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'GET OUT OF JAIL FREE' CARD: THE COURTS' OFFER OF ASSISTANCE TO ERRANT TRUSTEES

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INTRODUCTION

Decisions taken by trustees have consequences. When trustees make mistakes, especially mistakes that cost the trust fund dearly, can the courts ever erase those errors and let the trustees unwind what they have done and start afresh? To do so, of course, has obvious advantages for both the trustees and those beneficiaries affected by the mistakes, but it is correspondingly disadvantageous for any outsiders who might be equally affected by the court's decision to erase - in England most typically Her Majesty's Revenue and Customs. For a long time, the answer to the question posed seemed to be yes. This invaluable 'get out of jail free' card was delivered to errant trustees by virtue of what was routinely known as the rule in *Re Hastings-Bass*. The Supreme Court, the highest court in the land, has now indicated that this is not right, that *Re Hastings-Bass* has been misunderstood for over 23 years,¹ and that trustees are not so roundly protected by such a rule. However, in reaching its conclusions, it appears that the Supreme Court may have abolished one rule and replaced it with another, which also seems to benefit trustees.

ASSISTING TRUSTEES: DEVELOPMENT OF THE COURT AWARD OF A 'GET OUT OF JAIL FREE' CARD

The decision of the English Court of Appeal in *Re Hastings-Bass*² has now obtained the status of a 'rule'. The case concerned a power of advancement exercised pursuant to section 32 of the *Trustee Act 1925*. There were two settlements, one in 1947 and one in 1957. The trustees of the 1947

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¹ This approximation reflects the obiter comments made by Lord Justice Lloyd in *Pitt v Holt* (CA) that the contemporary understanding of the rule in *Re Hastings-Bass* was developed in *Mettoy Pension Trustees v Evans*, a decision taken in 1990.

² [1974] EWCA Civ 13; [1975] Ch 25.

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settlement transferred funds from that settlement into the 1957 settlement to be held subject to the terms of the 1957 settlement. Subsequently a dispute arose concerning whether estate duty was payable.

The judge at first instance held that the 1947 settlement trustees did not effectively exercise the power of advancement in a manner which would demand that estate duty became payable on the settlor's death. The Court of Appeal reversed the decision of Plowman J. The operative part of the judgment concerned the rule against perpetuities; however, the following dictum expressed by Buckley LJ became known as the rule in *Re Hastings-Bass*:³

“where by the terms of a trust (as under section 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 full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.”

The rule in *Re Hastings-Bass* is primarily invoked in cases where trustees have exercised their discretion without a full appreciation of the fiscal consequences of doing so. In many circumstances, and somewhat peculiarly, the trustees themselves have sought to have their decision overturned on the dubious ground that they would not have exercised their discretion in the manner they did had they considered the full consequences of their actions.

Mr. Justice Warner in *Mettoy Pension Trustees Ltd. v Evans* restated the rule in positive terms: “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.”⁴

The language of Mr. Justice Warner is significant; it bears on the issue of whether the trustee's action is void or voidable. His use of the term *interfere* suggested the appropriate remedy was voidness in contradistinction to mere voidability. Sir Robert Walker accurately emphasised the practical importance of the distinction between void and voidable when writing extra-judicially as a Lord Justice of Appeal:

³ Ibid 41.

⁴ [1990] 1 WLR 1587 (Ch) 1621. See also *Sieff v Fox* [2005] EWHC 1312, [2005] 1 WLR 3811 (Ch) 3847 (Lloyd LJ).

“If an appointment made by trustees may be void, despite having been (to all outward appearances) arrived at and recorded in the proper manner, it may lead to great uncertainty. The matter might be raised many years afterwards, when the trust fund had been distributed (and tax paid) on the assumption that the appointment was valid. If on the other hand it was merely voidable, all the restrictions appropriate to the equitable remedy of rescission would come into play, including delay and the acquisition of third-party rights.”⁵

The importance of having a rule with defined parameters is that it limits the discretion of the court so that consistent and foreseeable outcomes can be achieved. Furthermore beneficiaries under a trust are able to enforce their primary right under a trust – to require good administration by trustees – more readily where a rule, which operates on a trustee’s discretion, is certain. Notwithstanding the ability of the courts to state the rule in *Re Hastings-Bass* clearly, its scope remained uncertain and varied from case to case. In *Amp (UK) v Barker*,⁶ the High Court held that to invoke the rule in *Re Hastings-Bass* the court must be shown that the trustee *might* have acted differently and not necessarily *would* have acted differently. Mr. Justice Lightman in *Abacus Trust Company v Barr*⁷ required that there must have been a breach of trust to apply the rule in *Re Hastings-Bass*. The requirement that there be a breach of trust was subsequently disapproved by Lord Justice Lloyd in *Sieff v Fox*.⁸ Lloyd LJ explained that there was no requirement to show a breach of duty before the rule in *Re Hastings-Bass* could be invoked.

UNCERTAIN SCOPE: WHEN WILL THE COURTS DISPENSE THE VALUABLE ‘GET OUT OF JAIL FREE’ CARD?

Errant trustees will be eager to engage a rule that effectively gives them another attempt at executing their power in a way which would benefit the trust. However the courts have been unclear on what was needed to invoke the rule in *Re Hastings-Bass* and what its remedial consequence would be. Uncertainty surrounding the scope of the rule had obvious disadvantages – chief among them being inconsistent applications of the rule. Lord Neuberger of Abbotsbury, writing extra-judicially, observed that due to this uncertainty:

⁵ Sir Robert Walker, *The Limits of the principle in Re Hastings-Bass* 13 KCLJ 173, 176 – 177.

⁶ [2000] EWHC Ch 42; [2001] Pens LR 77 (Ch) 96.

⁷ [2003] EWHC 114; [2003] Ch 409 (Ch) 418.

⁸ *Sieff* (n 5) 80.

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“the Hasting-Bass principle infringes the most fundamental requirements of any legal principle”⁹ which is, of course, certainty.

Where the principle underpinning the rule was uncertain, there was difficulty with justifying the application of the rule. Was the rule in *Re Hastings-Bass* meant to operate like any other contractual vitiating factor? Lord Neuberger expressed concern that: “the circumstances where the principle applies are not in accordance with the law applicable to contractual transactions, where mistake only vitiates a document ‘when the element of consent is totally lacking.’”¹⁰ Lord Walker expressed a similar sentiment and suggested that a more *demanding*, certain, and principled test could curb the *unwelcomed tendencies* emanating from the rule.¹¹

Three crucial uncertainties that surrounded the rule in *Re Hastings-Bass* lead to three questions: first, did the rule apply solely to dispositive powers? second, should the rule be governed by the requirements for rescission? third, did the application of the rule result in the transaction being void or voidable?

In relation to the first question, it was unclear whether the rule in *Re Hastings-Bass* applied only to dispositive powers – that is power exercisable in respect of trust property in favour of objects – as opposed to management or administrative powers. In *Re Duxbury’s Settlement Trust*¹² the decision of the Court of Appeal suggests that the power to appoint new trustees fell outside the scope of the rule. Similarly, the power to enter, vary or cancel a contract with a third party was held to fall outside the rule.¹³ Michael Ashdown defended the rule in *Re Hastings-Bass*. According to Ashdown the rule facilitated proper administration by trustees. If Ashdown’s argument is correct and the rule was concerned with protecting ‘the beneficiaries’ entitlement to proper performance by trustees of their duty to consider¹⁴ there is difficulty in prescribing the rule only to mistakes related to dispositive powers. It is possible that the rule was restricted to dispositive powers in an attempt to provide added protection against errant trustees dissipating trust assets; however, it was unclear why added protection was not needed to defend against trustees doing things like saddling the trust with detrimental contractual liabilities.

In relation to the second question, it was unclear whether the *rule in Re Hastings-Bass* should be made consistent with the requirements governing the

⁹ Lord Neuberger, *Aspects of the law of mistake: Re Hastings-Bass Trusts & Trustees* (2009) 15 (4) 189, 194.

¹⁰ *Gallie v Lee* [1970] UKHL 5, [1971] AC 1004 (HL) 1026 (Lord Wilberforce).

¹¹ Walker (n 6) 183.

¹² [1994] EWCA Civ 21; [1995] 1 WLR 425 (CA) 428.

¹³ *Donaldson v Smith* [2006] EWHC B9 (Ch), [2007] WTLR 421 [53] – [54].

¹⁴ Michael Ashdown, *In defence of the rule in Re Hastings-Bass Trusts & Trustees* (2010) 16 (10) 826, 848.

rescission of deeds executed by mistake. The seminal statement outlining the test for mistake was made by Lord Justice Lindley in *Ogilvie v Littleboy*: “a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.”¹⁵ Mr. Justice Millet (as he then was) in *Gibbon v Mitchell* held that a deed will not be set aside unless “the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.”¹⁶ The rule in *Re Hastings-Bass* merely required a failure to account for relevant information and thereby set a threshold for avoiding a transaction well below the *Littleboy* and *Mitchell* tests. Notwithstanding the rule in *re Hastings-Bass* was not grounded in mistake, if the remedial consequence of applying the rule was setting aside the transaction, it was unclear why the requirement of the rule was not aligned with those governing the rescission of deeds executed by mistake; which would have a similar effect.

In relation to the third question, and in many ways the most controversial question surrounding the rule in *Re Hastings-Bass* was whether the application of the rule lead to the trustee’s exercised discretion being declared void *ab initio* or merely voidable, and thereby made subject to ordinary bars of rescission (laches, third party rights etc.). Richard Nolan observed that “[i]f a fiduciary did have authority to do what he did, but acted on the basis of a flawed decision, then his action should be voidable, rather than void.”¹⁷ This view contrasts with the decision in *Mettoy Pension Trustees v Evans* where it was suggested that the appropriate remedy was a declaration that the exercise of power was void.

Where a trustee fails to take into account relevant information before exercising their discretion, undoubtedly the resulting decision is flawed. The issue concerning whether the consequence was a determination that the transaction was void or voidable is not a trivial one, as the latter would have offered greater protection to third parties than the former. If the action was merely voidable it would stand until set aside, with the result that, for example, taxes would be payable on the transaction.

These three uncertainties invariably made it difficult for the court to apply the rule in *Re Hastings-Bass* consistently. Much of the academic criticism aimed at the rule reacted to them. The general consensus was that a rule with such far-reaching consequences ought to be definite in scope and well structured so as to avoid abuse of the rule and unfairness to parties external to

¹⁵ (1897) 13 TLR 399 (CA) 400.

¹⁶ [1990] 1 WLR 1304 (Ch) 1309.

¹⁷ Richard Nolan, “Controlling Fiduciary Power” (2009) 68 CLJ 293, 321. See also Ashdown (n 15) 848.

the trust. Similarly, it was difficult to justify the existence of the rule in light of its inconsistency with established legal principles.

SHIFTING RELIANCE: THE SUPREME COURT INTRODUCES FRESH UNCERTAINTY

The decision in Pitt v Holt and Futter v Futter

In *Pitt v Holt* the claimant, Mrs. Pitt, acted as the receiver for her husband. Mrs. Pitt, advised by professional financial advisers, gave no thought to liability for inheritance tax when executing the settlement. Consequently, large inheritance tax liabilities arose following her husband's death. The claimants brought an action for a declaration that the settlement should be set-aside in reliance on the *rule in Re Hastings-Bass*, or, alternatively, relief in equity, relying on the doctrine of mistake. In *Futter v Futter* the claimant, Mr. Futter, settled assets on two discretionary trusts. The trustees exercised their power of enlargement so as to avoid incurring capital gains tax. However, the trustees' legal advisors had overlooked a statutory provision that undermined the premise on which the transactions were based. Consequently large capital gains tax liabilities were incurred. The claimants brought an action for a declaration that the enlargement and advancements should be set-aside also in reliance on the rule in *Re Hastings-Bass*.

The Court of Appeal decision

Although the decision of the Court of Appeal¹⁸ is superseded by the Supreme Court's¹⁹ decision, it is instructive to begin from the principled and well-reasoned judgment of Lloyd LJ, as much of Lord Walker's analysis in the Supreme Court builds on that judgment, and often merely restates what was said in the Court of Appeal.

The Court of Appeal, while overturning the decision of the judge at first instance in both appeals, held that the so-called *Re Hasting-Bass rule* didn't actually exist, rather it was a rule developed on a misunderstanding of summary observations made in *Re Hastings-Bass*.²⁰ His Lordship went on to attempt to explain the *true principle*. First, if trustees act outside trust power their actions are void.²¹ If on the other hand trustees act within power, but in some way improperly, provided they act in good faith and for proper purposes their actions will at best be voidable. Where a transaction is voidable it is

¹⁸ [2011] EWCA Civ 197; [2012] Ch 132.

¹⁹ [2013] UKSC 26; [2013] 2 WLR 1200.

²⁰ [2011] EWCA Civ 197; [2012] Ch 132 [94].

²¹ *Ibid* [96].

subject to the discretion of the court to set it aside, whereas decisions that are void are automatically vitiated and set aside. Second, where a decision made by a trustee is within power but the action gives rise to a breach of duty, the transaction will be voidable at the instance of a *beneficiary* who was adversely affected.²²

The significance of the Court of Appeal's decision was that it introduced that it is the beneficiaries who must control the exercise of trustees' discretionary powers. The law as stated by Lloyd LJ would preclude the trustees themselves from turning around after the event and saying "I did something wrong, get me out of here." The policy underpinning this point must be correct. The power vested in trustees is for the benefit of beneficiaries; surely it must be the beneficiaries who bring a claim before the court with the aim of enforcing proper administration of the trust. It cannot be up to the trustee to decide whether to bring the claim or not and in effect decide whether to enforce the proper administration of the trust.

Furthermore, the Court of Appeal was adamant that only where a decision was made by a trustee in breach of duty, but otherwise within the trust power, would the transaction be voidable. As relief now turns on the fiduciary's breach of duty in making his decision, it is instructive to be aware of what duties the Court of Appeal outlined as pertinent when making decisions.

Lloyd LJ outlined four duties of trustees:

- the "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",²³
- the duty "that the power can be exercised only if it is for the benefit of the [appointee] or ... if it is thought to be 'a good thing' for [the appointee to receive the appointment] ... That good reason must be beneficial to the person to be advanced; it cannot be exercised capriciously or with some other benefit in view.",²⁴
- the duty to "address ... the question what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for [the trustees]".²⁵

²² Ibid [99]. This represents a departure from Lloyd LJ initial observation in *Sieff* where he doubted that a breach of fiduciary duty was required.

²³ Ibid [102]; see also *In re Baden's Trust Deeds* [1970] UKHL 1, [1971] AC 424 (HL) 449.

²⁴ Ibid [104]; see also *In re Pauling's Settlement Trusts* [1963] EWCA Civ 5, [1964] Ch 303 (CA) 333.

²⁵ Ibid [76]; see also *Edge v Pensions Ombudsman* [1999] EWCA Civ 2013, [2000] Ch 602 (CA) 627.

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- the statutory “duty of care, obliging [the trustees] to exercise such skill and care as is reasonable in the circumstances” or under the similar equitable duty, “which continues to apply to cases where the statutory duty does not.”²⁶

These four duties according to Lloyd LJ are owed until they are discharged, typically by performing the duty. The duties differ from each other and that is significant as to when the duty will cease to exist. *Prima facie*, the ability of beneficiaries to challenge a transaction based on an incorrect execution of a duty ought to be related to the strictness of the duty. For example, the first duty is a strict one – trustees *must* know the permissible area of selection. However, this was not the approach adopted by the Court of Appeal. Lloyd LJ appeared to say that trustees’ decisions are immune from attack by simply being careful and reasonable: carefully getting professional advice and reasonably relying on it will result in proper performance of all four duties. If there is any flaw in what was otherwise a well-reasoned judgment it is this point of careful and reasonable behaviour translating to proper execution of duties absent any thought of how strict the duty is.

To amplify, incorrect advice is simply incapable of allowing the trustee to know the permissible area of selection, even if they were careful in procuring the advice and reasonably relied on it. In such a circumstance there ought to be scope for beneficiaries to attack the resulting transaction, but the Court of Appeal said this is not the case. It took the view that it is an absolute defence that immunizes trustees’ decisions from attack, where they receive professional advice and reasonably rely on it.

In *Pitt v. Holt* (but not in *Futter v Futter*), the fiduciaries also argued that the transaction should be unravelled, relying on the doctrine of mistake. In the Court of Appeal this ground was unsuccessful. Lloyd LJ reasoned that notwithstanding a mistake had been made; it was a mistake neither as to an existing fact that was basic to the transaction, nor as to the effect of the transaction. Rather, the mistake related merely to the fiscal consequences of the transaction notwithstanding it was of ‘sufficient gravity’ to satisfy the *Ogilvie v Littleboy*²⁷ test.²⁸ The Court of Appeal was at pains to ensure an appropriate and necessary structure, with sufficient rigor, for permitting relief against a decision taken under advice by a fiduciary.

The strictness with which the Court of Appeal considered the law should apply equitable principles, is observant of the far-reaching consequences of these principles, and the ensuing disarray if they are applied enthusiastically. Indeed Conaglen supported a restrictive approach by observing, “constraints

²⁶ Ibid [107].

²⁷ *Ogilvie* (n 16).

²⁸ *Futter* (n 19) 219.

on equitable intervention are justifiable, in the interests of the stability of voluntary transactions.”²⁹ Indeed a restrictive approach is apposite particularly in light of the *unilateral* nature of the mistake operative in circumstances giving rise to consideration of the rule in *Re Hastings-Bass*.

Supreme Court decision

Lord Walker concurred with Lloyd LJ on the main issues concerning the scope of the rule in *Re Hastings-Bass*, but he differed with respect to the requirements for invoking the doctrine of mistake.³⁰ His Lordship observed that the error leading to what became known as the rule in *Re Hastings-Bass* occurred because of a conflation of *three separate strands of legal doctrine*, blurring their distinctions and resulting in a new rule distinct from what was actually decided in *Re Hastings-Bass*. Furthermore, his Lordship, in agreement with the earlier sentiment expressed by Lloyd LJ, commented that the rule would more aptly be termed ‘the rule in *Mettoy*’.³¹

With respect to the rule in *Re Hastings-Bass*, Lord Walker outlined three categories³², the existence of the third being a point of contention. The first category was termed *excessive execution*.³³ Excessive execution concerns the scope issue and deals with circumstances where actions are performed which fall outside the legitimate remit of the trustee’s power. The remedial consequence of excessive execution is that the transaction is void.³⁴ It must be emphasised that motives do not factor into the scope issue – transactions entered into outside the power are void without further deliberation into the motives of the trustees.

It follows that it is ideal for a beneficiary, who wishes to have a transaction unravelled, to argue that the trustee acted outside the power. However, a finding that the trustee did indeed act outside the power and therefore the transaction is void does not necessarily result in a favourable outcome for the beneficiary. It must be observed that voidness of the transaction and unwinding the transaction are distinct considerations.

Although the following observation did not fall for consideration by their Lordships in the Supreme Court it may be instructive, nonetheless, to emphasise what appears to be a salient point. Where a disposition has occurred under a *void* transaction, unwinding can occur only where the

²⁹ Matthew Conaglen, “*Reviewing the review of fiduciary discretions*” CLJ (2011) 70(2) 301, 303.

³⁰ *Futter* (n 20).

³¹ *Ibid* [1].

³² The issue of mistake constituted a fourth and separate consideration.

³³ [2013] UKSC 26; [2013] 2 WLR 1200 [60].

³⁴ *Ibid* [58].

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individual receiving trust assets is a donee or where he is not equity's darling – viz. he gave consideration but with notice. The upshot being that a beneficiary has a further evidential burden after arguing the transaction should be declared void for want of power.

Lord Walker's second category was termed *inadequate deliberation*.³⁵ Inadequate deliberation occurs where the trustee acts within the scope of the power, but the power is exercised without taking into account considerations that should have been considered or taking into account considerations that they should not have considered. The remedial consequence of inadequate deliberation is that the transaction is *voidable* if, and only if, taking into account the irrelevant information or not taking into account relevant information is a breach of fiduciary duty.³⁶

In effect, the second category requires a failure so inadequate that it amounts to a breach of fiduciary duty. From a policy perspective this tightening of the requirements makes it more difficult now than before to make a transaction voidable and thereby responds to the view of some commentators that the rule in *Re Hastings-Bass* was pro-trustee. Furthermore, the difficult 'would have/might have' debate is out-flanked, as the requirement for a breach of duty replaces the consideration of whether the trustee, had he been properly informed, would have (or might have) exercised the power differently. Significantly, "[i]f it is voidable, then it may be capable of being set aside at the suit of a beneficiary, but this would be subject to equitable defences and to the court's discretion."³⁷ It follows that the proper plaintiff is a beneficiary and not the defaulting trustee.

In the author's view, the decisions of the Court of Appeal and Supreme Court raise a doctrinal question with respect to the second category – inadequate deliberation. Does category two include negligence? Inadequate deliberation, as defined by the Supreme Court can indeed cover negligence. The first category (excessive execution) is concerned with scope, but the second category (inadequate deliberation) appears to be concerned with procedure and therefore seems to embrace negligence. But there is some reticence about including negligence in category two because we typically do not unwind transactions for negligence. Negligent conduct typically results in a claim for loss. Undoubtedly future cases will have to refine this category so as to determine what the proper limitation of the second category is.

Lord Walker's third category, expressed as an intermediate category between the first and second, is called *fraud on a power*. Fraud on a power occurs where the trustee exercises the power within its proper scope but for a

³⁵ Ibid [60].

³⁶ Ibid [70].

³⁷ Ibid.

positively improper purpose.³⁸ The cases cited under this category state that the remedial consequence of fraud on a power is that the transaction is void. The Supreme Court expressed some concern over this line of cases but declined to give judgment on whether this category was correct, as it was unnecessary for deciding the appeals. Richard Nolan,³⁹ however, has commented that the fraud on a power doctrine prevents trustees from acting capriciously: it means that the trustees must not “act for reasons which... could be said to be irrational, perverse or irrelevant to any sensible expectation of the settlor.”⁴⁰ It follows that there may be a benefit in retaining the doctrine subject to the court attenuating the remedial consequence of its application.

The other issue that fell for consideration by the Supreme Court concerned setting aside a voluntary disposition for mistake. Lord Walker held that the true test “is simply for there to be a causative mistake of sufficient gravity[:] the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction.”⁴¹ Additional guidance for applying the test outlined by their Lordships required that the gravity of the mistake must be assessed objectively in terms of *injustice* or using an equitable term, *unconscionability*.⁴² According to their Lordships this test was satisfied in *Pitt v Holt* and that appeal was allowed on this ground.

Lord Walker’s views on mistake in *Pitt v Holt* represent a marked change from his views expressed extra-judicially.⁴³ Lord Walker and Lord Neuberger, both writing extra-judicially, advocated that the law be aligned with the requirements for avoiding a transaction on the grounds of *non est factum*. However, the test developed by Lord Wilberforce in *Gallie v Lee*, in relation to the doctrine of *non est factum*, is more exacting than the test stated by the Court of Appeal in *Pitt v Holt*. The Supreme Court advocated an even lower threshold for invoking the doctrine of mistake to avoid a voluntary disposition with the foreseeable untoward effect of shifting reliance from the *rule in Re Hastings-Bass* to mistake.

The linchpin of the mistake doctrine is *justice* and/or *unconscionability*; but as is expected from the use of amorphous terms, they are fig leaves for boundless discretion and largely incompetent at producing consistent outcomes. Indeed, the Supreme Court acknowledged that their decision would be subversive of certainty, but viewed this as necessary for working justice:

³⁸ See *Cloutte v Storey* [1911] 1 Ch 18 and *Vatcher v Paull* [1915] AC 372.

³⁹ Nolan (n 18) 321; see also Ashdown (n 15) 826.

⁴⁰ *Re Manisty's Settlement* [1974] Ch 17 (Ch) 26 (Templeman J).

⁴¹ *Futter* (n 20) [122].

⁴² *Ibid* [126].

⁴³ Walker (n 6).

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“The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case.”⁴⁴

Having an *elaborate set of rules* and working justice in circumstances where a trustee has made a mistake while exercising discretionary powers are not mutually exclusive, as Lord Walker appears to suggest. Justice requires principled outcomes – the courts are more likely to arrive at a principled outcome where there exists a structured doctrine of mistake. The introduction of discretion raises the spectre of litigation rather than out-of-court settlement. Where it is suggested that a trustee was labouring under a mistake it cannot be said whether the mistake was causative and of sufficient gravity short of pursuing litigation and requiring the court to evaluate the circumstances surrounding the mistake. This raises transaction costs.

Lord Walker’s pronouncements about mistake in the Supreme Court were not merely cosmetic, or obvious, from the previous case law surrounding mistake. Whereas Lloyd LJ, in the Court of Appeal, had methodically worked through the previous case law to develop a principled and defined doctrine of mistake, Lord Walker stripped away certainty for discretion. The result is that there is now greater difficulty in determining the boundary dividing mistakes of causative significance, for which the court will provide relief, and those inadequate to invoke the discretion of the court. The decision as to which side a particular case falls will be susceptible to judicial manipulation, largely based on the court’s perception of the merits of the claim.

CONCLUSION

The ‘get out of jail free’ card delivered to errant trustees by virtue of the rule in *Re Hastings-Bass* meant that lower courts often found themselves bound by a plethora of case law that was largely unsatisfactory. Re-organisation of the rule into a structured principle began with the Court of Appeal decision in *Pitt v Holt* and *Futter v Futter* and culminated in the appeal from that decision to the Supreme Court. The Supreme Court has now confirmed that *Re Hastings-Bass* has been misunderstood for over 23 years, and that trustees are not so roundly protected by such a rule.

⁴⁴ *Futter* (n 20) 128.

The Supreme Court's decision in the joined appeals of *Pitt v Holt* and *Futter v Futter* has clarified some of the uncertainties surrounding the rule in *Re Hastings-Bass*. In effect, their Lordships affirmed much of the Court of Appeal's decision, principally from the only fully reasoned judgment of Lloyd LJ. Lord Walker, reading the unanimous decision of the Supreme Court differed from Lloyd LJ on the mistake point and in doing so, it is argued, shifted the 'get out of jail free' card away from the rule in *Re Hastings-Bass* towards mistake.

Notwithstanding the success of the Supreme Court in organising the principles surrounding the rule in *Re Hastings-Bass* so that it does not operate capriciously, their Lordships introduced fresh uncertainty and continued the dubious assistance given to errant trustees through their ruling on mistake. As a consequence of the Supreme Court's conclusions much of the criticisms formerly levied against the rule in *Re Hastings-Bass* are likely to become criticisms of the doctrine of mistake. For better or worse the Supreme Court's statement of law is absolute. Trustees remain armed with a 'get out of jail free' card, but the operative play is no longer receipt of wrong advice but a causative mistake.