as follows:

> "*where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account*"[174]

In *Sieff v Fox*,[175] the most recent decision on *Re Hastings-Bass*, it was observed by counsel that Warner J's positive formulation in *Mettoy* omitted one element from the principle which had been expressed by Buckley LJ, namely the words "notwithstanding that it does not have the full effect which he intended". On the particular facts of *Mettoy* the inclusion of such words were not necessary but Lloyd LJ[176] set out an amended version of the *Mettoy* formulation of the principle in *Sieff v Fox* in a form which encompassed the factual situations in both *Re Hastings-Bass* and *Mettoy* :

> "*Where a trustee acts under a discretion given to him by the terms of the trust, but the effect of the exercise is different from that which he intended, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account, or taken into account considerations which he ought not to have taken into account.*"[177]

One question which has been raised by commentators is whether the rule in *Re Hastings-Bass* may simply be regarded as no more than the application of the doctrine

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172 [1975] Ch 25 at 41G

173 [1990] 1 WLR 1587

174 *Ibid* at 1621

175 [2005] 3 All ER 693

176 *Sieff v Fox* was the last case which was heard by Lloyd J sitting as the Vice-Chancellor of the County Palatine of Lancaster but judgment was reserved and only delivered after Lloyd LJ's appointment as a Lord Justice of Appeal.

177 [2005] 3 All ER 693 at 708

of excessive execution under which an exercise of a power may be impugned if it has been exercised in such a way as to be outside the scope of the power.[178] It has been argued[179] that both *Re Hastings-Bass* and the earlier decision in *Re Abrahams' Will Trusts*[180] should simply be regarded as cases of an excessive execution of a power as the appointment was in each case perpetuitous and so beyond the scope of the power in each case. Other commentators have argued[181] in contrast that, the principles involved in what has become known as the rule in *Re Hastings-Bass* operate in a different way and serve a different function those applicable to a mere excessive execution even though while the exercise of a power which infringes the rule in *Re Hastings-Bass* could itself be said to be excessive as the donor of the power cannot have intended to have authorized the exercise the power in that manner.

The argument that the rule in *Re Hastings-Bass* is no more than the application of the doctrine of excessive execution was rejected in *Mettoy*, where Warner J concluded from an examination of the pre-*Mettoy* authorities that:

> "*… there is a principle which may be labelled "the rule in Re Hastings-Bass." I do not think that that application of that principle is confined, as Mr. Nugee has suggested, to cases where an exercise by trustees of a discretion vested in them is partially ineffective because of some rule of law or because of some limit on their discretion which they overlooked. If, as I believe, the reason for the application of the principle is the failure to by the trustees to take into account considerations which they ought to have taken into account, it cannot matter whether that failure is due to their having overlooked (or to their legal advisers having overlooked) some rule of law or limit on their discretion, or is due to some other cause.*"[182]

It is submitted that this conclusion is correct both on an analysis of the judgment in *Re Hastings-Bass* itself and on principle. Firstly, in setting out the two limbs of the rule in *Re Hastings-Bass*, Buckley LJ clearly distinguished between an excessive exercise of a power and a failure to take into account relevant considerations or to exclude irrelevant considerations and it was therefore clear that the second limb was intended to enunciate a wider principle. The second limb has been described as contemplating:

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178 See, generally, *Snell's Equity*, 31st ed, Thomson: Sweet & Maxwell (2005), at para. 9-12

179 E. Nugee QC, "Re Hastings-Bass Again – Void or Voidable? And Further Reflections", (2003) 3 PCB 173 at 181, and 183

180 [1969] 1 Ch 463

181 See G.Thomas and A. Hudson, *The Law of Trusts*, Oxford: Oxford University Press (2004), at para 18.03 and Thomas, *op.cit*., at paras. 8-03 and 8-03A

182 *Ibid*, at 1624

> "*the possibility that the intended or actual effect of an exercise of a power may well be authorized by the terms of the power (i.e., not an excessive exercise) and, yet, that such exercise may be impeachable because the trustee failed to consider relevant considerations or took irrelevant considerations into account*" [183]

The additional requirement that, in order for the rule or principle to apply, the trustees must have acted in breach of their fiduciary duty to consider as described in sections H and I above, was imported by the decision in *Re Barr's Settlement Trusts*.[184] There, the trustee and protector of a settlement had exercised a power of appointment in respect of 60% of the trust property with the intention of giving effect to the wishes of the settlor. However, an intermediary had misinformed the trustees and the protector as to the wishes of the settlor, who only wanted 40% of the trust property to be appointed. The persons in whose favour the appointment had been made argued that the rule in *Re Hastings-Bass* could only be applied where the mistake in question was sufficiently fundamental and that, on the facts in *Re Barr*, the mistake was not sufficiently fundamental. The competing contention was that the rule or principle in *Re Hastings-Bass* could be applied whenever there had been a mistake, no matter how that mistake arose.

Lightman J rejected both contentions and held that the rule did not require that the relevant consideration which had been overlooked by the trustees should make a fundamental difference between the facts as perceived by the trustees and the facts as they should have been perceived:

> "*All that is required in this regard is that the unconsidered relevant consideration would or might have affected the trustee's decision, and in*
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> *such a case as the present that the trustee would or might have made an appointment or no appointment at all.*"[185]

However, Lightman J also went on to hold that the rule in *Re Hastings-Bass* could only be applied where the exercise of the discretion or power amounted to a breach of the duty to consider by the persons exercising it:

> "*In my view it is not sufficient to bring the rule into play that the trustee made a mistake or by reason of ignorance or a mistake did not take into account a relevant consideration or took into account an irrelevant consideration. What has to be established is that the trustee in making his decision has … failed to*

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183 Thomas, *op. cit*, at 6-138

184 [2003] Ch 409

185 *Ibid* at [21]

> *consider what he was under a duty to consider. If the trustee has in accordance with his duty duly identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect*."[186]

Lightman J held that the rule applied in that case on the basis that the intermediary had been acting as the agent of the trustees when he misrepresented the wishes of the settlor to them and that this rendered the trustees' subsequent exercise of the power a breach of the duty to consider. In holding that a breach of the duty to consider was necessary before the rule in *Re Hastings*-Bass can be applied, Lightman J emphasized the fiduciary nature of that duty to consider:

> "*The existence of the fiduciary duty on the part of trustees governing the exercise of their fiduciary powers requires trustees to inform themselves of the matters which are relevant to the decision (see Scott v National Trust)*[187] *…, and in arriving at their decisions whether and how to exercise their discretionary powers to take into account all relevant but no irrelevant factors: (see Edge v Pensions Ombudsman).*[188] *The fiduciary duty requires trustees to follow a correct procedure in the decision-making process; see Etherton J in Hearn v Younger.*[189] *This duty lies at the heart of the Rule [in Re Hastings-Bass], which is directed at ensuring for the protection of the*
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> *beneficiaries under the trust that they are not prejudiced by any breach of such duty*."[190]

In so far as Lightman J suggests that there will be no breach of the fiduciary duty to consider unless it can be shown that a trustee has failed to use all proper care and diligence in obtaining the relevant information and advice before exercising his discretionary powers, the reasoning behind the decision in *Re Barr* has been the subject of much adverse commentary.[191] Such criticisms form part of a wider debate[192]

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186 *Ibid* at [23]

187 [1998] 2 All ER 705 at 717

188 [2000] Ch 602 at 627-8

189 [2003] OPLR 43 at [91]

190 [2003] Ch 409 at [16]

191 See, for example, B. Greene QC, "The Law Relating to Trustees' Mistakes- Where are We Now?", (2003) TLI , Vol 17, No 3, 114 and J. Hilliard, "Limiting Re Hastings-Bass", [2004] 68 Conv 208. Lightman J's decision has been described in as 'just about supportable' on the basis that the trustees had decided to act in accordance with the settlor's wishes and thus that that the trustees can therefore be regarded as under a duty to ascertain what those wishes actually were - see AJ Oakley,*Parker and Mellows: The Modern Law of Trusts*, 8th ed., London: Sweet &

as to the precise scope of the rule or principle in *Re Hastings-Bass* which is beyond the scope of this article but, in considering the suggestion that there will be no breach of the fiduciary duty to consider unless it can be shown that a trustee has failed to use all proper care and diligence in obtaining the relevant information and advice before exercising his discretionary powers, it should be noted that in *Sieff v Fox*[193] Lloyd LJ doubted that the principle or rule in *Re Hastings-Bass* applied only in cases where there has been a breach of duty by trustees in the manner described by Lightman J in *Re Barr*.[194]

Again, it is submitted that the resolution of this question lies in the proper analysis of the respective roles of the duty to consider and the relational concept duty of care or prudence as set out in Section I above. If the duty to consider falls to be considered as a fiduciary duty, as opposed to a relational concept duty, a failure by trustees to take into account a matter which they were under a duty to take into account or the taking into account of a matter which they ought not to have taken into account in

exercising their discretionary powers will amount to breach of fiduciary duty which will enable that exercise of discretion to be overturned under the rule in *Re Hastings-Bass* if the effect of that exercise is different from that which the trustees intended and the trustees would or might[195] have acted differently had they not so acted in breach of their duty to consider. It is suggested that Lightman J was thus correct in holding in *Re Barr* that a trustee's decision in exercise of his discretionary powers may only be overturned where the exercise of the discretion or power amounts to a

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Maxwell (2003) at 218-9, in which it is also observed that Lightman J made no reference to the fact that the trustees are not under any duty whatever to act in accordance with the wishes of the settlor in exercising their discretion; indeed, if they were to be under such a duty, the trust may be a sham – see *Snook v London and West Riding Investments* [1967] 2 QB 786, CA, at 802, *per* Diplock LJ.

192 See, for example, the Hon. Sir Robert Walker, "The Limits of the Principle in Re Hastings-Bass", (2002) 4 PCB 4 226, E. Nugee QC, "Re Hastings-Bass Again – Void or Voidable? And Further Reflections", (2003) 3 PCB 173, G. Thomas and A. Hudson, *The Law of Trusts*, Oxford: Oxford University Press (2004), at paras. 11.43 *et seq.* and *Sieff v Fox* [2005] 3 All ER 693

193 [2005] 3 All ER 693

194 *Ibid* at [119]

195 In *Sieff v Fox, supra*, Lloyd LJ held that in order for the decision to be overturned under the rule or principle in *Re Hastings-Bass*, it was necessary for the trustees to show that they *would* have acted differently 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 in a case where the trustees were free to exercise to decide whether or not to exercise the discretion in the first place and thus were under no obligation to act but, in a case where the trustees were under an obligation to exercise their discretion (as in such cases as *Stannard v Fisons Ltd* [1990] 1 PLR 179 and *Kerr v British Leyland (Staff) Trustees Ltd* [2001] 1 WTLR 1071, both of which were pension cases) it was only necessary for the trustees to show that they *might* have acted differently in order to invoke the rule or principle in *Re Hastings-Bass – ibid* at [50] – [56] and [119].

breach of fiduciary duty but that it is not necessary to show, in addition, that the breach of this fiduciary duty must be attributable to a failure on the part of a trustee to use "all proper care and diligence in obtaining the relevant information and advice" in relation to any relevant matter as Lightman J went on to suggest in that case.[196]

Accordingly, what the courts have often described in past cases as a failure to act in "good faith" or as acting unreasonably or improperly would, it is submitted, now be described either as a failure to follow a sound decision-making process or to exercise the fiduciary duty to consider.

L. Schmidt v Rosewood Trust Ltd

The cases considered in all the preceding sections demonstrate that, in reviewing the exercise of discretionary powers by trustees, the courts may question the process of decision-making adopted by trustees in individual cases process but will generally be

196 *Ibid* at [23] and see also B. Greene QC, "The Law Relating to Trustees' Mistakes- Where are We Now?", (2003) TLI , Vol 17, No 3, 114 at 119-20.

careful to refrain from questioning the merits of the decision itself.[197] This distinction has been justified on the following basis:

> "*… it is a fundamental principle that the Court will not interfere with the exercise of a power or discretion simply on the ground that it might have reached a better conclusion. Different people will be influenced by a variety of circumstances and they will have different ideas of what is reasonable in the exercise of their discretions. However, the donor has conferred a discretion on the donee of the power and not on any other person; and it would therefore not be appropriate if the discretion of another (or of the Court) were to be substituted for that of the donee*."[198]

This concentration upon the decision-making process accordingly still pays heed to the autonomy of the trustees in exercising their discretionary powers which was emphasized in Section D above in relation to the principle of non-intervention established by *Gisborne* and continues to be evident from the post-*McPhail* case law, as demonstrated in *Turner v Turner*, which has been considered in Sections F and I above, and at first instance in *Edge v Pensions Ombudsman*,[199] where Scott V-C stated:

> "*Except in a case in which a discretion has been surrendered to the Court, it is not for a judge to exercise the discretion. The judge may disagree with the manner in which trustees have exercised their discretion but, unless they can be seen to have taken into account irrelevant, improper or irrational factors, or unless their decision can be said to be one that no reasonable body of trustees properly directing themselves could have reached, the judge cannot interfere. In particular, he cannot interfere simply on the ground that partiality shown to the preferred beneficiaries was in his opinion undue*."[200]

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197 See, for example, the statement by Lord Truro LC in *Re Beloved Wilkes' Charity* (1851) 3 Mac 7 G 440 at 448 that the duty of supervision on the part of the court will be confined to the question of the honesty, integrity and fairness with which the deliberation of the trustees has been conducted, and will not be extended to the accuracy of the conclusion arrived at, which is referred to in Section D above. It has also been emphasized that the court cannot exercise a personal discretion connected with a trustee's personality or experience, or substitute its mere opinion of its advisability of some step for the opinion of the trustees –see A. Kiralfy, "A Limitation on The Discretionary Power of Trustees", (1953) 17 Conv. 285.

198 G. Thomas, *Thomas on Powers*, London: Sweet & Maxwell (1998) at 6-204

199 [1998] Ch 512

200 *Ibid*, at 534

Closely connected with the principle of the autonomy of trustees is the well-established rule that a trustee is not obliged to give reasons for the exercise of his discretionary powers,[201] notwithstanding that (at least until the decision in *Schmidt v Rosewood Trust Ltd*)[202] beneficiaries had a well-recognized right to see (and, indeed, were regarded as having a proprietary interest in) trust documents.[203] That rule is traditionally founded upon the statement of principle made by Lord Truro LC in *Re Beloved Wilkes' Charity*[204] that:

> "*If, however, as stated by Lord Ellenborough in The King v Archbishop of Canterbury,*[205] *trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision; but, if without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the court has no means then of saying that they have failed in their duty, or to consider the accuracy of their conclusion.*"[206]

As suggested in that statement, however, if the trustees do choose to state their reasons then the court will examine them in order to ascertain whether or not the trustees have acted in error.[207] Nevertheless, in *Dundee*,[208] Lord Normand emphasized

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201 See *Re Londonderry's Settlement* [1965] Ch 91, where both Harman LJ (at 928-9) and Salmon LJ (at 936) attributed the basis of the rule that the trustees' reasons for acting as they did are immaterial and need not be disclosed to the principle that the exercise by trustees of a discretion is not open to challenge in the courts in the absence of bad faith. This general position may, however, be affected by other circumstances. Accordingly, as Robert Walker J noted in *Scott v The National Trust*,201 if a trustee's decision is directly attacked in legal proceedings, the trustees may be compelled either legally (through disclosure or subpoena) or practically (in order to avoid adverse inferences being drawn) to disclose the substance of the reasons for their decision. It has been observed in this context, however, that if the exercise of a distributive discretions is in issue it is difficult to have initial evidence to support a claim and prevent it from being struck out as a mere "fishing expedition" - see Underhill and Hayton, *Law Relating to Trusts and Trustees*, 16th ed,. London: Butterworths Lexis Nexis at 702

202 [2003] 2 AC 709

203 See *Wilson v Law Debenture Trust Corporation plc* [1995] 2 All ER 337, CA, where the principle that that trustees are not required to give reasons for the exercise of their discretionary powers was applied to pension trusts as well to private trusts. This decision has been heavily criticised in the context of occupational pension funds by the Hon Sir Robert Walker extra-judicially in "Some Trust Principles in the Pensions Concept", *Trends in Contemporary Trust Law*, AJ Oakley (ed), Clarendon: Oxford (1996) 123 at131

204 (1851) 3 Mac 7 G 440

205 (1812) 15 East 117

206 (1851) 3 Mac & G 440 at 448

207 See, for example, *Klug v Klug* [1918] 2 Ch 67

(in a statement which was also subsequently cited in *Scott v The National Trust*),[209] that:

> "*It was said for the appellants that the courts have greater liberty to examine and correct a decision committed by the testator to his trustees, if they choose to give reasons, than if they do not. In my opinion that is erroneous. The principles on which the courts must proceed are the same whether the reason for the trustees' decision are disclosed or not, but, of course, it becomes easier to examine a decision if the reasons for it have been disclosed. Lord Truro's judgment in Re Wilkes's (Beloved) Charity ought not to be construed as going beyond that*."[210]

Trustees are under a duty to keep accurate accounts and records of trust property and a beneficiary or his solicitor is traditionally regarded as being entitled on request to inspect the accounts and supporting trust records and documentation which relate to the affairs of the trust on the basis that trust documents are trust property in which the beneficiary had a proprietary interest.[211] The right of a beneficiary to see trust documentation is not an absolute one, however, and one limitation on the beneficiary's right to disclosure is the need to protect the confidentiality of communications between trustees, especially in relation to the exercise of their discretions.[212] Criticisms have been voiced of the traditional view that a beneficiary has a right to disclosure of trust documents on the basis of a proprietary right to such documents but has no right to disclosure of confidential information relating to the

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208 [1952] 1 All ER 896

209 [1998] 2 All ER 705 at 718-9

210 [1952] 1 All ER 896 at 901

211 See *O'Rourke v Darbishire* [1920] AC 581 at 626, where Lord Wrenbury stated "If the plaintiff is right in saying that he is a beneficiary, and if the documents are documents belonging to the executors as executors, he has a right to access to the documents which he desires to inspect upon what has been called in the judgment in this case a proprietary right. The beneficiary is entitled to see all the trust documents because they are trust documents and because he is a beneficiary. They are in a sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. A proprietary right is a right to access to documents which are your own."

212 See *Re Cowin* (1886) 33 Ch D 179

exercise by the trustees of their discretionary powers.[213]

A new approach towards the question of a trustee's duty to disclose information which was adopted in *Schmidt v Rosewood Trust Ltd*,[214] in which Lord Walker, who gave the opinion of the Committee and extensively referred to the reasoning of Lord Wilberforce in *McPhail v Doulton*, rejected the trustees' central argument that, in contrast to an object of a discretionary trust, no object of a mere power could have any right or claim to disclosure because he had no proprietary interest in the trust property. Instead Lord Walker concluded[215] that the question of a beneficiary's right to seek disclosure of trust documents should best be approached not from the basis of a proprietary right but, instead, as one aspect of the court's inherent jurisdiction to supervise (and where appropriate intervene in) the administration of trusts[216] stating:

> "*Their Lordships consider that the more principled and correct approach is to regard the right to seek disclosure of trust documents as one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. The right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection which he may expect to obtain, will depend on the court's discretion...*"[217]

213 See Thomas, *op cit*, at paras.6-245-6-256 and Thomas and Hudson, *op. cit*. at 12.07-12.08, where it is observed that the application of the right to inspection of trust documents on the basis of a proprietary interest in such documents may be problematic in the case of objects or beneficiaries under discretionary trusts and objects of powers of appointment, neither of whom has a fixed or ascertainable entitlement in or to the trust fund, only a *spes*.

214 [2003] 2 AC 709

215 Adopting the approach which has been followed in a number of commonwealth authorities, including, in particular the decision of the Court of Appeal in New South Wales in *Hartigan Nominees v Rydge* (1992) 29 NSWLR 405 where Kirby P. expressed the view (at 421-2) that the right of access to access to trust documents to access to trust documents should be regarded as a right which the court will enforce to uphold the *cestuis que trust's* entitlement to a reasonable assurance of the manifest integrity of the administration of the trust by the trustees, citing H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts*, 2nd ed, Sydney: Law Book Co.(1990) at 425.

216 See also *Murphy v Murphy* [1999] 1 WLR 282.

217 [2003] 2 AC 709 at [51]

The approach adopted by the Privy Council in *Rosewood* is controversial.[218] Although the scope of the decision in *Rosewood* has been questioned,[219] it has been argued that, following the decision in *Daraydan Holdings v Solland International*,[220] *Rosewood* is likely to be followed by the English courts in preference to *Re Londonderry*.[221] As a decision of the Privy Council, *Rosewood* is, of course, highly persuasive and, while the *Re Londonderry* approach has been held to continue to apply in Australia,[222] the decision in *Rosewood* has been adopted and followed in New Zealand.[223]

The decision in *Rosewood* highlights the fact that the courts are no longer willing to be bound by the principles which were established by the nineteenth century cases such as *Gisborne*, which have in turn provided the underlying rationale for later decision such as *Re Londonderry*. The explicit adoption in *Rosewood* of the inherent jurisdiction to supervise, and, if necessary, intervene in the administration of the trust as the basis of any decision to order disclosure of information by trustees is, it is suggested, a logical development of the approach which was adopted in *McPhail* to decide the appropriate test for the inherent validity of discretionary trusts and powers. The test of certainty of objects in *McPhail*, and the criteria by which trust information should be disclosed in *Rosewood* were both expressly formulated having regard, in each case, to what was necessary to ensure the trusts are duly executed and administered in accordance with the purposes for which they were established.

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218 See Thomas and Hudson, *op. cit.* at 12.17- 12.18, where it is contended that that the decision in *Rosewood* undermines the orthodox view that a trust is, and must necessarily be, an equitable holding property vehicle and to support the alternative view that proprietary interests are not essential, provided that there is an effective enforcement mechanism. This criticism may be misplaced however. The recognition in *Rosewood* that the entitlement of a beneficiary to disclosure of trust documentation will be a matter for the discretion of the court to be exercised as part of its inherent jurisdiction to intervene in order to secure the due execution and administration of the trust amounts to no more, it is a suggested, than the recognition that different trusts exist for different purposes.

219 *Ibid*. Although *Rosewood* was not concerned with the question of disclosure by trustees of the reasons for the exercise of their discretions, it has been suggested that, following *Rosewood*, the climate has changed regarding the withholding by trustees of disclosure of their reasons with total impunity and the refusal of trustees to disclose the reasons for the exercise of their discretion in circumstances in which a reason is plainly called for may now support an inference of breach of trust – see the extra-judicial comments of Lightman J in giving the Withers Trust Lecture at Kings College, London reproduced at (2004) 1 PCB 23 at 30 .

220 [2004] EWHC 622, where (in the context of the rule in *Lister v Stubbs* (1890) 45 Ch D1), Lawrence Collins J held that the High Court and the Court of Appeal can follow a Privy Council decision even where they depart from previous Court of Appeal decisions

222 See *Crowe v Stevedoring Employees Retirement Fund* [2002] PLR 343

223 See *Foreman v Kingstone* [2004] 1 NZLR 841

M. Public Law Considerations

Recent case law suggests that principles and concepts similar to those in public law, such as the *Wednesbury "*unreasonableness"[224] and legitimate expectation, are being introduced into the realm of trust law, particularly (but not exclusively) in the context of pension trusts. In *Sieff v Fox*,[225] Lloyd LJ commented[226] that the element of whether the trustees took into account matters which they ought not to have done, or failed to take into account matters which they ought to have done in the *Re Hastings-Bass* formulation was itself reminiscent of the public law *Wednesbury* "unreasonableness" test which had been established as a relevant test in relation to the exercise of a discretion by trustees by the Court of Appeal in *Edge v Pensions Ombudsman*;[227] in that case, Chadwick LJ, giving the judgment of the court, observed that it was not without significance that the trustees in *Edge* (and probably in many similar cases) were chosen to exercise their discretion for very much the same reasons as the local authority in *Wednesbury*, namely that:

> "*It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with*." [228]

It has additionally been argued that a breach of the duty not to act capriciously may be indistinguishable from a failure to take into account relevant considerations or an insistence on taking into account irrelevant ones.[229] So considered, the concept of capriciousness in private trust law could also be said to bear a close similarity to the public law concept of Wednesbury "unreasonableness." *Wednesbury*

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224 See *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, CA, at 229-30, where Lord Greene MR stated that:-"The court is entitled to investigate the action of a local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely has refused to take into account matters which it ought to have taken into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority has nevertheless come to a conclusion so unreasonable that no reasonable authority could ever come to it. In such a case, again, I think the court can interfere."

225 [2005] 3 All ER 693

226 *Ibid* at [76]

227 [2000], Ch 602, CA

228 *Ibid* at 632

229 G. Thomas, *Thomas on Powers*, London: Sweet & Maxwell (1998) at 6-183

unreasonableness has been described[230] as having the advantages firstly of being an objective test and secondly that, with increasing numbers of judicial review cases, many judges and counsel will be more conversant with that test and so be happier dealing with it than with the *Re Manisty* concepts of perversity or capriciousness.

The public law concept of 'legitimate expectation' was also referred to in *Scott v National Trust*[231] by Robert Walker J, who appeared to suggest that it may have some applicability to private trust law and charitable trusts by stating:

> "*if for instance trustees (whether of a charity, or a pension fund, or a private family trust) have for the last ten years paid £1,000 per quarter to an elderly, impoverished beneficiary of the trust it seems arguable that no reasonable body of trustees would discontinue the payment, without any warning, and without giving the beneficiary the opportunity of trying to persuade the trustees to continue payment temporarily. The beneficiary has no legal or equitable right to continue the payment, but he or she has an expectation. So I am inclined to think that legitimate expectation may have some part to play in trust law as well as in judicial review cases*."

This statement was made in the context of a decision concerning the rights of huntsmen to object to a decision of the council of the National Trust, a charity, to ban deer hunting on some of the Trust's land but may be regarded as *obiter* since the huntsmen were not themselves objects of the National Trust.[232]

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230 See D.J. Hayton and C. Mitchell, *Hayton & Marshall, Commentary and Cases on The Law of Trusts and Equitable Remedies*, 12th ed, London: Sweet & Maxwell (2005), at 657-8. This view strongly contrasts with the view expressed in the previous edition of that textbook (D.J. Hayton, *Hayton & Marshall, Commentary and Cases on The Law of Trusts and Equitable Remedies*, 11th ed, London: Sweet & Maxwell (2001) at 581) that it was unnecessary to introduce the *Wednesbury* test into this area as the traditional principles in private trust law seemed to cover the same ground.

231 [1998] 2 All ER 705

232 The huntsmen were, however, were held to have a sufficient interest in the National Trust to bring "charity proceedings" within the meaning of s.33(1) of the Charities Act 1993 on the basis that they could be regarded as partners with the National Trust in the management of the land in question and in safeguarding red deer on that land and the preservation of the deer population could be considered to be one of the National Trust's purposes under the National Trust Act 1907.

How far this tendency to import public law concepts into trust law will continue is unclear. It has been observed[233] that it is not clear in *Scott* whether Robert J Walker was seeking to import the public law concept of legitimate expectation into trusts law or whether he meant to draw a parallel between that concept and the notion of reasonable expectation which has developed in the context of pension funds. In *R v The Charity Commissioner of England and Wales ex p. Baldwin*,[234] an application was made for judicial review of a decision by the Charity Commissioners that the decision of the trustees of an almshouse charity to set aside the applicant's appointment as an almsperson was regular and valid. The learned judge[235] stated that he saw no reason for importing rules of natural justice into the exercise of a discretion by the trustees of the will, since the trustees did not exercise their power in a type of situation where a right to make representations upon its exercise is normally afforded.

In *Baldwin* it was noted that, although the cases showed some signs of convergence, the private trust law approach and the public law approach remain fundamentally different in many respects. In public law, the courts are, as a general rule, reluctant to grant a remedy for failure to comply with the requirement of procedural fairness where it would make no difference to the ultimate result while, in relation to private trusts, under the rule in *Hastings-Bass*, the relevant test would appear to be that a decision will not be so flawed as to be invalid unless the trustee, if properly advised, would have acted otherwise.[236] The public law approach also differs from the trust approach in focusing on the position of the person about whom the decision is made while the trust law approach focuses on the information available to the person making the decision. Further critical differences between public law and private law proceedings have also been noted in other cases, the discretion vested in the court in public law proceedings whether or not to grant relief and the strict time limits insisted upon for the commencement of judicial review.[237]

233 See P. Luxton, *The Law of Charities*, Oxford: Oxford University Press (2001) at 9-136-9-140, where it is observed in relation to *Scott* that any suggestion that charity trustees may have a special duty towards persons who have enjoyed the benefits of the charity over a period of time is novel and its scope uncertain and raises the spectre of charity trustees having to give advance notification to persons who have enjoyed the benefits of the charity over a period of time before taking decisions which might adversely affect those persons

234 [2001] WTLR 137

235 Mr Jack Beatson QC sitting as a deputy judge of the High Court

236 See *Sieff v Fox* [2005] 3 All ER 693

237 See *Re Barr's Settlement Trusts* [2003] Ch 409 at [29] *per* Lightman J, who also refers to a third critical difference, namely that between the public and private law approaches to the distinction between void and voidable decisions, an issue which is outside the scope of this article.

On the facts of *Baldwin*, it was concluded that the trustees had adequately informed themselves and it was therefore unnecessary to consider whether the Commissioners' approach amounted to a reviewable error. Similarly Chadwick LJ has stated in *Edge v Pensions Ombudsman*[238] that it was not necessary to consider how far an analogy between the principles applicable in public law cases can or should be pressed in the different context of a private pension scheme.

The reasons for this apparent tendency to draw on public law principles as well as private trust law principles in this context may be a simple one. As Oliver has observed,[239] in both judicial review and private trust law the courts have a supervisory jurisdiction over the making of discretionary decisions, in one case by public bodies and in the other by trustees, and the requirements in relation to the making of discretionary decisions by trustees in private trust law and the need for legality and the *Wednesbury* reasonableness in the public law context therefore have a considerable number of parallels. Accordingly, public decision makers must act in accordance with the intention of Parliament, the body from whom their power derives through the medium of enabling legislation, must not act capriciously or *Wednesbury* unreasonably or for ulterior or improper motives. They must only take into account relevant considerations and not be influenced by irrelevant considerations, exercise discretions with an open mind and must not delegate their discretions to others or fetter their discretion. All these requirements have almost exact parallels in the context of the duties placed upon trustees by the court when trustees are exercising discretionary powers which are set out in Section F above.

In both public law and trust law the court is principally concerned in exercising its supervisory jurisdiction to avoid, ostensibly at least, substituting its own view as to the merits or correctness of the final decision and thus to preserve the autonomy of the decision maker.[240] Given this concern, it is suggested that only a limited number of mechanisms are available to the court to in order to ensure in both cases that (a) the decision-making process is a sound one and (b) to avoid the making of arbitrary and unreasonable decisions. It is not surprising that the machinery adopted to achieve these aims in the terms of the duties imposed by the person or a public body exercising the discretion will be very similar.[241]

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238 [2000] Ch 602 at 632

239 D. Oliver, *Common Values and the Public-Private Divide*, Butterworths: London (1999) at 187-92.

240 See Section L above.

241 Indeed, as Oliver has noted, Lord Greene MR, who gave the leading judgment in *Wednesbury* was a distinguished equity and trusts lawyer and may well have been drawing deliberately on equitable principles in formulating the grounds for review in the *Wednesbury* context (*ibid*, at 192).

The *Wednesbury* test itself undoubtedly has very close parallels not only with the rule in *Hastings-Bass*[242] but also with the statement by Lord Reid in *Dundee General Hospital Boards of Management v Walker*: [243]

> "*If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question they did not really apply their minds to it or perversely shut their eyes to the facts or that they did not act honestly or in good faith, then there was no true decision and the court will intervene*."[244]

On this basis, it is suggested that the equivalent to public law *Wednesbury* unreasonableness in private trust law is indeed to be found in the *Re Manisty* concept of capriciousness referred to in Section F above and the rule in *Hastings-Bass*, both of which would amount to instances of a breach of the fiduciary duty to consider. However, for the reasons which have been given above, it is suggested that there is no need to import public law principles into the area of trust law and that the principles which have been adopted and developed in private trust law are more than sufficient in themselves to provide an adequate basis upon which to exercise the supervisory jurisdiction.

N. Application to Charity Trustees

Notwithstanding that charitable bodies may, and do, adopt a variety of legal structures other than that of a trust, charitable trusts remain in widespread use and the internal law of many charities remains trust law which will accordingly continue to govern "internal" disputes in relation to the control and management of the charity[245] arising from decisions taken by those who are the "charity trustees" for the purposes of s.97(1) of the 1993 Charities Act 1993 (who, in the case of a trust, will usually be the trustees themselves as the persons having the general control and administration of the charity) in exercise of their discretionary powers in administering the charity in question.

As demonstrated above, private trust law principles have traditionally been applied by the courts in exercising judicial control over the exercise by charitable trustees of their discretionary powers and those principles emphasize the autonomy of the trustees

242 As noted, for example, in *Sieff v Fox* [2005] 3 All ER 693 at 716-7 *per* Lloyd LJ

243 [1952] 1 All ER 896

244 *Ibid* at 905

245 See J. Warburton, "Trusts: Still Going Strong 400 Years after The Statute of Charitable Uses, *Extending the Boundaries of Trustsand Similar Ring-Fenced Funds*, D Hayton (ed), Kluwer Law International (2002) 163

in the decision making process.[246] The balance of power in a trust therefore rests with the trustees and trust principles are traditionally reluctant to allow interference with that power. Indeed, this has been recognized by the Charity Commission in its advice to Membership Charities which states:

> "*Charity Commission staff are often approached by individuals associated with membership charities in connection with an internal dispute between different groups within the charity. The Charity Commission cannot act in the administration of the Charity. It is not therefore part of the Charity Commission's role to resolve disputes within charities where trustees have acted within the scope of their powers and duties, honestly and in good faith*"[247]

That statement may be regarded as a classic exposition of the principle of the principle of non-intervention established by *Gisborne* and the doctrines of a fraud on the power and excessive execution which are considered in Sections C and D above.

The duty to consider was formulated by Lord Wilberforce in *McPhail v Doulton* for the purpose of ascertaining the correct test for the certainty of objects of a power. The requirement for certainty of objects does not apply to charitable trusts as a charitable trust will not fail for want of a beneficiary and a trust for charitable purposes can be enforced by the Attorney-General even if there are no clearly defined objects provided a general charitable intention is shown so as to enable a *cy-prés* scheme to be formulated.[248] The validity of a charitable trust will therefore neither depend upon the ascertainability of its objects nor whether it is administratively unworkable but, instead, will depend upon whether or not the purposes of the trust themselves are charitable.

Nevertheless, as described in section I above, the duty to consider has a wider significance outside the context of certainty of objects as it is in essence a fiduciary

duty and forms part of the generic trust-defining duty[249] and thus forms part of the underpinning of the process of securing the due execution and administration of the

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246 See, for example, *Re Beloved Wilkes Charity* (1881) 3 Mac & G 40 and Sections D and M above. Many charitable trusts will incorporate elements of the structure of a discretionary settlement. In the context of private family trusts, discretionary settlements are often adopted for fiscal and tax-planning reasons, particularly in relation to inheritance tax and it has been observed that the popularity of discretionary trusts is in part due to the fact that the reported cases have established that it is often very difficult to attack the exercise by the trustees of their discretion, particularly where the discretion is an "absolute" or "uncontrollable, provided that the discretion has been exercised in good faith in accordance with the above principles – see A.J. Hawkins, "The Exercise by Trustees of a Discretion", (1967) 31 Conv 116 at 126-7 and also A. Kiralfy, "A Limitation on The Discretionary Power of Trustees", (1953) 17 Conv. 285

247 RS7 Membership Charities (2004) at 19

248 See *Moggeridge v Thackwell* (1802) 7 Ves 360 and *Mills v Farmer* [1815] 1 Mer 55

249 As defined by Harris and considered in section I above

trust. The developments in the modern case law considered in Sections J, K and L above all illustrate the wider use of this duty to consider in this context and that the judicial recognition of this duty for this purpose is now taking precedence over the principles in *Gisborne*. To that extent the decision in *McPhail* can be described as effecting a "sea change" in the approach of the courts towards the exercise of discretionary powers so that the courts will be likely to approach such questions from the standpoint of the fiduciary duty to consider.

Powers granted to trustees of a charitable trust will be fiduciary powers. Where a charity has adopted a legal structure other than that of a trust, the members of the management committee of a charitable unincorporated association and the directors of charitable companies limited by guarantee under the Companies Acts will, as the persons having the control and management of the charity, be the "charity trustees" within the meaning of s.97(1) of the 1993 Act.[250] It does not necessarily follow from this designation alone that such persons would be regarded as trustees in equity as various provisions of the 1993 Act itself seem to draw a distinction between "charity trustees" on the one hand and "trustee" and "trustee for a charity" on the other.[251] It is trite law, however, that company directors are fiduciaries and will owe duties of loyalty and good faith which have been described as "analogous to the duties of trustees *stricto sensu*".[252] In *Re Bell Bros Ltd* [253] Chitty J stated:

> "*The discretionary power is of a fiduciary nature, and must be exercised in good faith; that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously or wantonly. It may not be exercised for a collateral purpose*."[254]

250 "Trusts" are given an extended definition in relation to charities by Charities Act 1993, s.97(1) so as to mean the provisions establishing the charity as a charity whether those provisions take effect by way of trusts or not and has a corresponding meaning in relation to other institutions.

251 See Charities Act 1993, ss.13(5) and 16(1) and P. Luxton, *The Law of Charities*, Oxford: Oxford University Press (2001) at 9.08 and 9.142

252 P.L. Davies, *Gower's Modern Principles of Company Law*, 6th ed, at 599

253 (1891) 65 LT 245

254 *Ibid*, at 245-6

Similarly, Lord Green MR stated in *Re Smith & Fawcett Ltd* [255] that company directors must exercise their powers

> "*bona fide in what they consider – not what a court may consider – is in the interests of the company, and not for any collateral purpose*."[256]

Additionally, the members of the committee of a charitable unincorporated association are likely to be regarded as fiduciaries[257] so that discretionary powers which have been granted to such members are likely to be regarded as fiduciary powers for these purposes.

Accordingly, it is suggested that thee is no good reason why the recent emphasis which has been placed by the courts upon the fiduciary duty to consider in relation to private and pension trusts should not afford the same basis for the supervisory jurisdiction of the courts over the discretionary powers of charitable trustees as for other trusts. Similarly, although the decision in *Rosewood* concerned the entitlement of a beneficiary to disclosure of trust documentation, the rationale behind that decision also affords the fundamental principle that the court has a discretionary power to intervene in disputes which it will only exercise where it is necessary to do so in order to secure the primary and overriding object of the due execution and administration of the trust in question in order to achieve the underlying purposes behind the trust. Again, there is no reason why that principle should not apply to non-charitable and charitable trusts alike.

What is necessary to secure the due execution of a trust in order to achieve its underlying purposes may vary from trust to trust. Those purposes may be described by reference to the intentions of the settlor, in the case of a private or voluntary trust, for example, and by references to the charitable purposes for which the trust was established in the case of a public charitable trust. In the context of issues of disclosure and private trusts, it is only to be expected that, if the objects of any discretionary dispositive power are widely drafted, the court is likely to regard the various interests and claims of any potential objects in a somewhat different, and remoter, light to those of objects of a more narrowly drafted class of objects.[258] In the same context, different considerations are likely to come into play in relation to pension trusts than in the case of a charitable trust because of the underlying contractual relationship behind an occupational pension scheme and the public nature

of the charitable trusts. In relation to the latter, individual prospective objects of the

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255 [1942] Ch 304

256 *Ibid*, at 306

257 See J. Warburton,"Charity Members Duties and Responsibilities", [2006] 70 Conv 330

258 See *Murphy v Murphy* [1999] 1 WLR 282

charity are likely to be regarded as having a remoter right to disclosure than a contributor to a pension scheme but this will be balanced in the case of charities by the reporting and accounting requirements under Part VI of the Charities Act 1993 and the Charities SORP which are designed to help meet the public policy requirement that charities should be duly governed and administered. Accordingly the relevant principles may be applied in a lightly different manner to each type of trust.

The use of both the fiduciary duty to consider and the discretionary power to intervene where it is necessary to do so in order to secure the due execution and administration of the trust to provide the basis of the supervisory jurisdiction of the court over the exercise of trustees' discretionary powers is one which is therefore capable of universal application to both charitable and non-charitable trusts and, it is suggested, thereby obviates any need to develop different principles in relation to different types of trusts.

Pension trusts and charitable trusts do undoubtedly exist in different fiscal and regulatory environments from that of traditional family trusts by virtue (in the case of occupational pension schemes) of the Pensions Acts 1995 and 2004 and (in the case of charities) the Charities Acts 1993 and 2006 which grant wide powers of intervention to the Pensions Ombudsman and the Charities Commission respectively. The main distinction between charitable trusts and private trusts are that legal proceedings to protect the property of a charitable trust and to enforce the charitable obligation are instituted by the Crown as *parens patriae* represented by the Attorney General or by the Charity Commission under s.32(1) of the Charities Act 1993 and the Attorney General must be joined as a party if legal proceedings are brought by someone else. The underlying rationale behind this distinction is that charitable trusts are matters which concern the public and no private individual has a beneficial interest in the property of the trust as emphasized by Mummery LJ in *Gaudiya Mission v Brahmachary*[259] in stating:

> "*Under English law charity has always received special treatment. It often takes the form of a trust; but it is a public trust for the promotion of purposes beneficial to the community, not a trust for private individuals. It is, therefore, subject to special rules governing registration, administration, taxation, foundation and duration*."[260]

259 [1997] 4 All ER 957

260 *Ibid*, at 963

It was suggested by Lightman J in *RSPCA v Att-Gen*[261] that the fact that a charity is by definition a public, as opposed to a private, trust, means that the trustees are subject to public law duties and judicial review is in general available to enforce performance of such duties. Nevertheless Stanley Burnton J at first instance in *R (Heather and others) v The Leonard Cheshire Foundation*,[262] observed that the law of charities is a different public law, being of equitable origin, than that which applies to governmental authorities and is of common law origin.

All three categories of trusts remain, however, subject to the supervisory jurisdiction of the court. The overriding aim or concern of the court in exercising that jurisdiction in each case will be to ensure that the trust in question is duly administered in accordance with, and to give effect to, the purposes which lie behind the trust in accordance with Lord Walker's statement in *Rosewood*:

> "*It is fundamental to the law of trusts that the court has jurisdiction to supervise and if appropriate intervene in the in the administration of a trust, including a discretionary trust.*"[263]

There is, it is submitted, nothing in the fiduciary duty to consider or the discretionary power to intervene in order to secure that overriding aim which would prevent those principles from being applied in flexible and varying manner in order to give effect to the different purposes which lie behind those trusts.

One example in which the court will pay heed to the overriding concern to ensure that a trust is duly administered may be found, in the context of charitable trusts, by the interpretation which the court will give to "a person interested in the trust" for the purposes of allowing such a person to take charity proceedings under s.33(1) of the Charities Act 1993, as demonstrated by the decision in *Re Hampton Fuel Allotment Charity*,[264] some 12 years or so earlier than *Rosewood* and in which Nicholls LJ, in giving the judgment of the court, stated:

> "*If a person has an interest in securing the due administration of a trust materially greater than, or different from, that possessed by ordinary members of the public … that interest may, depending upon the circumstances, qualify him as a "person interested." It may do so because that may give him to echo the words of Sir Robert Megarry V-C in*

261 [2002] 1 WLR 448 at 460

262 [2001] EWHC Admin 429 at [94]-[95]

263 [2003] 2 AC 709 at para.36

264 [1989] Ch 484

Haslemere Estates Ltd v Baker[265] *'some good reason for seeking to enforce the trusts of a charity or secure its due administration …'* ,,[266]

O. Conclusion

Accordingly, in the light of these developments in the modern case law, it is submitted that all the relevant principles which govern the supervision of the courts over the exercise of discretionary powers by trustees can be found from trust law principles without recourse to public law principles or the need to apply different principles according to the nature of the trust in question. The relevant fundamental principles arise from the fiduciary duty to consider expounded by Lord Wilberforce in *McPhail* and the discretionary power to intervene under *Rosewood* where it is necessary to do so in order to secure the primary aim of the due execution and administration of the trust, both of which will have general application to both charitable and non-charitable trusts.

Having regard to the differing nature of private family, pension and charitable trusts, it will not, it is suggested, be surprising if the courts were to apply these principles in slightly different ways in exercising its supervisory jurisdiction in each case but any such differences will essentially arise from the same premise, namely what is necessary to secure the due execution and administration of the trust in order to give effect to the purposes behind the trust. In the context of private family trusts it is submitted that this development should have full regard to the underlying intention of the settlor, in the case of pension trusts to the contractual relationship between the members of the scheme and the entitlement to benefits payable under the scheme, while, in the context of charitable trusts, regard should be had to achieving the underlying charitable purposes of the trust.

In accordance with the fiduciary duty to consider, the courts will require charitable trustees in the exercise of both their dispositive and administrative discretionary powers to follow a sound decision-making process in deciding whether or not, and how, to exercise those powers and to consider only those matters which are relevant and necessary to ensure that the trust is duly administered. In any review of the exercise of discretionary powers by charitable trustees, the court will now consider whether it is necessary for the court to intervene in order to secure the primary and overriding object of the due execution and administration of the trust and in order to fulfil the charitable purposes of the trusts, as opposed to applying the previous benchmark principle of non-intervention in *Gisborne* in the absence of bad faith.

265 [1982] 1 WLR 1109 at 1122C

266 [1989] Ch 484 at 494

If the decision of charitable trustees does not accord with the primary and overriding object of securing the due execution and administration of the trust, this will be evidence that the trustees have not followed a sound decision-making process and the court will be likely to overturn the trustee's decision. If the decision of the trustees does not conflict with that object then the court is unlikely to interfere with the trustees' decision. The adoption of such an approach will essentially preserve the autonomy of charitable trustees in securing the due execution and administration of the trust.

Finally, it may be noted that, if the decision which falls to be made by charitable trustees in the exercise of their discretionary powers is one which is of great significance to the trust or is otherwise particularly momentous, the trustees may apply to the court for the court's sanction or approval of the proposed course of action; such an application will not, it seems, be regarded as a surrender by the trustees of their discretion and the court will be concerned on such an application to ascertain whether the decision is one at which a reasonable body of trustees properly instructed as to the scope of their powers could properly arrive and is one which is not manifestly unreasonable.[267] Again, it is submitted that in deciding whether to approve the decision of the trustees, the court will be primarily concerned to see that a sound decision-making process in the sense which has been described above has been followed by the trustees, who will usually be in a much better position than the court to know what is the in the best interests of the charity in question.

267 See *The Public Trustee v Cooper* [2001] WTLR 901.