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The Principle in Re Hastings-Bass

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The Principle in *Re Hastings-Bass*

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May I begin by saying how much I appreciate the opportunity to present this lecture named in honour of one of our most diligent and talented young lawyers of recent times. I did not know Libby Slater well, but I knew her well enough to have developed respect and admiration for her qualities as a fine practitioner.

I saw a small piece in The Sydney Morning Herald a couple of weeks ago about what must be the ultimate estate-planning tool. It was reported that twenty American states allow what are called “personal revival trusts”. Apparently, a holiday resort owner in Arizona has created one of these trusts and has also arranged that, after death, he and his wife and their favourite dogs will be frozen to await developments in science that will bring them back to life. At that point, the personal revival trust will operate and all his wealth will come back to him. Soon after reading that, I saw an article in the New South Wales Law Society Journal about the ease with which one can fall into a particular capital gains tax trap when transferring assets from one family trust to another. These two snippets struck a chord as I thought of what to say today by way of supplement to my written paper on the rule in *Hastings-Bass* – the written paper being more in the nature of a snapshot of the present state of affairs in relation to this topic of current relevance to trusts and trustees generally, including in the superannuation field.

The case which has given its name to the rule in *Hastings-Bass* [1] involved estate and tax planning which accepted the realities of human mortality. It involved two family settlements. One was created in 1947 and the other in 1957. By that period of history, the pre-occupation was not only with directing wealth to future generations but also with ensuring that it reached those future generations without suffering at the hands of the estate duty authorities.

The two settlements were conceived, it appears, by the advisers to Captain Hastings-Bass. After the creation of the second settlement in 1957, the trustees of the first settlement transferred funds to the trustees of the second settlement to be held upon the trusts of the second settlement. This was done in 1958. The trustees of the first settlement made the transfer in what they believed to be the exercise of a statutory power of advancement. The trusts of the second settlement were expressed to be, in essence, trusts for the benefit of Captain Hastings-Bass’s son, William, for life and after that son’s death for his issue. William, along with other family members, had an interest under the first trust. The transfer to the trustees of the second trust was by way of advancement for the benefit of William. Now, it is of no relevance whatsoever either that William is today the seventeenth Earl of Huntingdon or that his full name is William Edward Robin Hood Hastings-Bass, with some family members apparently claiming descent from the ancient thorn in the side of the Sheriff of Nottingham. Nor is it relevant in the slightest that William spent several years from 1989 training racehorses for the Queen, being the godson of her racing manager, Lord Carnarvon.

Back to the settlements. As it turned out, the trusts for persons beyond William under the second settlement, as regards the funds advanced by the trustees of the first settlement, failed because of breach of the rule against perpetuities. The trust for William for life was valid but it was only to that

extent that the purposes in view were actually achieved.

Now before we all start shaking our heads and saying that the solicitors should have been alive to the perpetuities problem, we must recognise, in fairness to them, that there was no perpetuities problem on the view of the law that prevailed at the time – a view that was actually confirmed at first instance a short time later in *Re Pilkingtons Will Trusts* [2]. But, as ultimate courts of appeal have a habit of doing, the House of Lords took a different view when the *Pilkington* case reached it in 1964 [3], with the result that, by the time *Hastings-Bass* came to trial at first instance, it was common ground that all the limitations under the second settlement other than the life interest of William were void for perpetuity.

After the *Pilkington* decision in the House of Lords had exposed this problem, the trustees of the first settlement decided to test in court the question whether any part of what they had attempted to by means of the 1958 transfer was properly regarded as valid. They did so by seeking determination of the question whether estate duty had or had not become payable in respect of the advanced fund on the death of Captain Hastings-Bass. He had died in 1964. The defendants were the Inland Revenue Commissioners. The judge at first instance held that the result actually produced by the 1958 transfer was substantially or essentially different from the intentions of the transferring trustees when they made the transfer. That being so, it was held that the trustees never effectively exercised the power of advancement and that the sum purportedly advanced had at all times remained subject to the trusts of the first settlement. On that basis it was decided that estate duty became payable on that fund on the death of Captain Hastings-Bass. (I must confess that I have not tracked through the factors determining the estate duty liability, but I do not think they matter).

The Court of Appeal approached the matter by asking the question whether it could be said that the trustees of the first settlement had never exercised their discretionary power of advancement. The court said that there could be no doubt that the trustees believed that they were exercising that power. They transferred funds to the trustees of the second settlement because they thought that that would benefit William. Did the fact that they believed their action would otherwise have a different legal effect from the limited effect which it in reality had result in the transfer not having been an exercise of their discretion?

There was no reason to suppose that, in the light of their own understanding or advice as to the law, they failed to ask themselves the right questions or to arrive in good faith at a reasonable conclusion. They must have asked themselves whether the creation of a life interest only for William, with subsequent gifts to others, would be for William's benefit. The answer was clearly "yes". They may not have asked themselves whether giving a life interest to William without anything further would benefit William but, the court said, even if that was so, their action should not be regarded as anything other than an exercise of their discretion under the power of advancement as it related to William. The court held that regard had to be had to what was effectively achieved. If that result could not reasonably be regarded as being beneficial to the person intended to be benefited, the advancement could not stand because it would be beyond the power of advancement. In any other case, the court said, the advancement would take effect in the manner and to the extent that it was capable of doing so. In other words, if there was benefit to the person intended to be benefited by the exercise of the power of advancement, it was beside the point that subsidiary aspects failed. The exercise of the power was therefore upheld, the result in respect of the advanced fund being that William achieved a life estate but there was, after his death, a constructive trust for the persons beneficially interested under the 1947 settlement. And importantly, at a pragmatic level, there was no estate duty charge.

I have gone into *Hastings-Bass* in some little detail to show that it was not really a case in which what has become to be known as the rule in *Hastings-Bass* was actually applied. The so-called rule is stated in a negative way in the judgment:

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

In that extract, the Court of Appeal identified two situations in which intervention by the court is

seen as at least permissible. The first is where what the trustee has achieved is unauthorised by the power conferred on him. That case is uncontroversial and need not be considered further. The second is where it is clear that the trustee would not have acted as he did if he had taken into account considerations which he should not have taken into account or if he had failed to take into account considerations which he ought to have taken into account. I put the negative language used by the Court of Appeal into what seems to be the correct positive form. According to this formulation, it must be clear that the trustee would not have acted as he did had it not been for either the impact of attention paid to considerations that should not have been addressed or the impact of failure to pay attention to considerations that should have been addressed. As I have said, *Hastings-Bass* itself was a case in which neither of those failings on the trustee's part could be seen.

The court is thus required, it seems, to delve into the mind of the trustee in order to identify and evaluate the mental processes brought to bear in doing whatever was done in exercise of a discretion. I shall come back to those matters.

Potential problems of evidence arose but did not require resolution in what I think was the first case to refer to *Hastings-Bass*. The case in question is *Turner v Turner* [4]. The decision there was that a body of trustees having three members had failed in the discharge of the fiduciary duty to consider all the issues pertinent to the exercise of discretionary powers; and, since they were unaware that they had any discretion and did not read or understand the effect of the documents they were signing, it followed that they had never applied their minds to the exercise of the discretion and were in breach of their duty, so that the power to appoint had not been validly exercised. There was a wealth of evidence in that case that the trustees were entirely unversed in business affairs and had become trustees to oblige the settlor, thinking that they would never be expected to do anything. *Turner v Turner* was decided on the basis that the court should put aside the purported exercise of the fiduciary power if satisfied that the trustees never applied their minds at all to the exercise of the discretion entrusted to them. That, of course, is not a difficult proposition; it is also a proposition quite separate from that said to emerge from *Hastings-Bass*. I do not accept the proposition embraced by some of the writers that *Turner v Turner* represents the first application of *Hastings-Bass*. The rule in *Hastings-Bass* (so-called) contemplates that the trustee set out to implement and achieve some intended objective. In other words, the trustee's mind is applied to the exercise of the particular discretion. That was not the situation in *Turner*. The trustees' minds were devoid of intention.

It was in the case of *Mettoy Pension Trustees v Evans* [5], decided in 1989, that the existence of something called "the rule in *Hastings-Bass*" was first mentioned. Warner J there surveyed a great deal of earlier case law. He held that the rule had at its centre failure by trustees to take into account considerations that they ought to have taken into account. The reason for their failure is, he said, irrelevant. In addition, it must be shown that the trustees did not have a proper understanding of the effect of their act. It must also be clear that, had they had a proper understanding of the effect of their act, they would not have acted as they did. Speaking of the burden of proof, Warner J said that those who challenge the exercise of the trustee's discretion are not under the same burden of proof and required to discharge it to the same standard as someone who seeks rectification of an instrument in a rectification suit.

The relevant questions were seen as, first, were the trustees under a duty to consider a particular thing; second, did they fail to consider it; and, third, if so, what would they have done if they had considered it. It was emphasised that, for the court to intervene, it must be shown that the trustees would not have done what they actually did. It is not enough that they would have realised that what they were doing was unsatisfactory to some extent. It was in the *Mettoy* case that the Court of Appeal's observations in *Hastings-Bass* were translated from the negative to the positive. Warner J said:

"For present purposes [the relevant principle] may be stated in these terms, which are the positive converse of a negative proposition enunciated by the Court of Appeal in *re Hastings-Bass* ...: 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."

Now *Mettoy*, like *Hastings-Bass* itself, was a case in which the trustees' decision was not found susceptible to be overturned. The judge had before him the question whether, if the trustees had known the true effect of a deed amending the benefits regime under a pension fund, they would have gone ahead and executed it. The main thrust of the amendments, in the relevant area, was to shift

from the trustees to the employer company the ability to decide how benefits should be augmented out of surplus on a winding up of the employer. On the evidence before him, the judge could not decide what the trustees would have done if they had been fully aware of the consequences of the amendments. The power given to the employer company by the amendments was regarded as a fiduciary power. On the evidence of one of the directors, they – and therefore the company - were concerned with the interests of the workforce and with preserving good industrial relations. In other words, there was no room for an inference that the company would have acted in some selfishly avaricious way and left the employee beneficiaries with some mere pittance. The judge's relevant finding was that, even if the relevant aspects had been at the forefront of their minds, the trustees may well have decided to do exactly what they in fact did.

It is in the next case - the 1991 case of *Stannard v Fisons Pension Trust Ltd* [6] - that we see an application of the *Hastings-Bass* principle; or, perhaps more accurately, a secondary application of it. The trustees of a pension fund had to transfer assets to another fund in consequence of a number of members transferring to another employer when the original employer sold part of its business. The trustees worked on the basis of the value of the fund in 1979. They failed to take into account enhanced value because of an upturn in the stock markets. Had that been recognised, the transfer could have been made on a basis more beneficial to virtually everyone in sight – the retained employees, the transferred employees and the transferee of the business included.

The *Stannard* case really turned on breach of duty, the relevant duty being that identified in the unreported Court of Appeal decision of *Kerr v British Leyland (Staff) Trustees Ltd* in 1986, namely, a duty to give properly informed attention to the exercise of a power or discretion where the persons affected are superannuation or pension beneficiaries who have effectively purchased rights as part of their employment. That kind of case is one where, according to some of the cases, the situation is really one of duty rather than power or, perhaps more precisely, a power coupled with a duty to exercise it – something that will not intrude in the ordinary family situation of the kind with which *Hastings-Bass* itself was concerned.

Hastings-Bass received only secondary attention in *Stannard*. It was said, in effect, that the decision reached by reference to *Kerr* was supportable also by reference to *Hastings-Bass*. It is from this juxtaposition that derives one of the live issues about the *Hastings-Bass* principle, namely, whether breach of duty is an element of the vitiating or avoiding.

Later cases opened up the possibility that the rule might apply not only where the trustees would not have acted as they did had they appreciated the true position but also where they might not have done so. That possibility was recognised by Jonathan Parker J in *Green v Cobham* [7], a case decided in January 2000. The case had been argued on the “would” basis rather than the “might” basis, and the court inquired into what the trustees would have done had they appreciated certain capital gains consequences. The decision was that, had that been appreciated, the trustees would not have gone ahead as they did. Various possible versions of alternative courses open to the trustees were canvassed. The judge was content to say that, on the evidence, there was no doubt that, had the trustees appreciated the capital gains tax consequences, they would not have done what they did. The result, therefore, was reached on the “would” basis, not the “might” basis.

By the year 2000 – more than a quarter of a century after the decision in *Hastings-Bass* – Jonathan Parker J preferred not to refer to the “rule” in *Hastings-Bass*. It was, at best, “an emerging principle which may be applied to exercise of powers by trustees” – a principle, moreover, having “obvious affinities to the much more developed area of the principles which courts will apply when judicially reviewing the exercise of statutory powers by public authorities”. These last words are from the June 2000 judgment of Park J in *Beadner v Granville-Grossman* [8]. I suppose the description of the rule as “an emerging principle” is fair enough, given that there were so few cases in the intervening 25 years. Park J approached it cautiously:

“The principle is still in an early stage of development and the limits to it have not been established. There must surely be some limits. It cannot be right that whenever trustees do something which they later regret and think that they ought not to have done, they can say that they never did it in the first place. Further, there is no reported decision (nor, as far as I know, unreported decision) in which the principle has been applied so as to take away beneficial interests from the persons who are properly entitled to them under the trust instruments.”

Park J rejected entirely an attempt by counsel to extend the reasoning in *Hastings-Bass* by having the court not only declare something which the trustees had done to be void but also to hold that the trust takes effect as if the trustees had done something which they never did it all. Referring to the earlier cases, he held that that would be entirely contrary to principle.

These two cases of 2000 were referred to briefly in a decision of 8 December of that year. In *AMP (UK) plc v Barber* [9], the main claim was a claim for rectification of a resolution of pension trustees increasing benefits for members retiring through incapacity. The trustees and the employer had overlooked the fact that certain other benefits were tied, as to quantum, to the incapacity benefit. The flow-on effect of the change into those other areas had been simply overlooked. Lawrence Collins J upheld the rectification claim, referring to authority making rectification available in relation to a unilateral and voluntary settlement. He did not, I note, have anything explicit to say about how the doctrine of rectification comes to apply to a resolution of trustees, although a close reading of the report suggests that it was in fact a written resolution actually signed by the trustees at a meeting, with the minutes of the meeting referring to the signing that took place at the meeting. Under the scheme of the relevant pension plan, the judge found that agreement between the trustees and the employer was an element of the amendment process culminating in the signing of a written resolution of the two trustees. The rectification question was therefore approached on the basis of a need to find a common intention to affect incapacity benefits only, that is, not to affect also the other benefits quantified by reference to incapacity benefits. That finding was made and rectification was ordered.

Hastings-Bass received only subsidiary attention in the *AMP* case. But it was attention which did nothing to advance the cause of certainty. Lawrence Collins J went back to *Kerr British Leyland Staff (Trustees) Ltd*, the unreported decision of the Court of Appeal of 26 March 1986 and *Stannard v Fisons Pensions Trust Ltd*, the 1991 case, as authority for the proposition that the correct question is whether, if the trustees had taken the right matters into consideration, that “might” have materially affected their decision. Curiously, perhaps, he rejected the “would” test in favour of the “might” test, saying that *Hastings-Bass* indicated the former but the later decisions of the Court of Appeal by which he was bound favoured the latter. One wonders whether the matter was really that clear cut when *Hastings-Bass* itself was also a decision of the Court of Appeal and the later Court of Appeal judgments apparently did not refer to it directly. There was also reference to the void versus voidable issue and an expression of opinion in favour of void. *Hastings-Bass* was dealt with in the *AMP* case only by way of *obiter dicta*.

I do not intend to go specifically to all the other single judge decisions – although it is significant that from 2000 onwards, the pace picked up. *Hastings-Bass* was dealt with in the three English decision of 2000 I have mentioned, in one in each of 2001, 2002 and 2003 and in three 2005 cases [10]. The last of these – the decision in *Sieff v Fox* on 28 June 2005 – was a decision of a Lord Justice of Appeal sitting as a judge of the Chancery Division. It is useful to go straight to that case to see the current state of play in England.

Sieff v Fox, on its facts, bears a striking resemblance to *Hastings-Bass* itself. The trustees of a 1971 settlement exercised a discretionary power of appointment in favour of Lord Howland so as to cause part of the trust property to be held on the trusts of a 1987 settlement under which there was a wider class of family discretionary beneficiaries. All concerned – the trustees and Lord Howland – took advice about the capital gains tax liability and proceeded on the basis of that advice. It turned out that the advice had been wrong and that the appointment gave rise to substantial tax. Lloyd LJ, in a comprehensive judgment, canvassed the whole of the case law and came up with a number of propositions. He started off by stating a revision of the *Mettoy Pensions* positive version of the relevant principle. He expressed it thus:

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

Lloyd LJ later referred to and defended the relevance of public law analogies. He mentioned the case of *Edge v Pensions Ombudsman* [11] where the Court of Appeal had relied heavily on such analogies in assessing the appropriateness of the actions of pension trustees. In *Edge*, there was reference to *Harris v Lord Shuttleworth* [12], a pension fund case, where the Court of Appeal approved the applicability to decisions of pension trustees of the procedural requirements laid down in *Lee v*

Showmen's Guild of Great Britain [13], so that they must ask themselves the right questions, they must act on a correct appreciation of the law and applicable rules and they must not arrive at perverse decisions, including decisions which do not take into account irrelevant considerations. The Court of Appeal in *Edge* went to the heartland of administrative law and quoted a passage from *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [14]. It suggested the value of such approaches by way of analogy, noting that pension trustees are, like local authorities, entrusted with decisions to which their particular expertise is relevant. Lloyd LJ, in *Sieff v Fox*, defended the introduction of public law concepts, particularly in relation to pension trusts but also in relation to private trusts.

Lloyd LJ did, however, distinguish between cases where trustees are under a duty to act and those where they are not. Where there is no duty to act, review of the result should, he said, proceed on the pure *Hastings-Bass* basis, that is by asking whether the trustees would have done what they did had they not misunderstood the relevant matter. But in cases where the trustees are under a duty to act, Lloyd LJ was prepared to regard the "might" test as the appropriate test – although it appears that this might only be so where the discretion is one which entails not pure bounty but some entitlement to have the trustees' decision made, as in the case of an employee and his or her pension. This appears at paragraph 53 of the judgment in *Sieff v Fox*.

There is now a considerable academic literature on *Hastings-Bass*. The various journal articles are referred to in the written paper [15]. I do not intend to go into them all but I do want to take up some of the themes.

The first is a kind of mystification as to why equity is so benign in these cases. If someone comes to equity wanting rectification of an instrument – even a unilateral instrument – they must shoulder a heavy burden. Let us look for a moment at the 1995 decision of the New South Wales Court of Appeal in *Commissioner of Stamp Duties v Carlenka Pty Ltd* [16], the facts of which will have a familiar ring against the background of our *Hastings-Bass* discussion. The case concerned a family trust. The trustee, a company, executed two deeds poll to enlarge the class of discretionary income beneficiaries. Unknown to the principal of the trustee company and its solicitor, the deeds attracted substantial stamp duty. They had the effect not only of expanding the class of income beneficiaries but also of expanding the class of capital beneficiaries. The Court of Appeal held that it had been proved to the requisite standard that the latter aspect was not part of the intention of the trustee company, with the result that the deeds were rectified to exclude it. The court observed that, in the mistake context, "intention" does not include consequences which the parties did not have in mind when the instrument was executed even if, had they thought of them, they would have intended them. There is thus a clear concentration on what was in the mind – not what would or could or should have been – and on making the instrument match that. And, as the cases say, there must be clear and convincing proof of the actual intention. So, rectification is an altogether more stringent affair than *Hastings-Bass*.

So too is mistake. In an influential lecture delivered at King's College, London, in 2002 and mentioned in the paper [17], Lord Walker of Gestingthorpe (as he now is) points out that there is what he calls "a narrow line of authority indicating that a voluntary transaction may be rescinded on the ground of mistake" – but, as he observes, subject to the same restrictions that apply to a contract: delay, acquiescence, the intervention of third party rights and so forth. Again, equity is exacting and stringent. It looks to the effect of what was done and its correspondence or otherwise with what the relevant persons thought they were doing and intended to do.

But *Hastings-Bass* can be relied on when the trustees knew exactly what they were doing and why they were doing it and intended to do exactly what they did, but some nasty consequence later emerges. *Hastings-Bass* thus goes beyond both rectification and mistake. It is available even though the trustees' intentions are fully realised and even though they proceeded knowingly and deliberately. The issue is as to non-correspondence between what they did and what they would have done if the missing relevant consideration had been present in their minds or the present irrelevant consideration had been absent from their minds.

Much depends on an assessment of what the trustees took into account and what the trustees would have done. And that goes to evidence. How do we know? How do we find out?

What the trustees took into account will always be a question of fact. It will be determined on the evidence, starting, no doubt with whatever documents can be shown to have been before them. But it would be dangerous to assume that they had read and understood those documents. So evidence from the trustees themselves will be required, assuming that they are available to give it.

Once it is ascertained what the trustees took into account (and I will come back to that), it becomes necessary to decide what they should have taken into account, so that the necessary comparison can be made between the considerations by reference to which they actually proceeded and the considerations by reference to which they should have proceeded. If the comparison shows a discrepancy, the *Hastings-Bass* threshold is crossed. But how do we determine what the trustees should have taken into account?

Look at the verbal formulation. In *Hastings-Bass* itself, there is reference to “considerations which he should not have taken into account” and “considerations which he ought to have taken into account”. The “should” and “ought” refer to some required standard of conduct. How is that standard set? Where does the obligation come from? The traditional view of the duty of a trustee exercising a discretionary power is that the trustee must act “upon genuine consideration”, that is, take an informed view of whether to exercise the discretion and not act irresponsibly, capriciously or wantonly – also, as Sir Garfield Barwick put it in *Lutheran Church of South Australia v Farmers Co-operative* [18], that, in exercising the power, “proper considerations are in mind, and improper considerations excluded”.

But these traditional formulations referring to proper and improper considerations are not concerned with commercial, fiscal and similar considerations. They are concerned with the propriety of trustees’ behaviour. We would readily accept that it is a gross breach of trust to lend trust moneys to one’s needy and financially unstable friend rather than deposit them in the Commonwealth Bank. When we speak of a duty of trustees to act with proper considerations in mind, we are concerned with excluding improper influences such as self-interest and foreign purpose. The preoccupation is with single-minded regard for the welfare of beneficiaries and the furtherance of their interests without distorting inroads. This is something quite different from the proposition that there exists, in relation to any particular decision by a trustee, some kind of compulsory checklist that the trustee is bound to follow – has legal advice been obtained; is the rule against perpetuities satisfied; are the valuations of assets up to date; has there been sign-off that stamp duty, income tax, capital gains tax and GST are being kept to the absolute minimum? That kind of expectation or duty does not apply in administrative law unless made mandatory by statute. I quote from the 1986 judgment of Brennan J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [19]:

“The Court has no jurisdiction to visit the exercise of a statutory power with invalidity for failure to have regard to a particular matter unless some statute expressly or by implication requires the repository of the power to have regard to that matter or to matters of that kind as a condition of exercising the power.”

That observation, as approved and adopted by Gleeson CJ and McHugh J in *Foster v Minister for Customs* [20], was seen as relevant to the conduct of company directors and the discharge of their duties in the recent decision of the New South Wales Court of Appeal in *St George Soccer Football Association v Soccer NSW Ltd* [21]. In the absence of some pre-existing and observable obligation to take a particular matter into account, there is no duty upon directors or, I suggest, upon trustees, to do so.

In the trustee context and absent some directive in the trust instrument, the standard against which *Hastings-Bass* would seek to measure trustees’ conduct – that is, the check list they are meant to work to (the “should” and “ought” check list) - is elusive. So too may be any reliable assessment of what they actually took into account. Assume there are three trustees. Unless the trust instrument says otherwise, they must act unanimously. In that, of course, they differ from company directors. But the necessary unanimity goes only to the decision made. Assume that Trustee A, in deciding whether to hive off part of the trust fund into a new trust for the benefit of William, is actuated mainly or even solely by a well-based belief that that will save estate duty on the death of Captain Hastings-Bass – and doesn’t pause to think whether the limitations beyond William’s life interest are valid. Assume that Trustee B is concerned only to ensure that better provision is made for William, whatever the estate duty consequences may be – and never addresses those considerations. And assume that Trustee C, knowing that A and B have been fully into the matter and are in favour, simply agrees because they agree and he respects their judgment. What is the distillation for the purposes of the rule in *Hastings-Bass*? Has C taken into account an irrelevant consideration, namely, that A and B are in favour, without turning his mind to the real issues (whatever they are)? Has B failed to take into account a relevant consideration by not concerning himself with the estate duty consequences? Has A taken into account an irrelevant consideration by concerning himself with the protection of Captain Hastings-Bass’s estate? And if the answer to any of these questions is “Yes”, what does that arguable shortcoming on the part of one of three do to the single decision subscribed to unanimously by the body of trustees?

You may gather from what I have said that I have reservations about the applicability of administrative law thinking in this area – even, I might say, where we are dealing with superannuation trustees and beneficiaries who have earned and paid for their interests. Australian case law already recognises the special position occupied by these trusts and the reality that trustees' decisions going to realisation or quantification of benefits must be approached in a more stringent way than purely discretionary decisions, including, for example, decisions under discretionary trusts of a family kind. The Australian cases referred to in the written paper deal predominantly with decisions of the former kind. I shall come back to them.

Some of the literature canvasses the question whether the rule in *Hastings-Bass* extends to all fiduciary decision making. In two articles published in 2002 and mentioned in the paper [22], Ian Dawson of the University of Newcastle upon Tyne answers that question in the affirmative. He is not alone. It has also been suggested, albeit tentatively, that the rule should apply to donees of non-fiduciary powers. Analogies are drawn with principles of judicial review. The *Hastings-Bass* principle is seen as concerned with flawed decision making generally. The administrative law way of thinking is to the fore again – but inappropriately so, in my view.

How would the rule apply decisions of directors of companies? Directors are fiduciaries. When they act as a board – and also when they act as individuals – they must act in the interests of the company as a whole. Proper purpose is the basic principle. But, as the recent adoption of the statutory business judgment rule emphasises, boards of directors are meant to take into account all sorts of different matters in coming to a commercial decision. They are also meant to take risks. And most importantly, they do not have to be unanimous. Majority rule is the order of the day. In the *Howard Smith* case [23], the Privy Council remarked on the wide range of considerations open to directors in exercising the power to refuse registration of a transfer of shares. They referred to the High Court's decision in *Australian Metropolitan Life Assurance Co Ltd v Ure* [24]. But the vitiating force in *Howard Smith* and in all such cases is improper purpose. In directors' duty cases, the court is not called upon to take stock of matters addressed, matters not addressed and some paradigm of matters to be addressed. It looks to purpose and the propriety of the purpose. And if it is improper, invalidity follows.

Any attempt to introduce *Hastings-Bass* thinking into this arena would, in my view, be to inject an entirely foreign and chaotic influence. One simply cannot accept the idea that directors themselves might come to court and say, in effect, "By a four to three majority, we decided to buy this business of hiring out movies on video tape. The full effect intended was to acquire a viable and long-term profit making business. But none of us had properly appreciated that DVD had arrived and on-demand cable television is just around the corner - not to mention Telstra's Bigpond Movie Downloads reported in this morning's Age. If the four of us who voted in favour had thought of those things, they would have voted against. So please declare our decision void".

As I move towards my conclusion, let me touch briefly on three matters. First, there is the void versus voidable debate. Is the affected decision void or merely voidable? In *Abacus v Barr*, Lightman J undertook an analysis preferring the "voidable" point of view. It was not necessary for the point to be decided. In *Sieff v Fox*, Lloyd LJ doubted Lightman J's analysis but again came to no concluded view. For myself, I must confess an attraction to the "voidable" point of view. The reality is that the power has been regularly and effectively exercised. That should be enough to cause the exercise to stand unless an affected person persuades the court to intervene – with the court itself taking into account all the usual factors including, for example, acquiescence, delay and change of position.

Second, there is the "would" or "might" debate. In the generality of case, "would" must be the test (assuming that one is a *Hastings-Bass* believer at all) – that is, would the trustees have acted differently had the relevant but missing element been present in their minds or the irrelevant and inappropriate element been absent from it? The "might" test – involving, perhaps, no more than a mere shadow of possibility - seems to me altogether too remote from reality. Lloyd LJ did, however, see it as relevant to pension cases where the contractual nexus means the beneficiaries are entitled to require the trustees to act.

Third, the bulk of the pronouncements in the decided cases are no more than *obiter dicta*. Several of the judges have seen fit to comment on aspects of the emerging principle that are not central to their decisions. Each attempted judicial blueprint addresses perceived deficiencies in the last. A succession of first instance blueprints is not altogether helpful. In a number of the cases, the central decision has been unrelated to *Hastings-Bass*. There is a need for someone with a lot of spare time and self-discipline to analyse all the English first instance judgments in a rigorous way and to

extract the *ratio decidendi* of each. I suspect that the resultant kernel of *Hastings-Bass* principle would be quite small.

I have already made brief reference to the Australian jurisprudence and I will finish by saying a little more about it. In the *Asea Brown Boveri Superannuation Fund* case [25], of course, Beach J declined to follow *Hastings-Bass*, *Mettoy* and *Stannard v Fissons*. Academic commentators have criticised him for doing so, surmising that he would also regard as inapplicable to trustee decision making principles of rectification and mistake. For my own part, I do not gather that at all from the judgment. Beach J accepted and followed the approach in earlier Australian cases, particularly *Karger v Paul* [26]. In that case, McGarvie J held that the important question is whether the discretion was exercised, not how it was exercised. The court will inquire into whether the trustees acted in good faith, upon real and genuine consideration and in accordance with the purposes for which the discretion was conferred and not for some ulterior purpose. The court is concerned to know what the trustees took into account only because it is interested in whether they acted fairly, reasonably, honestly and for proper purposes. Of course, if the trustees gave reasons for their decision, those reasons will be looked at to see whether they have, in reality, discharged their functions according to law. But unless there is some specific requirement, they need not give reasons and cannot be required to say what their reasons were. Those approaches, one might think, are quite sufficient to keep trustee decision making within appropriate bounds.

Hastings-Bass is fledgling equity jurisprudence. Sooner or later, Australian judges are going to be challenged to apply it. Whether they will do so or whether the *Asea Brown Boveri* rejection and the *Karger v Paul* approach will be regarded as sufficient remains to be seen. And there can be no doubt that whatever judicial pronouncements emerge will be closely scrutinised. That, of course, is what has happened and is happening in England. I would like to leave you with the opening paragraph of Sir Gavin Lightman's Withers Lecture at King's College, London, delivered in October 2003, just nine months after his decision in *Abacus v Barr*. He said this [27]:

"Not long after Lord Walker's lecture last year I had occasion to consider the rule in *Hastings-Bass* in the case of *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409 ('*Abacus*'), and if my decision was in any way courageous departing (as it did) from a line of authority and making my own furrow on the question whether a decision successfully challenged on *Hastings-Bass* grounds was void or voidable, I acknowledge the encouragement to my resolution afforded by Lord Walker's lecture. My decision was not appealed to the Court of Appeal. Instead there was an appeal to the legal profession as a whole by way of legal periodical. I have in mind in particular the article in 17 *Trust Law International* (2003) 114-128: *The Law Relating to Trustees' Mistakes – Where Are We Now?* by Mr Brian Green QC, a member of the same stable, Wilberforce Chambers, as leading counsel for the unsuccessful party in *Abacus*. Such an appeal has decided advantages over an appeal to the Court of Appeal: (1) there is no requirement of giving notice of the appeal to anyone and the judge has no right to be heard; (2) there is no limitation of the issues raised to those raised before the judge; (3) there is no limitation of the arguments advanced to those advanced before the judge; and (4) there is no further appeal. Judges become accustomed to viewing in silence and with amused (or bemused) detachment the subsequent deconstruction of their judgments. Moses himself, the story reads, when brought back to this world could not recognise in developed Jewish law the founding principles which he had himself laid down."

END NOTES

[1] *In re Hastings-Bass* [1975] Ch 25

[2] [1959] Ch 699

[3] *Pilkington v Inland Revenue Commissioners* [1964] AC 612

[4] [1984] Ch 100

[5] [1990] 1 WLR 1587

[6] [1992] IRLR 27

[7] [2002] BTC 170

[8] [2001] Ch 523

[9] [2001] Pensions LR 77

[10] *Abacus Trust Co (Isle of Man) Ltd v National Society for the Prevention of Cruelty to Children* [2002] BTC 179; *Hearn v Younger* [2005] Pensions LR 51; *Abacus Trust Co (Isle of Man) Ltd v Barr* [2003] Ch 409; *Gallaher v Gallaher Pensions Ltd* [2005] Pensions LR 108; *Burrell v Burrell* [2005] All ER (D) 351; *Sieff v Fox* [2005] 3 All ER 693

[11] [2000] Ch 602

[12] [1994] ICR 991

[13] [1952] 1 All ER 1175

[14] [1948] 1 KB 223

[15] Walker, R "The Limits of the Principle in Re Hastings-Bass" (2002) 13 *King's College Law Journal* 173; Hilliard, J, "Re Hastings-Bass: Too Good to be True?" (2002) 16(4) *Trust Law International* 202; Dawson, I, "Administrators' Reprieve?" [2002] *The Conveyancer* 67; Goodman, D and Groves, C "Need Trustees' Mistakes Stand?" [2002] *PCB* 102; Green, B, "The Law Relating to Trustees' Mistakes – Where Are We Now?" (2003) 17(3) *Trust Law International* 114; Hilliard, J, "Limiting Re Hastings-Bass" [2004] *The Conveyancer* 208; Bevan, C, "Commentary on the Paper by Lord Walker", paper presented to the Society of Trust and Estate Practitioners, Sydney, 23 August 2004; Hayton, D, "Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts" [2005] *The Conveyancer* 229

[16] (1995) 41 NSWLR 329

[17] (2002) 13 *King's College Law Journal* 173

[18] (1970) 121 CLR 628

[19] (1986) 162 CLR 24

[20] (2000) 200 CLR 4423

[21] [2005] NSWCA 481

[22] [2002] *Insolvency Lawyer* 180; [2002] *The Conveyancer* 67

[23] [1974] AC 821

[24] (1923) 33 CLR 199

[25] [1999] 1 VR 144

[26] [1984] VR 161

[27] <http://www.dca.gov.uk/judicial/speeches/jl211003.htm>