COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER:	2203-0043AC and 2203-0045AC
TRIAL COURT FILE NUMBER:	1103 14112
REGISTRY OFFICE:	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, RSA 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("1985 SAWRIDGE TRUSTEES")
STATUS ON APPEAL:	Respondent
RESPONDENT:	THE OFFICE OF THE PUBLIC TRUSTEE OF ALBERTA (the "OPGT")
STATUS ON APPEAL:	Appellant
RESPONDENT:	CATHERINE TWINN
STATUS ON APPEAL:	Appellant
INTERVENERS:	SAWRIDGE FIRST NATION ("SFN") and SHELBY TWINN
STATUS ON APPEAL:	Interveners
DOCUMENT:	**FACTUM**

Appeal from the Memorandum of Decision (Sawridge #12) of the
Honourable Mr. Justice John T. Henderson
Dated the 4th day of February, 2022

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OVERVIEW

1. Trusts are unique in law in that the beneficial title and legal title to assets are separated. Trustees hold legal title to the assets in the trust and beneficiaries hold beneficial title. This distinction is at the very heart of the case before this Court and has been since this action began over ten years ago. The 1985 Sawridge Trustees (the "1985 Trustees") brought an advice and direction application in 2011 to seek direction on two issues: firstly, the approval of the transfer of the assets to the 1985 Trust; and secondly, the determination of who the beneficiaries are.

2. The Consent Order made in 2016 ("2016 Consent Order") by the Honorable Justice Thomas ("Justice Thomas"), was meant to deal with the first issue of legal title to the assets to determine which trustees held legal title. The 2016 Consent Order directed that the title to the assets was held by the 1985 Trustees. The question of who holds beneficial title – that is, who the beneficiaries are – remained outstanding.

3. The Appellants take the position that beneficial ownership was determined through the 2016 Consent Order. However, this position overlooks the central reality of trust law – beneficial and legal title are fundamentally two different concepts. The language of the 2016 Consent Order itself is clear in its silence – beneficial title was not addressed. The Honourable Justice Henderson ("Justice Henderson") identified this issue during case management in April 2019, and the 1985 Trustees pursued an application to interpret the effect of the 2016 Consent Order. The Court made a decision based on an application brought forward by the 1985 Trustees.

4. As Justice Henderson recognized, the 1985 Trustees are in a difficult position.[1] The 1985 Trustees must manage conflicting fiduciary duties to the 1985 Beneficiaries, the 1982 Beneficiaries (as Justice Henderson's decision is the current governing decision), and a fiduciary duty to find a solution to this litigation so benefits can flow to beneficiaries.

5. Rather than focussing on the central and critical legal issue, the Appellants focus on procedure. They attack Justice Henderson, arguing that he "entered the fray",

[1] Justice Henderson's decision under appeal is reported as *Twinn v Trustee Act*, 2022 ABQB 107 at paras 36-41 [*Sawridge #12*].

engaged in a "collateral attack", was results oriented, and even ascribe motive to him for engaging in the review of the 2016 Consent Order. The Appellant Catherine Twinn, and her step-granddaughter, the Intervener Shelby Twinn, go as far as claiming he was biased. This is unfortunate given the fault for any ambiguity in the 2016 Consent Order rests with all the parties. If transfer of beneficial title was to be dealt with through the 2016 Consent Order, it should have been included in the wording of the 2016 Consent Order.

6. This focus on procedure and attacks upon Justice Henderson distracts from the central issue under appeal – was Justice Henderson correct in law when he concluded trustees of one group of beneficiaries could not unilaterally transfer beneficial interest to another trust with a different group of beneficiaries, where the scope of that power did not permit it, and where there was no compliance with s. 42 of the *Trustee Act*.[2]

PART 1 – FACTS

A. The Trusts Were Created for the Benefit of the SFN Members

i. Members as Beneficiaries

7. The history of the pre-1982 informal trusts, the 1982 Trust, the 1985 Trust and the 1986 Trust[3] is not in dispute. In every trust deed examined in this litigation, the one common thread is that assets are held in trust for "members" of the SFN.

ii. Creation of Trusts

8. Prior to the creation of the 1982 Trust, assets belonging to the SFN were held by individuals in informal trusts since the First Nation itself was not considered a valid legal entity capable of holding assets for its membership.[4] The 1982 Trust was created to consolidate assets which were held in these informal trusts and was settled by Chief Walter Twinn. The intention of the Settlor, as stated in the trust deed, was that he was

[2] *Trustee Act*, RSA 2000, c T-8. (*Trustee Act*)
[3] Affidavit of Paul Bujold, sworn September 12, 2011 at paras 29-31. (OPGT Extracts of Key Evidence, ("EKE") Tab 5)
[4] Affidavit of Paul Bujold, sworn September 12, 2011 at para 8. (OPGT EKE, Tab 5)

placing assets in trust for the benefit of the members of the SFN.[5] The 1982 Trust Deed (the "1982 Deed") specified that beneficiaries would be members of the SFN.[6]

9. In 1985, a new trust (the 1985 Trust) was created and assets were purported to be transferred to it from the 1982 Trust. The Settlor was Chief Walter Twinn.

10. The 1985 Trust was settled during a time of significant legal turbulence in Canada due to the inception of the *Canadian Charter of Rights and Freedoms*.[7] Among other changes, the Charter was set to affect the *Indian Act*[8] – namely in how First Nations determine membership, with membership now being non-discriminatory, and extending to illegitimate children, and women who had previously been excluded after marrying men outside their First Nation. As the 1982 Trust tied the definition of "Beneficiary" to the concept of membership, the SFN feared an influx of new members and therefore beneficiaries.[9] Thus, the 1985 Trust Deed (the "1985 Deed") defined "beneficiaries" as "members" based on a frozen-in-time version of the *Indian Act* (which would not be subjected to the anticipated changes due to the *Charter*).[10]

11. In short, the SFN was in a protectionist mode trying to limit the number of members and wanted to control who the members would be. The SFN opposed the portion of Bill C-31 (the act amending the *Indian Act*) dealing with inclusion of women who lost their membership as a result of marriage,[11] initiated constitutional litigation over the right to control membership,[12] and, inter alia, opposed the injunction to include 11 members who lost membership as a result of marriage.[13]

12. Despite the Appellants' claims, there is no evidence to show that the intention of the settlor of the 1985 Trust was to benefit individuals who were not members of the First Nation. Regardless, the language in both the 1982 Deed and the 1985 Deed is clear in setting out that the trusts were created for the members of the First Nation.

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[5] Affidavit of Paul Bujold, sworn September 12, 2011 at Exhibit A, para 1. (OPGT EKE, Tab 5)
[6] Affidavit of Paul Bujold, sworn September 12, 2011 at Exhibit A, para 6. (OPGT EKE, Tab 5)
[7] s 8, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[8] *Indian Act*, RSC 1985, c I-5; for the historical version, see Affidavit of Paul Bujold, sworn September 12, 2011 at Exhibit F. (OPGT EKE, Tab 5). Any references to historical nomenclature are not intended to be disrespectful.
[9] Affidavit of Paul Bujold, sworn September 12, 2011 at Exhibit A, para 15. (OPGT EKE, Tab 5)
[10] Affidavit of Paul Bujold, sworn September 12, 2011 at Exhibit G. (OPGT EKE, Tab 5)
[11] *Sawridge Band v Canada*, 2003 FCT 347, as cited in *Sawridge #12*, *supra* note 1 at para 27(viii).
[12] *Sawridge Band v Canada*, 2008 FC 322, as cited in *Sawridge #12*, *supra* note 1 at paras 84 & 85.
[13] *Sawridge Band v Canada*, 2003 FCT 347, as cited in *Sawridge #12*, *supra* note 1 at para 84.

B. Procedural History

i. 2011 Procedural Order

13. The 1985 Trustees commenced this Action through a procedural order issued by Justice Thomas in 2011.[14] In that Order, the 1985 Trustees sought the advice and direction of the Court on two issues:

a. Firstly, to approve the transfer of assets from the 1982 Trust to the 1985 Trust ("**First Issue**"); and

b. Secondly, to determine the definition of beneficiaries because it was discriminatory ("**Second Issue**").[15]

ii. 2015 Settlement Application

14. On June 12, 2015, the 1985 Trustees brought a settlement application to resolve the First Issue and the Second Issue.[16] They sought an efficient, practical solution to the longstanding litigation. In keeping with their various potential fiduciary duties, the 1985 Trustees also proposed to grandfather all the minors the OPGT represented at that point granting them beneficial title.

15. The 1985 Trustees separated the issues of legal title (the First Issue) and beneficial title (the Second Issue) in this Settlement Application. They did not conflate them to suggest that the transfer of assets then determined who the beneficiaries were.

16. The Settlement Application was adjourned and never revisited as there was insufficient interest from the parties. It was clear that the 1985 Trustees needed to find another path to solving the problems addressed in the Settlement Application.

iii. Transfer of Assets - 2016 Consent Order

17. With respect to the First Issue, in 2016, the parties ultimately entered into a consent order and the 1985 Trustees prepared a brief to support the request for the 2016 Consent Order. Even the transfer of assets to the 1985 Trustees was not

[14] Procedural Court Order, Justice Thomas, dated August 31, 2011, filed September 6, 2011. (OPGT EKE, Tab 3)
[15] Procedural Court Order, Justice Thomas, dated August 31, 2011, filed September 6, 2011, at para 1. (OPGT EKE, Tab 3)
[16] Application of the Sawridge Trustees, filed June 12, 2015, at Schedule B. (1985 Trustees EKE, Tab 1)

completely settled as the OPGT negotiated a reservation for an accounting of the assets.[17]

18. Contrary to the suggestion of Catherine Twinn, that the intention of the 2016 Consent Order was to "extinguish" the rights of the 1982 beneficiaries,[18] the 2016 Consent Order does not address the elimination of the rights of a class of beneficiaries. Nor does the evidence support this. Rather, the evidence and the pleadings are clear that the Second Issue remained a live issue.

19. There is no direct evidence the 1985 Trustees intended to transfer beneficial title to the assets in the 2016 Consent Order. The Appellants and the intervener Shelby Twinn found certain instances where the 1985 Trustees refer to the "beneficiaries of the 1985 trust" and submit that this shows the intention of the 1985 Trustees.[19]

20. The 2016 Consent Order does not address beneficial ownership.[20] The 1985 Trustees did not consent to relief involving beneficial ownership. In granting the 2016 Consent Order, Justice Thomas does not address beneficial ownership. Rather, after signing the Consent Order, the next step was "who the beneficiaries are."[21] At the conclusion of the 2016 Consent Order hearing, the parties moved on to the Second Issue.

iv. 2018 Jurisdiction Application

21. To address the Second Issue, the 1985 Trustees filed a two-part application to confirm whether the Court had jurisdiction to consider the matter (the Jurisdiction Application). If the Court had jurisdiction, the 1985 Trustees then sought the Court's advice on the substance of the Second Issue, "who the beneficiaries are."

22. The Jurisdiction Application was a step on the path to curing the discrimination and ending the litigation. Justice Henderson provided a different path to a solution.

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[17] 2016 Consent Order, Justice Thomas, dated August 24, 2016, filed August 25, 2016 at para 2. (1985 Trustees EKE, Tab 2)
[18] Factum of the Appellant, Catherine Twinn at para 46.
[19] Factum of the Appellant, The OPGT at para 27.
[20] 2016 Consent Order, Justice Thomas, dated August 24, 2016, filed August 25, 2016. (1985 Trustees EKE, Tab 2)
[21] *Sawridge #12*, *supra* note 1 at para 258.

v. 2019 Interpretation Application of the 2016 Consent Order

23. During case management, on April 25, 2019, Justice Henderson posed a legal question regarding beneficial title. After consideration of the legal question posed, and consistent with their fiduciary duties to find a solution, the 1985 Trustees thought it was their fiduciary duty to bring brought an application to have the legal question of whether beneficial title was transferred under the 2016 Consent Order determined. This application was brought by the 1985 Trustees of their own accord and voluntarily.[22] They were not directed by the Court to do so.[23] The Court did not have a "desired result"[24] and it allowed the parties to come to Court several times for clarification of the issue, commencing April 25, 2019, filed 17 briefs, and presented arguments for 2 days in November 2021, in order to fully explore the legal questions posed by the 1985 Trustees in their application.[25]

24. Justice Henderson's question raised the issue of whether the rights of the 1982 Trust beneficiaries had been considered and reiterated the concern the 1985 Trustees had of future litigation.[26]

vi. Summary of Attempts to Address Second Issue

25. Throughout this process, the 1985 Trustees have made several attempts to address the Second Issue. The 1985 Trustees attempted the amendment through a settlement to be imposed using the Court's *parens patriae* jurisdiction;[27] they attempted to amend using section 42 of the *Trustee Act*;[28] they took steps towards amendment by entering an order to deem the trust to be discriminatory;[29] and, they brought the Jurisdiction Application.[30]

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[22] Application for Interpretation of the 2016 Consent Order, Filed September 13, 2019 at para 10. (1985 Trustees EKE, Tab 3)
[23] Application for Interpretation of the 2016 Consent Order, Filed September 13, 2019 at paras 8-9. (1985 Trustees EKE, Tab 3)
[24] As suggested in the Factum of the Appellant, Catherine Twinn at paras 25(b), 52, and 53.
[25] *Sawridge #12*, *supra* note 1 at para at para 27; For the Transcripts of Proceedings related to these appearances, see OPGT EKE, Tabs 27-30 and 32-35.
[26] Transcript of Case Management Hearing, held April 25, 2019 at 503:31-40. (OPGT EKE, Tab 26)
[27] Application of the Sawridge Trustees, filed June 12, 2015, at Schedule B. (1985 Trustees EKE, Tab 1)
[28] Affidavit of Paul Bujold, sworn January 9, 2019 at Exhibit A. (OPGT EKE, Tab 24)
[29] Consent Order (Issue of Discrimination), Justice Thomas, dated January 19, 2018, filed January 22, 2018 (1985 Trustees EKE, Tab 4)
[30] Application by the Sawridge Trustees for Advice and Direction, filed August 11, 2018 at paras 5 and 23. (OPGT EKE, Tab 20)

26. The Appellants did not take the position that these steps were beyond the Court's power.

PART 2 – GROUNDS OF APPEAL

27. The OPGT raised five grounds of Appeal, divided into six sections of its argument.[31] Additionally, the intervener Catherine Twinn raised several grounds of appeal, many of which are similar to or identical to those raised by the OPGT.[32]

28. The 1985 Trustees respond to each of the allegations set out by the Appellants with three general statements which are explained in the various subheadings that follow:

a. Justice Henderson was correct in applying the law regarding the lack of authority of the 1982 Trustees to transfer the beneficial title of the subject assets to the 1985 Trust;

b. Justice Henderson was correct in stating the Court has the jurisdiction to interpret a Court order; and

c. At no time did Justice Henderson exceed his jurisdiction as CMJ.

PART 3 – STANDARD OF REVIEW

29. In general terms, the 1985 Trustees agree with the Standard of Review presented by the OPGT in its factum: the standard of review is correctness for questions of law, and palpable and overriding error on questions of fact, with a higher standard for questions of mixed fact and law.[33] Further, discretionary and case-flow-related decisions of a CMJ are owed a degree of deference.[34] The Court of Appeal has held repeatedly held that CMJs are to be afforded "'elbow room' to resolve endless interlocutory matters", and that this may require the CMJ to be "innovative."[35]

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[31] Factum of the Appellant, The OPGT at para 25.
[32] Factum of the Appellant, Catherine Twinn at para 25.
[33] Factum of the Appellant, The OPGT at para 68, citing *Piikani Nation v McMullen*, 2020 ABCA 366 at para 26.
[34] Factum of the Appellant, The OPGT at para 69, citing *Piikani Nation v McMullen*, 2020 ABCA 366 at paras 23 and 27.
[35] *Korte v Deloitte, Haskins and Sells*, 1995 ABCA 569 at para 3; upheld and reaffirmed most recently in *Piikani Nation v McMullen*, 2020 ABCA 366 at para 23.

30. However, in its factum, the OPGT suggests that the decisions of Justice Henderson ought to be afforded less deference simply because of his "newness."[36] The 1985 Trustees submit that this position is entirely without merit, based both on the law and the facts of this case.

31. In putting forward this line of argument, the OPGT relies on a single authority: *Lameman v Alberta*, which states "Deference is increased where the decision is made by a CMJ as part of a series of decisions in an ongoing matter."[37] *Lameman* does not serve to reduce the degree of deference owed to a CMJ; rather, it increases the baseline degree of deference every CMJ is owed in circumstances where that CMJ is involved in an ongoing matter. Accordingly, *Lameman* serves to increase the degree of deference that Justice Henderson is owed.

32. Regardless, Justice Henderson spent a great deal of time involved in this case ahead of rendering his decision that is now the subject matter of this appeal. Between the time Justice Henderson was appointed as CMJ in December 2018, and when he made his decision, he had received and read a total of 11 affidavits, 29 briefs and reply briefs, 4 applications, 5 productions and submissions of documents, 3 letters, and issued 7 orders. This does not include the 10 boxes of preliminary documentation Justice Henderson read and reviewed prior to the commencement of proceedings in April 2019.[38]

33. In short, notwithstanding the jurisprudence does not support a lesser degree of deference for "new" CMJs, Justice Henderson was far from unfamiliar with the matters before him; he had been the CMJ for over 38 months. Accordingly, his decisions should be given additional deference.

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[36] Factum of the Appellant, The OPGT at para 74.
[37] *Lameman v Alberta*, 2013 ABCA 148 at para 13, citing *Ford Motor Company of Canada, Limited v Welcome Ford Sales Ltd,* 2011 ABCA 158 at para 12 and *De Lage Landen Financial Services Canada Inc v Royal Bank of Canada*, 2010 ABCA 394 at para 13.
[38] Transcript of Case Management Hearing, held April 25, 2019 at 502:34. (OPGT EKE, Tab 26)

PART 4 – ARGUMENT

A. Justice Henderson was correct in applying the law regarding the lack of authority of the 1982 Trustees to transfer the beneficial title of the assets to the 1985 Trust

i. The "power of advancement" cannot be used to benefit strangers

34. The Appellants allege that Justice Henderson misinterpreted and inappropriately applied the law relating to the ability of the 1982 Trustees to use the power of advancement found in the 1982 Trust to transfer all legal and beneficial title to the 1985 Trust.[39] Specifically, they allege that the wording of the power of advancement contained in the 1982 Trust gave the 1982 Trustees unfettered discretion to complete the transfer of all legal and beneficial ownership of the assets to the 1985 Trust.[40] Further, they argue that, on the day of the transfer in 1985, the beneficiaries in the two trusts were the same, and therefore the transfer was 'beneficial' to the 1982 and 1985 beneficiaries.[41]

35. With respect, it is the Appellants who are mistaken as to how a power of advancement can be used. Justice Henderson was correct in stating that "The ability of the 1982 Trustees to deal with the trust assets is prescribed by the terms of the 1982 Deed and by the fiduciary duties that they owed to the 1982 Beneficiaries, present and future members of the SFN."[42]

36. Justice Henderson correctly highlights two essential components of any power given to a trustee. First, the scope of the power is defined by the trust deed. Secondly, the trustees' fiduciary duties to the beneficiaries are paramount. Put another way, by Professor Geriant Thomas in his seminal text, *Thomas on Powers*, "the power can be exercised only in favour of the objects of that power and in furtherance of the purpose for which it was conferred."[43]

37. Regarding the scope of the power being prescribed by the terms of the deed, this is a "fundamental juristic principle that any form of authority may only be exercised for

[39] Factum of the Appellant, The OPGT at para 67(D); Factum of the Appellant, Catherine Twinn at para 71.
[40] Factum of the Appellant, The OPGT at para 14(ii);
[41] Factum of the Appellant, The OPGT at paras 103 and 106
[42] *Sawridge #12*, *supra* note 1 at para 122.
[43] Geraint Thomas, *Thomas on Powers*, 2nd Ed (Oxford: Oxford University Press, 2012) at 400.

the purposes conferred, and in accordance with its terms."[44] Justice Henderson cites Justice Cullity regarding the "even hand" principle, stating that the power of advancement is "subject to fiduciary standards, and the supervision of the court…"[45] He further confirms that a Trustee cannot "refuse to consider the interests of a beneficiary who is known to him."[46]

38. The 1982 Deed sets forth the following core purposes and terms:

> ..the Settlor is the Chief… and in that capacity has taken title to certain properties on trust for the present and future members of the [Band]
>
> No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein.
>
> the Trustees shall hold the Trust Fund for the benefit of all members, present and future, of the Band…] [emphasis added]
>
> the Trustees shall have complete and unfettered discretion to pay… [income and capital]…as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above [emphasis added]

39. The Appellants cite *Pilkington*[47] as authority for the trust to trust transfer being proper.[48] *Pilkington* may properly stand for the principle that a broad power of advancement includes the ability to complete a trust to trust transfer. It cannot stand for the principle that the power allows the trustees to perform acts beyond the purposes and terms of the trust, or as set out in the defined powers. Here, the objects of the power of advancement are the present and future members of the SFN. The donee of the power, the 1982 Trustees "cannot introduce a stranger to the class of discretionary objects."[49]

40. If the Appellants' interpretation of the 2016 Order is correct, possibly 26-55 non-members of the SFN are beneficiaries.[50] To use Professor Geraint Thomas' phrase, they are 'strangers' to the Trust. To use the phrasing referenced by Justice Henderson, in *Pilkington*, these non-members are not "incidental."[51] To use the phrasing referenced

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[44] Geraint Thomas, *Thomas on Powers*, 2nd Ed (Oxford: Oxford University Press, 2012) at 403.
[45] *Sawridge #12*, *supra* note 1 at para 142.
[46] *Sawridge #12*, *supra* note 1 at para 143.
[47] *Pilkington v. Inland Revenue Commissioners*, HL 8 Oct 1962. (*Pilkington*)
[48] Factum of the Appellant, The OPGT at para 67(B); Factum of the Appellant, Catherine Twinn at para 60 and 76.
[49] Geraint Thomas, *Thomas on Powers*, 2nd Ed (Oxford: Oxford University Press, 2012) at 429.
[50] *Sawridge #12*, *supra* note 1 at paras 16 and 64.
[51] *Sawridge #12*, *supra* note 1 at para 154, citing *Pilkington* at para 636.

by Justice Henderson, in *Hunter Estate*, non-members are "alien" to the intentions of the 1982 Settlor, to benefit 'all members, present or future' of the Band.[52]

41. The fact that, in one moment in time, on April 15, 1985, the beneficiaries of the 1982 Trust were the same as the 1985 Trust, does not mean the beneficiaries of the two trusts are the same. To rely on this is disingenuous. There would be no need for a 1982 Trust and a 1985 Trust if the intention of the 1985 Settlor was to benefit the same people named in the 1982 Trust, with the same assets. The definition of beneficiaries in the two trusts is intentionally, markedly different, and the evidence is clear the 1985 Settlor's "Objective Number 1" was to exclude those women who would be SFN members under Bill C-31.[53]

42. Nothing in the 1982 Deed preserved the 1982 Settlor's power to exercise control over legal or beneficial ownership of the assets after he transferred them into the 1982 Trust in 1982, or to revise the definition of beneficiary as set out in the 1982 Deed.

43. The intentions of each settlor of a trust, first and foremost, must be judged based on the particular terms of each trust. One person acting as a settlor on multiple trusts cannot be ascribed the same intentions for each trust. The terms of each trust clarify the intentions of each Settlor. Only the terms of the trust can determine if that same person, or any other, can make changes to the trust or to the beneficiaries. The Settlor cannot disregard those terms, attempt to retain control of the assets, and "do with the trust property as he pleases."[54]

44. The Appellants point out that in *Pilkington*, the approved trust transfer potentially benefited Penelope's unborn children, who were not beneficiaries of the original trust.[55] Hence they say that where the power of advancement is sufficiently broad (which it was in the 1982 Deed) then it includes the ability to benefit new beneficiaries,[56] or 'strangers.' This is an erroneous leap of logic.

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[52] *Sawridge #12*, *supra* note 1 at para 163, citing *Hunter Estate* (1992), 7 OR 372 (CJ) at para 20, OJ No 400.
[53] *Sawridge #12*, *supra* note 1 at para 94.
[54] Donovan Waters, Lionel Smith, Mark Gillen, *Law of Trusts in Canada,* 5th Ed (Toronto: Carswell) at p 154.
[55] Factum of the Appellant, Catherine Twinn at para 77.
[56] Factum of the Appellant, The OPGT at para 67(B).

45. In trust law, incidental benefit to non-objects of the power may be permitted, where it benefits the object. This may be done by addressing the object's legal or moral obligations (for example to the object's spouse or children).[57] The power is exercised for:

> the benefit (albeit "benefit" in the wide sense) of the object, O. If there is a power to advance for the benefit of O, one cannot normally create new trusts giving trustees a wide power of appointment in favour of O's siblings, or cousins, or more remote family, as that will not normally be for the benefit of O. The test is whether the trustees have O's interest and O's interest only, in mind.[58]

46. Justice Henderson applied the law correctly by finding that the 1982 Trustees' power to complete a trust to trust transfer did not go so far as to permit the 1982 Trustees to go beyond the scope and purpose of the 1982 deed, or to benefit non objects of the power. It would be difficult to find that conferring benefits on individuals who are not members of the First Nation was a benefit to the 1982 Beneficiaries. It is also difficult to say that in the transfer, the 1982 Trustees had the 1982 Beneficiaries' interest and only the 1982 Beneficiaries' interest in mind.[59]

47. In trust law, there may be several types of beneficiaries, including individual beneficiaries and classes of beneficiaries. Each trust deed in this litigation was prepared for the benefit of a class of beneficiaries.[60] This is similar to the concept of a class gift, which is defined as the number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole, rather than to members constituting the body as individuals. Another analogy is the concept of a "static entity", as described in *Bruderheim Community Church v Board of Elders*.[61]

48. Due to some clever timing, individuals who comprised the class of beneficiaries as between the 1982 Trust and the 1985 Trust were identical at one moment in time in 1985, because the definition of beneficiaries at that moment were members of the SFN.

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[57] Geraint Thomas, *Thomas on Powers*, 2nd Ed (Oxford: Oxford University Press, 2012) at 425.
[58] James Kesler & Fiona Hunter, *Drafting Trusts & Will Trusts in Canada*, 5th Ed (Toronto: LexisNexis) at p 228.
[59] *Sawridge #12*, *supra* note 1 at para 193, quoting Professor Cullity (as he then was).
[60] *Sawridge #12*, *supra* note 1 at para 192.
[61] *Bruderheim Community Church v Board of Elders*, 2018 ABQB 90 at paras 74-78; aff'd 2020 ABCA 393, as cited by Justice Henderson in *Sawridge #12*, *supra* note 1 at para 71.

The focus was not on the individuals that comprised the class at that particular moment in time. *Pilkington* would permit the transfer because it involved the same class – members of the First Nation. However, if the class is not identical, the transfer of beneficial title could not work. In this case, the changing definition led to dramatic exclusion of some beneficiaries and an increase in the 1985 beneficiaries who are not members of the SFN.

49. Justice Henderson queried whether the 1985 Trustees could transfer the assets from the 1985 Trust to the 1986 Trust, because the definition of "beneficiaries" is similar to that in the 1982 Trust.[62] The Appellants said that it was not possible.[63] This is, however, difficult to reconcile. If the previous transfer which resulted in a different group of individual beneficiaries was legitimate, then the subsequent transfer also ought to be legitimate, so long as the receiving trust deals with a similar class – members of the SFN. This is consistent with the evidence of the former Chief's intention to transfer the assets into the 1986 Trust.[64] Conversely, if it is impermissible to transfer the 1985 Trust assets to the **1986** Trust because the beneficiary definition differs, the same must have been true in 1985.

50. Where there is an "unauthorized appointment to someone not within the class of objects," or where "what is done is not within the scope of the power", the transaction is void.[65] Justice Henderson was correct in law when he found the attempted transfer of beneficial title in 1985 to be void. Acknowledging the validity of the 2016 Consent Order, and the damage that would be done to the assets if the transaction was unwound, Justice Henderson appropriately reconciled these two states of affairs by noting that only legal title, not beneficial title, had been transferred.

51. When faced with a void transaction in a trust law situation, "the Court can use equity to avoid damaging uncertainty as to what has and has not been validly decided,

[62] *Sawridge #12*, *supra* note 1 at para 98.
[63] Factum of the Appellant, The OPGT at paras 17-18; Factum of the Appellant, Catherine Twinn at para 19-20, and 87.
[64] Affidavit of Paul Bujold, sworn September 12, 2011 at para 34. (OPGT EKE, Tab 5)
[65] Geraint Thomas, *Thomas on Powers*, 2nd Ed (Oxford: Oxford University Press, 2012) at 533.

and to exercise its discretion as to the appropriate remedy, thereby making it easier to reach a just outcome while recognizing the defect in the transaction."[66]

ii. Section 42 of the *Trustee Act* prohibits non-compliant transfers

52. Upon reviewing section 42 of the *Trustee Act*, Justice Henderson correctly concluded that, without approval of the Court, the transfer of assets was not possible, and was, in fact, prohibited by section 42(3).[67]

53. In reviewing the history of section 42 of the *Trustee Act*, Justice Henderson concludes that the intention of the Legislature was to maintain the integrity of trusts, and variations are only permitted where all beneficiaries consent and the Court approves. The Court may review contingent beneficiaries and protect them by not allowing a variation.

54. Since Objective #1 in the 1985 Trust creation was the elimination of rights of the Bill C-31 women, the failure to go to Court to have the variation approved denied the Court the opportunity to consider the variation and consent on behalf of the Bill C-31 women. Failure to comply with section 42 was serious, as there was a specific targeted action to exclude a subclass of beneficiaries. This failure rendered the 1985 Asset transfer void.[68]

55. The Appellants point to *Pilkington* as authority for the transfer, but there is no authority for the proposition that *Pilkington* could override the requirements of section 42 of the *Trustee Act*.

iii. The intentions of the 1982 Settlor, as outlined in the 1982 Trust, are paramount to any other intentions

56. The Appellants spend considerable time in their factums asserting their interpretation of the intentions of the various parties, including the 1982 Trustees in 1982 and in 1985, the 1985 trustees in 1985, the 1985 Trustees as litigants in 2016 and

[66] Geraint Thomas, *Thomas on Powers*, 2nd Ed (Oxford: Oxford University Press, 2012) at 533.
[67] *Twinn v Trustee Act*, 2022 ABQB 107 at para 119, 216-235, 273, and 281. [Sawridge #12]
[68] *Sawridge #12*, *supra* note 1 at para 209.

currently, the other parties to the litigation in 2016, as well as the intentions of the 1982 Settlor and the 1985 Settlor.[69]

57. The 1982 Settlor's intentions in 1982, when he settled the 1982 Trust, are paramount. These intentions are set out in the 1982 Deed, reproduced above.[70]

58. Trustees' intentions are rarely of paramount importance. Rather, their duty is to implement the settlor's intentions, as per the deed. It may appear the 1982 Trustees intended to transfer beneficial title to the 1985 trust; however, this is immaterial. The better question is, could they do it in law according to the terms of the 1982 Trust?

59. The Appellants' allegation that the 1985 Trustees intended to transfer beneficial title of the assets to, and was being held by, the 1985 Trustees for the benefit of the 1985 Beneficiaries is likewise immaterial. What matters is, in law, did the 1982 Trustees have the power to transfer beneficial ownership of the 1982 assets to the 1985 Trustees?

60. The 1985 Settlor's intentions in settling the 1985 Trust are relevant to the interpretation of the 1985 Trust. However, when the 1985 Trustees receive the assets of the 1982 Trust, the 1985 Settlor's intentions are only relevant insofar as those intentions must be to benefit the same objects – the same class of beneficiaries – and fit within the scope and purpose of the 1982 Trust, if the parties wish to successfully transfer beneficial title to the assets from the 1982 Trust to the 1985 Trust.

61. The record shows this was not the case.

B. Justice Henderson was correct in setting out and applying the law regarding the interpretation of a Court order

i. Justice Henderson did not err in interpreting the 2016 Consent Order

62. In the proceedings below, Justice Henderson applied the correct principles regarding the interpretation of Court Orders when interpreting the 2016 Consent Order.[71] In its Factum, the OPGT explicitly recognizes the validity of both the

[69] Note: Catherine Twinn and the OPGT also assert their interpretation of Justice Henderson's intentions, which is dealt with in this factum at pages 21 to 23.
[70] See paragraph 38 of this factum.
[71] *Sawridge #12, supra note 1* at para paras 110-116.

interpretive legal test applied by Justice Henderson[72] and the objective, not subjective, interpretation of a Court Order,[73] both described as follows in *Yu v Jordan*:

> ... the interpretation of a Court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the Court. As such it is the Court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a Court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.[74]

63. This Court has cited *Yu* with approval and adopted the foregoing paragraph as of 2022 in *Alberta Health Services v Pawlowski*.[75]

64. In short, "it is the Court, not the parties, that determines the meaning of its order."[76] The Appellants incorrectly focus on the subjective intent and interpretation of the parties. This is of limited value. Justice Henderson interpreted the 2016 Consent Order objectively and his interpretation was not tarnished through the subjective intent and interpretation of the parties, in accordance with the law as stated in *Yu* and *Pawlowski*.

65. The Courts have recognized the importance of objective interpretation of Court Orders without assistance from the subjective intent and interpretation of the parties.

66. In *Weinrich Contracting Ltd v Wiebe*, this Court reviewed the interpretation of an order by a CMJ that stayed proceedings and tolled limitation periods.[77] Applying a similar test to the test in *Yu*, this Court also recognized that "the intention of the Court that granted the order" was relevant, as opposed to the subjective intention of the parties.[78] Another relevant factor in *Wiebe* was "the arguments made by the parties."[79]

67. In *Wiebe*, this Court also made several important observations applicable to the case in hand. Firstly, this Court held that the CMJ had to address the litigation as it actually unfolded and not based on how it might have progressed had different

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[72] Factum of the Appellant, The OPGT at para 92.
[73] Factum of the Appellant, The OPGT at para 95.
[74] *Yu v Jordan*, 2012 BCCA 367 at para 53 [*Yu*].
[75] *Alberta Health Services v Pawlowski*, 2022 ABCA 254 at para 51.
[76] *Alberta Health Services v Pawlowski*, 2022 ABCA 254 at para 51.
[77] *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at paras 5-7.
[78] *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at para 25.
[79] *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at para 25.

decisions or strategies been employed by the parties.[80] Secondly, that as it pertains to an interpretation of an order, a reasonable interpretation consistent with the wording of the text would not warrant appellate intervention.[81]

68. Justice Henderson had the authority to interpret the 2016 Consent Order and did so by abiding by the correct law. Justice Henderson objectively interpreted the 2016 Consent Order according to the test set out in *Yu* and adopted by this Court in *Pawlowski*. Justice Henderson objectively determined the "intentions of the Court" in granting the 2016 Consent Order as opposed to the intentions of the parties in applying for the 2016 Consent Order, and as per *Wiebe* came to a reasonable conclusion consistent with the wording of the order. Justice Henderson also rightfully considered the objective arguments, grounded in law, of the SFN and the 1985 Trustees to guide his objective interpretation, again as per *Wiebe*.

69. In contrast to the objective approach employed by Justice Henderson with the proper consideration of SFN and Trustee arguments, the OPGT in their Factum advances a position based on the subjective intention and interpretation of the parties. They argue that the issue of beneficial title was off the table after the 2016 Consent Order, that the 2016 Consent Order was meant to ask a specific question on the transfer of beneficial title, but cite no authority or language in the 2016 Consent Order to support the 2016 Consent Order asking this question, and they provide speculation about the subjective intention of the parties, without evidence to support this subjective intention of the question of beneficial interest nor authority to support whether the subjective intention of the parties is relevant.

70. On this note, the 1985 Trustees were clear that beneficial title was still an issue to be determined, and Justice Thomas mused that a trial may be necessary to determine this final issue.

71. Furthermore, Justice Henderson accurately declined applying general contractual interpretation principles; the 2016 Consent Order was not an agreement amongst all

[80] *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at para 26
[81] *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176 at para 33.

parties, and the 1982 Trustees and 1982 Beneficiaries were not parties to it. SFN and the 1985 Trustees also did not intend a transfer of beneficial title.

72. This Court has cited with approval the definition of consent order as advanced under an Appeal Record Digest in *Gerrow v Dewar*:

> A consent order, by definition, means that the respondent[s] to the relief being sought… have consented, not that some other person has consented.[82]

73. The Appellants' interpretation of the 2016 Consent Order would have major negative consequences to the 1982 Beneficiaries, but, as noted by Justice Henderson, they did not consent to the 2016 Consent Order.[83] Therefore, the 2016 Consent Order was not a contract, as it is not a settlement agreement consented to by all parties.

74. Therefore, although Justice Henderson correctly commented that the 1985 Trustees did not intend to transfer beneficial ownership under the 2016 Consent Order, the 1985 Trustees' intentions did not (and should not) unilaterally inform Justice Henderson's interpretation of the 2016 Consent Order under the *Yu* test. In contrast to the arguments advanced by the OPGT, the intention of the parties and subjective interpretations are not as relevant to the interpretation of the 2016 Consent Order, which was correctly recognized by Justice Henderson as not transferring beneficial title.

ii. <u>The Parties did not intend to determine beneficiaries in the 2016 Consent Order</u>

75. The Appellants both allege that Justice Henderson "created a record that did not exist" in 2016.[84] Specifically, they allege that Justice Henderson "committed a palpable and overriding error in finding the 1985 Trustees had not intended the [2016 Consent Order] to confirm the transfer of the beneficial interest in the assets to the 1985 beneficiaries."[85]

76. The Appellants refer to portions of pleadings and evidence to support this allegation. With respect, this selective emphasis on excerpts in isolation and without

[82] *Gerrow v Dewar*, 2011 ABCA 348 at para 4.
[83] *Sawridge #12*, *supra* note 1 at paras 4, 51, and 114.
[84] Factum of the Appellant, Catherine Twinn at para 4.
[85] Factum of the Appellant, The OPGT at part 4.

context is in fact an attempt by the Appellants to create their own alternative record that did not exist in 2016.

77. When taken in its entirety, the record shows the 1985 Trustees did not know who the beneficiaries were, and to whom they owed a fiduciary duty. They recognized they owed fiduciary duties to the 1985 Beneficiaries, but also possibly to the 1982 Beneficiaries, and others.

78. The application arose because the 1985 Trustees wished to make distributions, but were uncertain to whom they could make those distributions. Beginning in 2009, they attempted to give notice to 'individuals who may be beneficiaries of the 1985 Trust' by placing advertisements in all known newspapers in western Canada.[86] This information was used to compile a list of who may be beneficiaries and potential beneficiaries of the 1982 Trust and 1985 Trust, including, inter alia, all registered members of the SFN, and all affiliates known to the government.

79. In an open letter to all of these potential beneficiaries, Mr. Bujold explained the process and ended with: "where it is still not clear after this process whether someone is or is not a beneficiary, the Trusts will apply to the Alberta Court for its advice on the matter."[87]

80. In 2011, the 1985 Trustees began the Court process to seek clarification on the two foundational issues at the heart of these proceedings, being the First Issue and the Second Issue.

81. First, the 1985 Trustees sought to set the procedure for answering these two questions. On August 31, 2011, Justice Thomas directed the 1985 Trustees to serve notice of the application on various people, including, but not limited to all known and potential beneficiaries of the 1982 and 1985 Trusts. Collectively, the various people were referred to as "Beneficiaries and Potential Beneficiaries."[88]

82. By 2015, the matter had not resolved, and the 1985 Trustees brought the Settlement Application to resolve the First and Second Issues, whereby beneficiaries

[86] Affidavit of Paul Bujold, sworn August 30, 2011 at paras 7-8. (OPGT EKE, Tab 2)
[87] Affidavit of Paul Bujold, sworn August 30, 2011 at Exhibit D, page 4. (OPGT EKE, Tab 2)
[88] Procedural Court Order, Justice Thomas, dated August 31, 2011, filed September 6, 2011. (OPGT EKE, Tab 3)

would be defined as “members in the Band”, similar to the 1986 Trust definition of beneficiaries, and including the Bill C-31 women.[89] Further, the 20 minor 1985 beneficiaries who were not members of the SFN would be ‘grandfathered’ in as Beneficiaries.[90] Secondly, the transfer of the assets from the 1982 Trust to the 1985 Trust would be approved.[91] The parties could not agree on terms, and the application was adjourned.

83. In 2016, the 1985 Trustees proposed a revised solution to resolve at least the First Issue, the transfer of assets. In presenting the proposed consent order to the Court, counsel for the 1985 Trustees stated: “We simply wish to have the Court agree that the transfer is approved and the 1985 Trust is the entity with which to deal.”[92]

84. The 1985 Trustees acknowledge that, with the benefit of hindsight, they, and all parties, should have been more clear in their wording of the 2016 Consent Order.

85. The Appellants make much of the fact that the 1985 Trustees did not explicitly state that they intended only to transfer legal title, not beneficial title. They rely heavily on one of Mr. Bujold’s statements, that “the Trustees seek the Court’s direction to declare that the asset transfer was proper and that the assets in the 1985 Trust are held in trust for the beneficiaries of the 1985 Trust.”[93] This statement should be taken in context of the entire application for advice, and the conduct of the 1985 Trustees.[94] The 1985 Trustees were steadfast; since 2009, in their concern to whom they could make any distributions. They did not think that the 2016 Consent Order resolved this. Their actions bear this out. Since 2016, they have continued to seek guidance on the Second Issue, who the beneficiaries are, and have made no distributions.

86. Interestingly, until Justice Henderson astutely identified the separation between legal and beneficial title to the assets, this more precise wording had been explicitly used in the Deed of Transfer, dated April 16, 1985, between the 1982 Trustees and the

[89] Application of the Sawridge Trustees, filed June 12, 2015, at Schedule B. (1985 Trustees EKE, Tab 1)
[90] Application of the Sawridge Trustees, filed June 12, 2015, at Schedule B. (1985 Trustees EKE, Tab 1)
[91] Application of the Sawridge Trustees, filed June 12, 2015, at Schedule B. (1985 Trustees EKE, Tab 1)
[92] Letter from Dentons to Hutchison Law, dated June 22, 2016 (OPGT EKE, Tab 8), as cited by Justice Henderson in *Sawridge #12*, *supra* note 1 at para 12.
[93] Affidavit of Paul Bujold, sworn September 12, 2011 at para 35. (OPGT EKE, Tab 5)
[94] Affidavit of Paul Bujold, sworn September 12, 2011 at para 32 to 35. (OPGT EKE, Tab 5)

1985 Trustees, which specifically states the 1982 Trustees hold 'legal title' to the assets, and that they transfer 'legal title' to the 1985 Trustees.[95]

87. Justice Henderson reasonably and appropriately inferred that the 1985 Trustees' hesitance to make distributions until the Court had clarified for whom the assets were held, in fact meant that 'beneficial interest' or 'who the beneficiaries are' as Justice Thomas characterized it, was still a live issue. There was no common intention between the parties on this point.

88. Ultimately, the parties' intentions in 2016 are secondary to whether or not, in law, beneficial title could be transferred.

89. Trustees have duty to future beneficiaries. The 1982 Trustees could not simply favor the current Beneficiaries over the future Beneficiaries. The 1982 Trustees had a duty to both. They had a duty to those Beneficiaries who would be born in the future and a duty to the Bill C-31 women who they knew would be made Beneficiaries. They also had a duty not to dilute the trust for the current Beneficiaries.

90. Professor Donovon Waters states, in *Law of Trusts in Canada*:

> That duty must be discharged with honesty, objectivity and care, but that is all. Impartiality lies in the presence of an honest and objective evaluation of each named beneficiary's position, and a consequent decision. The same is true when trustees have a power of encroachment over capital in favour of joint life tenants, or even a power of appointment over capital. The duty of impartiality has been breached when honesty, objectivity and care are all present, but the result is one which favours Beneficiary A over Beneficiary B without an express or implied authority from the trust instrument…
>
> Perhaps the principal impact of the rule upon trustees, however, is when they must administer the trust assets in such a way that they provide fairly for the beneficiaries whose interests in the trust property are successive.[96]

C. Justice Henderson did not exceed his jurisdiction as CMJ

i. Justice Henderson did not inappropriately "enter the fray"

91. The OPGT claims that Justice Henderson "entered the fray."[97] Catherine Twinn alleges that Justice Henderson was "grasping" to reach his "desired" and

[95] Affidavit of Paul Bujold, sworn September 12, 2011 at Exhibit J. (OPGT EKE, Tab 5)
[96] Donovan Waters, Lionel Smith, Mark Gillen, *Law of Trusts in Canada,* 5th Ed (Toronto: Carswell) at p 1024-1025.
[97] Factum of the Appellant, The OPGT at paras 116 to 121.

"predetermined result."[98] The Appellants therefore allege that Justice Henderson's impartiality and neutrality was impugned. In asserting this claim, the OPGT relies on this Court's holding in *Jonsson v Lymer*.[99] However, the actions of Justice Lee in *Lymer* are clearly distinguishable from the actions of Justice Henderson in this case.

92. *Lymer* involved a Court directed application for a vexatious litigant order made by Justice Lee, who was the CMJ in that case.[100] Conversely, Justice Henderson brought no application in his own right. In his role as CMJ, Justice Henderson did exactly what CMJs are encouraged to do: ask questions, raise issues, and progress the litigation.

93. Respectfully, there is a spectrum of judicial intervention against which a judge's conduct ought to be viewed. On the one side of the spectrum, any judge is free to ask a question or raise an issue. Indeed, this Court has recognized, in the context of a trial judge, a "sworn duty" to seek clarification on points in issue.[101] A judge's questions may be pointed,[102] and may require the judge to interrupt or interject,[103] and the judge need not canvas counsel in advance of asking their question.[104]

94. On the other end of the spectrum are instances where judges bring their own applications (as was the case in *Lymer*) or where a line of questioning by a judge strays into irrelevant or unrelated matters.[105]

95. With respect to this "continuum", a CMJ has more leeway to engage in questioning and clarification of the issues before them. This is highlighted by the Alberta Rules of Court, which establish the authority of CMJs:

> A CMJ, or if the circumstances require, any other judge, may facilitate efforts the parties may be willing to take towards the efficient resolution of the action or any issue in the action through negotiation or a dispute resolution process other than trial[106]

96. Facilitating the efforts of the parties in accordance with this rule requires a degree of back-and-forth between the CMJ and the parties to the litigation. Questions

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[98] Factum of the Appellant, Catherine Twinn at paras 52-53.
[99] *Jonsson v Lymer*, 2020 ABCA 167 at para 44.
[100] *Jonsson v Lymer*, 2020 ABCA 167 at para 1.
[101] *R v Oracz*, 2011 ABCA 341 at para 7.
[102] *R v KG*, 2016 ABCA 205 at para 9.
[103] *R v Crawford*, 2015 ABCA 175 at para 18.
[104] *R v KG*, 2016 ABCA 205 at para 12.
[105] *R v Crawford*, 2015 ABCA 175 at para 18.
[106] *Alberta Rules of Court*, AR 124/2020 at 4.14(1)(e).

need to be asked and answered, issues raised, all while having regard to the established body of jurisprudence preventing a judge from "entering the fray."

97. In this context, Justice Henderson's conduct was entirely appropriate: he fulfilled these duties, and when interpretation issues arose, he declined to engage in those issues until a party brought an application.[107]

98. Notwithstanding these arguments, the relief sought by the OPGT is entirely inconsistent with the jurisprudence. In overturning the holding of Justice Lee in *Lymer*, this Court held that the vexatious litigant order should not have been granted, the form of order was overbroad, and the sanction for contempt therefore could not stand given fairness had been impugned. Accordingly, the Court referred the question of sanction for contempt back to the Queen's Bench for a fresh hearing.[108] It did not simply set aside Justice Lee's finding, which is the relief sought by the OPGT.[109]

ii. Final Relief

99. Notwithstanding the arguments of the Appellants, Justice Henderson did not provide unauthorized "final relief." Justice Henderson points out the perplexing position of the parties on this issue in his decision.[110] His decision is no different than the 2016 Consent Order. Even if it could be considered final relief, it is in keeping with the many examples of "final relief" that were granted during the course of case management. There are many instances in the 12 formal decisions and countless orders made where the issue before the CMJ was finally settled. Not least of these decisions is the significant full indemnity costs award granted to the OPGT which they have fought hard to defend, and for which significant costs have been paid by the Trust to the lawyers representing the OPGT. This is certainly a form of final relief. Inter alia, the decisions to award advanced costs to the OPGT,[111] the rejection of inclusion of Maurice Stoney,[112] the direction on privilege,[113] the direction on document production,[114] the direction to

[107] Transcript of Case Management Hearing, held December 20, 2019 at 822:10-17. (OPGT EKE, Tab 34)
[108] *Jonsson v Lymer*, 2020 ABCA 167 at para 86.
[109] Factum of the Appellant, The OPGT at para 122.
[110] *Sawridge #12*, *supra* note 1 at para 18 and 19.
[111] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2012 ABQB 365 at para 39; aff'd 2013 ABCA 226.
[112] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 436.
[113] Consent Order (Privilege), Justice Henderson, dated December 18, 2018, filed December 19, 2018 (1985 Trustee EKE, Tab 5).
[114] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299.

reject the addition of parties,[115] and the direction on the issue of membership,[116] are all forms of final relief. But none of these orders or judgements are beyond interpretation by the Court if that is necessary to determine a matter in this litigation.

100. In his written decision, Justice Henderson specifically discusses potential next steps in the litigation. He titles this section: "Steps Going Forward" and notes that a number of further steps may be required in order to finally determine "who the beneficiaries are."[117] He concludes by stating that: "A litigation plan should be developed to proceed with those steps that the parties seek to advance."

101. The Appellants argue that the 2016 Consent Order itself was a form of final relief in the context of the proceeding and that Justice Henderson was unable to revisit the order without the consent of the parties.[118] The 1985 Trustees sought advice, and Justice Henderson gave it, stating explicitly "the advice I give is…"[119]

102. The Appellants seem to argue that, simply by objecting, they deprived Justice Henderson of his ability as CMJ. Justice Henderson was not permitted to modify or vary the 2016 Consent Order. That is why Justice Henderson was not modifying the 2016 Consent Order; rather, he was simply interpreting the 2016 Consent Order. As Justice Henderson himself said on many occasions, it was his intention to determine what the "effect" was of the 2016 Consent Order – what did the 2016 Consent Order mean in relation to the Beneficiary class.[120] He agreed the 2016 Consent Order stood, and assets were transferred to the 1985 Trust – but what did that mean? It is unclear how the interpretation of the 2016 Consent Order (which was ordered by a CMJ) could be outside the authority of a CMJ.

[115] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377.
[116] *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 299.
[117] *Sawridge #12*, *supra* note 1 at para 289-291.
[118] Factum of the Appellant, The OPGT at para 24; Factum of the Appellant, Catherine Twinn at para 92.
[119] *Sawridge #12*, *supra* note 1 at paras 285-286.
[120] *Sawridge #12*, *supra* note 1 at paras 18-19.

iii. CMJs are entitled to issue Final Relief

103. There is no blanket prohibition restricting the jurisdiction of a CMJ from hearing matters that may constitute "final relief." In fact, as set out above, there have been numerous decisions made by Justice Thomas and Justice Henderson that are all final.

104. Rule 4.14 sets out the authority of CMJs, which includes "[exercising] the powers that a trial judge has by **adjudicating any issues** that can be decided before commencement of the trial" [emphasis added].[121] Furthermore, under Rule 4.14(2), a CMJ "must hear every application filed with respect to the action for which the CMJ is appointed", unless the *Rules of Court* provide otherwise.[122]

105. Rule 4.15 is the sole Rule limiting a CMJ's authority. It provides that a CMJ cannot hear "an application for judgment by way of a summary trial" and cannot preside over the trial of an action without consent of all parties.[123] Although Rule 4.15 prohibits a CMJ from issuing judgment under a summary trial application which may involve final relief, it does not prohibit a CMJ from adjudicating issues, issuing judgment, and ordering final relief pursuant to all other applications they are required to preside over under the *Rules of Court*. Justice Henderson notes that this application is not a summary trial.[124]

106. Indeed, CMJs frequently deal with matters that give rise to final relief. CMJs are able to hear summary judgment applications, which routinely issue final relief, without running against the prohibition under Rule 4.15 and requiring consent of all parties. This is because summary judgment applications are not summary trial applications, as they are dealt with under completely different rules in the *Rules of Court*.[125] Thus, a CMJ presiding over a summary judgment application and issuing final relief is acting in accordance with their adjudicative authority under Rule 4.14(g) and abiding by their requirement to hear all applications besides summary trial applications under Rule 4.14(2). In *Rana v Rana*, Associate Chief Justice Rooke commented that the referenced applications (striking out pursuant to Rule 3.68 and summary judgment

[121] *Rules of Court,* AR 124/2020 at Rule 4.14(g).
[122] *Rules of Court,* AR 124/2020 at Rule 4.14(2).
[123] *Rules of Court,* AR 124/2020 at Rule 4.15.
[124] Sawridge #12 at para 24.
[125] *Rules of Court* at Rules 7.2-7.4 and Rules 7.5-7.11.

pursuant to Rules 7.2-7.3) would be appropriately referred to the CMJ in the applicable action.[126]

107. This Court has also recognized the ability of CMJs to issue final relief. In *Bröeker v Bennett Jones*, a CMJ was assigned to preside over a civil action related to defamation by a deceased person and negligence and breach of fiduciary duty by a law firm.[127] The CMJ dealt with an application to dismiss applications in the surrogate or estate action, resulting in the CMJ setting aside applications for formal passing of accounts of the estate and the appellant's claim as an unpaid claimant of the estate, as well as prohibiting "[the appellant] from filing further documents in the estate action."[128] Furthermore, regarding the related civil action, the CMJ held that "the appellant had no basis for any claim against the estate… [and] any cause of action properly fell within the confines of the civil matter" as against the law firm.[129] This Court rejected the appellant's argument that, among other things, the CMJ exceeded her jurisdiction by granting final relief for an uncontested estate and in the splitting of the claims which were otherwise consolidated.[130]

108. Furthermore, in *Karagic v Karagic*, a CMJ issued an order for the partition and sale of a matrimonial home, removing the appellant from the title of the home and transferring the home to the respondent.[131] This Court upheld the CMJ's decision, stating that: "the Court does not accept the appellant's position that the orders of the CMJ, even though amounting to final relief on disposition of the matrimonial home, was unreasonable or unfair."[132] Furthermore, this Court also held that final relief on sub-issues related to the order in issue, such as "the issue of allocating to the appellant full responsibility for the costs associated with the foreclosure and failure to keep up payments", was justified.[133] Thus, in *Karagic*, this Court recognizes that CMJs can issue

[126] *Rana v Rana*, 2022 ABQB 139 at para 25.
[127] *Bröeker v Bennett Jones*, 2010 ABCA 67 at paras 1-4.
[128] *Bröeker v Bennett Jones*, 2010 ABCA 67 at paras 5-9.
[129] *Bröeker v Bennett Jones*, 2010 ABCA 67 at para 9.
[130] *Bröeker v Bennett Jones*, 2010 ABCA 67 at paras 12, 22.
[131] *Karagic v Karagic*, 2017 ABCA 394 at para 1.
[132] *Karagic v Karagic*, 2017 ABCA 394 at para 35.
[133] *Karagic v Karagic*, 2017 ABCA 394 at para 29.

final orders, as well as that these final orders can arise pursuant to legislation and deal with substantive rights to property.

109. The entitlement of CMJs and decision-makers presiding over actions commenced by Originating Application to issue final relief is also in accordance with the Court system's purpose and intention of resolving matters "in a timely and cost effective way."[134]

iv. Impacts of the decision

110. The 1985 trust is discriminatory – this is recognized by Court order and is not a point of contention.[135] It discriminates against women members who marry non-Indigenous men and punishes female children for being "illegitimate." The 1982 and 1986 Trust would apply only to members on the membership list and both trusts contain no discrimination with respect to the definition of "beneficiaries."

111. The OPGT speaks of the minors who will be affected if the 1982 beneficiary definition is upheld.[136] Their concerns are legitimate. However, there is no result in this litigation in which no person is impacted. Justice Henderson highlights this quandary.[137]

112. The 1982 Trust definition of Beneficiaries allows individuals to apply to be members, in which case, they would be Beneficiaries under the 1982 Trust. The 1985 definition would continue to eliminate rights of women as they marry; as a fixed definition, it also allows anyone to apply to be a member, and therefore a beneficiary.

113. Catherine Twinn claims that the Bill C-31 women received payments when they enfranchised.[138] There is no direct evidence of this before this Court.[139] The women who were and are born after the Bill C-31 women, who can no longer enfranchise, will be impacted and lose their benefits under the 1985 Trust, as will their children, if they marry non-Indigenous men.

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[134] *Rules of Court*, AR 124/2020 at Rule 1.2; *Hryniak v Mauldin*, 2014 SCC 7 at paras 2 and 28. As cited by Justice Henderson in *Sawridge #12*, *supra* note 1 at para 27(x).
[135] Consent Order (Issue of Discrimination), Justice Thomas, dated January 19, 2018, filed January 22, 2018. (OPGT EKE, Tab 16)
[136] Factum of the Appellant, The OPGT at para 48.
[137] *Sawridge #12*, *supra* note 1 at paras 15-17 and 62-65.
[138] Factum of the Appellant, Catherine Twinn Factum at para 11.
[139] Catherine Twinn also provides numerous statements in respect of enfranchisement in her factum. There is no direct evidence in these proceedings that such payments took place nor any direct evidence filed on enfranchisement.

114. The 1985 Trustees filed a brief for Justice Henderson which outlines some of the impact of the 1985 definition of beneficiary.[140] The impact was also recognized by Justice Henderson in his decision.[141]

v. Justice Henderson was not biased and did not have a desired result; allegations of bias are improper and untimely

115. Both Catherine Twinn and her step-granddaughter Shelby Twinn have raised the issues of bias and apprehension of bias on the part of several Justices who have heard parts of the case before this Court. These allegations cannot go unanswered as they impugn both the reputation of the Court, and of Counsel for the 1985 Trustees.

116. Catherine Twinn repeatedly suggests that Justice Henderson had a "desired result."[142] In the absence of any evidence, it is inappropriate to suggest that Justice Henderson had any personal stake or 'desire' in any given outcome.

117. Catherine Twinn was surreptitious in her raising of bias. In her brief, she states: "In 2018 [Justice Henderson] replaced Justice Thomas as the case management Justice…Both are former lawyers from the Dentons firm."[143] Arbitrary reference to the former law firm of Justice Henderson and Justice Thomas, without more, is irrelevant and inappropriate.

118. Catherine's step-granddaughter Shelby Twinn was not as subtle in her remarks:

> This history raises questions about the relational membership web in the Legal Forum, a private legal Club, and the 12 year Denton's thread. Both CMJ's and the SFN lawyer, Ed Molstad (Molstad), are members of the Legal Forum, and both CMJ's were former Dentons' lawyers, along with Justice Feehan who endorsed the urgings of Doris Bonora, his former partner at Dentons' he holds in esteem, to restrict my June 15, 2022 Intervention.[144]

119. This is the first time the issue of bias has been raised. The 1985 Trustees state, unequivocally, that there is no justification for an allegation of bias or apprehension of bias. The allegations put forward indirectly by Catherine Twinn and directly by her step-granddaughter Shelby Twinn are furthermore not supported by evidence nor law.

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[140] Brief of the Sawridge Trustees in Respect of the Impact of the Definition of Beneficiaries in Respect of the 1982 and 1985 Trust, filed Nov 30, 2020. (1985 Trustee ECE, Tab 6)
[141] *Sawridge #12*, *supra* note 1 at paras 15-17, 62-65.
[142] Factum of the Appellant, Catherine Twinn at paras 25, 52, and 53.
[143] Factum of the Appellant, Catherine Twinn at para 23.
[144] Factum of the Appellant, Catherine Twinn at para 6.

120. Firstly, Catherine Twinn and Shelby Twinn cannot raise bias for the first time on appeal. In *LN v SM*, this Court held:

> This Court cannot permit a party who has knowledge of grounds for disqualification on the basis of reasonable apprehension of bias to await the results of the trial and then, if unhappy with the result, raise the issue for the first time on appeal.[145]

121. As recently as 2022, this Court has expressed its general "[reluctance] to entertain arguments that are advanced for the first time on appeal", especially when "the factual record needed to resolve new arguments is incomplete."[146]

122. Neither Catherine Twinn nor Shelby Twinn cite the legal test for bias or reasonable apprehension of bias.[147] Rather, they conveniently ignore the Courts' staunch warnings regarding "the strong presumption of judicial impartiality [that] is not easily displaced", that "a simple allegation" will not cause a judge to remove themselves from proceedings, that "appeal Courts do not impute bias lightly", and that "there is a high burden of proof on the party alleging bias."[148] Shelby Twinn also alleges actual bias, which has a higher persuasive threshold.[149]

123. Catherine Twinn and Shelby Twinn's concerns regarding Justice Henderson and Justice Thomas being former lawyers at Dentons are unfounded. In *Al-Ghamdi*, Justice Hillier heard a similar application made against himself – allegations of bias due to Justice Hillier being a former partner at one of the counsel's law firm.[150] Justice Hillier rejected the allegations of bias.

124. In further dismissing the arguments of bias, Justice Hillier also cited the two to five year cooling off period for Justices under the Canadian Judicial Council's *Ethical Principles for Judges*.[151]

125. We further note that in the application before The Honourable Justice Feehan ("Justice Feehan"), the record shows the parties were canvassed about bias and

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[145] *LN v SM*, 2007 ABCA 258 at para 66.
[146] *Bethel United Church v North Pacific Properties*, 2022 ABCA 224 at paras 24, 151-152.
[147] For the legal test, see: *Zak v Zak*, 2021 ABQB 360 at paras 43-46; *Al-Ghamdi v Alberta*, 2016 ABQB 424 at paras 55-74.
[148] *Zak v Zak*, 2021 ABQB 360 at para 44; *Al-Ghamdi v Alberta*, 2016 ABQB 424 at paras 58, 80.
[149] *R v Garry*, 2020 ABQB 526 at para 24.
[150] *Al-Ghamdi v Alberta*, 2016 ABQB 424 paras 2-3.
[151] Canadian Judicial Council, *Ethical Principles for Judges*, at E.19(c).

concern for conflict and all parties advised that they had no issues with Justice Feehan hearing the matter.

126. The 1985 Trustees submit the parties are not in a position to raise bias, after a decision has been rendered in the Court below with which they are unhappy.

vi. There are no limitations issues

127. Catherine Twinn argues that Justice Henderson failed to adequately consider the application of the *Limitations Act*[152] to any remedial relief with respect to the transfer, which occurred 37 years ago.[153] With respect, the 1985 Trustees disagree. Justice Henderson adequately addressed whether there were limitations issues in paragraphs 56 to 61 of his reasons,[154] and concluded the application is properly characterized as one for advice and direction, to which the *Limitations Act* does not apply.

PART 5 – RELIEF SOUGHT

128. The 1985 Trustees ask that the appeal be dismissed, and return the matter to Justice Henderson to complete case management.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 26th day of August, 2022.

Estimate of time required for the oral argument: 45 minutes.

[152] *Limitations Act*, RSA 2000, c L-12.
[153] Factum of the Appellant, Catherine Twinn at para 102.
[154] *Sawridge #12*, *supra* note 1.

Table of Authorities

30. *R v Garry*, 2020 ABQB 526
31. *R v KG*, 2016 ABCA 205
32. *R v Oracz*, 2011 ABCA 341
33. *Rana v Rana*, 2022 ABQB 139
34. *Rifco Inc. (Re)*, 2020 ABQB 366
35. *Sawridge Band v Canada*, 2003 FCT 347
36. *Sawridge Band v Canada*, 2008 FC 322
37. *Sawridge Band v Canada*, 2003 FCT 347
38. *Sawridge Trust v Alberta (Public Trustee)*, 2017 ABQB 377
39. *Serendipity Ventures Inc v Winters*, 2016 ABQB 398
40. *Twinn v Trustee Act*, 2022 ABQB 107
41. *Yu v Jordan*, 2012 BCCA 367
42. *Weinrich Contracting Ltd v Wiebe*, 2022 ABCA 176
43. *Zak v Zak*, 2021 ABQB 360
44. Donovan Waters, Lionel Smith, Mark Gillen, *Law of Trusts in Canada,* 5th Ed (Carswell)
45. Geraint Thomas, *Thomas on Powers*, 2nd Ed (Oxford: Oxford University Press, 2012)
46. James Kesler & Fiona Hunter, *Drafting Trusts & Will Trusts in Canada*, 5th Ed (Toronto: LexisNexis)

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

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in view of this case, which suggests "a series of inconvenient and irregular exceptions from the modern doctrine," the draftsman should expressly state in the will that the precatory words are not to create any trust or legally binding obligations.[70]

C. "Sham" Trust

What is the position if the terms of the trust instrument appear usual in character, but the actual intention of the settlor and the trustee is to disregard those terms and for the settlor, either as trustee himself or with the compliance of the trustee, to retain control of the assets and do with the trust property as he pleases? This hidden intention of settlor and trustee being revealed, is the trust void as a "sham", or is the trust valid but the trustee is acting in breach of trust?

The term "sham" in English and offshore parlance, adopted in Canada, is not a precise term. It is more a turn of speech; its meaning has been given as "something that is not what it seems; a counterfeit."[71] It originated in England with regard to transactions, to which of course there are always at least two parties, and it means the parties' true intent is that others shall be misled by the terms appearing in the transactional instrument. The real terms are something other, and the instrument is therefore declared void.[72] Used in the trust law setting, now a practice in Canada as elsewhere, it describes a trust that the courts will declare void because the provisions in the trust instrument do not represent the settlor's true intent as to the terms upon which the trustee is to hold the trust asset(s). Though the trust instrument sets out the persons or purposes that are to benefit, the settlor's true intent is to retain control of the assets purportedly held in trust because the true intent, for instance, is to appear to have disposed of the assets and so to evade tax, to defeat personal creditors, or prejudice the claims of an estranged spouse or the children of the relationship. A trust created by the settlor who declares himself the trustee of the property, rather than make a transfer of assets to another as trustee, lends itself to this misrepresenting

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direction to carry out the executory trust in the way [the testatrix] has described" (*supra*, note 65, at 549). Wynn-Parry J. followed this ruling in *Re Steele*, *supra*, note 64, at 609. An executory trust must be executed by the donee of the trust property; does not that still take the initiative out of the son's hands?

[70] *Snell*, at para. 22-014.

[71] Black's Law Dictionary, 9th ed. (St. Paul, Minn.: West, 2009).

[72] In *Snook v. London & West Riding Investments Ltd.*, [1967] 2 Q.B. 786 (Eng. C.A.), Diplock L.J. said of a "sham" that "if it has any meaning in law, means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create" and further that, "for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating". In *Antle v. R.*, 2010 CarswellNat 4878, 61 E.T.R. (3d) 13 (F.C.A.), the Federal Court of Appeal, in assessing whether a trust was a "sham" in the context of a tax assessment, held that the required state of mind with respect to an intent to mislead is "not equivalent to *mens rea* [a criminal intent to deceive] and need not go so far as to give rise to what is known at common law as the tort of deceit . . . It suffices that parties to a transaction present it as being different from what they know it to be."

high market prices and purchase debt securities which yield a steady income? The life tenant says one thing, the remainderman another. But the trustees must decide; it is their discretion.

However, not all duties and powers of trustees involve a distinct duty of impartiality. A discretionary trust may require of trustees, for example, that they determine which of the named beneficiaries shall benefit from the trust property, and in what amount. That duty must be discharged with honesty, objectivity and care, but that is all. Impartiality lies in the presence of an honest and objective evaluation of each named beneficiary's position, and a consequent decision. The same is true when trustees have a power of encroachment over capital in favour of joint life tenants, or even a power of appointment over capital. The duty of impartiality has been breached when honesty, objectivity and care are all present, but the result is one which favours beneficiary A over beneficiary B without an express or implied authority from the trust instrument.[120] A discretionary trust, a power of encroachment, and a power of appointment contain that authority.

It follows from what has been said that the duty of impartiality may exist whether there is one class of beneficiaries, or two or more classes. Let us take a one class situation, that is, named beneficiaries or a class of beneficiaries, to each of whom the trust gives identical interests. How does even hand arise? To take again the example of the division of a fund, the trustees may have to convey "an equal share" to each of four grandchildren as each grandchild attains the age of twenty-five. When the first attains that age, the trustees should not merely pay out or transfer one quarter of the trust fund. Through a professional valuation of the various elements of the portfolio or property at the time when they propose to make the first payment, they should ensure that they can later show they had in mind, not only present dollar amounts, but possible fluctuations of value over the likely period of distribution to the grandchildren. In this way they attempt to make sure, so far as they can, that each grandchild obtains the same value from the trust.[121]

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[120] For comment on whether breach of the duty of loyalty has also occurred, see, *infra*, note 123. Litigation between trust beneficiaries (or will beneficiaries) is an occasion when trustees demonstrate their impartiality by remaining neutral. This is so even if the trustees are concerned on behalf of infant, unborn, and remote beneficiaries: *Re Schroder's Will Trusts*, [2004] 1 N.Z.L.R. 695 (New Zealand S.C.). In *Lecavalier v. Sussex (Town)* (2003), (sub nom. *Re Forbes Estate*) 268 N.B.R. (2d) 201, (sub nom. *Re Estate of Forbes*) 6 I.T.E.L.R. 819 (N.B. Q.B.), the executor's litigation support of an intestate heir's argument that the testamentary gift of residue was invalid invoked the express disapproval of the court.

[121] See further *Underhill and Hayton* at para. 44.49. The duty is restricted to the property subject to the trust. Unless the instrument provides to the contrary (e.g., with a hotchpot clause), the trustees are not concerned with gifts the settlor or testator has earlier made to any beneficiary of the trust. If the trust instrument contains no trustee power of appropriation, may the trustees at the time of the first payment (or on the trust taking effect) divide the trust fund into as many parts as there are beneficiaries, and hold separate accounts for those whose interests are to remain in trust? There are obvious dangers in this practice, should the later investment experience of each of the accounts differ significantly, and it is shown that the complaining beneficiary was incapacitated by minority from consenting to the original division. See *Underhill and Hayton* at paras. 44.50 - 44.53. The better opinion would appear to be that it should not be done without consent, and that, if necessary because of incapacity, application be made under the variation of trusts jurisdiction.

Perhaps the principal impact of the rule upon trustees, however, is when they must administer the trust assets in such a way that they provide fairly for beneficiaries whose interests in the trust property are successive. This is not a real difficulty when, for instance, there is a substitutional gift. A is to take capital on the death of a life tenant, and there is a gift over to B should A die in the life tenant's lifetime. If the successive beneficiaries are both exclusively interested in income, or exclusively interested in capital, as are A and B in the above example, both are essentially interested in the same thing. It is the distinction between income and capital that is so important in the context of this rule; here are two classes of beneficiaries, for income and capital beneficiaries are interested in different things. With regard to the trust fund the income beneficiary is looking for the best yield obtainable, while traditionally the capital beneficiary is concerned with the safety of the fund. However, high yield usually means high risk, low yield low risk, and here is the inherent conflict between the interests of these two types of beneficiary. It is the duty of the trustees so to manage the fund that they do the best possible for both, and this means holding an even balance between yield and risk. Unless, and to the extent only that, the trust instrument requires or permits them to do otherwise, they must ensure that the assets originally received into the trust are put into a form which brings about this balance, and that the assets they subsequently acquire, again in the exercise of their power of investment, have the same result.

The duty to act impartially not only requires the initial trust portfolio to be such that it will support successive beneficial interests, but it affects the mode of allocation, as between successive beneficiaries, of any property coming into the trust fund after the trust is in effect. It also means that, when the cost of outgoings has to be charged to the trust, some mode of distribution between successive beneficiaries must be arrived at so that liability does not fall on one to the unfair advantage of another.

Property coming into the trust fund will have to be allocated fairly as between income and capital beneficiaries. This applies not only to moneys, securities, land and houses, jewellery, paintings, and other assets falling into the estate of a deceased person after his death as the result of property rights or contractual rights existent at his death, but to further funding of an *inter vivos* trust after the trust has come into effect. It also applies to benefits issued by corporations to their shareholders when it is the trustee who, on behalf of the trust, is one of the shareholders. As for outgoings whose cost has to be borne, there are the obvious problems of taxes, and the debts of the testator. Annuities charged on the estate or trust fund: is it income or capital or both which must bear this obligation? Repairs to buildings have to be put in hand, and there is the question of the amortization of premiums and discounts in investments. In addition to outgoings, there may be losses; losses caused by a fall in the market and a necessity to sell, the failure of a mortgage transaction and security, and business losses. All these have to be borne on a sharing basis among the beneficiaries, if and to the extent that no third party is liable for the loss or there is no means by which those liable are able to make good the loss.

It will now be apparent that there are three questions which confront the trustees. First, is the duty to act impartially involved in the discharge of the administrative or dispositive duty in question, or the exercise of the particular power? Second, if so,

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THE EXCESSIVE EXECUTION OF A POWER

A. General principle

'Excess in the exercise of a power consists in the transgression either of the rules of law or of the scope of the power'.[1] Most instances of excessive execution involve attempts to go beyond that which is authorized by the express or implied terms of the particular power. Common examples include improper delegation of the power;[2] attempts to impose or annex unauthorized conditions;[3] the creation of excessive interests; the inclusion of persons who, or purposes which, are not proper objects of the power;[4] and a failure to comply with any restriction or condition imposed on the power which is being exercised.[5] It is also arguably the case that the application of the rule against conflicts of interests in relation to the exercise of a power is but another instance.[6] Moreover, an exercise of a power which transgresses the rule against perpetuities or the rule against excessive accumulations, is an excessive execution of that power: indeed, these particular rules of law, unlike certain others, cannot be excluded by the express terms of the power. The rules against perpetuities and excessive accumulations; the delegation of powers and discretions; and the rule against conflict of interests, are all dealt with in detail in separate chapters.[7] In this chapter, we shall be looking **8.01**

[1] Farwell, 324.
[2] *Re Boulton's Settlement Trust* [1928] Ch 703.
[3] *Pawlet v Pawlet* (1748) 1 Wils KB 224. *cf. Re Witty* [1913] 2 Ch 666.
[4] *Re Boulton's Settlement Trust* [1928] Ch 703.
[5] *Price v Williams-Wynn* [2006] EWHC 788 (Ch); [2006] WTLR 1633.
[6] See Ch 12 below.
[7] See Chs 5, 6, and 12 respectively.

primarily at the excessive execution of a power in orthodox terms, namely excess by virtue of (a) annexing unauthorized conditions, (b) granting excessive interests, and (c) including persons who, or purposes which, are not proper objects of the power. As we shall see, this classification, though still useful, is less appropriate in modern circumstances than it once was, especially in relation to powers to 'benefit' objects of the particular power.

8.02 Whether or not a particular exercise is excessive depends, in each case, on the scope of the specific power. Any exercise which fails to comply with the express terms of the power is clearly excessive. Ascertaining the true scope or extent of a power is self-evidently crucial for a wide range of reasons. It establishes, for example, whether the donee of the power has carried out an act which is outside his authority or has acted wrongfully but within his authority; it can dictate what the donee has undertaken to do and the limits of his obligations; and it can have far-reaching effects on the rights and liabilities of others. Thus, in the case of a private 'family' settlement, it is common practice to include an express prohibition on the exercise of any power or discretion conferred by the settlement (whether by way of payment or application of any part of the funds subject to the settlement, or any of its income, or otherwise) which may directly or indirectly confer a benefit on the settlor or any spouse of the settlor.[8] Similarly, where a restriction or condition was imposed on a power in order to ensure that any exercise of it complied with the strict requirements of section 71 of the Inheritance Tax Act 1984, an appointment which included a free-standing unauthorized provision which breached this restriction was held to be excessive and severed. There was 'no reason why the inclusion of [the offending provision] should somehow contaminate and invalidate the dispositions evidently intended and otherwise properly authorized and appointed'.[9] Any exercise of any such power or discretion which has or might have such a prohibited effect is excessive and void.[10] Similarly, in the context of occupational pension scheme trusts, it is not uncommon to find (particularly in older schemes) a provision prohibiting the repayment of money (especially from surplus funds on a winding-up) to the employer. Any direct payment to the employer in these circumstances, and probably any indirect attempt to create the conditions in which this might be accomplished, such as by amending the scheme so as to delete the prohibition, is also unauthorized,[11] although, of course, it is always a matter of construction whether any such payment or amendment falls within the scope of the relevant restriction.[12] In other cases, a power to augment the benefits of one class of members may not authorize a similar augmentation of benefits of another class.[13] Indeed, in many cases the limits of a power may have to be determined by implication and

[8] Thereby preventing the application of the income tax anti-avoidance provisions of Part 5 of Chapter 5 (and especially ss 624–625) of the Income Tax (Trading and Other Income) Act 2005 and also the inheritance tax 'reservation of benefit' provisions of s 102 of the Finance Act 1986.

[9] *Price v Williams-Wynn* [2006] EWHC 788 (Ch), para 29. Subject to certain exceptions, s 71 ceased to have effect on 22 March 2006: see generally Thomas and Hudson, Ch 36.

[10] Indeed, any exercise of a power directly in favour of any stranger (ie a non-object) is excessive. It is often a question of some difficulty whether or not the power, as a matter of construction, permits the proposed exercise, eg whether a power to '*benefit*' an object authorizes an execution in favour of someone not expressly named as an object, or, indeed a delegation of the power: see paras 6.67–6.71 above and paras 9.38–9.61 below. An indirect attempt to favour a stranger may be an excessive or a fraudulent execution of the power.

[11] *UEB Industries Ltd v Brabant* [1992] 1 NZLR 294 (see also [1990] 3 NZLR 347); *Wilson v Metro Goldwyn Mayer* (1990) 18 NSWLR 730; *Sulpetro Ltd v Sulpetro Ltd Retirement Plan Fund* (1990) 73 Alberta LR 44; *Re Pension Plan of Employees of Stearns Catalytic Ltd* 44 British Pension Lawyer 23. *Re Vauxhall Motor Pension Fund* [1989] 1 PLR 49 (where, as a matter of construction, the proposed amendment was held not to be prohibited).

[12] *Re Vauxhall Motor Pension Fund* [1989] 1 PLR 49; *Lock v Westpac Corporation* [1991] PLR 167; *Askin v Ontario Hospital Association* [1991] OR (3d) 641.

[13] *Leadenhall Independent Trustees Ltd v Welham* [2004] EWHC 740 (Ch); [2004] OPLR 115.

may give rise to difficult questions of construction.[14] In each case, however, the effect of an excessive execution of a power is either that such execution is good in part and bad in part or, alternatively, that it does not amount to an execution at all:

> Where there is a complete execution of a power and something added which is improper, the execution is good and the excess void; but where there is not a complete execution, or where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails.[15]

In order for the appointment to be valid, it must be distinct and absolute and not so tied up with the whole series of limitations as to form one system of non-severable trusts.[16]

B. Excessive exercise distinguished from other impeachable executions

8.03 There is clearly an overlap between an excessive execution of a power and several other categories of impeachable executions of a power. Indeed, they are often difficult to distinguish. For example, there was always a close similarity between an excessive exercise and breach of the so-called 'rule in *Hastings-Bass*', where an exercise of a power which failed to achieve or bring about the intended result was frequently overturned. Under *Re Hastings-Bass*[17] and *Re Abrahams' Will Trusts*,[18] a question arose as to whether a particular exercise of a power of advancement was wholly void, or just partially void, on the basis that the application of the rule against perpetuities had drastically altered the trusts intended to be created by the relevant advancement. At first sight, such a question would seem to be simply one of an excessive execution of a power[19] (as most perpetuitous executions would be). However, in *Re Hastings-Bass*,[20] Buckley LJ indicated that the principle enunciated by Cross J in *Re Abrahams* was directed at the case where 'the effect of the perpetuity rule has been to alter the intended consequences of an advancement so drastically that the trustees cannot reasonably be supposed to have addressed their minds to the question relevant to the true effect of the transaction'. In a long list of subsequent decisions, Buckley LJ was taken to have distinguished between an excessive exercise of a power, on the one hand, and a failure to take into account relevant considerations or to exclude from consideration irrelevant factors, on the other. This came to be regarded as the substance of the so-called 'rule in *Hastings-Bass*'.[21] This development has now been held to be wholly erroneous. The Court of Appeal, in the joint appeals in *Pitt v Holt* and *Futter v Futter*,[22] held that what had come to be called the *Hastings-Bass* rule was not derived from the ratio of that case but from the decision of Warner J in *Mettoy Pension Trustees Ltd v Evans*.[23]

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[14] Questions as to the scope of a power are without limit and may range from ascertaining membership of its class of objects and even the purpose(s) for which it was conferred to determining whether a particular rule of law which the donor can exclude and which would otherwise apply (such as the rule against delegation or the rule against conflicts of interests) has in fact been excluded. For the construction of instruments generally, see Ch 2 above. See also *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch).

[15] Farwell, 343, referring to *Alexander v Alexander* (1755) 2 Ves Sen 640, 644, *per* Sir Thomas Clarke MR; Sugden, 498–529; *Hamilton v Royse* (1804) 2 Sch & Lef 315, 332; *Adams v Adams* (1777) 2 Cowp 651; *McDonald v McDonald* (1875) LR 2 Sc & Div 482; *Re Farncombe's Trusts* (1878) 9 Ch D 652; *Re Cohen* [1911] 1 Ch 37; *Re Holland* [1914] 2 Ch 595; *Mackenzie's Trustees v Mackenzie* [1927] SC 424.

[16] *Rucker v Scholefield* (1862) 1 Hem & M 36; *Reid v Reid* (1858) 25 Beav 469; *Re Oliphant's Trusts* (1916) 86 LJ Ch 452; *Re Johnson's Settlements* [1943] Ch 341. The passage in the text above was quoted, with approval, by Neuberger J in *BES Trustees v Stuart* [2001] WL 606469, 22; [2001] OPLR 341; [2001] PLR 283.

[17] [1975] Ch 25. See paras 10.78–10.106 below.

[18] [1969] 1 Ch 463.

[19] This point was argued, unsuccessfully, in *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1622–3.

[20] [1975] Ch 25, 41.

[21] *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1624, *per* Warner J.

[22] [2011] EWCA Civ 197.

[23] [1990] 1 WLR 1587.

The true rules are that a purported exercise of a discretionary power on the part of trustees would be void if what was done was not within the scope of the power (that is, an excessive exercise); and, by contrast, if an exercise by trustees of a discretionary power was within the terms of the power, but the trustees had in some way breached their duties in respect of that exercise, then (unless it was a case of a fraud on the power) the trustees' act was not void but it might be voidable at the instance of a beneficiary who was adversely affected. The donor of a fiduciary power does not authorize any exercise of that power without prior careful consideration by the donee. Nevertheless, despite the fact that many factors are common to both, the principles applicable to an excessive exercise of a power, on the one hand, and those involved in the duty of a fiduciary to have a proper understanding of the effect of an exercise of a power, on the other, operate in different ways, serve different functions and have different outcomes. The two should not, therefore, be merged or confused. Thus, an exercise of a power of appointment, irrespective of whether it is a fiduciary or a non-fiduciary power, will fail entirely if it is exclusively in favour of non-objects, without any need to investigate or question the considerations which the appointor may or may not have taken into account; and it will fail *pro tanto* if it is in favour of both objects and non-objects, provided that the valid interests are severable from the invalid. On the other hand, an exercise of a power (which must probably be a *fiduciary* power) may be exclusively in favour of objects of the power and yet still be invalid on the basis that the actual effect of the exercise is materially different from that intended, or because insufficient account was taken of crucially relevant factors, or too much account was taken of irrelevant ones.[24] In this case, if the exercise of the power constitutes a breach of fiduciary duty, the exercise may be voidable (and not void); and, if there is no breach of fiduciary duty (for example, because expert advice was sought and followed), the exercise will not be set aside. The doctrine against excessive execution is directed at the question whether and the extent to which a power may be exercised at all: it is concerned with *ultra vires*. The other rule is concerned with an improper exercise of a power: it deals with the case where the power is wide enough, in terms, to authorize the actual outcome but where that outcome is not the one intended, or would not have been such if that power had been exercised properly. The decision in *Pitt v Holt* and its re-affirmation of classic equitable principles is therefore dealt with separately elsewhere.[25]

8.04 Similarly, it is often difficult to distinguish between an excessive execution of a power and (a) a failure to comply with the terms of a conditional or contingent power, (b) a breach of the rule against conflict of interests, and (c) a fraud on the power. In relation to conditional powers, a failure to comply with the terms of the condition is *ultra vires* and is therefore excessive and void. However, strictly speaking, a true contingent power is one which does not even arise or become exercisable until the happening of a specified future event or fulfilment of a specified condition or contingency (or one which is exercisable by a contingent person).[26] Any purported exercise of such a power before the occurrence of the future event or contingency is simply null and void in its entirety. It is not a case of an improper exercise of an existing power; and it is inappropriate, therefore, to regard such an exercise as 'excessive'. The question seems to have arisen in *Price v Williams-Wynn*,[27] where the powers in question were restricted in various ways so as not to infringe the requirements of section 71 of the Inheritance Tax Act 1984 (the accumulation and maintenance conditions). It was argued that the inclusion of certain provisions which failed to conform with

[24] See, eg *Stannard v Fisons Pension Trust Ltd* [1991] PLR 225; and see paras 10.75–10.132 below, together with discussion of the similar Australian duty in paras 10.133–10.138 below.

[25] See paras 10.78 *et seq.* below.

[26] Contingent powers are dealt with in Ch 14 below. See para 14.02 below, in particular.

[27] [2006] EWHC 788 (Ch); [2006] WTLR 1633.

these requirements invalidated the whole of the deeds of appointment or, alternatively, that they merely constituted excessive provisions which, being severable could be ignored leaving the rest unaffected. The judge opted for the latter interpretation rather than the former. It was clear that the appointments actually made were 'plainly intended by the trustees who made them' and the offending provisions, being excessive, could be severed and disregarded. However, it is always a question of construction whether the terms of the power prohibit the annexing of a condition (breach of which may authorize severance)[28] or actually prevent a power being exercisable in the first place (which would render any purported exercise null and void).

8.05 The relationship between an excessive exercise and the rule against conflict of interests is also unclear. In broad terms, the rule prohibits a trustee (or other fiduciary) from deriving a profit from his position, which includes preventing him from exercising a power for his own advantage. However, the possibility of conflict can arise only if the trustee (or other fiduciary) has the power to act in the first place and, if so, what the scope or extent of that power might be. Thus, in relation to administrative powers, such as powers of sale or of investment for example, a particular disposition of, or dealing with, property by a trustee (whether in favour of himself or another) must be shown to be an authorized act. If the terms of the relevant power expressly or by implication prohibit a sale of trust property to X, for example, it is irrelevant whether X is the trustee of that property: a sale to X would be excessive and void; and whether or not a conflict of interest could be established would be immaterial. In this kind of case, the position in reality is that a disposition may be carried out with anyone in the world, with the exception of X. The rule against conflict of interests seems to have the effect (whether by implication of law or by the implied intention of the donor of the power) of excluding X himself from the category of persons with whom he could otherwise deal. In this sense, the rule is but one aspect of the excessive exercise of a power. The same might hold in relation to dispositive powers, such as powers of appointment or of advancement, although in these cases it is difficult to see how far the rule might apply (if at all). Such a power is exercisable only in favour of the specified or identified objects. If X is not an object, then any exercise of the power by X in his own favour is simply excessive or fraudulent, irrespective of whether X is a trustee or not, in which case the rule against conflict of interests would again seem to be irrelevant. On the other hand, if X is a legitimate object of the power, it is difficult to see how the rule could apply without defeating the manifest intention of the donor of the power. It is unclear, therefore, whether the rule actually serves any purpose in relation to the exercise of a fiduciary's powers beyond those already served by the doctrines against excessive or fraudulent exercise or, alternatively, whether the rule is itself no more than an aspect of these doctrines.

8.06 The dividing line between excessive execution of a power and a fraud on the power can be very fine, partly because the cases in both areas largely turn around the introduction of non-objects (indeed, fraudulent appointments are generally attempts to achieve the effects of an excessive appointment without actually making one) and partly because the central issue is the intention of the appointor when he exercised the power. 'An appointment subject to a condition to be performed by the appointee, such as the establishment of a trust, may be a fraud on the power if the purpose of the imposition of the condition is to benefit the appointor or a third person who is not an object of the power.'[29] Alternatively, the imposition of such an unauthorized condition could also be said to be clearly excessive. However, the distinction between a fraudulent exercise and an excessive one is nonetheless marked and crucial. A fraudulent exercise may appear, on its face, to be perfectly

[28] See paras 8.09–8.14 below.

[29] *Vatcher v Paull* [1915] AC 372, 379; *Kain v Hutton* [2008] NZSC 61; [2008] 3 NZLR 589; *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch).

proper and in full compliance with the terms of the power. Moreover, a fraudulent execution is generally entirely (and not just partially) invalid: there is usually no possibility of severance. As Sargant J said in *Re Holland*:[30]

> If, on the one hand, there is a genuine appointment to an object of the power, coupled with an attempt to impose on that appointment conditions or trusts in favour of persons who are not objects, then the appointment stands good free from the conditions. If, on the other hand, there is no genuine appointment to an object of the power, but the appointment actually made to that object is for purposes foreign to the power, then the whole appointment fails as being in substance an appointment unwarranted by the power, and that whether the real purposes of the appointment have or have not been communicated to the nominal appointee and assented to by him.

An excessive exercise of a power is generally easier to establish than a fraud on the power. An allegation of excessive exercise involves a question of construction of the terms of the power and of the purported execution (which may, of course, sometimes be a difficult matter): has the particular execution exceeded that which was authorized in terms? An allegation of fraud on the power, on the other hand, requires proof of lack of genuine motive and intention, often in cases where there may be a multiplicity of motives. Thus, the burden of proving a fraud on the power is usually a hard one to discharge.

8.07 This should not, however, disguise the fact that, in modern circumstances, where dispositive powers in particular are couched in very broad terms, there is often considerable overlap, and a commonality of relevant evidence, between allegations of an excessive or fraudulent execution of a power. Powers to 'benefit' their objects are particularly problematic, for it is now well established that, in many cases and especially (though not exclusively) in relation to powers of advancement, an execution of the power to 'benefit' an object does not necessarily have to be directly in favour of that object himself: in appropriate circumstances, it may benefit others (strangers to the power) as well, even to the exclusion of the named primary object himself. In what circumstances, and for what reasons, then can it be said that any such exercise is excessive or fraudulent or neither? This rather tricky question is touched upon briefly in this chapter[31] but is dealt with more fully in relation to the doctrine of fraud on a power in Chapter 9 below.[32]

C. Categories of excessive execution

8.08 The traditional classification of cases of excessive execution of a power are the following: (a) excess by annexing unauthorized conditions; (b) granting excessive interests; and (c) including persons or purposes which are not proper objects of the power. This classification is not intended to be exhaustive. Moreover, some example of excessive execution may fall into more than one category. In modern circumstances, the third of these categories is probably the most important. Each category will be discussed separately.

(1) Excess by way of annexing conditions

8.09 Clearly, conditions cannot be created or imposed by the exercise of a power unless the donee is authorized to do so by the terms of that power.[33] It is immaterial whether the power is a fiduciary

[30] [1914] 2 Ch 595, 601. In *Re Burton* [1955] Ch 82, 99, Upjohn J said that it was 'plain' that this passage was referring to the doctrine of fraud on a power.

[31] See paras 8.14 and 8.19 below.

[32] See paras 9.38–9.61 below.

[33] *Burleigh v Pearson* (1749) 1 Ves Sen 281, 282, *per* Lord Hardwicke.

or non-fiduciary power. In some cases, conditions generally may be unauthorized, irrespective of whether their purported creation is intended to benefit an object of the power. A simple power of selection or distribution, for instance, will not be wide enough,[34] but such powers are now unusual. On the other hand, it is probably sufficient if the words 'in such manner and form' are present.[35] In most cases (and especially given that most powers are now exclusive in nature), the question is not whether a condition may or may not be imposed at all but simply whether the particular condition which it is sought to be imposed is authorized or unauthorized.[36] The terms of a power of appointment may, for example, authorize the creation of contingent or conditional interests and also the conferring of a similar power upon an object, but not the imposition of a need for prior consent to the exercise of such a power. In each case, it is largely a matter of the construction of the terms of the power.

8.10 If an appointment is made subject to an unauthorized condition, and there is no fraud, that is, it is simply excessive, the appointment itself will be valid, and the condition alone held void, provided the invalid condition is separable; if it is not, the appointment as a whole is infected.[37] One would have thought that the fact that a condition is separable clearly does not indicate, of itself, that the donee possessed an overriding and genuine intention to benefit an object, but this is often overlooked (at least, where there is present *some* intention to benefit the object). Thus, an appointment to an object subject to a charge for an unauthorized object is valid, but the charge is void.[38] (The same result would follow, presumably, where the purported charge is in favour of another proper object, because it is the lack of authority to create any such condition that is objectionable and not the fact that it has been created in favour of a non-object.)[39] Similarly, if A has power to appoint £1,000 among his children, and he appoints the entire sum to them subject to a condition that they shall release a debt owing to them, the appointment of the £1,000 stands, the condition annexed thereto alone being void, for 'the boundaries between the excess and proper execution are precise and apparent'.[40] (If the appointment is fraudulent, that is, motivated by the desire to benefit the creditor and not the objects, then it would probably be entirely void.)[41] In such cases the courts could have taken the view that the condition, though void, was an integral part of the donee's intention and, being void, therefore infected the entire exercise, but they did not often do so. Nor did they take the view that the effect of the exercise was to create a limited interest in the object (akin to a contingent or defeasible interest). Rather, the condition was excised, leaving the core interest unaffected. Thus, where a power of division of a fund ('in such shares and proportions') was exercised in favour of six children equally, but the share of one of them was to be held on trust until he attained the age of 30 years, at which time it would pass to the other five if his conduct proved 'unworthy' in the meantime, it was held that the power did not authorize the

[34] *Butler v Butler* (1880) 7 LR Ir 407.

[35] *Pawlet v Pawlet* (1748) 1 Wils KB 224; *Dillon v Dillon* (1809) 1 Ball & B 77.

[36] See, eg *Vatcher v Paull* [1915] AC 372; *Price v Williams-Wynn* [2006] EWHC 788 (Ch); [2006] WTLR 1633.

[37] This proposition is not affected, it is submitted, by either *Stroud v Norman* (1853) Kay 313 or *Vatcher v Paull* [1915] AC 372, in both of which the relevant power authorised the annexing of conditions.

[38] *Re Jeaffreson's Trusts* (1866) LR 2 Eq 276; *Dowglass v Waddell* (1886) 17 LR Ir 384.

[39] Clearly, there can be a considerable overlap between category (a) and category (c).

[40] *Alexander v Alexander* (1755) 2 Ves Sen 640, 644; *Re Holland* [1914] 2 Ch 595. See also *Richardson v Simpson* (1846) 3 Jo & Lat 540; *Watt v Creyke* (1856) 3 Sm & G 362; *Rooke v Rooke* (1862) 2 Drew & Sm 38; *Roach v Trood* (1876) 3 Ch D 429; *Re Staveley* (1920) 90 LJ Ch 111; *Re Neave* [1938] Ch 793 (on which see *Re Simpson* [1952] Ch 412, and *Re Burton's Settlements* [1955] Ch 82). *cf. Stuart v Lord Castlestuart* (1858) 8 Ir Ch Rep 408, where an appointment to a son on condition that he released his father's estate from a loan raised in the son's favour, was upheld on the basis that the father's motive was to prevent injustice to his other children and he derived no benefit himself.

[41] Thus illustrating one of the key differences in outcome between an excessive and a fraudulent exercise.

annexing of conditions and the son took absolutely.[42] An appointment to two objects, with conditions annexed that one should not sell or dispose of the property and the other should create a strict settlement of her appointed share, was held valid but the conditions void.[43] Similarly, in *Sadler v Pratt*,[44] A, who had four children by her first husband and three by her second, exercised a power to appoint a fund among the former only in favour of all her children equally. She declared that, if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband. It was held that the appointment was not wholly void, but that the first class of children took one-seventh of the fund each (that is, that which had been intended for them) under the appointment and that the remainder went to them equally in default of appointment.[45]

8.11 It was said in *Stroud v Norman*[46] that the cases distinguish between a limitation over on a given event and a simple condition which it is attempted to be attached to the execution of a power. This may be a difficult distinction to draw in any given instance. Nevertheless, it seems a correct and necessary one, especially in relation to exclusive powers of appointment. A person with an exclusive power of appointment can appoint on a contingency.[47] Therefore, an appointment to one object, on condition that he does such and such an act and, if he fails to do it, then over to another object, may still be valid, for an act to be performed by the appointee is no different in substance from any other contingency, such as attaining a specified age or the birth of other children. Nevertheless, this must be treated with caution. The fact that a power of appointment is exclusive (as most powers now are)[48] is not necessarily material: the donee may indeed exclude an object altogether, but if he purports to exercise the power in an object's favour, he must do so in accordance with the terms of that power.[49] Thus, a power to give property *unconditionally* will probably not be properly executed if the appointor directs that the property is to go over in the event of the donee dying under 21.[50] Indeed, this much seems clear from *Stroud v Norman* itself.

8.12 An appointment fails in its entirety if it is subject to an inseparable unauthorized condition. In *Webb* v *Sadler*,[51] for instance, the donee of a power of appointment among children appointed to trustees upon such trusts as one of the children with the consent of the donee of the power during his life and, after his death, with the consent of the trustees, should appoint. The requirement as to consent was held to be inseparable from the power and thus rendered it wholly void.[52] Similarly, an appointment by will of £200 to an object, subject to payment of burial expenses and the appointor's small debts, was held not separable and therefore bad.[53] If the excessive condition were a condition precedent, it is possible that the whole appointment would fail, for the event on which

[42] *Butler v Butler* (1880) 7 LR Ir 401.

[43] *Palsgrave v Atkinson* (1884) 1 Coll 190.

[44] (1833) 5 Sim 632. But see sub-category (c) at paras 8.32–8.34 below.

[45] It was said in *Stroud v Norman* (1853) Kay 313, that the appointment in *Sadler v Pratt* was partially void not because of an unauthorized condition, but because it was a scheme for effecting an improper purpose by favounng non-objects. If so, it is difficult to see why the appointment was not entirely void on the basis that the primary intention of the appointor was fraudulent.

[46] (1853) Kay 313, 327–8.

[47] See, eg *Caulfield v Maguire* (1845) 2 Jo & Lat 141; *Graham v Angell* (1869) 17 WR 702.

[48] See paras 3.102–3.114 above.

[49] *Butler v Butler* (1880) 7 LR Ir 401.

[50] See Sugden, 527, *Dillon v Dillon* (1809) 1 Ball & B 77. This would be the case irrespective of whether the gift over is in favour of another, proper object.

[51] (1873) 8 Ch App 419.

[52] See also *Re Perkins* [1893] 1 Ch 283; *Re Cohen* [1911] 1 Ch 37. *D'Abbadie v Bizoin* (1817) 5 Ir Eq 205 is probably better regarded as a case of fraud on the power.

[53] *Hay v Watkins* (1843) 3 Dr & War 339.

the appointment arose or became effective would not have occurred.[54] Such a possibility was mentioned briefly, but apparently not considered sufficiently serious, in the recent decision in *Price v Williams-Wynn*.[55]

8.13 If a condition is annexed, not to the enjoyment of the appointed fund but to the appointor's own property, the doctrine of excessive execution itself is not available. For example, if a testator makes a gift by will of his own property to O, on condition that O settles other property already appointed to him by the testator, for the benefit of non-objects, failure to conform with the condition does not render the appointment nugatory *ex post facto*. In such a case, the appointee is put to his election: he can either enjoy his share of the appointed fund, unfettered, and forfeit his interest in the appointor's property, or he can enjoy his share of the latter upon the terms of settling the appointed fund.[56]

8.14 Finally, it ought to be emphasized, yet again, that the fact that the appointor purports to attach conditions intended to compel the appointee to settle the appointed funds on, or to make provision thereout for, non-objects, is often a sound indication of a fraud on the power, although this is not necessarily so. The first question is simply whether conditions may be imposed and, if so, of what kind. This determines whether the purported execution is excessive or not. However, a particular condition may be authorized in form but has nonetheless been imposed not for the benefit of the object but for the indirect benefit of a stranger to the power. This determines whether the exercise is fraudulent or not. In principle, the distinction is clear. However, in practice, and especially where the particular power authorizes an exercise for the 'benefit' of the object, some difficult questions can arise and the distinction becomes somewhat blurred. This issue is discussed in greater detail in Chapter 9 below.[57]

(2) Granting excessive interests

8.15 Under the same principles, where excessive interests are created on the execution of a power, then provided the boundaries and the excess are distinguishable the execution will be good and only the excess void. Thus, if a power to lease for 21 years is exercised so as to grant a lease for 40 years, the power is well executed to the extent of 21 years; or if a power to jointure for life is exercised 'for 99 years, if she so long lives', the execution is again good *pro tanto*: in both cases, it is clear by how much the donee has exceeded his power.[58] A power (like a direction) to accumulate income for a period in excess of any available accumulation period was good *pro tanto* and only the excess was void (provided the relevant perpetuity period is not also exceeded).[59] (Following the abolition of the rule against excessive accumulations by the Perpetuities and Accumulations Act 2009,

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[54] Farwell, 345.

[55] [2006] EWHC 788 (Ch); [2006] WTLR 1633. See para 8.04 above.

[56] *Re Burton* [1955] Ch 82; *Re Neave* [1938] Ch 793; *King v King* (1864) 15 Ir Ch R 479: *Churchill v Churchill* (1867) LR 5 Eq 44, 49; *Roach v Trood* (1876) 3 Ch D 429, 444. See also *Frear v Frear* [2008] EWCA Civ 1320; [2009] WTLR 221 (a recent case not involving a power but dealing with the doctrine of election and the admissibility of extrinsic evidence under s 21(1)(c) of the Administration of Justice Act 1982 in the interpretation of the will).

[57] See, eg, *Kain v Hutton* [2008] NZSC 61, [39], [42], [2008] 3 NZLR 589. See also paras 9.38–9.61 below.

[58] *Campbell v Leach* (1775) Ambl 740; *Parry v Brown* (1663) 2 Freem 171; *Alexander v Alexander* (1755) 2 Ves Sen 640, 644. See also para 5.61 above. At common law, however, the excess would have been fatal: *Roe d Prideaux Brune v Prideaux* (1808) 10 East 158; Sugden, 520–1. So, too, where the power is controlled by statutory provisions (unless the terms of those provisions suggest otherwise): *Bishop of Bangor v Parry* [1891] 2 QB 277; and see *Smortle v Penhallow* (1701) 2 Lord Raym 995, 1000. If, in the jointure example, the object outlives 99 years, the estate is then undisposed of.

[59] *Griffiths v Vere* (1803) 9 Ves 127; *Leake v Robinson* (1817) 2 Mer 363, 389; *Eyre v Marsden* (1838) 2 Keen 564 (affd 4 My & Cr 231).

accumulations may now continue for the duration of the applicable perpetuity period of 125 years, so that any excessive direction would necessarily render the direction or power to accumulate void *in toto*, unless the trust is charitable in nature, to which the former rule would presumably still apply.)[60] So too, where a power becomes ineffective as to part of the property, an appointment of the whole is good *pro tanto*.[61] A power to charge a particular sum will be duly executed by a charge of a larger sum, only the excess being void.[62] An appointment of a greater interest than that authorized by the power may also be cut down and saved.[63] And where a power to appoint £25,000 was exercised so as to appoint £15,000 clear of death duties, it was held effective as an appointment of £15,000 together with any death duties up to a ceiling of £10,000.[64]

(3) Including persons or purposes which are not proper objects of the power

8.16 It is, of course, trite law that there is an excessive execution of a power of appointment if such execution is in favour of strangers (for example where a power to appoint to children is exercised in favour of grandchildren).[65] Here, again, if the interests given to the strangers are separable from those given to objects, it will be effective pro *tanto*; if not, the appointment will be void *in toto*. Since the interests that can be appointed clearly vary greatly in nature, it is convenient to classify the different kinds, however loosely.

(i) Appointment of an interest to an object, followed by an interest to a stranger

8.17 The main instance in this category would be the appointment of a life interest to an object (O) with remainder to a stranger (S). Here, O obtains a valid life interest (and no more), but the appointment to S fails, so that the property purported to be appointed to S goes as in default of appointment (or is held on resulting trust, as the case may be).[66] Another, though now less common, instance would be an appointment of a vested defeasible interest to object O, with gift over to stranger S by way of executory limitation, to take effect on the happening of some event or contingency, for example 'to O in fee simple but if O should die in his father's lifetime, remainder to S in fee simple'.[67] Similarly, 'to O in fee simple until he ceases to reside in the family home, remainder to S in fee simple'.[68] Nothwithstanding that the gift over to stranger S can never take effect, or that it is distinct and severable from the gift to O, the happening of the stipulated event or the satisfying of the stated contingency will still divest O of his interest.[69] This was the intention of the appointor, as inferred from the form of the appointment. It follows however, that if there is an express declaration, or if it can be inferred from the terms or form of the appointment, that divesting should not occur unless the gift over is effective, then this will not occur and the original

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[60] Perpetuities and Accumulations Act 2009, ss 13, 14 (in respect of instruments taking effect on or after 6 April 2010). See Ch 5 above.

[61] *Re Turner* [1932] 1 Ch 31.

[62] *Parker v Parker* (1714) Gilb Rep 168.

[63] *Peters v Morehead* (1730) Fort 339; but see *Wykham v Wykham* (1811) 18 Ves 395.

[64] *Re Keele Estates (No 2)* [1952] Ch 603.

[65] *Re Hepworth* [1936] Ch 750; *Re Hoff* [1942] Ch 298; *Re Brinkley's Will Trusts* [1968] Ch 407.

[66] *Adams v Adams* (1777) 2 Cowp 651; *Brudenell v Elwes* (1801) 1 East 442; *Bristow v Warde* (1794) 2 Ves 336; *Reid v Reid* (1858) 25 Beav 469; *Rucker v Scholfield* (1862) 1 Hem & M 36. And see *Routledge v Dorril* (1794) 2 Ves 357; *Crompe v Barrow* (1799) 4 Ves 681; *Smith v Lord Camelford* (1793–1795) 2 Ves 698. In some old cases, the court applied a limited *cy pres* doctrine in instances where there were two objects, one general and one particular, and the general purpose was effected at the expense of the particular, as far as the power would allow, with the result that an appointment to object O for life, with remainder to O's children (being strangers), would give O an estate tail: see Sugden, 498–504.

[67] *Brown v Nisbett* (1750) 1 Cox Eq Cas 13.

[68] Gray, §114, n 3.

[69] *Brown v Nisbett*, above; *Doe d Blomfield v Eyre* (1848) 5 CB 713; *Re Staples* [1933] IR 126; and see *Bate v Willats* (1877) 37 LT 221. *cf. Gatenby v Morgan* (1876) 1 QBD 685 and *Re Jones* [1915] 1 Ch 246, both involving 'pre-Wills Act 1837' devises.

gift to O becomes absolute.[70] Moreover, the gift to O may become absolute where the gift over to S is void for remoteness, for that is not dependent on any intention of the appointor.[71] Similarly, general rules of law as to the distinction between, and the characteristics of, determinable interests and interests defeasible by condition subsequent apply to appointments.[72]

8.18 If there is no absolute appointment to an object of the power, but the appointment is coupled with a series of invalid limitations, so as to form one system of trusts, the whole appointment will fail. In *Rucker v Scholefield*,[73] for example, the donees of a power of appointment among children and their issue appointed that the trustees should stand possessed of the trust fund upon trust to appropriate one-fifth for the benefit of each daughter, and to pay and apply the income of the share of each to her for her separate use; and, after the death of each daughter, to hold her share on 'the trusts following' for the benefit of her children. In the event, only the life interests were valid and, subject thereto, the fund went as in default of appointment. Wood V-C pointed out that, where (as in this case) there is, as a matter of construction, one system of trusts, all that can be done is to give effect to so many of them as is consistent with law. In some circumstances, however, the relevant appointment may indicate sufficiently clearly that, in the event of the failure of the trusts declared in respect of some shares (for example because the beneficiaries of such trusts are strangers to the powers) those shares are to accrue to the other shares, the trusts whereof have not failed.[74]

8.19 If there is an appointment under a special power of appointment to an object of that power in trust for strangers, it is unclear whether the object will hold the fund absolutely, on the basis that the appointment is one and indivisible[75] or because the so-called rule in *Lassence v Tierney*[76] applies, or whether it fails entirely, on the basis that the appointor did not intend to benefit that object and had not addressed his mind properly (or at all) to the nature or effects of the appointment.[77] The appointment might also be seen to be a fraud on the power. It is certainly difficult to see how such an appointment could stand if the appointor cannot be shown to have intended to confer any benefit on the object himself.[78]

8.20 Finally, there is the rule in *Lassence v Tierney*.[79] In *Woolridge v Woolridge*,[80] Page Wood V-C stated:

> where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes, i.e. not only so far as they attempt to regulate the

[70] *Webb v Sadler* (1873) 8 Ch App 419, 426; *Re Rooke* [1953] Ch 716.

[71] *Brown v Nisbett*, above; *Re Brown and Sibly's Contract* (1876) 3 Ch D 156; *Re Staveley* (1920) 90 LJ Ch 111; *Re Pratt's Settlement Trusts* [1943] Ch 356.

[72] See generally, paras 3.38A–3.38C above and Megarry and Wade, paras 3-066–3-067.

[73] (1862) 1 Hem & M 36. See also *Re Finch and Chew's Contract* [1903] 2 Ch 486; *Line v Hall* (1873) 43 LJ Ch 107, 108.

[74] *Re Swinburne* (1884) 27 Ch D 696. *cf. Tomkyns v Blane* (1860) 28 Beav 422 (where the object was put to his election).

[75] Farwell, 347; Sugden, 518; *Rucker v Scholefield* (1862) 1 Hem & M 36; *Gerrard v Butler* (1855) 20 Beav 541. See also *Tomkyns v Blane* (1860) 28 Beav 422 (where the object was put to his election).

[76] (1849) 1 Mac & G 551. See the next para for an outline of this rule.

[77] *Hamilton v Royse* (1804) 2 Sch & Lef 315, 332; *Re Cohen* [1911] 1 Ch 37. Such a case seems capable of falling under the head of failure to exercise an active discretion at all (*Turner v Turner* [1984] Ch 100) or as a breach of fiduciary duty in relation to the exercise of a power within the scope of *Pitt v Holt* [2011] EWCA Civ 197. See further paras 10.54–10.56 below.

[78] See also paras 9.38–9.61 below.

[79] (1849) 1 Mac & G 551.

[80] (1859) Johns 63, 69.

> quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election.[81]

This is an application to appointments of what became known as 'the rule in *Lassence v Tierney*', the essence of which has been stated thus:

> If you find an absolute gift to a legatee in the first instance, and trusts are engrafted or imposed on that absolute interest which fail, either from lapse or invalidity or any other reason, then the absolute gift takes effect so far as the trusts have failed, to the exclusion of the residuary legatee or next of kin, as the case may be.[82]

The rule therefore depends on the existence of an initial absolute gift and its subsequent cutting down (which is absent in the earlier examples in the present classification). A limitation containing both gift and restrictions thereon will normally not bring the rule into operation,[83] nor will a gift to donees 'subject to the provisions hereinafter contained'.[84]

(ii) Appointment of an interest to a stranger, followed by an interest to an object

8.21 Two separate questions arise here. First, is the appointment in remainder in favour of an object valid, or does it perish along with the prior invalid appointment in favour of a stranger? Secondly, if it is valid, is it accelerated so as immediately to vest in possession? Both questions were once tied up with the common law's complex rules governing the validity of remainders, and, although these rules are no longer with us, it is still helpful to consider them briefly. One of these rules was that a limitation of a remainder must be preceded by a limitation of a vested estate of freehold. There could be no abeyance of seisin. Moreover, if the remainder was dependent on the preceding limitation, the destruction or invalidity of that precedent estate would destroy the remainder too.[85] Appointments which contravened these rules were, therefore, likely to be void,[86] although a distinction was drawn between those made by deed and those made by will.[87] An appointment by deed speaks from the time of the deed's execution; and it was generally not permitted to 'wait and see' whether the unoffending limitations in remainder would, in the event, indeed be dependent upon a prior invalid limitation, or would, in fact, immediately vest in possession.[88] Appointments by will, on the other hand, were treated more leniently. Here, the issue depended 'wholly upon intention, which the Courts execute even at the expense of the general rule of law . . . the question turns upon the intention, and not upon any thing peculiar to powers, beyond the circumstance that the invalidity of the intermediate estates was occasioned by an excess in the execution of the power'.[89]

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[81] See also *Churchill v Churchill* (1869) LR 5 Eq 44; *Re Neave* [1938] 3 All ER 220.

[82] *Hancock v Watson* [1902] AC 14, 22, *per* Lord Davey. See also *Rucker v Scholefield* (1862) 1 Hem & M36.

[83] *Re Rayne* [1927] 2 Ch 1.

[84] *Re Cohen's Will Trusts* [1936] 1 All ER 103.

[85] See generally, Simpson, 199–200.

[86] See, eg *Brudenell v Elwes* (1801) 1 East 442.

[87] See generally Farwell, 353–5.

[88] See Megarry and Wade, paras 9-001–9-006, 9-024–9-029, 9-059–9-069 and 9-089–9-112.

[89] *Crozier v Crozier* (1843) 3 Dr & War 353, 365, 368, *per* Lord St Leonards. This rule seems to be based on a more lax approach to the construction of wills generally: see 367. The rule applied irrespective of whether the intermediate limitations were invalid because of an excessive execution of the power or by reason of a general rule of law (see 368) although an appointment embracing objects not within the perpetuity period would have been wholly void. Whether there continues to be a more lenient approach to the construction of wills as opposed to deeds is doubtful. The 'modern' approach to construction (for which see Ch 2 above) focuses on each separate instrument and leans heavily in favour of upholding, rather than striking down, its provisions. This probably means that ancient technical rules will be avoided, where possible, but it still does not mean that a court can disentangle valid from invalid provisions by imputing intentions to the parties which they themselves clearly did not possess.

8.22 These rules never applied to personalty or to equitable estates in land. And, of course, since 1925 the only legal estates capable of subsisting or being created in realty are the estate in fee simple absolute in possession and the term of years absolute,[90] so that all remainders and reversions,[91] as well as life interests, must necessarily be equitable and take effect under a trust. Many of the older cases would thus seem to have perished along with the common law rules upon which they were based and which gave rise to the distinctions mentioned above. However, the central issue remains that of the intention of the appointor, be it expressed in a deed or a will, and that the guiding principle in all cases ought to be that adopted in *Crozier v Crozier*.[92] Indeed, the abolition of the old common law remainder rules has simply removed a substantial obstacle which formerly would have defeated the clear intention of many an appointor. On the other hand, if the intention of the appointor is paramount, it must therefore be possible, in principle, (although perhaps extremely unlikely) that a subsequent interest can still be made dependent upon, and therefore made to perish along with, a prior invalid interest, notwithstanding the abolition of the old common law remainder rules. Thus, an appointment to stranger S for life, remainder to object O, will be valid as to O but clearly not as to S.[93] If there is an appointment to stranger S, but with a gift over to object O on a contingency, the appointment to S is clearly void, but the gift over to O will take effect if (and *only* if) the contingency is satisfied.[94] Thus, if, under a power to appoint to children, there is an appointment to grandchild S, but if he dies before attaining the age of majority then gift over to child O, the gift over will take effect only if S dies during his minority; if he does not, the property subject to the power passes in default of appointment.[95] The same consequence ensues presumably when the gift over to object O depends on the happening of some particular event or the satisfying of some stipulated condition (be it precedent or subsequent).

8.23 As to the second question, namely whether the interest of object O is accelerated because the prior gift to stranger S is void, there is no reason why limitations under an appointment should not be subject to the same rules as limitations which do not so arise. It has been said that 'as a general rule the effect of a disclaimer or other destruction of the particular estate is to accelerate the estates in remainder.'[96] To be precise, acceleration depends both on the nature of the remainder and on a discernible intention that it be accelerated. As Jenkins LJ put it, in *Re Flower's Settlement Trusts*:[97]

> The principle, I think, is well settled, at all events in relation to wills, that where there is a gift to some person for life, and a vested gift in remainder expressed to take effect on the death of the first taker, the gift in remainder is construed as a gift taking effect on the death of the first taker or on any earlier failure or determination of his interest, with the result that if the gift to the first taker fails . . . or . . . does not take effect because it is disclaimed, then the person entitled in remainder will take immediately upon the failure or determination of the prior interest, and will not be kept waiting until the death of the first taker.

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[90] Law of Property Act 1925, s 1(l)(a), (b).

[91] Apart from reversions expectant on leases: *ibid.*, s 205(l)(xix).

[92] (1843) 3 Dr & War 353, 370: 'for here although the life interest is void, yet it would still further defeat the testator's intention if the remainder... were not supported'.

[93] *Crozier v Crozier* (1843) 3 Dr & War 353; *Alexander v Alexander* (1755) 2 Ves Sen 640; *Doe d Duke of Devonshire v Lord Cavendish* (1782) 4 Term Rep 741n; *Robinson v Hardcastle* (1788) 2 Bro CC 344; *Reid v Reid* (1858) 25 Beav 469.

[94] *Alexander v Alexander*, above; *Robinson v Hardcastle*, above; *Routledge v Dorril* (1794) 2 Ves 357; *Re Enever's Trusts* [1912] 1 IR 511. *cf. Crompe v Barrow* (1799) 4 Ves 681; *Hewitt v Lord Dacre* (1838) 2 Keen 622.

[95] *Long v Ovenden* (1881) 16 Ch D 691.

[96] *Re Scott* [1911] 2 Ch 374.

[97] [1957] 1 WLR 401, 405; the requisite intention was in fact absent here.

This general principle applies to both real and personal property; it applies to both wills and settlements *inter vivos* although 'it may well be more difficult, in the case of a settlement, to collect the intention necessary to bring the doctrine of acceleration into play';[98] it applies where the remainder is a class gift;[99] and it applies to any interest, including partial (such as an annuity) and residuary interests.[100]

8.24 As to the nature of the remainder, 'to bring the doctrine of acceleration into operation something must be found... equivalent to the gift of a vested remainder'.[101] However, it need not be both vested and indefeasible, for a vested defeasible remainder will suffice.[102] In contrast, if, at the time of the determination of the prior estate, the remainder following that estate is still contingent, there can be no acceleration, for it will then still not be possible to tell whether it will take effect.[103] Even an express provision that, on the failure or determination of a prior interest, a subsequent contingent interest was to vest in possession immediately would not bring about an acceleration of that interest; rather, it would simply be the satisfaction of an alternative contingency. Here, again, the position was formerly complicated, in the case of legal estates, by the feudal rules governing the limitation of real estate. It was impossible for an estate in remainder to come to an end so as to let in a prior estate. Consequently, only vested and indefeasible remainders could be accelerated: vested defeasible remainders, still less contingent reminders, could not.[104] However, where the limitations were equitable, the requirements of feudal law were satisfied by vesting the legal fee in trustees.[105] Thus there were no technical difficulties to prevent acceleration of equitable remainders.[106] Since 1925, of course, all such remainders are necessarily equitable.[107] Consequently, general principles now apply without exception.[108]

8.25 The second requirement for acceleration, namely a discernible intention that it should occur, is of equal importance. Equity 'carried out the intention of the testator by giving effect to the equitable limitations according to the terms of his will';[109] and the same applies to deeds.[110] This, of course, is a matter of the construction of the relevant instrument. However, the cases show that the court will often go a long way to find such an intention that acceleration should occur. The words 'with remainder' alone have been held sufficient to show that a subsequent estate arises and vests in possession on the cesser, for whatever reason, of the prior estate.[111] Even if the subsequent limitation

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[98] *Loc. cit.* See also *Re Sadick* [2009] HKCU 1957; [2010] WTLR 863.

[99] *Eavestaff v Austin* (1854) 19 Beav 591; *Jull v Jacobs* (1876) 3 Ch D 703; *Re Johnson* (1893) 68 LT 20; *Re Crothers' Trusts* [1915] 1 Ir R 53.

[100] *Re Hodge* [1943] Ch 300, where Simonds J said, at 301–02: 'An interest is postponed that a prior interest may be enjoyed. If that prior interest is determined, whether by the death of a prior beneficiary or for any other cause, the reason for postponement disappears and there is no reason why there should not be acceleration.'

[101] *Re Flower's Settlement Trusts*, above, 408; *Re Dawson's Settlement* [1966] 1 WLR 1456; *Re Harker's Will Trusts* [1969] 1 WLR 1124.

[102] *Re Willis* [1917] 1 Ch 365; *Re Conyngham* [1921] 1 Ch 491; *Re Taylor* [1957] 1 WLR 1043; *Re Hatfeild's Will Trusts* [1958] Ch 469.

[103] *Re Townsend's Estate* (1886) 34 Ch D 357; *Re Taylor*, above, 1045; *Re Scott* [1975] 1 WLR 1260.

[104] *Re Scott*, above, 378–80; criticized in (1916) LQR 83 and 392 (FE Farrer) but referred to with approval by an unrepentant Warrington LJ in *Re Conyngham* [1921] 1 Ch 491, 498.

[105] *Abbiss v Burney* (1881) 17 Ch D 211, 229, 233.

[106] *Re Conyngham* [1921] 1 Ch 491, 498.

[107] Law of Property Act 1925, s 1(1).

[108] *Re Hatfeild's Will Trusts* [1958] Ch 469, 475.

[109] *Abbis v Burney*, above, 233; *D'Eyncourt v Gregory* (1864) 34 Beav 36: *Re Willis* [1917] 1 Ch 365, 372–3; *Re Conyngham* [1921] 1 Ch 491; *Re Hatfeild's Will Trusts* [1958] Ch 469; *Re Dawson's Settlement* [1966] 1 WLR 1456; *Re Harker's Will Trusts* [1969] 1 WLR 1124.

[110] *Re Flower's Settlement Trusts*, above.

[111] *Re Hatfeild's Will Trusts*, above, 475.

were expressed in terms not to take effect in possession until the decease of the prior life tenant, this too will be readily construed as a limitation of a remainder to take effect in every event which removed the prior interest out of the way: words such as 'from and after his decease' are taken to indicate only the order of succession of the limitations and not the precise time at which they are to vest in possession.[112] Similarly, 'after the death' has been readily treated as equivalent to 'subject to the foregoing trust'.[113] In another instance, where there was a gift to A for life 'and then to be divided equally between her issue', the court construed the word 'then' as equivalent to 'at her death', or 'after her death', or perhaps 'subject to her life interest'.[114]

8.26 There are very few cases, in fact, where an intention to accelerate has not been found. In *Re Flower's Settlement Trusts*,[115] for instance, the settlor had given discretionary powers to trustees to apply trust income during his lifetime in favour of a wide variety of objects (excluding himself, his wife and his children); there followed other trusts, including a life interest for his widow, which were to take effect 'after the death of the settlor'. The trusts which were to have operated during his lifetime were void for uncertainty. The Court of Appeal held that such indications of intention as there were in the trust deed pointed strongly against acceleration; 'after the death' was intended literally in this case. Similarly, in *Re Young's Settlement Trusts*,[116] Harman J concluded that the doctrine of acceleration was inapplicable to the 'very peculiar limitations' which he had to consider. These provided for the division of trust income into thirds, each one-third being payable to one of the settlor's sons for life, with remainder to his named wife (if married to him at his death) during her widowhood, with remainder to the children of that son, subject to a proviso that, if any child of a son died before 'the date hereinafter fixed for the distribution of the capital of the trust fund' leaving issue, then the share of income which would have been payable to such child was to be paid to the issue of such child equally *per stirpes*. The capital of the trust fund was to be held 'upon the determination or failure of the last surviving life interest in any part of the income... upon trust to divide the same equally and per capita amongst each and every the child or children' of the three sons. Although Harman J acknowledged that the doctrine of acceleration could involve some alteration of beneficial interests,[117] he was not prepared, in the circumstances of *Re Young*, to infer such an intention on the part of the settlor. Given the peculiar form of the trusts, acceleration would have produced anomalous and unfair results.[118] *Re Young* is, therefore, entirely consistent with other decisions in that an intention to accelerate was considered essential, even if, on the facts, it was not found. However, Harman J noted that he had been referred to 'no case in which the effect of a disclaimer or surrender was to alter vested interests in possession, as is suggested to be the result here'.[119] This, it is suggested, should have little significance if an intention to accelerate is expressed or can otherwise be inferred, although it might be cogent evidence that such acceleration was not in fact intended.

8.27 Intention is also clearly important in determining two other matters. First, where there is a contingent remainder and the contingency has not been satisfied at the time of the determination

[112] *Lainson v Lainson* (1854) 5 De GM & G 754, 756; *Re Conyngham*, above, 498.
[113] *Re Taylor*, above, 1047; and *Re Young's Settlement Trusts* [1959] 2 All ER 74, 78.
[114] *Re Davies* [1957] 1 WLR 922.
[115] [1957] 1 WLR 401.
[116] [1959] 2 All ER 74.
[117] *Re Davies* [1957] 1 WLR 922, *Re Johnson* (1893) 68 LT 20 and *Re Flower's Settlement Trusts* [1957] 1 WLR 401 were referred to.
[118] [1959] 2 All ER 74, 78B–D, 79E–F. Harman J referred to 'a startling result'. See also *Re Faux* (1915) 113 LT 81, especially 89.
[119] [1959] 2 All ER 74, 79D.

of the prior interest, what is to happen to the income which accrues in the interim? In the absence of some indication to the contrary, such income cannot be accumulated pending the contingency, for by giving away the prior interest (usually a life interest) the testator or settlor has evinced an intention against accumulation. The income, therefore, is undisposed of (and passes under the residuary gift or as on a partial intestacy or is held on resulting trust, as the case may be).[120]

8.28 The second issue is whether acceleration has the effect of closing a class of beneficiaries who are entitled in remainder. The cases suggest that this may indeed be what happens, but they are not entirely consistent. In *Re Johnson*,[121] there was a devise to the testator's son (A) for life, with remainder to A's wife for life, with remainder 'after the death of the survivor of them' to trustees for sale upon trust for 'all my children who shall then be living'. The life interests of A and his wife were later revoked by codicil. Stirling J held not only that the class gift took effect immediately but also that the class closed at once, its members being all the living children of the testator, which presumably would include A himself. More recently, in *Re Davies*,[122] Vaisey J held that, where a share of residue had been left to A for life 'and then to be divided equally between her issue', and A disclaimed her life interest, the principle of acceleration so applied as to give the share to A's three children to the total exclusion of other unknown members of the class. The remainder must, of course, be vested, for otherwise it could not be accelerated at all.[123] Generally, and in the absence of a strong indication to the contrary, where there is a gift to a class subject to a contingency (for example 'to the children of A who shall attain the age of 21') the class will close when the first member of the class to fulfil that contingency does so, and the class will be confined to those in existence when the first capital share[124] becomes payable to the exclusion of anyone born thereafter; but until that happens, the class remains open.[125]

8.29 It is often said that class-closing rules are 'not founded on any view of the testator's intention',[126] for there are, in fact, two conflicting intentions: one that all class members take, the other that they take at a certain time or event.[127] They are rules of convenience, or perhaps better called 'artificial rules of construction'.[128] Nevertheless, it remains the case that the rules can be excluded expressly

[120] *Re Taylor* [1957] 1 WLR 1043, 1045, where 'acceleration' is printed for 'accumulation': see [1957] 3 All ER 58c; *Re Scott* [1975] 1 WLR 1260. In *Re Hatfeild's Will Trusts* [1958] Ch 469 it was argued that the income should be accumulated under the provisions of s 175 of the Law of Property Act 1925, but this was rejected on the grounds that the section does not apply where 'such income, or any part thereof, may be otherwise expressly disposed of'.

[121] (1893) 68 LT 20; applied in *Re Crothers' Trusts* [1915] 1 Ir R 53.

[122] [1957] 1 WLR 922. This, it is submitted, is an unsatisfactory decision in some respects, though approved of *obiter* in *Re Taylor* [1957] 1 WLR 1043. Of the first alternative considered, namely an intestacy as to the income during the remainder of A's life, Vaisey J thought it was supported by *Re Vernon* (1906) 95 LT 48, 'but this is far from conclusive'; and of the second alternative, namely that the remainder was vested but defeasible, he concluded that it 'seems logical, though it might be awkward to work out in practice' but 'I can find no authority at all', which is clearly erroneous in view of earlier cases: see para 8.24 above.

[123] *Jull v Jacobs* (1876) 3 Ch D 703: *Re Townsend's Estate* (1886) 34 Ch D 357; and see the observations thereon in *Re Davies* above, 926, and in *Re Taylor*, above, 1048; *Re Scott* [1975] 1 WLR 1260.

[124] The rule does not apply to gifts of income only (*Re Stephens* [1904] 1 Ch 322) or to discretionary trusts of income (*Re Ward* [1965] Ch 856); but it is not excluded simply because land is held on trust for sale and sale is postponed (*Re Edmondson's Will Trusts* [1972] 1 WLR 183.

[125] *Andrews v Partington* (1791) 3 Bro CC 401; the rule applies also to deeds: *Re Knapp's Settlement* [1895] 1 Ch 91. See also *Re Chartres* [1927] 1 Ch 466; (1954) 70 LQR 61 (JHC Morris); and [1958] CLJ 39 (SJ Bailey).

[126] *Re Emmet's Estate* (1880) 3 Ch D 484, 490.

[127] *Mainwaring v Beevor* (1849) 8 Hare 44, 49; *Re Stephens* [1904] 1 Ch 322, 328: *Re Chartres* [1927] 1 Ch 466, 474–5.

[128] *Re Ransome* [1957] Ch 348, 358. For class-closing rules generally, see Megarry and Wade, paras 9-059–9-079 and 14-073–14-077; (1954) 70 LQR 61 (JHC Morris); [1958] CLJ 39 (SJ Bailey); Morris and Leach, 109 *et seq.*; and see paras 8.32–8.34 below.)

by a direction to the contrary.[129] On the other hand, although the decision of Vaisey J in *Re Davies* was approved by Upjohn J in *Re Taylor*,[130] such approval was *obiter* and the doctrine of acceleration was not applied in the latter case. In *Re Kebty-Fletcher's Will Trusts*,[131] Stamp J easily distinguished the case before him, where there had been an assignment of the life interest to trustees on the trusts which would have been applicable if the tenant for life were dead, from *Re Davies*, where there had been a disclaimer of the life interest. Nevertheless, Stamp J clearly doubted whether *Re Davies* was correctly decided; and, in *Re Harker's Will Trusts*,[132] Goff J refused to follow it. In *Re Harker*, the life tenant had executed a deed of release and surrender of his life interest and the two questions before the court were (i) whether the interests in remainder of his children had been accelerated into possession and (ii) if so, whether the rule in *Andrews v Partington* applied so as to close the class of children. As to question (i), Goff J held that the children's interests had indeed been accelerated, but, as to question (ii), he held that the rule in *Andrews v Partington* did not apply. According to Goff J, the rule is adopted only when the court is endeavouring to reconcile two inconsistent directions, one that the whole class of beneficiaries shall take, and the other that the fund shall be divided at a moment when the whole class cannot be ascertained,[133] that is, where the testator intended, or may be taken to have intended, a distribution at a moment which may be anterior to the birth of all the members of the class.[134] In the case before him, there was no such inconsistency.

> Where the class are independent of the tenant for life, then, of course, the testamentary dispositions are such that the testator may be taken to have intended a distribution before they are ascertained, but when they are the children of the tenant for life that is not so.[135]

He therefore refused to follow *Re Davies*. He explained *Re Johnson*[136] on the basis that a conflict arose in that case on the testamentary documents; and he distinguished *Jull v Jacobs*[137] and *Re Townsend's Estate*[138] on the ground that the problem did not present itself in either case. *Re Chartres*,[139] where Astbury J applied the rule so as to close a class entitled in default of appointment upon the release of a power of appointment, was explained on the ground that the testator himself had specified the expiration of the period of distribution.[140] Therefore, whether the rule applies so as to close a class comprised of the life tenant's own children, on the acceleration of their interests into possession on the disclaimer or surrender of the life interest, is seriously in doubt. Megarry and Wade[141] state that, where the remainders are accelerated by the premature determination of a prior life interest and a remainderman is already qualified to take, the rule will not apply unless the limitation is one to which the rule would in any case apply. Thus, where there is a gift to A for life, with remainder to his children who attain 21, no remainderman could be born after A's death and so the premature determination of A's life interest will not bring within the rule a

[129] *Scott v Earl of Scarborough* (1838) 1 Beav 154; *Hodson v Micklethwaite* (1854) 2 Drew 294; *Re Ransome* [1957] Ch 348; *Re Henderson* [1969] 1 WLR 651; *Re Clifford's Settlement Trusts* [1981] Ch 63.

[130] [1957] 1 WLR 922.

[131] [1969] Ch 339.

[132] [1969] 1 WLR 1124.

[133] Citing Buckley J in *Re Stephens* [1904] 1 Ch 322, 328.

[134] *Re Kebty-Fletcher* [1969] Ch 339, 344, *per* Stamp J. See also *Bassett v Bassett* [2005] WTLR 51; *Hammersely v Newton* [2005] WASC 221; and *Re Sadick* [2009] HKCU 1957; [2010] WTLR 863.

[135] [1969] 1 WLR 1124, 1128.

[136] (1893) 68 LT 20.

[137] (1876) 3 Ch D 703.

[138] (1886) 34 Ch D 357.

[139] [1927] 1 Ch 466.

[140] This was also the view taken by Stamp J in *Re Kebty-Fletcher* [1969] Ch 339. However, it is difficult to justify in view of Astbury J's general approach and particularly his observations at [1927] 1 Ch 466, 478.

[141] At para 14-076.

limitation which would otherwise stand outside it. However, where the remainder is to A's grandchildren who attain 21, the rule would apply to the limitation, so as to exclude some of the grandchildren, if A's life interest is prematurely determined. This is the distinction which Goff J had in mind in *Re Harker*. Nevertheless, it is still inconsistent with *Re Davies*.

8.30 There is no convincing reason why the same rules should not apply to limitations created by the exercise of a power of appointment. Certainly, it is the intention of the appointor which is the crucial factor: 'The question turns upon the intention, and not upon anything peculiar to powers, beyond the circumstance that the invalidity of the intermediate estates was occasioned by an excess in the execution of the power.'[142] However, according to Farwell,[143] appointments by will differ in this respect from devises and bequests, not in ignoring the importance of intention but in the assumption or presumption which is made in establishing that intention. 'An appointment by will to an object in remainder, after a particular estate to a stranger is not accelerated, unless a contrary intention can be gathered from the instrument executing the power: but the estate goes during the period over which the particular estate, if valid, would have extended, to the persons entitled in default.' Thus, where a fund is appointed to stranger S for life, remainder to object O, the income of the fund would go as in default of appointment during S's lifetime, unless a contrary intention is evident. On this basis, where there was an appointment on trusts for stranger S, but if they should become 'incapable of taking effect' then in favour of object O, a clear contrary intention was manifested and there was an immediate appointment to O.[144] Similarly, O's interest in remainder was accelerated on the determination of a determinable life interest appointed to S and there was express provision (and hence the requisite contrary intention) that on such event the life interest 'should cease and determine as fully and effectually as it would by [S's] actual decease'.[145]

8.31 If any such presumption ever existed, its strength and indeed its continued existence are matters of uncertainty. The only authority referred to in support of the proposition by both Farwell and Sugden is *Crozier v Crozier*,[146] where Lord St Leonards evidently regarded it as well settled. Nevertheless, *Crozier* was concerned almost entirely with the question whether the subsequent limitation failed or not. The cases referred to in the judgment do not seem to be helpful on the question of acceleration for, in many of them, the limitations in remainder under the relevant appointment appear to have been contingent in any event.[147] The remainder in *Crozier* itself was not contingent. Nevertheless, it was obvious from the dispositions in the will that the testator did not intend that remainder to be accelerated.[148] Indeed, Lord St Leonards himself concluded that, having reviewed the authorities, the question turns on intention;[149] and his statement does not seem to warrant the inference that, in the case of testamentary appointments, there is to be no acceleration of a remainder unless a 'contrary intention' can be gathered from the will. If any such presumption ever existed, it seems to have been of the mildest kind; and there does not seem to be any convincing reason why it should now prevail. Since intention is indisputably paramount, and

[142] *Crozier v Crozier* (1843) 3 Dr & War 353, 368, *per* Lord St. Leonards.

[143] At 355–6, following Sugden, 515, who was following his own decision in *Crozier v Crozier*, above.

[144] *Line v Hall* (1873) 43 LJ Ch 107; *Rochford v Hackman* (1852) 9 Hare 475. This, it seems, could equally well be regarded as an instance of alternative sets of trusts, one of which simply could not take effect. See too, *Re Finch and Chew's Contract* [1903] 2 Ch 486.

[145] *Craven v Brady* (1867) LR 4 Eq 209.

[146] (1843) 3 Dr & War 353.

[147] See, eg, *Alexander v Alexander* (1755) 2 Ves Sen 640, 642: *Robinson v Hardcastle* (1786) 2 Bro CC 22, 29–30; *Crompe v Barrow* (1791) 4 Ves 681; *Routledge v Dorril* (1794) 2 Ves 357, 363; and see also *Brudenell v Elwes* (1801) 1 East 442.

[148] *Craven v Brady* (1867) LR 4 Eq 209, 214.

[149] (1843) 3 Dr & War 353, 368.

provided the remainder is not contingent when the question arises, then the assumption should be that a subsequent limitation is only postponed during the subsistence or enjoyment of a prior one, and that the destruction of that prior interest should, in the absence of a contrary indication, lead to the acceleration of the remainder.

(iii) Appointment to a class embracing both objects and strangers

8.32 The basic rule is relatively straightforward:

> When an appointment is to a class, some of whom are within and others are not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A, who is within the limits, and say so much is to go to him, though the others are not within the limits, yet the appointment to A shall take effect; but if the appointment is to a class, some of whom may, and others may not, be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails.[150]

Thus, the relevant class must be ascertained or ascertainable at the relevant time and also the share each member was intended to take must then be known. The operation of this principle is illustrated clearly by *Re Farncombe's Trusts*.[151] A power to appoint to issue, 'such issue to be born before any such appointment', was exercised in favour of A (an object) for life, remainder to A's children in equal shares at 21. Three children (including one *en ventre sa mere*) were living at the date of the appointment; three others were born afterwards. Hall V-C held[152] that, if all the children attained 21, the three children who were proper objects of the power would take a one-sixth share each, and the remaining three-sixth shares would go as in default of appointment. If any child who was not an object died before he attained 21, his 'share' would 'go to increase in part or wholly, according to circumstances, the shares well appointed'. Although it is not entirely clear what he meant by this, it seems consistent with his reasoning (based on the intention of the appointor) that, if (say) S1 dies under 21, his presumptive 'share' does not accrue in equal one-third shares to the shares of 01, 02, and 03, but is split five ways between them and S2 and S3, so that two-fifths of S1's presumptive 'share' still goes as in default of appointment. It follows that if (say) 01 dies under 21, three-fifths of his presumptive share would go as in default of appointment.

8.33 The same approach applies, it seems, where a fund is appointed to objects and strangers as joint tenants. In *Re Kerr's Trusts*,[153] Lord Jessel MR refused to apply to a fund the rules of tenure applicable to realty, so that an appointment to O and S as joint tenants was effective to the extent of O's interest, but that of S failed and went as in default of appointment. Whether the same conclusion could be reached where land is involved remains undecided. The implication of *Re Kerr* is that it could not. On the other hand, to the extent that beneficial joint tenants of land would have been regarded, since 1925 and until 1 January 1997,[154] as having interests in the proceeds of sale of the land rather than in the land itself, the *Re Kerr* approach could well apply. Moreover, each joint tenant is seised of the whole fee; and they have to take simultaneously. Hence, the disclaimer by one joint tenant does not affect the other(s), for the whole estate is already vested in him or them.[155] However, the relevance of such rules may be difficult to establish where it is intention that matters most; and in the absence of some clear indication, the appointor's intention will be

[150] *Harvey v Stracey* (1852) 1 Drew 73, 117, *per* Kindersley V-C. See also *Sadler v Pratt* (1833) 5 Sim 632.
[151] (1878) 9 Ch D 652.
[152] *ibid.*, 657–8.
[153] (1887) 4 Ch D 600.
[154] Trusts of Land and Appointment of Trustees Act 1996, ss 3–5, Sch 2.
[155] *Adams v Taunton* (1820) 5 Mad 435; *Townson v Tickell* (1819) 30 B & Ald 31; *Doe d Chidgey v Harris* (1847) 16 M & W 517, 524.

difficult to ascertain. The 'all or nothing' nature of a joint tenancy is capable of operating against, as well as in favour of, the object. Similarly, although a right of severance might strengthen his claim to a moiety, such a right could only arise if a valid joint tenancy had been created in the first place, which could well be the crucial issue.

8.34 If it is not possible to ascertain precisely what share or interest an object is intended to take, the whole appointment fails. This may be the case, for instance, if the class of appointees remains open or unascertained at the relevant time, so that it is not possible to stipulate even the minimum interest of an object. Similarly, where discretionary trusts are created in favour of a class of objects and non-objects, the appointment will be void *in toto*.[156] In the application of this principle, it is permissible to 'wait and see' what the actual state of affairs may be at the time of distribution or vesting. An appointment made to take effect in the future is not void simply because the appointees may, when that time arrives, include strangers as well as objects.[157] Thus, if the power authorizes an appointment in favour of children and issue living at the appointer's death, one must wait and see whether there are then objects to take and whether their respective shares are ascertainable.[158]

(4) **Miscellaneous cases**

8.35 Since an excessive execution of a power or discretion is essentially an unauthorized exercise, one which is *ultra vires*, the doctrine is clearly capable of applying in innumerable instances and the categories dealt with earlier in this chapter are simply examples organized into orthodox categories. Thus, for example, an appointment need not be in favour of a stranger as beneficiary: it is equally excessive if a person who is appointed as trustee is expressly excluded by the trust instrument—something that is of particular importance in relation to the appointment of trustees in one jurisdiction by an appointor, or at the direction of a court, in another jurisdiction.[159] Other examples, such as an execution which is in breach of the rule against perpetuities or the rule against excessive accumulations, or in breach of the rule against delegation, are sufficiently common and problematic to merit separate treatment.[160] It is also suggested that a breach of the rule against conflict of interests may also be an example of the operation of the same doctrine.[161] However, these examples and categories of excessive execution are clearly not exhaustive.[162] Whenever and wherever a limited authority to act or decide is conferred on a person, irrespective of whether he is a trustee or other fiduciary (such as a company director or agent) or merely an ordinary individual, there is potential for that authority to be exceeded. Sometimes, it may be a difficult question of construction to determine the intended scope of a particular power: for example, it is highly material whether or not powers conferred on an employer in relation to a pension scheme are exercisable for its own benefit or in its own interests.[163] If it is a fiduciary power, in the strict sense, then it may not be so exercised in the absence of express authorization; but if it is an 'enlarged' fiduciary power, or not a fiduciary power at all, and if, on the proper construction of the power, one of its purposes or objects is to

[156] *Re Brown's Trusts* (1865) LR 1 Eq 74: here, the discretionary trusts, which were to arise on the forfeiture of a protected life interest appointed to an object, were not authorized by the terms of the power in any event.

[157] *Harvey v Stracey*, above, 133.

[158] *Re Witty* [1913] 2 Ch 666. If there are no objects to take, the rule in *Lassence v Tierney*, above, may apply.

[159] *Re the A Irrevocable Trust* (1999–2000) 2 ITELR 482 (High Court of the Cook Islands). See also *Re Newen* [1894] 2 Ch 297; *Montefiore v Guedalla* [1903] 2 Ch 723, 725; *Re Sampson* [1906] 1 Ch 435.

[160] See Chs 5 and 6 above.

[161] See Ch 12 below for the rule against conflict of interests.

[162] eg, certain investments may exceed the scope of a power of investment; *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch); *Khoo Tek Keong v Ch'ng Joo Tuan Nesh* [1934] AC 529; and a power to appoint real estate among children in tail did not authorize an appointment to one of those children for a lesser estate, such as an estate for life: *Re Porter's Settlement* (1890) 45 Ch D 179.

[163] As in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR. 589.

benefit the employer, then its exercise by the employer in its own favour will not be excessive. The exercise may be open to challenge on the ground that the employer is in breach of its implied duty of good faith,[164] or (if it is a fiduciary power) of one of the many duties owed by the donee of such a power, as discussed below.[165] It may even be a fraudulent exercise of the power. The particular 'breach' may thus be categorized in different ways, depending on the precise facts of each case. Nevertheless, each category of 'breach' is different and rests on different considerations. In none of these latter examples is there an *excessive* execution in the sense described in this chapter: only if the intended *scope* of the particular power is not complied with will this be the case.[166] Finally, it must again be emphasized that the scope of a particular power, and the question whether the authority conferred by it has been exceeded or not, is an issue of construction in the first instance. Older authorities—and the orthodox classification of excessive executions based on them—tend to emphasize technical rules (of both property law and construction) and often regard previous decisions on construction as binding. Courts nowadays are not so hidebound in their approaches to construction and seek, wherever possible, to uphold rather than strike down the provisions of the instruments before them. This clearly does not mean that authority will be found where none exists; but it probably does mean that the doctrine of excessive exercise of a power will be viewed and applied more as a general principle than by reference to established categories and past decisions.

D. Postscript: the defective execution of a power

8.36 Executions of powers which were invalid by reason of a failure to comply with all the requirements of the power were sometimes aided in equity. The execution was not actually held good, but the court interfered and compelled the person entitled in default of execution to make good the defect.[167] The basic principle was this: whenever a person having power over an estate (whether of ownership or not) showed an intention to execute the power in discharge of some moral or natural obligation, equity would operate on the conscience of the persons entitled in default of appointment and compel them to perfect the intention.[168]

8.37 This ancient jurisdiction to cure a defective execution of a power, whose origins are obscure, was dealt with in Chapter 10 of the first edition of this work. This material is not reproduced here for the simple reason that, in the recent decision in *Breadner v Granville-Grossman*,[169] this particular jurisdiction was discussed and its application rejected in terms which suggest that it probably has little, if any relevance, in modern conditions. Having noted that the last case in which the jurisdiction had even been discussed was decided in 1949,[170] and the last one in which had actually been applied was decided in 1908,[171] Park J concluded:[172]

> I might be willing to expand the doctrine if I felt that it had vitality in modern conditions and ought to be expanded. However, I do not feel that. A doctrine which was last applied in 1908 is

[164] See paras 10.195–9.210 below.
[165] See Ch 10 below. See *Burt v Superannuation and Pension Scheme Trustees Ltd* [1995] OPLR 385.
[166] See, eg, paras 16.08–16.25 below.
[167] Farwell, 375; Sugden, 352.
[168] *Chapman v Gibson* (1791) 3 Bro CC 229; *Lowson v Lowson* (1791) 3 Bro CC 272. *cf. Holmes v Coghill* (1806) 7 Ves 506 and (1806) 12 Ves 206.
[169] [2001] Ch 523.
[170] *Re Hambro's Marriage Settlements* [1949] Ch 484.
[171] *Re Walker* [1908] 1 Ch 560. The only other significant decisions involving the jurisdiction were *Kennard v Kennard* (1872) 8 Ch App 227 (applied) and *Cooper v Martin* (1867) 3 Ch App 47 (not applied): see the first edition of this work (1998) Ch 10.
[172] [2001] Ch 523, 548.

> falling into disuse. I believe that it was developed when family settlements, and powers exercisable in relation to trust funds, took very different forms from those which they take today. Most modern settlements are drafted in much detail and give to trustees, who are often professional trustees who charge for their services, extensive powers of many kinds. Where the trustees have failed to exercise a power I do not feel an inclination to expand the circumstances where the court may intervene and hold that the trust should be administered as if they had exercised it, thereby taking away from beneficiaries property rights which had apparently vested indefeasibly.

Thus, a jurisdiction which had been in decline for a long time, and which in truth was hardly ever exercised, seems to have little, if any, application in modern circumstances.

9

FRAUD ON A POWER[1]

A. General principles

The doctrine of 'fraud on a power' has always been central to the law of powers; and, as one of the few bases upon which an exercise of a power can be challenged, it has also been one of the most frequently invoked. It is also a slippery concept, dependent as it is on questions of motive and **9.01**

[1] Sir George Farwell and FK Archer, *A Concise Treatise on Powers* (3rd edn, 1916) ('Farwell'), Ch X; Edward Sugden (Lord St Leonards), *A Practical Treatise on Powers* (8th edn, 1861) ('Sugden'), Ch 12; Henry Chance, *A Treatise on Powers* (1831) 2 vols, and supplement (1841); *Halsbury's Laws*, vol 36(2) (4th edn, 1999, reissue); I J Hardingham and R Baxt, *Discretionary Trusts* (2nd edn, 1984) ('Hardingham and Baxt'), 101–10; LA Sheridan, *Fraud in Equity* (1957), 116–124; (1936) 25 Kentucky LJ 3 (AH Eblen); (1947) 12 Conv (NS) 106 (Benas); (1948) 64 LQR 221 (HL Hanbury); (1977) 3 Monash LR 210 (Y Grbich); (2007) 22 NZULR 496 (P Devonshire); (2009) CLJ 293 (RC Nolan); [2010] NZLR 503 (P Devonshire).

purpose, although the basic notion is relatively straightforward. The donee of a limited power must exercise it *bona fide* for the end designed by the donor, which requires that the power can be exercised only in favour of the objects of that power and in furtherance of the purpose for which it was conferred.[2] If the donee, in good faith, exercises a power in favour of a stranger or in some other way which is not consistent with the terms and scope of his power, such exercise, as we have seen, is excessive.[3] If, however, the donee deliberately attempts 'to secure the effect of an excessive execution without actually making one',[4] the exercise of the power is not simply excessive: it is in fact fraudulent and void.[5] As Lord Westbury LC put it, in *Duke of Portland v Topham*,[6] the donee 'must act with good faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (sinister in the sense of being beyond the purpose and intent of the power)'. The phrase 'fraud on a power' does not 'carry the sense of deceit which the word "fraud" bears in other contexts' (although, of course, such deceit may be involved): 'it indicates the doing of something which is not right, using those words in their broad sense—at least, *a deliberate defeating* of what the donor of the power authorised and intended'.[7] Or, in Lord Parker's much-cited words:[8]

> 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.

Thus, on this basis, it has long been argued that the expression 'fraud on a power' is itself misleading and inaccurate and that the doctrine should, therefore, be re-named as 'the improper purposes doctrine'. This has much to recommend it, especially in view of the fact that the doctrine is applied extensively in areas of the law which bear very little resemblance to those which formed the basis of the traditional classification of 'fraud' in this context.[9] However, it must be borne in mind that an excessive exercise of a power is also an exercise for 'improper purposes'; and an excessive exercise may then need to be re-named as well, as 'the doctrine of unauthorized exercise'.

9.02 In any event, there are two basic elements in a fraudulent exercise of a power first, a disposition beyond the scope of the power by the donee, whose position is referable to the terms, express or implied, of the instrument creating the power; and, secondly, a deliberate breach of the implied obligation not to exercise that power for an ulterior purpose. The first element is common to both

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[2] See also the (somewhat laboured) example in paras 9.60–9.61 below.

[3] See Ch 8 above.

[4] GW Keeton and LA Sheridan, *Equity* (2nd edn, 1976), 258.

[5] *Aleyn v Belchier* (1758) 1 Eden 132; *Cloutte v Storey* [1911] 1 Ch 18; *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505, 509–11. The passage in the text above was cited in *Re Bird Charitable Trust* [2008] WTLR 1505, 1528.

[6] (1864) 11 HLC 32, 54. Although the 'good faith' and 'proper purpose' requirements are invariably associated with each other in this context (as, indeed, in this chapter) and treated as if they were synonymous, this is not actually the case. Although motive is important in relation to a fraud on the power, a blatant exercise for an improper purpose may be made in good faith (and is till invalid). Moreover, the 'proper purpose' rule applies to non-fiduciaries as well as fiduciaries, whereas the requirement of 'good faith' generally applies only to the latter. See, eg, *Re Brook's Settlement* [1968] 1 WLR 1661, 1666; *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199, 217; *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co* (1968) 121 CLR 483, 493. *Teck Corporation Ltd v Millar* (1973) 33 DLR (3d) 288.

[7] *Re Dick* [1953] Ch 343, 360, *per* Lord Evershed MR (my emphasis).

[8] *Vatcher v Paull* [1915] AC 372, 378 (my emphasis). See also *Cachia v Westpac Financial Services Ltd* [2000] FCA 161; (2000) 170 ALR 65; *Lancedale Holdings Pty Ltd v Health Group Australasia Pty Ltd* [1999] NSWSC 609 (*per* Bryson J); [1999] NSWCA (on appeal); *Gambotto v WCP Ltd* [1995] HCA 12; (1995) 182 CLR 432.

[9] See, eg, paras 9.35–9.36 and 9.62–9.71 below. See also *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch) [67]–[68].

a fraudulent and an excessive execution. It is the second element which distinguishes a fraud on a power and which makes it such a difficult concept to apply. An appointment to an object subject to an unauthorized condition that he passes on a benefit to a stranger could result in the severance of the condition, leaving a valid appointment to the object, (that is, as an excessive appointment it would be invalid *pro tanto*) or in a fraudulent and void appointment.[10] The dividing line can sometimes be difficult to discern,[11] but what is of decisive importance is the intention or purpose of the donee in exercising the power:[12] if there is present some 'ulterior purpose' or 'collateral purpose', a 'deliberate defeating'[13] of the donor's intention, there is a fraud on the power. An *excessive* execution of a power generally turns on a question of construction. A *fraudulent* execution turns upon the true intention or real motive of the donee of the power, which is usually much more difficult to ascertain.[14] In effect, it is yet another example of equity looking to the substance of the transaction rather than its form.

9.03 The doctrine of fraud on a power is not founded upon a state of conscience imputed to the donee in equity.[15] Dishonesty of some kind is often present, but it is not essential. Indeed, the donee's intention or motive may be perfectly honest. Thus, the doctrine may apply where the donee honestly believes that, by his exercise of the power, he is disposing of the property in a more beneficial manner, or in a way which is consonant with what he believes would have been the real wish of the donor of the power, in the circumstances prevailing at the date of such exercise.[16] The true intention of the donor of the power as to its scope and purpose must, of course, be ascertained from the instrument creating the power, even where the donor and the donee are the same person.[17] In this, as in other contexts, the relevant provision 'itself restricts the authority which it confers, by describing that purpose as its object'.[18] This may sometimes involve difficult questions of construction, particularly where the evident purpose is to ensure maximum flexibility, as in the case of a typical power of variation in a trust deed.[19] Whether the real purpose of a power may be ascertained by reference to extrinsic evidence is also a matter of some difficulty and uncertainty. If the power is conferred by a trust instrument or will, it would normally be the case that its purpose, as well as its scope, would need to be ascertained by reference only to the terms of that instrument or will. Extrinsic evidence might occasionally be admissible to supplement those

[10] It could also be a void appointment, of course, on the basis of a failure to carry out one of the duties discussed in Ch 10 below (eg failing to exclude irrelevant considerations, or to consider relevant ones).

[11] See, eg, *Re Holland* [1914] 2 Ch 595; and *Re Cohen* [1911] 1 Ch 37.

[12] *Re Crawshay* [1948] Ch 123, 135; see, too, *Palmer v Wheeler* (1811) 2 Ball & B 18; *Wade v Cox* (1835) 4 LJ Ch 105; *Harrison v Randall* (1852) 9 Hare 397 *Humphrey v Olver* (1859) 33 LTOS 83; *Pares v Pares* (1863) 33 LJ Ch 215; *Re Huish's Chanty* (1870) LR 10 Eq 5; *Mackechnie v Marjoribanks* (1870) 22 LT 841; *Re Chadwick's Trusts* [1939] 1 All ER 850; *Re Simpson* [1952] Ch 412.

[13] *Re Dick* [1953] Ch 343, 360.

[14] As Hammond J stated, in *Wong v Burt* [2004] NZCA 174, [32]: 'The case law in this area is difficult, not so much for the underlying principles, which seem plain enough, but in their application to often quite complex estates, or inter-related transactions.' This problem is manifested clearly in different conclusions reached in *Wong* itself and in the subsequent NZ Supreme Court decision in *Kain v Hutton* [2008] NZSC 61; [2008] 3 NZLR 589, on which see [2010] NZLR (P Devonshire), 503.

[15] Farwell, 458–9.

[16] *Aleyn v Belchier* (1758) 1 Eden 132; *Duke of Portland v Topham* (1864) 11 HLC 32; *Vatcher v Paull* [1915] AC 372; *Topham v Duke of Portland* (1869) 5 Ch App 40, 59. See also *The Bell Group Ltd (in liquidation) v Westpac Banking Corporation (No 9)* [2008] WASC 239.

[17] *Lee v Fernie* (1839) 1 Beav 483; *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517; *Hutchins v Hutchins* (1876) 10 IR Eq 453. See also *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch), [68], citing the above passage.

[18] *Attorney-General ex rel Izard v Brown* et al (1818) 1 Swanst 265, 302 (in relation to an Act of 1810 dealing with the protection of the town and shore of Brighton).

[19] *Kearns v Hill* [1991] PLR 161; *Re Dyer* [1935] VLR 273; *Re Ball's Settlement Trusts* [1968] 1 WLR 899, 904.

terms, for example, in the form of a letter of wishes,[20] but probably not to contradict them.[21] In relation to wills, extrinsic evidence is admissible under the provisions of section 21 of the Administration of Justice Act 1982, but only where part of the will is meaningless or there is ambiguity on the face of the will or in the light of surrounding circumstances.[22] These particular conditions are not likely to be of much assistance in determining the purpose of a power. In other circumstances, however, particularly where the power in question is one element in a complex commercial arrangement and where consideration will undoubtedly have been given, the relevant documentation may not contain an adequate or complete picture of the purpose of that power. It may be necessary, in order to give business efficacy to the arrangement, and to reflect the true intentions of the parties, to resort to extrinsic evidence in order to establish both the intended scope and purpose of the power. Thus, in *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd*,[23] where investors in a unit trust assumed and expected that they would be entitled to remain unit-holders 'for the long term', it was argued that a power of compulsory redemption, although expressed in absolute terms, was nonetheless subject to this 'long term assumption'. As Dodds-Stretton JA stated:[24]

> The appellants contended that no authority or learned commentary precluded the consideration of parol or extrinsic evidence in order to determine the purpose of a trust power. The statement in relevant authorities and texts that the scope of a trust power must be ascertained from the trust instrument was not directed at cases such as the present, in which the trust deed did not represent the entire or real agreement between the parties. As such, it was not inconsistent with the reception of parol or extrinsic evidence where necessary to determine the purposes of the power. Such an approach accorded, it was said, with equity's preference for substance over form. . .

In the event, this particular argument did not need to be decided, but Dodds-Stretton JA nonetheless noted that, in his opinion, 'neither the authorities nor the relevant equitable principles prohibit the consideration, in an appropriate case, of parol and extraneous evidence in order to discern the purpose of a trust power'. This, of course, is probably a question of necessary implication rather than one of pure construction;[25] and the principle must presumably be applied (or rejected) in accordance with the relevant rules governing admissibility of extrinsic evidence in the particular context, for example, such rules differ widely depending on whether the provision in question is in a will, a deed, or a contract. Nevertheless, it is suggested that, in appropriate circumstances, the true purpose of a power may be proved, in principle, by means of extrinsic evidence.[26]

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[20] See, eg, *Breakspear v Ackland* [2009] Ch 32; *Re Internine Trust* [2006] WTLR 1551; *Countess Bathurst v Kleinwort Benson (Channel Islands) Trustees Ltd* [2007] WTLR 959; *Re Avalon Trust* [2007] WTLR 1693; *Wingate v Butterfield Trust (Bermuda) Ltd* [2008] WTLR 357; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405.

[21] If extrinsic evidence contradicts the terms of the power, presumably the appropriate remedy is rectification.

[22] See, eg, *Sprackling v Sprackling* [2008] EWHC 2696 (Ch); [2009] WTLR 897; *Re Segelman* [1996] Ch 171; *Miskelly v Arnheim* [2008] NSWSC 1075. See also paras 2.43–2.44 above.The provisions of a will may also be supplemented, of course, by a separate document which is incorporated by reference: see, eg, *Croker v Marquis of Hertford* (1844) 4 Moo PC 339; *Singleton v Tomlinson* (1878) 3 App Cas 404; *University College of North Wales v Taylor* [1908] P 1401; *Re Jones* [1942] 1 All ER 642.

[23] [2008] VSCA 86; [2009] WTLR 1685.

[24] *ibid.*, [103], [105].

[25] See, eg, also the general observations on construction in *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408, 458-9; and also *Investors Compensation Scheme v West Bromwich BS* [1998] 1 WLR 896, 912–13. See also *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65, 83; *Lock v Westpac Banking Corp Ltd* (1991) 25 NSWLR 503; *Gambotto v WCP Ltd* (1995) 182 CLR 432, 446–8.

[26] This statement is not intended to suggest that the task may not still be exceedingly difficult. After all, ascertaining the true purpose of a power as at the date of its creation may well be problematic if the question arises many years later, particularly in commercial contexts.

Although the doctrine is usually considered in the context of special powers of appointment and, indeed, in relation to such powers conferred on trustees as such (as will also be the case here), the doctrine applies to the 'exercise of any limited power where the purpose of such exercise is to defeat the purpose for which the power was conferred',[27] including powers of advancement,[28] powers to jointure or raise portions,[29] and to any power conferred on trustees as such (even powers of investment).[30] Thus, an appointment in favour of a particular object which has been induced by a bribe (given or promised) will be a fraud on a power.[31] The doctrine applies to a power conferred on the committee of management of a pension scheme to amend the scheme's trust deed, 'which can only be exercised for the purpose of promoting the purpose of the scheme, namely to provide pensions for those employed in the undertaking, and not to bring about the unnecessary dissolution of the scheme'.[32] Similarly, it was held not to be appropriate for trustees to take into account the compensation available under the Pension Protection Fund when making decisions in relation to the assets of an occupational pension scheme.[33] The purpose of a power to purchase annuities available under the scheme rules was to enable the trustee, if it thought fit, to apply an amount of money to purchase an insurance policy to provide members with benefits in substitution for those they were entitled to under the scheme. It was implicit in the scheme rules that only a fair share of the scheme assets could be used for such a purpose. However, the true purpose of the trustee's proposal was to apply a disproportionately large, and therefore unfair, share of the scheme assets in the purchase of the buy-out policy. That went far beyond the purposes for which the power existed in the context of the scheme as a whole and was therefore an improper purpose. Indeed, in principle, the exercise of any power, whether it be dispositive or administrative,[34] in any context or circumstances where equity can intervene,[35] ostensibly for the purpose for which it was conferred but in reality for some ulterior and improper motive, is capable of being a 'fraud on a power', even if this description may not actually be employed in that particular context. Thus, it applies outside trusts law; it is capable of applying to fiduciary arrangements generally, such as partnerships, agencies, joint ventures, and the decisions and activities of company directors; it applies to *non-fiduciary* powers as well as fiduciary ones;[36] it can operate in relation to commercial affairs, such as special resolutions of companies,[37] including those governed primarily by contract; and, indeed, it applies to public law as well as private law. As Hammond J stated, in *Wong v Burt*:[38] 'The notion of a fraud on a power itself rests on the fundamental juristic principle that any form of authority may only be exercised for the purposes conferred, and in accordance with its terms.' **9.04**

[27] *Re Courage Group's Pension Schemes* [1987] 1 WLR 495.

[28] *Lawrie v Bankes* (1858) 4 K & J 142; *Molyneux v Fletcher* [1898] 1 QB 648.

[29] *Saunders v Shafto* [1905] 1 Ch 126.

[30] *Cowan v Scargill* [1985] Ch 270, 288; *Re Smith* [1896] 1 Ch 71 (trustee bribed to make an investment: the case is not expressed to be of fraud on a power).

[31] *Re Wright* [1920] 1 Ch 108, 118; *Rowley v Rowley* (1854) Kay 242, 262. See also *A-G for Hong Kong v Reid* [1994] 1 AC 324. A director is now under a statutory duty not to accept a benefit from a third party: Companies Act 2006, s 176.

[32] *Re Courage Group's Pension Schemes* [1987] 1 WLR 495. Millett J's judgment is clearly couched in terms of a fraud on a power (of amendment). *Duke of Portland v Topham* (1864) 11 HLC 32 was cited in argument, but neither it nor any other case on fraud on a power was referred to in the judgment.

[33] *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch); [2009] PLR 379.

[34] *Robinson v Briggs* (1853) 1 De Sm & G 188, 223; *Re Bird Charitable Trust* [2008] WTLR 1505, 1529, [75]; *Re Osiris Trustees Ltd* [2000] WTLR 933; *Re Papadimitriou* [2004] WTLR 1141; *Wong v Burt* [2004] NZCA 174; *Arakella v Paton* [2004] NSWSC 13.

[35] 'The doctrine of fraud on a power expresses an equitable limitation on a power conferred by an instrument such as a trust instrument': *Arakella v Paton* [2004] NSWSC 13, [119], *per* Austin J.

[36] See the cases in n 41 below.

[37] *Gambotto v WCP Ltd* [1995] HCA 12; (1995) 182 CLR 432. *cf. Arakella v Paton* [2004] NSWSC 13.

[38] [2004] NZCA 174, [27].

This principle is one of general application. It is essentially an *ultra vires* doctrine, but one based largely on improper or ulterior motive rather than just exceeding scope of authority.[39]

9.05 Where a trustee exercises a power fraudulently, there is, of course, a breach of fiduciary duty as well.[40] However, such a fraudulent exercise of a power differs from any other improper exercise of a power by a trustee (for example, taking into account an irrelevant consideration, or failing to take into account a crucially relevant one, or otherwise failing to exercise his discretion properly) in that there will be present an intention, a deliberate attempt (which may be honest or dishonest), to circumvent or even defeat the real purpose and object of the power. However, the donee need not be a trustee or even occupy a fiduciary position.[41] The doctrine of fraud on a power applies to fiduciary and non-fiduciary powers alike[42]—a significant fact that is often overlooked. Indeed, it is often the only ground upon which the exercise of a non-fiduciary power may be challenged. This is particularly important in instances where there is some doubt or confusion as to whether or not the donee of the power actually occupies a fiduciary position, for example a protector of an 'off-shore' trust. The doctrine does not apply, however, to beneficial powers,[43] such as general powers, or hybrid powers conferred on the donee for his own benefit.[44] In addition, where there is a joint power, a fraudulent intent on the part of only one donee is sufficient to render its exercise void.[45]

9.06 The existence and scope of a particular power must be distinguished from the purpose for which it is exercised.[46] A power of investment conferred on trustees may authorize investment in assets of a particular description, but it may still be a fraudulent exercise of that power if such assets are acquired (say) with the primary intention and purpose of benefiting the donee of the power.[47] A power of amendment contained in the provisions or rules of a pension scheme will usually be subject to express restrictions on its exercise, such as a prohibition on the alteration of the main purpose of the scheme, or on making or permitting a payment of any of the scheme's assets to a participating employer.[48] Any attempt to exercise the power directly for a prohibited purpose (for example, declaring that any surplus is returnable to the participating employers) is excessive and ineffective, just as an exercise of a power of appointment in favour of strangers, rather than objects, would be. There is simply no power in existence which enables any such exercise to be made effectively. On the other hand, the power of amendment may authorize alterations or

[39] See, eg, *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2008] VSCA 86; [2009] WTLR 1685, [101]–[107], where it was argued that the trustee's apparently absolute power of compulsory redemption of investors' units under a unit trust was subject to an assumption that they would be able to retain their investment 'in the long term'. The true purpose of the power was 'to provide a structure for the collective, long-term investment by the unit-holders in the business'. The CA of Victoria held in favour of the investors on the ground of estoppel and therefore did not feel it necessary to decide the 'fraud' argument.

[40] He will be liable *qua* trustee and also personally: *Wong v Burt* [2005] 1 NZLR 91, [59].

[41] See, eg, *Lane v Page* (1754) Amb 233; *Aleyn v Belchier* (1758) 1 Eden 132, 138; *Re Crawshay* [1948] Ch 123; *Re Dick* [1953] Ch 343; *Re Brook's Settlement* [1968] 1 WLR 1661. See also *Price v Bouch* (1986) 53 P & CR 257; *Mettoy Pension trustees Ltd v Evans* [1990] 1 WLR 1587, 1613; *National Grid Co plc v Laws* [1997] OPLR 207; *Yorkshire Bank plc v Hall* [1999] 1 WLR 1713; *Paragon Finance v Nash* [2001] EWCA Civ 1466; [2002] 1 WLR 685.

[42] *Re Bird Charitable Trust* [2008] WTLR 1505, 1531.

[43] See para 9.115 below.

[44] *Re Triffitt's Settlement* [1958] Ch 852, 863. There seems to be no reason, however, why the doctrine should not apply to a hybrid power of which the donee is an excluded object, but which he attempts to exercise for his own benefit.

[45] *Lawrie v Bankes* (1858) 4 K & J 142.

[46] See, eg, *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 505D. The subsequent statement, at 505E, to the effect that a power can be exercised only for the purpose for which it is conferred must be read in this light.

[47] It will also fall foul of the rule against conflict of interests: see Ch 12 below and see also *Dalriada Trustees Ltd v Faulds* [2011] EWHC 3391 (Ch).

[48] See, eg, *Re Courage Group's Pension Schemes* [1987] 1 WLR 495, 503; and *Imperial Group Pension Trust Ltd v Imperial Tobaco Ltd* [1991] 1 WLR 589, 591–2. See also ss 37 and 77 of the Pensions Act 1995.

additions to other provisions of the scheme, such as widening the range of investments, authorizing the loan of the trust funds, changing the level of contributions, and so forth. There may even be express powers to achieve these ends already in existence. If any of these powers is exercised with the purpose of benefiting a participating employer, rather than the members and beneficiaries of the scheme, such exercise may be fraudulent and void.[49] This is a particularly difficult problem in cases (which are common) where the trustees of a pension scheme are also the directors or other officers of the participating employers. It is possible, of course, that an exercise of a particular power in the interests of an employer may also benefit the beneficiaries of the scheme. However, it is only in the most unusual circumstances, it seems, that this will actually be the case. The insolvency of the employer will not generally pose a risk to the funds of an independently constituted scheme; and the continued employment of members of the scheme will probably not be sufficient justification for putting at risk the entitlement of pensioners and deferred pensioners under the scheme.[50]

9.07 Whether or not a power to amend or vary the provisions of a pension scheme is exercisable after the employing company has ceased to carry on business depends on the terms of the relevant power, but, if it is, it must not be exercised fraudulently (that is, inconsistently with the underlying purpose of the scheme). It seems that a power of amendment which is simply expressed to be exercisable 'from time to time and at any time' may not survive after the commencement of a winding-up,[51] in which case the question of fraud in its exercise cannot arise.

B. Fraud on whom?

9.08 The cases seldom address themselves to the simple question: upon whom is a fraud on the power perpetrated? This clearly matters in relation to standing to complain of an alleged fraudulent exercise. The silence may well be because the answer was assumed to have been obvious. Certainly, it is generally assumed that the persons who would have been 'defrauded' are those entitled in default of appointment. The exercise of a special power of appointment divests (either wholly or partially according to the terms of the appointment) the interests limited in default of appointment and creates new interests in those persons in whose favour the appointment is made.[52] The takers in default of appointment should only be divested of their interests (if at all) by an honest and proper exercise of the power.[53] As Lord Parker stated in *Vatcher v Paull*:[54]

> The limitations in default of appointment may be looked upon as embodying the primary intention of the donor of the power. To defeat this intention the power must be *bona fide* exercised for the purpose for which it was given.

[49] *Re Courage Group's Pension Schemes*, above; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Re The National Grid* [1997] PLR 157; *Re National Bus Company* [1997] PLR 1. There may be an original power to lend money to the employer. It does not follow, however, that such a power can be exercised so as to lend money to the employer for less than the market rate of interest (unless this too is expressly authorised). Nor does it follow that such a power can properly be exercised if the employer is not financially viable. See generally *Evans v London Co-operative Society Ltd, The Times*, 6 July 1976.

[50] *Cowan v Scargill* [1975] Ch 270; *Blankenship v Boyle* (1971) 329 F Supp 1089. *cf. Withers v Teachers' Retirement System of the City of New York* (1978) 447 F Supp 1248.

[51] *Re ABC Television Ltd Pension Scheme* (1973) unreported, transcript in Inglis-Jones, 3426–7; *Re Dan Jones & Sons (Porth) Ltd Employees' Pension Fund* [1989] PLR 21; *Thrells Ltd v Lomas* [1993] 2 All ER 546. *cf. Re Edward Jones Benevolent Fund* (1985) unreported, transcript in Inglis-Jones, 3411–22. See also paras 14.39–14.45 below.

[52] *Re Brooks' Settlement Trusts* [1939] Ch 933; Farwell, 310–11; Fearne, 226–33; *Duke of Northumberland v IRC* [1911] 2 KB 343, 354. See also *Att-Gen v Earl of Selborne* [1902] 1 QB 388, 398.

[53] *Re Greaves* [1954] Ch 434, 447.

[54] [1915] AC 372, 379.

Clearly, this theory cannot apply to all powers. In some contexts, for example, the exercise of powers by directors of companies, the notion of 'takers in default' makes no sense. Even in relation to trusts, if the power in question is a power in the nature of a trust (that is, a discretionary trust, where trustees are under a duty both to consider and to distribute)[55] there can be no gift over, and thus no takers, in default.[56] A fraud on such a power must therefore be a fraud on its objects. A question then arises as to whether it can be said that the objects of any other kind of power could similarly be 'defrauded'. Lord Parker's *dicta* in *Vatcher v Paull*[57] are not necessarily inconsistent with such a view, for it may well be that the limitations in default of appointment are the 'primary intention' of the donor of the power, but it does not follow that they are his *only* intention. Indeed, in *Topham v Duke of Portland*,[58] Turner LJ clearly recognized both a primary and a secondary intention:

> The purpose of the author of a settlement, by which a power is created, is to benefit the objects within the range of the power. If the power be exercised beyond that range, his intention is that the property, the subject of the power, shall go to those who are entitled in default of appointment . . . When therefore it is asked that effect may be given to an appointment, which has for its object to go beyond the power, it is in truth asked that the unauthorized purpose of the donee may be preferred to the authorized purpose of the donor, and that to the prejudice of those who would be entitled but for the donee's unauthorized purpose.

9.09 In fact, it seems to be a principle of long standing that, where there are two or more objects, the fraudulent execution of the power may be challenged by any one of them.[59] In *Rowley v Rowley*,[60] Wood V-C distinguished three classes of cases involving the doctrine of fraud on a power. The second class consisted of cases where the fraud 'may be wholly on the parties who are interested in the distribution of the fund'; and he went on to refer (in the context of severance) to 'the case of distribution among several objects of a power, where there is a clear right in all the parties interested in the distribution. . . the object of the donor of the power being to have a fair and equal distribution of it'.[61] This proposition accords with common sense. There may well not be any benefit to the takers in default even if they were to establish a fraudulent execution, for the appointor is then free to make another, valid appointment in favour of an object not entitled in default.

9.10 It is well established that a mere power need not be exercised, whether it be conferred on trustees by virtue of their office,[62] or on a non-fiduciary.[63] It also seems settled that trustees (who are clearly fiduciaries) may be liable to an object for simply refusing to consider whether or not the power ought to be exercised.[64] However, the existence or non-existence of duties to consider or exercise are distinguishable from the duties which arise upon an actual exercise. Both a trustee and a

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[55] *McPhail v Doulton* [1971] AC 424. See paras 3.83–3.90 above.

[56] *Re Mills* [1930] 1 Ch 654; *Re Gestetner* [1953] Ch 672; *Roddy v Fitzgerald* (1857) 6 HL Cas 823; *Goldring v Inwood* (1861) 3 Giff 139; *Re Sprague* (1880) 43 LT 236; *Richardson v Harrison* (1885) 16 QBD 85, 102, 104; *Re Brierly* (1894) 43 WR 36; *Re Perowne* [1951] Ch 785; also *Re Lyons and Carroll's Contract* [1896] 1 IR 383; *Re Hall* [1899] 1 IR 308. See also paras 3.74–3.78 and 3.83–3.90 above.

[57] Cited above.

[58] (1963) 1 De GJ & S 517, 568–9.

[59] See, for instance, *Aleyn v Belchier* (1758) 1 Eden 132; *Daubeny v Cockburn* (1816) 1 Mer 626.

[60] (1854) Kay 242, 258–9.

[61] At 259, 260.

[62] *Re Gulbenkian's Settlements* [1970] AC 408.

[63] See paras 3.81 above and 10.05–10.53 below.

[64] *Re Hay's Settlement Trusts* [1982] 1 WLR 202; *Turner v Turner* [1984] Ch 100; *Ames v Scudder* (1884) 83 Mo 189; *Re Hodges* (1878) 7 Ch D 754; *Re Roper* (1879) 11 Ch D 272; *Re Lofthouse* (1885) 29 Ch D 921; *Re Gestetner* [1953] Ch 672, 688; *Gartside v IRC* [1968] AC 553, 606, 617–18; *Re Manisty* [1974] Ch 25; *Lutheran Church of Australia v Farmers' Co-operative Executors* (1970) 121 CLR 628, 639. These authorities and *dicta* are clearly inconsistent with the remarks of Lord Hodson in *McPhail v Doulton* [1971] AC 424, 441. See also paras 10.05–10.53 below.

non-fiduciary, if and when they do exercise a power, are under a duty to do so strictly in accordance with its terms, in furtherance of the purpose for which it was created or conferred, and to ensure that any exercise is neither excessive nor fraudulent. In this sense, a donee who is not a trustee must, in making an appointment, nonetheless act as a trustee would act.[65] The object of a discretionary trust, for example, not only has a right to have the trust fund duly and properly administered, but he also has a hope or expectancy of benefit.[66] The object of a mere power vested in a non-fiduciary has a similar hope or expectancy.[67] Both, therefore have an 'interest' in a loose sense which needs to be protected; both have 'rights' which would be prejudiced, if not defeated, by a fraudulent exercise of the power.

9.11 Indeed, in *Re Nicholson's Settlement*,[68] the Court of Appeal, in discussing the distinction between a power of appointment in favour of one object fulfilling a particular qualification and a power in favour of members of a class, seems to have directed its attention precisely towards the rights of the objects and not anyone entitled in default. Jenkins LJ stated:[69]

> The [sole] appointee and no one else is benefited, as the donor of the power intended should be the case if the appointor decided to exercise the power; and there is no detriment to any one else. Where, however, there is a power to select among a class, and a particular beneficiary is selected in order to achieve a collateral purpose, the result is *pro tanto* to diminish the interest of the other beneficiaries, a diminution which the appointor is no doubt authorized to effect in a *bona fide* attempt to achieve what he considers justice and fairness as between the beneficiaries, but which he is not authorized to effect in order to achieve a collateral purpose.

In principle, there does not seem to be any good reason why the objects of any power should not have standing to come to court to challenge a particular execution of that power as being fraudulent.[70] It also accords with long-standing authority.

9.12 Finally, there may also be a fraud on the donor of the power, although this seems very unlikely. It is difficult to see how the question of fraud could be separated from that of *locus standi*: the court would not entertain a claim from someone who could not show himself to have been directly prejudiced. For that reason, it seems unlikely that the donor of the power (as in the case of a settlor who has parted with all interest in settled property) could bring any action simply in his capacity as donor. Nevertheless, in at least one class of cases—the first class distinguished by Wood V-C in *Rowley v Rowley*[71]—the donor is said to be the person prejudiced by a fraudulent execution.

> There is, first of all, the case in which there may be a fraud on the donor of the power, or those who claim under him, by the person who takes the fee-simple or other estate which is the subject of the power. There may be cases in which the fraud is on him alone, there being only one person interested in the charge which may have been created, as in the case of a jointure, and many other similar cases, such as, for example, a power of raising a given sum of money out of a given estate, for a single

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[65] *Scroggs v Scroggs* (1755) Amb 272, 273. It is not suggested, of course, that there is a general similarity between their positions: there is not.

[66] *Gartside v IRC* [1968] AC 553; *Re Munro's Settlement Trusts* [1963] 1 WLR 145, 148.

[67] *Re Brooks' Settlement Trusts* [1939] Ch 993. See also paras 3.81 above and 10.05–10.53 below.

[68] [1939] Ch 11; this case is discussed more fully below.

[69] At 20. This reflects the arguments put to the court, at 15, 16.

[70] Indeed, in *McPhail v Doulton* [1971] AC 424, 441, Lord Hodson seems to have acknowledged that there is such a right. An analogous right would be that of a beneficiary in an unadministered estate: *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694; *Re Leigh* [1970] Ch 277. Someone who has a hope of benefiting (as next of kin) if a person should die childless and intestate does not have a sufficient interest, however, to bring an action for fraudulent execution of a power: *Molyneux v Fletcher* [1898] 1 QB 648, 655–6, following *Clowes v Hilliard* (1876) 4 Ch D 413 and *Re Parsons* (1890) 45 Ch D 51.

[71] (1854) Kay 242, 258–9.

> individual, and, if the power be exercised so as to enable the donee of the power to raise money upon it for a purpose of his own, it is a fraud upon the donor of the power and the party claiming through him that any part of that sum should be raised for any purposes except those prescribed by the power.

The basis upon which this view is justified is not at all clear, but it seems to be this: if A confers a power on B to charge property (or to appoint a life interest therein) in favour of C, and both B and C agree that, if and when B exercises the power, C will confer some benefit on B, neither of them (being the two parties directly interested in the execution) will wish to allege fraud; and there is no other object of the power to do so either.[72] However, this is clearly an execution which is not in accord with the intention or purpose of the donor of the power. Consequently, the fraud is said to be on him. But it is not clear whether this is simply because he is the donor or because he is also the taker in default of appointment in such circumstances. Another thing that is not clear is whether it is correct to say, as Wood V-C did, that, in the case of a power to jointure, only one party is interested, namely the jointress (and presumably, in the case of a power to charge, the chargee). It is suggested below[73] that this is not the case.[74] In any event, where a power to jointure or charge in favour of one object only is involved, it seems that any fraud on the power will be on the donor, if not on someone else as well. It is suggested, therefore, that, whatever the nature of the power, any claim alleging its fraudulent exercise can be made, and can only be made, by someone who has or had an interest which has been prejudiced or defeated (in whole or in part) by such fraudulent exercise, whether that interest be in default of appointment, in possession or remainder, or by way of resulting trust, and whether vested or contingent; or by someone who is a proper object of the power, or, perhaps, in the appropriate and rare case, by the donor of the power.

C. Grounds upon which exercise may be held fraudulent

9.13 An exercise of a power may be fraudulent if it was made (1) pursuant to an antecedent agreement or bargain between the donee and an object of the power whereby a non-object is to benefit; or (2) for a corrupt purpose; or (3) for purposes foreign to the power. Heads (1) and (2) are, for most purposes really sub-divisions of head (3).[75] However, this classification is retained here not only because it is one of convenience and has been sanctioned by long use, but also because there may occasionally be cases which would fall within category (1) but not within categories (2) or (3)[76]—and, if *Re Nicholson*[77] remains good law, this might be important in relation to a power to appoint in favour of one object only.

(1) Antecedent agreement between donee and object

9.14 The execution of a limited power (of whatever nature)[78] may be fraudulent and void on the ground that it was made in pursuance of an antecedent agreement by the appointee to benefit persons who are not objects of the power or entitled in default of appointment (or presumably if it was made to

[72] This is, of course, simply an example of a fraudulent execution. It is not meant to suggest that the benefit must be provided by C himself, or that it must be derived from the appointed property.

[73] See the discussion of *Re Nicholson's Settlement* [1939] Ch 11, at paras 9.25 and 9.29–9.34 below.

[74] Farwell's comment on this is '(*Sed. qu.*)': see 491.

[75] *Re Bird Charitable Trust* [2008] WTLR 1505, 1529.

[76] See paras 9.40–9.48 below. As Hammond J stated, in *Wong v Burt* [2004] NZCA 174, [30]: 'These distinctions are useful for analytic and descriptive purposes, but it is necessary to recall that the *sine qua non* which makes the exercise of a discretion or power "improper" is the improper intention of the person exercising it.'

[77] [1939] Ch 11. See paras 9.25 and 9.29–9.34 below.

[78] The significance of this is explained below, at para 9.115 below.

effect some purpose not authorized by the power), even if that agreement is in itself unobjectionable.[79] The nature of the advantage, and whether it is intended to accrue to the appointor or someone else (other than the person(s) entitled in default), is generally immaterial, although, of course, where the donee is a trustee (or other fiduciary) the rule against conflict of interests may also apply.[80] The appointor may have bargained for some advantage to himself, such as the return to him of part of the appointed property,[81] or the payment of his debts,[82] or the lending to him (even on good security) of the appointed fund;[83] or on condition that the appointee should buy his (the appointor's) life interest in the appointed property;[84] or that the appointee would not claim restitution of part of a trust fund paid to the appointor in breach of trust.[85] There is no shortage of examples, from different centuries:[86] an executor having power to dispose of a church preferment could not bargain for an advantage to himself;[87] a municipal corporation, trustee for a school, could not grant a lease containing a covenant that the lessee shall grind his corn at the corporation mill;[88] and a parent with a power to appoint among children could not bargain with a child for purchase of a share appointed.[89] On the other hand, the advantage or benefit may have been intended for some other stranger to the power: the appointee may have agreed or undertaken, for instance, to pay over the appointed funds,[90] or to resettle the appointed property in favour of non-objects.[91] In all such cases, if there is an antecedent agreement, there is fraud. Similarly, where the exercise of a power is induced by a bribe (promised or given) from the object benefited by that exercise, or an appointment of a fiduciary in exchange for payment, there is a corrupt bargain and the exercise is fraudulent and will be set aside.[92]

9.15 It clearly does not follow, however, that an appointment to an object of the power, coupled with a contemporaneous settlement by that object of the appointed fund, is automatically void. The court might consider this to be an absolute appointment of the property to the object, followed by a disposition by him of the property in favour of strangers to the power. In *Goldsmid v Goldsmid*,[93] for example, there was an appointment to trustees, of whom an object of the power (A) was one, upon trusts to be declared by a subsequent deed; and, by that deed, to which A and all the trustees were parties, trusts were declared in favour of A and, *inter alia*, his wife (a non-object). Wigram V-C upheld the appointment, declaring:[94]

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[79] Farwell, 471.

[80] See Ch 12 below.

[81] *Daubeny v Cockburn* (1816) 1 Mer 626, 644; *Jackson v Jackson* (1840) 7 Cl & Fin 977. See also *Redman v Permanent Trustee Company of NSW Ltd* [1916] HCA 47; (1916) 22 CLR 84.

[82] *Farmer v Martin* (1828) 2 Sim 502; *Reid v Reid* (1858) 25 Beav 469.

[83] *Arnold v Hardwick* (1835) 7 Sim 343.

[84] *Duggan v Duggan* (1880) 5 LR Ir 525 (aff'd, 7 LR Ir 152); and see *Stuart v Lord Castlestuart* (1858) 8 Ir Ch R 408.

[85] *Askham v Barker* (1850) 12 Beav 499.

[86] See the examples given by Higgins J in *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* [1922] HCA 62; (1922) 31 CLR 421.

[87] *Richardson v Chapman* (1760) 7 Bro Parl Cas 318.

[88] *Attorney-General v Stamford* (1747) 2 Swans, App, 591.

[89] *Cuninghame v Anstruther* (1872) LR 2 HL (Sc) 223.

[90] *Lee v Fernie* (1839) 1 Beav 483.

[91] *Salmon v Gibbs* (1849) 3 De G & Sm 343; *Carver v Richards* (1860) 1 De GF & J 548. See, also *Birley v Birley* (1858) 25 Beav 299; *Pryor v Pryor* (1864) 2 De GJ & Sm 205; *Knowles v Morgan* (1909) 54 Sol Jo 117; *Evans v Nevill* (1908), *The Times*, 11 February 1908.

[92] *Re Wright* [1920] 1 Ch 108, 118; *Rowley v Rowley* (1854) Kay 242, 262; *Sugden v Crossland* (1856) 3 Sm & G 192.

[93] (1842) 2 Hare 187.

[94] *ibid.*, 198.

> . . . where the appointee, an object of the power, joins in the deed of appointment, and the deed shews that that which is done has been so done by agreement with that party, the Court considers that party as making a settlement of the property. If [the object], therefore, to whom unquestionably an exclusive appointment might have been made, agrees that the property shall be settled as in this case it has been, what possible difference can it make whether the property is given to [the object] in the form of an interest, or whether a control over the property is given to [the object] in the form of a power. The act complained of is not . . . the act of the donee of the power, but it is the separate act of [the object], which she acquired the power of exercising by means of the appointment first made by the donees of the power.

In *Daniel v Arkwright*,[95] there were two appointments, one upon the trusts of a contemporaneous marriage settlement upon the marriage of Object A, the other in favour of Object B who was already married. Page Wood V-C upheld the first appointment on the basis that it could be treated as an appointment to Object A of her share, followed by the settlement by her of that share. On the other hand, the second appointment could not be upheld, because, under the law as it then stood, Object B, being already married, 'could not deal with her share by exercising any will of her own with reference to a settlement'.[96] Thus, there is ancient authority in support of the proposition that an appointment made in favour of a non-object may, in exceptional circumstances, be upheld if it is made with the consent of an object,[97] whether the subject-matter of the power be property in possession or reversion.[98]

9.16 The mere existence of a contract or bargain between appointor and appointee for a settlement is not enough to avoid the appointment in such circumstances: it must be shown that, but for the contract or bargain, the appointment would not have been made.[99] On the other hand, if it can be shown that the appointment was effectively induced by the appointor—being made in pursuance of an antecedent agreement or for a corrupt or foreign purpose—it will be a fraud on the power.[100] The question in each case is: in what character does the appointee take the property? If the appointment is in substance for his absolute use and benefit, the appointment is good; but if the appointor's purpose is to effect distribution amongst persons not objects of the power, the appointee merely being a conduit, the appointment cannot be supported.[101] It is not enough that the appointor *hopes* that the appointee will so dispose of the appointed property as to benefit a non-object, if the appointor intends to benefit the object whatever disposition the latter may subsequently make of the appointed property.[102] Essentially, in such circumstances the court takes the common-sense view that what may be done by two deeds shall not fail because it is done by one, provided it appears to have been done with the assent of all parties (usually signified by the fact that the object is a party to the relevant instrument), who, with full knowledge of their rights

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[95] (1864) 2 H & M 95.

[96] *ibid.*,106. The second appointment could be rectified, however.

[97] *White v St Barbe* (1813) 1 Ves & B 399; *Wright v Goff* (1856) 22 Beav 207; *Cunninghame v Anstruther* (1872) LR 2 Sc & Div 233, 234. See also *Re Brook's Settlement* [1968] 1 WLR 661; and paras 9.37 *et seq* below. For a recent application of this approach, see *Kain v Hutton* [2008] 3 NZLR 589.

[98] *Re Cosset's Settlement* (1854) 19 Beav 529.

[99] *Re Turner's Settled Estates* (1884) 28 Ch D 205.

[100] *Thompson v Simpson* (1841) 1 Dr & War 459, 487; *Goldsmid v Goldsmid* (1842) 2 Hare 187; *Birley v Birley* (1858) 25 Beav 299; *Daniel v Arkwright* (1864) 2 Hem & M 95; *Whitting v Whitting* (1908) 53 Sol Jo 100; *Re Foote and Purdon's Estate* [1910] 1 IR 365; *Re Boileau's Will Trusts* [1941] WN 222. The court's willingness to take this view may also be crucial for the purposes of the rule against perpetuities: see para 5.40 above.

[101] Farwell, 475; *Re Crawshay* [1948] Ch 123; *Langston v Blackmore* (1755) Amb 289; *Fitzroy v Duke of Richmond (No 2)* (1859) 27 Beav 190; *Birley v Birley*, above; *Pryor v Pryor* (1864) 2 De GJ & Sra 205; *Cooper v Cooper* (1869) LR 8 Eq 312; *Roach v Trood* (1876) 3 Ch D 429.

[102] *Re Crawshay*, above, 135.

and the effect of their actions, endeavoured to carry them into effect.[103] However, although the appointment would be good, since it embodies two distinct transactions—one by the appointor and one by the appointee—there could be two disposals for capital gains tax purposes, for example, and two transfers of value for inheritance tax purposes, with all the consequences which that might entail.

9.17 Given that the limitations in default of appointment (assuming there to be any) are 'looked upon as embodying the primary intention of the donor of the power',[104] a bargain or condition which leads to the fund or property going in default 'can never therefore defeat the donor's primary intention', and will thus not be fraudulent.[105] Thus, an appointor can release his power, even in pursuance of a bargain, and even if he himself benefits therefrom: the doctrine of fraud on a power does not apply to a release precisely because the effect of a release is to benefit those entitled in default.[106] On the same basis, it is presumably not necessarily fraudulent to appoint to an object with the purpose that a benefit be passed on to the person(s) entitled in default.[107] Of course, where the appointee is the sole object of the power and also the person entitled in default, he is in effect the sole owner of the property, and an agreement with the appointor as to the destination of that property, wherever that might be, will not be fraudulent.[108]

9.18 This leads to the question of whether there can be a fraud on the power where the appointor is also the person entitled in default. A straightforward application of Lord Parker's *dicta* in *Vatcher v Paull*[109] might suggest not. It has been argued that, even where there is a bargain that the appointee will benefit a non-object out of the property, there can be no fraud, for the appointor 'is in effect owner, and could himself make the effect more realistic by releasing the power'. Furthermore, the same argument, it is said, 'applies where the person entitled in default of appointment is not the donee of the power, but where the donee and the remainderman join to act as owners'.[110] This conclusion has been criticized—and, it is suggested, rightly so—on the basis that it cannot apply in all circumstances: specifically, it would not seem appropriate where the appointor/taker in default is a trustee.[111] In the absence of some express provision in the trust instrument, a trustee, unlike an ordinary donee, cannot release a mere power conferred upon him.[112] Moreover, he is under a duty to the objects of the power to consider its exercise from time to time, as well as a duty to ensure that any exercise is non-fraudulent.[113] Consequently, unless it can be argued that, by making the trustee the taker in default, the donor impliedly excused him from such a duty to consider, the trustee cannot deal with the property which is the subject-matter of the power as if he were its absolute owner. He must, at the very least, carry out his duty to the objects of the power and give honest and proper consideration to an appointment in their favour. Only having done so can he decide to allow the property to pass to himself in default of appointment. Indeed, as long

[103] *ibid.* See also *Kain v Hutton* [2008] 3 NZLR 589.

[104] See para 9.08 above.

[105] *Vatcher v Paull* [1915] AC 372, 379, *per* Lord Parker; *Re Greaves* [1954] Ch 434, 446.

[106] *Re Somes* [1896] 1 Ch 250; *Re Greaves* [1954] Ch 434, 445, 446. See also paras 9.109–9.111 below.

[107] This may be considered necessary, for instance, where the power is fiduciary and cannot be released, and it is intended to benefit those entitled in default sooner rather than later. 'Not necessarily fraudulent' because a fiduciary owes other duties to the objects: see Ch 10 below.

[108] *Wright v Goff* (1856) 22 Beav 207.

[109] [1915] AC 372, 379: see para 9.01 above.

[110] LA Sheridan, *Fraud in Equity*, 122, 124. The only authority cited in support of this proposition is *Wright v Goff*, above, but in that case it was the appointee, not the appointor, who was entitled in default.

[111] *Hardingham and Baxt*, 103–04 (and see 101–10 generally).

[112] *Re Eyre* (1883) 49 LT 259; *Re Mills* [1930] 1 Ch 654; *Re Wills' Trust Deed* [1964] Ch 219. Section 155 of the Law of Property Act 1925 is not available to a trustee. See Ch 15 below.

[113] See paras 10.06–10.20 below.

as there are objects in existence or capable of coming into existence, his duty to consider will persist, so it seems that he will then be equally incapable of diverting the property to any other non-object. Of course, if all the objects are in existence, ascertained, and *sui juris*, they and the trustee/taker in default have absolute dominion over the property and can dispose of it as and to whomsoever they see fit.[114]

9.19 In the context of head (1), it does not matter whether the power in question is one to appoint to one or other of a class of objects or one to appoint in favour of one object only.[115]

9.20 Moreover, despite its ostensible subject-matter (namely an antecedent agreement between 'donee' and 'object'), it would be erroneous to restrict head (1) to such a narrow compass. This particular head is really but an example 'of the underlying principle that a power only be exercised for the purpose for which it was conferred and in accordance with its terms'.[116] As such, *any* agreement between the donee of a power and *anyone* else as to the exercise of that power for an ulterior purpose would be fraudulent, such as, for example, an agreement between a trustee and an investment adviser whereby the former receives an inducement from the latter in connection with the appointment or choice of trust investments, or an agreement to exercise a power of consent, and so on. The examples could easily be multiplied, but it matters not whether they fall squarely within head (1). Indeed, in reality, there is but one head, under which all fraudulent executions fall, and that is head (3) below.

(2) **Execution for a corrupt purpose**

9.21 A power is fraudulently executed and void if the execution was made for a corrupt purpose. A simple example is where the appointor intends a benefit to result to himself, such as where he appoints to a child of his (who is a proper object of the power) who is in delicate health and likely to die, intending or hoping that he will take the property as next of kin;[117] or where bonuses accruing on insurance policies held in trust were appointed with the intention that they be used to discharge the premiums payable by the appointor, who was thereby released from having to pay them himself;[118] or where an appointment is made so that the appointees can mortgage the appointed property, the mortgage money being paid to the appointor;[119] or where monies are advanced to a beneficiary to be applied towards repayment of a debt owed to the trustee by the beneficiary's husband;[120] or where a parent appointed money to a daughter to meet his burial expenses;[121] or where a tenant for life having statutory power to lease wanted to lease to a trustee for himself.[122] There is no reason either why a trustee who is bribed to make a particular

[114] *Re Smith* [1928] Ch 915; *cf. Re Nelson* [1928] Ch 920n; *Re Chardon* [1928] Ch 464; and *Berry v Geen* [1938] AC 575. See also paras 3.80–3.91 above.

[115] *Re Nicholson's Settlement* [1939] Ch 11. This case is discussed fully at paras 9.29–9.34 below.

[116] *Re Bird Charitable Trust* [2008] WTLR 1505, 1529.

[117] *Lord Hinchinbroke v Seymour* (1789) 1 Bro CC 395; *Palmer v Wheeler* (1811) 2 Ball & B 18; *Jackson v Jackson* (1840) 7 Cl & Fin 977; *Keily v Keily* (1843) 4 Dr & War 38, 55 (where *Lord Sandwich's Case* (1789) is cited); *Gee v Gurney* (1846) 2 Coll 486; *Rowley v Rowley* (1854) Kay 242; *Lady Wellesley v Earl Mornington* (1855) 2 K & J 143; and see *Warde v Dixon* (1858) 28 LJ Ch 315; *Eland v Baker* (1861) 29 Beav 137; *Davies v Huguenin* (1863) 1 Hem & M 730; *Carroll v Graham* (1865) 11 Jur NS 1012; *Henty v Wrey* (1882) 21 Ch D 332; *Dowager Duchess of Sutherland v Duke of Sutherland* [1893] 3 Ch 169; *Re De Hoghton* [1896] 2 Ch 285; *Chandler v Bradley* [1897] 1 Ch 315; *Middlemas v Stevens* [1901] 1 Ch 574; *Re Cornwallis West* (1919) 88 LJKB 1237.

[118] *Harrison v Randall* (1851) 9 Hare 397.

[119] *Pares v Pares* (1863) 33 Li Ch 215, where the facts, though suspicious, were held (surprisingly) not to constitute fraud.

[120] *Molyneux v Fletcher* [1898] 1 QB 648.

[121] *Hay v Watkins* (1843) 3 Dr & War 339.

[122] *Boyce v Edbrooke* (1903) 1 Ch 836.

investment should not fall within this category of fraudulent execution.[123] Indeed, the corrupt purpose is often the provision of some benefit to the trustee himself and, in this sense, it is also vulnerable as an unauthorized 'self-dealing'. Thus, for example, trustees for a school could not lease to one of the trustees;[124] and the governors of a school could not lease to one of the governors.[125] The same principle applies to all discretionary powers, such as consents.[126] It also applies well beyond the field of trusts law, as in *Calder and Hebble Navigation Co v Pilling*,[127] where a canal company with power to make by-laws for the good government of the company, for the good and orderly use of navigation, and for well-governing of bargemen, made a by-law that navigation should be closed every Sunday: the court held that the company had no power to enforce the proper observance of religious duties. The same is true of any power, such as a power to consent (to a distribution, an investment or any other matter),[128] or to appoint a trustee or protector (who, for example, may be more amenable to the appointor's demands), or to change the proper law of a settlement (to another jurisdiction where, for example, the appointor or another can derive a novel benefit, such as an enhanced indemnity provision or increased remuneration): the question, in each case, is whether the relevant power was exercised for an ulterior motive.

9.22 The nature of the benefit is immaterial; it need not be derived from the appointed property, nor even be financial: for example, an appointment giving preference to a child of a first marriage in order to induce the wife to have the decree *nisi* of divorce made absolute and so leave the appointor free to marry again was fraudulent and void.[129] Indeed, where the appointor has deliberately set out to achieve the benefiting of some non-object by means of the appointment he has made, there is a fraudulent execution of the power. It is not necessary that the appointee be under 'strong moral suasion' to carry out the wishes of the appointor.[130] Clearly, in any of these cases, if the donee of the power is a trustee, he will also be guilty of a breach of trust.

9.23 However, the mere fact that the donee of the power may possibly derive some benefit from its exercise will not necessarily render that exercise fraudulent. Thus, an appointment will not be avoided simply because the appointee is an infant. In *Beere v Hoffmister*[131] for example, A and his wife had a joint power of appointment in favour of her children; in default of appointment, the fund was settled on the children who attained the age of 21 and, subject thereto, to the wife's next of kin. The power was exercised, reserving a joint power of revocation, in favour of the sole child, then aged three and in good health (although the wife was seriously ill). The child died two years later and A became entitled to her property. The appointment was held valid, there being no

[123] *Re Smith* [1896] 1 Ch 71; and see *Cowan v Scargill* [1975] Ch 270, 288. It does not seem to have been argued that, where a sole trustee of co-owned property appointed a second trustee deliberately in order to rely on the overreaching provisions of ss 2(l)(ii) and 27(2) of the Law of Property Act 1925 and thereby defeat any right of the other co-owner(s) to prevent sale, such appointment was for a corrupt purpose, fraudulent and void.

[124] *Attorney-General v Dixie* (1805)13 Ves 519.

[125] *Attorney-General v Earl of Clarendon* (1810) 17 Ves 491.

[126] Farwell, 463. See also *Eland v Baker* (1861) 29 Beav 137; *Strange v Smith* (1755) Amb 263; *Clarke v Parker* (1812) 19 Ves 1, 18; and *Mesgrett v Mesgrett* (1706) 2 Vern 580.

[127] (1845) 14 M & W 76. See also *Commonwealth & the Central Wool Committee v Colonial Combing, Spinning & Weaving Co Ltd* [1922] HCA 62; (1922) 31 CLR 421, where Higgins J saw no reason why it should not apply to the Government, or where the foreign purpose was an increase in the funds of the Treasury.

[128] See the example set out by Deputy-Bailiff Birt in *Re Bird Charitable Trust* [2008] WTLR 1505, 1529, [75].

[129] *Cochrane v Cochrane* [1922] 2 Ch 230.

[130] *Re Dick* [1953] Ch 343, 359–60, reasserting *Vatcher v Paull* [1915] AC 372, 378, and explaining Re *Crawshay* [1948] Ch 123, 135.

[131] (1856) 23 Beav 101. See also, *Butcher v Jackson* (1845) 14 Sim 444; *Hamilton v Kirwan* (1845) 2 Jo & Lat 393; *Domville v Lamb* (1853) 1 WR 246; and *Fearon v Desbrisay* (1851) 14 Beav 635.

evidence of a corrupt purpose. There are many other examples. In *Cockcroft v Sutcliffe*,[132] lands were limited to a father for life, with an exclusive power of appointment in favour of his children. Two of his sons set up in partnership and, at their request, the father joined them. In order to provide capital for the business, the father appointed the lands to the two sons and then joined with them in mortgaging the fee, the mortgage advance being placed to the general credit of the partnership. There being no evidence of any bargain or bad faith on the father's part, and no advantage to him other than that derived from the mortgage money being employed by the firm of which he was a partner, the appointment was held valid.[133] Indeed, in *Re Merton*,[134] Wynn-Parry J, referring to Lord Parker's *dicta* in *Vatcher v Paull*,[135] summarized the position as follows:

> It appears to me that that is a clear direction to the court, in each case, to inquire what is the purpose and intention of the appointor; and if, and only if, it appears from the evidence that the object was to secure a benefit for himself or for some other person not an object of the power, is the transaction to be held to be invalid. Those words direct that the court shall embark on that inquiry and they are, therefore, the reverse of words which are apt to establish or recognise the existence of any inflexible rule . . . .
>
> The court has to ask itself, what was the appointor's purpose and intention? Was it to secure a benefit for himself or some person not an object of the trust? If the answer is 'Yes,' there is vice; and if the answer is 'No,' there is no vice.

(If such a transaction were to be carried out by a trustee, however, it would probably be impeachable under the rule against conflict of interests.)[136] Similarly, an appointment may not be impeachable if one of its purposes is ultimately to widen the administrative powers of a settlement under which the appointor is life tenant.[137] Of course, these could equally well be examples of fraudulent execution of a power: it depends on the purpose of the donee and on the circumstances of each case.

> The meaning and the good sense of the rule appears to be that if the appointor, either directly or indirectly, obtain any exclusive advantage to himself, and that to obtain this advantage is the object and the reason of its being made, then that the appointment is bad; but that if the whole transaction taken together shows no such object, but only shows an intention to improve the whole subject-matter of the appointment for the benefit of all the objects of the power, then the exercise of the power is not fraudulent and void, although by the force of circumstances such improvement cannot be bestowed on the property, which is the subject of the appointment, without the appointor to some extent participating therein.[138]

9.24 Although an appointor may appoint to himself if he is one of the objects of the power,[139] it does not necessarily follow that, if he does so, 'there is nothing to invalidate'[140] that appointment. This may be the case where the power is a 'beneficial power'; but where the appointor is also a trustee and the power was conferred upon him *qua* trustee (that is, it is still a fiduciary power), he must exercise that power (and indeed any other power, such as a power to consent to an appointment by

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[132] (1856) 2 Jur NS 323.

[133] See, too, *Pares v Pares* (1863) 10 Jur NS 90, and *Baldwin v Roche* (1842) 5 Ir EqR 110.

[134] [1953] 1 WLR 1096, 1100, 1101. See also *Kain v Hutton* [2008] NZSC 61; [2008] 3 NZLR 589, [49], [50]; *Noel v Lord Walsingham* (1824) 2 Sim & St 99; and *Smith v Lord Camelford* (1795) 2 Ves 698.

[135] See para 9.01 above.

[136] See Ch 12 below. Should it not also be the case with partners?

[137] *Re Huish's Charity* (1870) LR 10 Eq 5; *Pickles v Pickles* (1861) 7 Jur NS 1065.

[138] *Re Huish's Charity* (1870) LR 10 Eq 5, 9–10, *per* Lord Romilly, MR.

[139] *Taylor v Allhusen* [1905] 1 Ch 529; *Re Penrose* [1933] Ch 793.

[140] Halsbury's Laws, Vol 36, 277.

another) *bona fide* for the benefit of the objects.[141] He must at least consider the claims or circumstances of the objects before he can appoint to himself. (Whether this is regarded as a question of executing a power for a 'corrupt purpose' or simply as a breach of trust does not seem to matter.) Difficult questions may arise where the donee of a fiduciary power is also an object of that power; and, although an exercise of such a power in favour of the donee himself may not be fraudulent it may nonetheless be open to challenge on other grounds, such as the application of the rule against conflict of interests.[142] It also remains the case that, pending such an appointment in his own favour, he may and must still exercise any powers that he possesses according to their terms and only for their intended purpose; he can not exercise them in a fraudulent manner.

9.25 Finally, the decision of the Court of Appeal in *Re Nicholson's Settlement*[143] may have established that, in the absence of an agreement, arrangement or understanding with the appointee which fetters the interest given to him, it is not possible to sustain an allegation of fraud *under this head* where the power in question empowers an appointment in favour of one object only, as in the case of an appointment to someone who answers a particular description or fulfils a particular qualification. Category (2), in other words, may apply only to a power to appoint to several persons or to one or other of the members of a *class* of objects. This view, it is suggested, does not have much to recommend it. *Re Nicholson's Settlement* is a much-criticized decision, however, and it is discussed fully below.[144]

(3) Execution for a foreign purpose

9.26 An execution of a power is said to be fraudulent and void if it is for some purpose foreign to the power.[145]

> The purpose of the author of a settlement, by which a power is created, is to benefit the objects within the range of the power. If the power be exercised beyond that range, his intention is that the property, the subject of the power, shall go to those who are entitled in default of appointment. When therefore it is asked that effect may be given to an appointment, which has for its object to go beyond the power, it is in truth asked that the unauthorized purpose of the donee may be preferred to the authorized purpose of the donor, and that to the prejudice of those who would be entitled but for the donee's unauthorized purpose.[146]

All cases of fraudulent execution clearly involve an 'unauthorized purpose'. For most purposes, therefore, categories (1) and (2) above are effectively but subdivisions of the third.[147] In all three cases, however, these must be some ulterior purpose, a 'deliberate defeating' of the donor's intention,[148] for it is this element that distinguishes a fraud on a power from a merely excessive exercise.

9.27 Examples of 'foreign purposes' generally involve an intention to benefit someone who is not an object of the power. For instance, in *Re Marsden's Trust*,[149] a donee of a power to appoint in favour of children of her marriage wished to benefit her husband. She proposed to appoint to her daughter

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[141] See, for instance, *Eland v Baker* (1861) 29 Beav 137, where a good title could not be made. See also *Re Beatty* [1990] 1 WLR 1503; para 1.58 above and paras 12.09–12.18 below.
[142] See Ch 12 below.
[143] [1939] Ch 11.
[144] See paras 9.29–9.34 below.
[145] Farwell, 477; Halsbury's Laws, Vol 36, 277.
[146] *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517, 568, *per* Turner, LJ.
[147] Farwell, 460.
[148] *Re Dick* [1953] Ch 343, 360. See also paras 9.01–9.02 above.
[149] (1859) 4 Drew 594.

on condition that the latter made over half the appointed property to her father (the terms of the power being 'upon such conditions and with such restrictions' as the donee should appoint). Having been advised that such an appointment was not authorized, the donee then appointed the property to her eldest daughter unconditionally. By arrangement, on the donee's death, her husband would inform the daughter of her mother's real desire and the daughter would thereby be induced to carry out that desire. The appointment was held fraudulent and void.[150] Similarly, an appointment will be void where its purpose is that the appointed property should pass to a non-object under an assignment already executed by the appointee.[151] Although many such instances will involve a bargain between appointor and appointee (and therefore fall under category (1) above) a bargain is not essential. Whether the power is executed for a corrupt or foreign purpose, if it is the appointor's *intention* to benefit a non-object or to further an unauthorized purpose the appointment is fraudulent. The appointee need not be under 'strong moral suasion' to carry out the wishes of the appointor.[152] The appointee need not even know of the fraudulent intention or purpose; and it is irrelevant that the purpose never takes effect.[153]

9.28 However, the notion of a 'foreign purpose' embraces far more than an intention to benefit a non-object. In *D'Abbadie v Bizoin*,[154] for example, the foreign purpose was (appropriately) an intention on the part of the donee to induce her son (an object of the power) to reside in France; this was held not to be warranted by the power. Similarly, although the terms of a power may authorise the imposition of a condition, the actual condition stipulated in an appointment to an object may nonetheless be 'foreign' and fraudulent.[155] (In this case, at least, there seems to be an overlap between the doctrine of fraud on a power and the duty not to take irrelevant considerations into account.)[156] Another common example, prior to the abolition of the rule against excessive accumulations in the Perpetuities and Accumulations Act 2009, was the case where a revocable appointment was made in favour of an infant object (A), with the sole purpose of enabling the period during which the income of the appointed property could be accumulated to be prolonged (by virtue of the application of section 31 of the Trustee Act 1925), but where there was no intention to benefit A himself, the concluded purpose being an ultimate appointment of the property (plus accumulations) to another adult object (B). Although such revocable appointments were commonly made in practice, their status remained doubtful (unless, of course, it could be said that some benefit to A, as well as B, was contemplated and that the appointment would have been made in any event). Now that accumulation of income may continue for the duration of the perpetuity period of 125 years, this stratagem is no longer necessary in England and Wales, although it might still be relevant in other jurisdictions. It is not necessary that the appointee should be privy to the transaction or that the purpose is not communicated to him before the appointment, 'because the design to defeat the purpose for which the power was created will stand just the same, whether

[150] *cf. Re Crawshay* (1890) 43 Ch D. 615, doubted in *Re Crawshay* [1948] Ch 123.

[151] *Hay v Watkins* (1843) 3 Dr & War 339, 343; *Weir v Chalmley* (1850) 1 Ir Ch R 295; *Lady Wellesley v Earl Mornington* (1855) 2 K & J 143; *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517, 568; *Re Perkins* [1893] 1 Ch 283; *Re Cohen* [1911] 1 Ch 37; *Re Walker and Elgee's Contract* (1918) 53 Ir LT 22; *Re Dick* [1953] Ch 343. See also paras 3.92–3.96 above.

[152] *Re Dick* [1953] Ch 343, 359–60, explaining *Re Crawshay* [1948] 123.

[153] *Re Crawshay*, above, 135; *Re Wright* [1920] 1 Ch 108, 117.

[154] (1871) 5 IR Eq 205.

[155] *Vatcher v Paull* [1915] AC 372, 379; *Re Perkins* [1893] 1 Ch 283; *Re Cohen* [1911] 1 Ch 37. *cf. Hodgson v Halford* (1879) 11 Ch D 959, where a forfeiture clause on marrying anyone not a Jew was held to be authorized by the power.

[156] See paras 10.75–10.145 below.

the appointee was aware of it or not'.[157] Nor is it relevant that the appointor himself gets no personal benefit from the appointment.[158]

9.29 According to the decision of the Court of Appeal in *Re Nicholson's Settlement*,[159] this head of fraudulent execution, like category (2) above, does not apply to a power to appoint in favour of one object only. An execution of such a power can be set aside as a fraud on the power only if it can be proved that there was some bargain, arrangement, or understanding between the appointor and the appointee which fetters the appointed interest in the appointee's hands in favour of some person or persons other than the appointee himself.[160] The power under scrutiny in *Re Nicholson's Settlement* was one conferred upon a tenant for life (A) to appoint an income interest 'to any husband who may survive her for his life or for any less period'. In default of issue to A (as proved to be the case) the fund was to pass to her relations in England. For many years, A had lived with a family in Oregon; and when she was over 80 years of age she became anxious to make provision for them, but had no means beyond the income she received from the settlement. In the course of correspondence she sought to make a bargain with her relations that, if she released her power of appointment, they would surrender half the capital, which she would then be free to dispose of in any way she wished. Her relations were not prepared to agree, notwithstanding the fact that she mentioned the possibility that, if they would not do so, she would marry and exercise her power of appointment. She did in fact marry, but never lived with her husband. She exercised her power in his favour and, two years later, died. Her relations, as takers in default, challenged the validity of the appointment. The evidence, which was not disputed, showed that there was 'no bargain, arrangement or understanding between the lady and her husband in any way fettering his complete control over the income appointed to him', although it was 'easy to infer that when she appointed in her husband's favour she had it in mind that some of the income would find its way to the friends whose future welfare was her serious concern'.[161] Farwell J held that the attempt to establish a fraud on the power failed, and his decision was upheld by the Court of Appeal.

9.30 Unfortunately, *Re Nicholson's Settlement* was not decided simply on the question of inadequate evidence. The Court of Appeal approved and adopted a distinction put forward by Farwell J at first instance.

> For the present purpose it is to be noted that there are two types of powers of appointment which have to be distinguished. Of the first type are powers for an appointor to alienate in favour of a person filling a particular qualification (for example, husband or wife, to take the common case) a part of or an interest in the property, with the result of diminishing *pro tanto* the interest passing to persons to whom (subject to the exercise of the power of appointment) the property is given. Of the second type are powers for an appointor to select and define the beneficial interests *inter se* of several members of a class of beneficiaries or their issue in a fund which (subject to the exercise of the power of appointment) is to pass in defined proportions to some or all of the members of the class.
>
> In the case of either type of power the appointment will or may be vitiated either wholly or *pro tanto* if it is shown to have been made upon a bargain or even arrangement or understanding which fetters the appointed interest in the appointee's hands in favour of either the appointor himself or some outside party, or is directed to providing some advantage for the appointor or some outside party. The principle is that such an appointment amounts in substance to an appointment *pro tanto* in favour of some one outside the qualification stipulated for, or the class of beneficiary defined, by the

[157] *Re Marsden's Trusts* (1859) 4 Drew 594.
[158] See cases cited in n 151 above.
[159] [1939] Ch 11.
[160] ie category (1) alone applies
[161] *ibid.*, 18

> donor of the power. The execution of the power is alien in reality, though possibly not in form, to the power conferred.[162]

In all the reported cases in which appointments had been invalidated on the grounds of a foreign purpose (that is, category (3) above) the power in question was one of the second type. And the Court of Appeal found it difficult to see how this ground of invalidity could be applicable to a power of the first type. In the absence of an agreement or understanding fettering the enjoyment by the appointee of the appointed interest, there was no room for any complaint of unfairness. A hope or expectation on the part of the appointor that the appointee would use or apply the interest given to him for some particular end would not suffice.

> Where the power can be exercised only in favour of a particular person, and there is no question of selecting among a class, there is no room for any complaint of unfairness if the appointment results in fact in the appointee taking the appointed interest without any fetter. The appointee and no one else is benefited, as the donor of the power intended should be the case if the appointor chose to exercise the power; and there is no detriment to any one else. Where, however, there is a power to select among a class, and a particular beneficiary is selected in order to achieve a collateral purpose, the result is *pro tanto* to diminish the interest of the other beneficiaries, a diminution which the appointor is no doubt authorized to effect in a *bona fide* attempt to achieve what he considers justice and fairness as between the beneficiaries, but which he is not authorized to effect in order to achieve a collateral purpose. While therefore it may well be that in the case of powers of the second type defined above the Court may inquire into the ultimate object which the appointor hopes to achieve, and where that object is collateral may invalidate the appointment, there is no authority for the proposition that such an enquiry is appropriate or permissible in the case of a power of the first type defined above; and we can discern no principle which would justify such an enquiry: on the contrary the very nature of the power, containing as it does no element of selection among competing objects of bounty, would seem to negative the appropriateness of any such inquiry.[163]

In the absence of evidence of an agreement with the appointee, the appointment by A was thus upheld.

9.31 Even if it is accepted that the power in *Re Nicholson's Settlement* was indeed a power to appoint to one object only—after all, A was empowered to appoint to 'any' husband who might survive her—the decision is difficult to accept. It overlooks the elementary point that the threefold classification of fraudulent execution of a power is a mere classification of convenience, and indeed that head (1) and head (2) are but subdivisions of head (3). The principles underlying these categories seem to be fundamentally the same. In a case such as *Beere v Hoffmister*,[164] for instance, there was only one object at the time of the appointment, and no bargain or arrangement; and though no fraud was established, it is clear that the court did not rule out the possibility simply because there was no other object. Moreover, does the classification apply only to powers of appointment, or does it extend to other powers as well? It is not at all uncommon for powers of advancement or powers to apply capital, to which the doctrine of fraud on a power can apply, to be in favour of a sole object:[165] indeed, in *Re Abrahams*,[166] Cross J stated that a power of advancement has only one object. Must there be a bargain, arrangement, or understanding between the donee of the power and the beneficiary before an advancement or application of capital can be impeached?

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[162] [1938] Ch 11, 18–19, *per* Clauson LJ.

[163] [1938] Ch 11, 20–1.

[164] (1856) 23 Beav 101. The power was to appoint to a class of children, in fact, but there was only one child. If it is not of the first type mentioned in *Nicholson*, would it make any difference if the possibility of child-bearing had ceased?

[165] *Lawrie v Bankes* (1858) 4 K & J 142; *Molyneux v Fletcher* [1898] 1 QB 468.

[166] [1969] 1 Ch 463, 484.

Perhaps such a power would be treated differently on the basis that its exercise results in the defeat or destruction of the interests of those entitled in default, rather than the postponement of their vesting in possession.

9.32 A more fundamental criticism[167] is that it ignores the rights of the takers in default (the English relations in the present case). It is self-evident that, where there is only one object, there are no rights of other objects to take into account. However, in respect of the takers in default, if they are to be divested of their interests or indeed, if the enjoyment of their interest is to be postponed, they are entitled to demand that any exercise of the power be in good faith, that it not be 'alien in reality . . . to the power conferred'.[168] Why should an appointment to a sole beneficiary not be fraudulent if its sole purpose is that the property should pass to a non-object under an assignment already executed by the appointee?[169] What about an appointment to a sole object as a result of a bribe by that object?[170] Even if it were possible to fit such a case within the description of 'bargain, arrangement or understanding'—which is made more difficult in view of the way in which the Court of Appeal used those terms—it would not be one which fettered the interest appointed to the appointee. What of the case where the purpose is to induce the appointee to reside abroad?[171] Proof of the existence of a bargain or understanding with the appointee which fetters the interest given to him is no doubt the clearest evidence of fraud. But that is surely not a pre-requisite. The 'principle' which the Court of Appeal could not discern, as a justification for inquiring into the ultimate purpose which the appointor hoped to achieve, is that which underlies the very notion of fraud on a power: those entitled in default of appointment (assuming there be any) are also entitled to demand that the power be exercised, and their interests divested or postponed, in good faith and strictly in accordance with the substance, and not just the form, of the donor's purposes. The fact that the appointee is seen to answer or satisfy some formal requirement or description should not be sufficient, in itself, if the reality is that there is no substance to this claimed status. In any event, the appointor's power in *Re Nicholson* was not a fiduciary power in the modern sense, that is, she was under no obligation to exercise it or consider its exercise and could have forgotten or ignored it entirely. A similar power conferred on a trustee or other fiduciary would undoubtedly give rise to a range of duties and it would probably not be a proper exercise of the power simply on the basis that the object answered a particular formal qualification (and had no other entitlement).

9.33 Finally, in *Rowley v Rowley*,[172] Wood V-C clearly thought that in the case of a power to appoint to or for the benefit of one object only, there could be fraud on the donor of the power himself 'and the party claiming through him'.[173] It is not clear whether the fraud is on the donor *qua* donor, or on the donor as taker in default of appointment. If it is the latter, then the exercise of the power in *Re Nicholson* was impeachable.[174] Moreover, it seems to be implicit in the decision in *Re Nicholson* that the exception in question is based on the cases involving powers to jointure. In fact, such powers were always regarded as anomalous, and the extension of any principles established in relation to them should not readily be extended to other powers or to other circumstances.[175]

[167] This is the point made forcefully by Hardingham and Baxt, 105–06.

[168] *Re Nicholson's Settlement* [1938] Ch 11, 19.

[169] *Hay v Watkins* (1843) 3 Dr & War 339, 343; *Lady Wellesley v Earl Mornington* (1855) 2 K & J 143; *Re Crawshay* [1948] Ch 123. See paras 9.26–9.28 above for 'foreign purposes' generally.

[170] *Re Wright* [1920] 1 Ch 108, 118; *Rowley v Rowley* (1854) Kay 242, 262.

[171] *D'Abbadie v Bizoin* (1871) 5 IR Eq 205.

[172] (1854) Kay 242.

[173] *ibid.*, 259.

[174] By the other children of the donor.

[175] Powers to jointure are discussed in greater detail below, at paras 9.116–9.118.

9.34 It is unclear whether *Re Nicholson's Settlement* applies to head (2) (that is, corrupt purposes) as well as head (3) (that is, foreign purposes). It is possible to read part of Clauson LJ's judgment[176] as excluding from consideration those cases in which the fraud was some form of 'dishonesty or of any fraud in the ordinary sense of the term'. He went on to refer expressly to cases in which the intention was that 'an object foreign to the power should be achieved'; and it is in reference to such cases 'invalidated on this ground' that the distinction between two types of power is made. Indeed, it would be remarkable if the *Nicholson* distinction were to apply in the circumstances illustrated by some of the cases falling within head (2), that is, that none of the appointments there invalidated would have failed if there had been only one object. Would it be possible, for instance, to justify an appointment where the sole object was the appointor's child and was seriously ill, and the appointor's primary purpose was to take the property as the child's next of kin?[177] At first instance, the argument before Farwell J was centred on appointments for a foreign purpose; and Farwell J's judgment appears to be confined to that category too.[178] Unfortunately, *Re Nicholson's Settlement*, with its rather general references to 'collateral purposes', does not make it clear whether head (2) was intended to be excluded from the scope of the decision or not—something which probably reflects the generality of the arguments before it. In any event, it must be questioned whether *Re Nicholson* should be regarded as laying down a rule or principle applicable to 'single object' cases generally. The court clearly could not impeach the marriage of the donee and the object (even if it was a marriage of convenience only). It also seems clear that the court concluded, on the evidence, that the object/husband had complete control over the income appointed to him. There was thus no room for a finding of fraud and this should have been sufficient to dispose of the case, without the need to promulgate general principles. It is suggested that, in view of the dissatisfaction felt about the decision generally, the exclusion from its ambit of as many cases as possible would be desirable.

D. Fraud on a power and occupational pension schemes

9.35 The doctrine of fraud on a power applies equally to powers and discretions conferred under occupational pension schemes (and other 'commercial' trusts). The exercise of scheme powers by the trustees or by employers for an 'ulterior' or 'foreign' or 'collateral' purpose will be fraudulent and void.[179] As we have seen, the doctrine is capable of applying to powers which are not fiduciary in nature as well as to those which are fiduciary in the strict sense.[180] However, it is clearly not the case that the exercise of every and any power conferred on the employer in relation to a pension scheme will be held fraudulent if or in the event that the purpose of effect of such exercise is to enable the employer to derive some personal benefit or advantage or, indeed, if such exercise is made pursuant to some bargain between the employer and the members or trustees of the scheme. It is in this area, in particular, that it becomes difficult to distinguish the boundaries between fraudulent and excessive exercise of powers, to identify what duties (if any) are owed by an employer in the exercise of its scheme powers and also how all these issues relate to each other. This is particularly difficult because they all tend to revolve around and depend upon the same facts.

[176] [1938] Ch 11, at 19, 20.
[177] *Lady Wellesley v Earl Mornington* (1855) 2K &J 143.
[178] See [1938] Ch 308, 10, 11–12.
[179] *Re Courage Group's Pension Scheme* [1987] 1 WLR 495. See also *Libby v Kennedy* [1998] OPLR 213: trustees' appointment of 'death in service' benefit upheld.
[180] See paras 9.04–9.05 above.

However, this should not disguise the fact that they are fundamentally different. Suppose, for example, that the employer has a power to amend a pension scheme, or, alternatively, that the trustees have such a power which is exercisable with the consent of the employer. Suppose, too, that the employer wishes to have the scheme amended so as to introduce a new provision conferring some benefit or advantage on the employer, (for example, a right to surplus funds, where none existed before; or a right to introduce new participating employers to the scheme). In return for such an amendment, the employer may be willing to accede to a bargain for an increase in benefits. In such a case, the first question is simply whether the intended benefit to the employer (the payment of any part of surplus funds or whatever) is prohibited by the provisions of the scheme. If it is, then any such amendment is excessive and void; and no question of fraudulent exercise of the power need be addressed. However, as we shall see,[181] the question whether the amendment is indeed excessive is not always straightforward. For example, it is highly material whether the power is exercisable by the employer for its own benefit or in its own interests.[182] If it is a fiduciary power, in the strict sense, then it may not be so exercised in the absence of express authorization; but if it is an 'enlarged' fiduciary power, or not a fiduciary power at all, and if, on the proper construction of the power, one of its purposes or objects is to benefit the employer, then its exercise by the employer in its own favour will not be excessive.[183] The exercise may be open to challenge on the ground that the employer is in breach of its implied duty of good faith,[184] or (if it is a fiduciary power) of one of the duties owed by the donee of such a power, as discussed below.[185] However, it will not be excessive and it will not then be fraudulent. Therefore, in such a case, provided such other obligations (if any) are complied with, it would seem to be entirely proper for the employer to bargain with the objects of the power or with the trustees of the scheme in order to obtain some advantage for itself (whether it be a share of surplus, a contributions holiday,[186] or otherwise). If, on the other hand, it is attempted to accomplish a prohibited purpose by some means which is not in terms excessive, (for example, by amending the scheme so as to introduce a power to transfer funds to another scheme under which the employer would be entitled to the prohibited benefit;[187] or by entering into a bargain under which a power created for the exclusive benefit of members is exercised in such a way as to deprive them of or derogate from their rights)[188] then such an act would be carried out for a collateral or ulterior purpose and would therefore be fraudulent. **9.36**

E. Fraud and powers to 'advance' or 'benefit' the beneficiary/object

Few settlements do not now incorporate a power to pay or apply capital money for the 'benefit' of a beneficiary or object. Indeed, it is usually the case that modern settlements include a range of such powers, including an express or statutory[189] power of advancement ('for the advancement or benefit' of a beneficiary) and a power of appointment for the 'benefit' of members of a class of objects. In principle, the doctrine of fraud on a power applies to this kind of power as much as **9.37**

[181] See Ch 16 generally and especially paras 16.08–16.26 below.
[182] As in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589.
[183] See Ch 12 below for the rule against conflict of interests.
[184] See paras 10.195–10.210 below.
[185] See Ch 10 below.
[186] *Stannard v Fisons Trust* [1992] IRLR 27; *LRT Pension Trustee Co Ltd v Hatt* [1993] OPLR 225, 266; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Re The National Grid* [1997] PLR 157, 180.
[187] *Hillsdown Holdings*, above; *Burt v FMC Superannuation and Pension Scheme Trustees Ltd* [1995] OPLR 385.
[188] *Imperial Tobacco*, above; *Hillsdown Holdings*, above; *Cullen v Pension Holdings Ltd* [1992] PLR 135.
[189] Section 32 of the Trustee Act 1925.

any other.[190] However, as we have already seen, in has long been the case that, in certain circumstances, such powers may properly be exercised so as to introduce some benefit to non-objects. In some rare instances,[191] this was because the benefited object was himself a party to the particular exercise and the transaction was therefore regarded as an absolute appointment of the property to the object, followed by a disposition by him of the property in favour of strangers to the power: that which might have been done by two deeds did not fail simply because it had been done by one, that is, 'single-stage' appointments.[192] However, other decisions have actually gone much further and established that a power to 'advance' or 'benefit' a beneficiary—and almost certainly also a power to appoint for the 'benefit' of an object—implicitly authorizes an exercise which confers a benefit upon non-objects. Even in *Re Brook's Settlement*,[193] for example, where an appointment, made as part of an arrangement to vary the trusts of a settlement,[194] benefited the appointor himself and was held to be a fraud on the power, Stamp J still recognized that the doctrine was not always so strict as to prohibit an exercise which benefited a non-object, or even the appointor himself:[195]

> If the authorities rested there it might have been thought to follow that an appointment by a life tenant, the purpose of which, or one of the purposes of which, was to enable a division of the trust fund between appointor and appointee thereby excluding the other objects of the power and those entitled in default of appointment, would *ipso facto* be a fraudulent exercise of the power. So to hold would have been to apply the doctrine of fraud on the power strictly. It is, however, to be observed that the exercise of a fiduciary power of appointment does not become a fraud on the power because in fact it confers a benefit upon a person who is not an object of the power, but because the purpose, or one of the purposes, of the appointment is not to benefit the appointee who is an object of the power but is an ulterior purpose. The fact that a person who is not an object of the power does obtain a benefit is no doubt often evidence that that was the purpose or one of the purposes of the appointment. But that is not always so; and the distinction between the effect of the appointment and its purpose remains. Since the purpose of an appointment by a father who, in exercise of a fiduciary power, appoints a fund to his daughter to enable her to settle it upon the trusts of her marriage settlement is to benefit the daughter and it has no other purpose, such an appointment is not a fraud on the power notwithstanding that the daughter's husband and children will obtain a benefit. In the cases to which I must make reference hereafter, the courts have tended to make this distinction and to hold that an appointment made by a tenant for life is not ipso facto made for a purpose outside the scope of the power although in fact the appointor himself is intended to take part of the appointed property. A step in that direction was taken in *In re Merton*[196] and *In re Robertson's Will Trusts*,[197] where the appointments, although made in anticipation of a division of the trust fund between appointor and appointee, were held not to be tainted because they were transactions separate from and independent of the scheme for the division of the trust funds and it was no part of the purpose of the appointor in making the appointment to put part of the appointed fund in the hands of the appointor or to produce a situation in which the other objects of the power or those entitled in default of appointment would be precluded from objecting to the division.

[190] *Lawrie v Bankes* (1858) 4 K & J 142; *Molyneux v Fletcher* [1898] 1 QB 648; and see *Cowan v Scargill* [1975] Ch 270, 288.

[191] See paras 9.15–9.16 above.

[192] See also *Routledge v Dorril* (1794) 2 Ves Jun 356; *White v St Barbe* (1813) 1 Ves & B 399; *Re Gosset's Settlement* (1854) 19 Beav 529; *Morgan v Gronow* (1873) LR 16 Eq 1; *Re Collard's Will Trusts* [1961] Ch 293; *Re Vaux* [1939] Ch 465; *Re Abrahams' Will Trusts* [1969] 1 Ch 463; *Re Earl of Coventry's Indentures* [1974] Ch 77, 94, where this approach was 'conveniently called the *White v St Barbe* (1813) 1 Ves & B 399 doctrine'.

[193] [1968] 1 WLR 1661.

[194] For the doctrine of fraud on a power in the context of variation of trusts, see paras 9.72–9.76 below.

[195] [1968] 1 WLR 1661, 1665–6.

[196] [1953] 1 WLR 1096.

[197] [1960] 1 WLR 1050.

Many other decisions have already been discussed, in the context of the rule against delegation.[198] However, they also concern parallel issues, namely the *extent* to which such powers authorize an execution of a power which introduces non-objects and, of course, whether there is then any scope for the application of the doctrine of fraud on a power. Clearly, if the power can properly be exercised in favour of non-objects, to what extent (if at all) can it ever be said that that particular exercise is fraudulent? In attempting to answer these questions, it is convenient to deal with powers of advancement and powers of appointment separately, even if the conclusions in relation to each may well be the same.

(1) Powers to 'advance' or 'benefit' beneficiaries

9.38 The kind of power under consideration in this section is a power, commonly referred to simply as 'a power of advancement' but actually much broader in scope than that, to 'advance or benefit' a beneficiary who is entitled to an interest (of whatever kind) in the capital of the trust fund. The power conferred by section 32 of the Trustee Act 1925 is the obvious example, but similar powers are often conferred in trust instruments (whether by variation of the statutory power or in alternative express terms). This kind of power is contrasted with a power of appointment to 'benefit' a mere object who does not have any such interest.[199] For these purposes, 'advancement' suggests the establishing of a beneficiary in life,[200] although 'benefit' had wider import.[201] Indeed, the words 'advancement or benefit' were recognized as 'large words' when they occurred even in pre-1926 express powers:[202] they were generally widely construed and did not stand upon niceties of distinction, provided that the proposed application could fairly be regarded as for the benefit of the beneficiary who was the object of the power. This wide construction has been carried forward to the statutory power which uses the same words. Thus, it has long been established that a power to pay or apply capital for a beneficiary's 'benefit' authorizes payment to, or in favour of, someone other than the beneficiary himself. It has been held to authorize payment from a wife's fund to enable her husband to set up in business in England, thus preventing the separation of the family;[203] and to authorize the creation of sub-settlements under which persons other than the beneficiary (such as members of his family), being non-objects of the power, benefited.[204]

9.39 None of this is necessarily inconsistent with the doctrine of fraud on a power, for that doctrine can only apply in the context of the precise terms of the power conferred. Where the power expressly or by necessary implication authorizes indirect payment to or for the benefit of a person who is not in terms a member of its class of objects, then such a payment can not of itself be a fraud on the power. Nevertheless, irrespective of the width of a particular power, the donee must still exercise it properly, for good reason, and certainly not with any sinister or bye purpose or intent.[205] Thus, an exercise of a power of advancement, ostensibly for the benefit of its primary object, but in

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[198] See paras 6.46-6.55 above.

[199] In other words, the expressions 'beneficiary' and 'object' are used in a strict technical sense (as is the case throughout this work) and not as synonyms for each other. The same is true of the word 'interest'. Whether there is any need to differentiate between these powers is another matter, which is dealt with in subsequent paragraphs.

[200] *Re Kershaw's Trusts* (1868) LR 6 Eq 322, 323.

[201] *Lowther v Bentinck* (1874) LR 19 Eq 166, 169.

[202] See, eg, *Re Breeds' Will* (1875) 1 Ch D 226; *Lowther v Bentinck* (1874) LR 19 Eq 166, *Re Brittlebank* (1881) 30 W.R 99. See, generally, Thomas and Hudson, paras 14.29–14.55.

[203] *Re Kershaw's Trusts*, above.

[204] *Re Halsted's Will Trusts* [1937] 2 All ER 570; *Pilkington v IRC* [1964] AC 612; *Re Gerbich* [2002] 2 NZLR 791, 796. See also *Perry v Perry* (1870) 18 WR 482; *Perpetual Trustee Co Ltd v Smith* (1906) 6 SR (NSW) 542; *Re Lesser* [1947] VLR 366; *Public Trustee v Larkham* (1999) 21 WAR 295.

[205] *Re Pauling's Settlement Trusts (No 1)* [1964] Ch 303.

substance and reality for the benefit of a stranger (such as someone towards whom the object felt no legal or moral obligations), is likely to be a fraudulent exercise, irrespective of the use of the word 'benefit' and of the width of the power in other circumstances. The principle is easy to state. It is clear, however, that several difficult questions can arise in its application.[206] How 'direct' does the 'benefit' to the relevant beneficiary need to be to be acceptable? Will a minimal 'benefit' suffice and how does one assess it? When will a particular execution be sufficiently 'extravagant' to be struck down as fraudulent? Indeed, does the doctrine of fraud on a power apply in any real sense at all in these instances?

9.40 The extent to which the words 'pay or apply . . . for the advancement or benefit' in section 32 (or analogous powers) permit an advancement or application by way of resettlement and the delegation of powers has already been dealt with.[207] This question was at the core of the decision of the House of Lords in *Pilkington v IRC*.[208] There was another objection to the proposed re-settlement in that case, however—albeit one that, in view of earlier authorities, was not pressed very hard—namely the fact that its trusts might, in certain circumstances, confer a benefit on non-objects. The House of Lords dismissed this objection, too. As Viscount Radcliffe made clear,[209] 'if the disposition itself, by which I mean the whole provision made, is for [the beneficiary's] benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise. Thus a man's creditors may in certain cases get the most immediate advantage from an advancement made for the purpose of paying them off, as in *Lowther v. Bentinck*;[210] and a power to raise money for the advancement of a wife may cover a payment made direct to her husband in order to set him up in business (*In re Kershaw's Trusts*).[211] The exercise will not be bad therefore on this ground.' Indeed, it had been established earlier that there is no need to show that the 'benefit' is 'related to his or her own real or personal needs'.[212] Nevertheless, Viscount Radcliffe seems to have been implying that the benefit to non-objects must be 'incidental' only.[213] Indeed, it is evident from *Pilkington* that the possibility of 'really extravagant cases of resettlements being forced on beneficiaries in the name of advancement' had been fully considered as a possibility; and, although it did not there compel the introduction of a limitation on such a wide power,[214] the implication would again seem to be that, if the proposed re-settlement had been 'extravagant', the House would have declared it so.[215]

9.41 Subsequent decisions have gone further, however. Indeed, in *Re Clore's Settlement Trusts*[216] Pennycuick J held that an express power conferred on trustees to pay or apply part of a trust fund for the advancement or benefit of a beneficiary was wide enough to permit the trustees to raise capital and pay it, not to the beneficiary himself, but to the trustees of a charity which he wished

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[206] *Wong v Burt* [2004] NZCA 174, [32]; *Kain v Hutton* [2008] NZSC 61; [2008] 3 NZLR 589; and see also [2010] NZLR 506 (P Devonshire).

[207] See paras 6.60–6.71 above.

[208] [1964] AC 612.

[209] Ibid, 636.

[210] (1874) LR 19 Eq 166.

[211] (1868) LR 6 Eq 322.

[212] *Re Pilkington's Will Trusts* [1961] Ch 466, 481, *per* Lord Evershed. The benefit can simply be the saving of taxation: *Pilkington v IRC*, above, 640; *Re Wills' Will Trusts* [1959] Ch 1, 11–12, *per* Upjohn J.

[213] It seems clear, from the cases, however, that the benefit derived by other persons need not in fact be 'incidental'. This statement was approved by Tipping J in *Kain v Hutton* [2008] NZSC 61, [50].

[214] [1964] AC 612, 641.

[215] It is also significant, perhaps, that, in *Pilkington*, the trustees had not surrendered their discretion to the court and thereby asking the court to take the proposed action: they were simply asking for a declaration that the relevant power authorised the course of action which they themselves proposed to take.

[216] [1966] 1 WLR 955; [1966] 2 All ER 272.

to benefit. The power had to be exercised for the improvement of the material situation of the beneficiary. This was not confined to his direct financial advantage. It could include, for instance, the discharge of certain moral or social obligations on his part, such as those he might have towards dependants.[217] In the case of a wealthy man, it might also include enabling him to discharge the moral obligations that he recognized to make charitable donations.[218] The nature and amount of those donations depended on all the circumstances of the case, including the position in life of the beneficiary, the amount of the fund and the amount of his other resources. If the obligation were not to be met out of the trust fund, the beneficiary would have to meet it out of his own pocket, if at all. Thus, the use of trust money improved his material situation. It also appears that the advanced beneficiary himself desired the trustees to exercise their power in the manner proposed—a fact not often mentioned, but which may have had an important bearing on the outcome.[219]

9.42 The nature of an acceptable 'benefit' was discussed in detail in the recent decision in *X v A*,[220] where Hart J held that it had to be a 'material benefit'. This was an application by trustees of a marriage settlement for directions as to whether it was open to them to exercise their powers of revocation and re-appointment, which were in common form, in such a way as to release a very substantial part of the trust capital to the life tenant, who was the wife of the settlor, for the purpose of enabling her to devote it to charitable causes or, alternatively, to appoint it direct to those causes, and at the same time to make out of the remaining fund provision for members of her family, some of whom, for one reason or another, were not eligible to benefit under the settlement trusts as originally constituted.[221] The trustees had on two other occasions advanced a total of £850,000 to the wife to enable her to pass it on to charity. The trustees' proposal, as presented to Hart J, was that the entire trust fund (worth £3.21 million), apart from £750,000, be advanced to the wife for the same purpose; and that £750,000 be retained in trust for the benefit of herself and a class of beneficiaries.[222] The court was not being asked to say how it would itself exercise the discretion, but was merely being asked to 'bless' the particular transaction proposed by the trustees: the trustees were not surrendering their discretion to the court. Thus, the court had to ensure that the proposed exercise was within the terms of the power and that it did not infringe the trustees' duty to act as ordinary, reasonable, and prudent trustees might act—which essentially meant that the court had to be satisfied that the trustees could properly form the view that the proposed transaction was for the benefit of the beneficiary.[223]

9.43 On the first question, Hart J noted that Viscount Radcliffe had stated, when construing the phrase 'advancement or benefit' in section 32 in *Pilkington v IRC*,[224] that it covered 'any use of the money which will improve the material situation of the beneficiary'. It was also well established that an

[217] At 274. See also *Pilkington v IRC* [1964] AC 612; *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452; *Re Kershaw's Trusts* (1868) LR 6 Eq 322; *Re Halsted's Will Trusts* [1937] 2 All ER 570.

[218] *cf. Re Walker* [1901] 1 Ch 879.

[219] It is not suggested, of course, that, as long as the advanced beneficiary requests or agrees to the proposed course of action, the trustees can simply exercise the power for that purpose: they must still be satisfied, after proper consideration, that it is for his or her benefit. See also *Re T Settlement* [2002] WTLR 1529; (2001–02) 4 ITELR 820 (RC Jersey) (where the adult beneficiaries again requested and approved the advancement).

[220] [2005] EWHC 2706 (Ch); [2006] 1 WLR 741.

[221] One of the peculiar features of the decision is that it was accepted that an earlier revocable appointment had validly incorporated in the class of appointable objects certain individuals who seem to have been non-objects under the terms of the head settlement.

[222] A class wide enough to include the apparent non-objects.

[223] See *Richard v Mackay* (1997) 11 Tru LI 23, 24; *Public Trustee v Cooper* [2001] WTLR 901, 922; and *Re S Settlement* (2001–02) (RC Jersey) 4 ITELR 206.

[224] [1964] AC 612, 635.

advancement may be for the 'benefit' (indeed, for the material benefit) of a beneficiary if capital is applied towards the discharge of that beneficiary's moral and social obligations towards his dependants;[225] or, in the case of a wealthy beneficiary, of his moral obligations to make charitable donations.[226] Neither the introduction of non-objects (that is, persons who were not named or identified explicitly in the head settlement as objects of the power being exercised)[227] nor the delegation of any trusts and powers will necessarily be objectionable. Subsequent cases, to which Hart J also referred, had further illustrated the width of the word 'benefit' in this context: *Re CL*;[228] *Re Hampden's Settlement Trusts*;[229] and *Re Leigh's Settlement Trusts*.[230] In view of these authorities, Hart J concluded: 'Lest there be any doubt on the subject my answer to the question whether the power can in principle (i.e. as a matter of construction) be exercised by advancing money to or for the benefit of the wife so that she may discharge a moral obligation to charity my answer is affirmative.'

9.44 However, as to the second question, namely whether the actual proposed transaction was of 'benefit' to the particular advanced beneficiary, Hart J's conclusion was that it was *not* open to the trustees to make it. He acknowledged that the amount of the sums advanced will depend on the facts and circumstances of the particular case, including the position in life of the beneficiary, the amount of the fund, the amount of his other resources and, in particular, whether the beneficiary would meet the obligation out of his own pocket if it were not met out of the trust fund. *Re Clore* had made it clear that, 'if the obligation is not to be met out of the capital of the trust fund, he [the beneficiary] would have to meet it out of his own pocket, if at all. Accordingly, the discharge of the obligation out of the capital of the trust fund does improve his material situation.' As Hart J put it, this passage emphasized 'the potentially limiting effect of the requirement (from which none of the authorities have departed) that there be some sense in which the beneficiary's material situation can be said to be improved'. The same point had been made by Walton J in *Hampden*, when he said:

> By way of *reductio ad absurdum* if [the beneficiary] had himself no resources whatever then I do not think it would be possible objectively to regard the making of a provision of half a million pounds or thereabouts for his children as realistically conferring a benefit upon him . . . here he is himself . . . very well provided for, and that makes all the difference. In every case the question must be one of degree, but there are no such difficulties in this case

In the present case, Hart J found it impossible to see how this requirement could be satisfied. Viewed objectively, it could not be said that the proposed advance was relieving the wife of an obligation she would otherwise have to discharge out of her own resources if only because the amount proposed to be advanced exceeded the amount of her own free resources.[231]

9.45 There is therefore no doubt that, in the context of a power of advancement (whether it be statutory or express), the word 'benefit' is given a very wide meaning. It is clearly wide enough to permit an advancement or application of funds by trustees, in special circumstances such as those evidenced

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[225] *Pilkington v IRC* [1964] AC 614; *Roper-Curzon v Roper-Curzon* (1871) LR 11 Eq 452; *Re Kershaw's Trusts* (1868) LR 6 Eq 322; *Re Halsted's Will Trusts* [1937] 2 All ER 570.

[226] *Re Clore's Settlement Trusts* [1966] 1 WLR 995; [1966] 2 All ER 272.

[227] See para 9.45 below.

[228] [1969] 1 Ch 587: this case actually concerned the word 'benefit' under the Variation of Trusts Act 1958.

[229] [1977] TR 177, which involved a settlement by appointment on the beneficiary's children, thereby relieving him of the 'considerable obligation in respect of making provision for their future' which he would otherwise have owed.

[230] Decided in 1980 and now reported in (2005) 19 Tru LI 109: this case concerned a substantial application to a charity founded to maintain the stately home.

[231] The decision in *X v A* is discussed more fully (and mildly criticized) in Thomas and Hudson, paras 14.33–14.38.

in *Re Clore*, which amounts to the complete diversion or divestment of a beneficiary's share in favour of a stranger and to the entire exclusion of the beneficiary himself. It seems to follow, therefore, that a power of advancement must also be sufficiently wide, in principle, to permit the creation of discretionary trusts or protective trusts, or indeed any kind of trust. Moreover, the advanced beneficiary in whose favour, or for whose benefit, the power of advancement is being exercised, need not himself be a beneficiary or object of any such newly-created discretionary (or other) trust. Certainly, it is difficult to identify any convincing principle by which such instances could logically be classified as being, of their very nature, non-beneficial purposes and be distinguished from *Re Clore*. The crucial factor in each case is whether the particular purpose which it is proposed to effect or achieve by means of an exercise of the power of advancement (whether it be an outright payment of money to the beneficiary or the creation of a new settlement) is actually of benefit to the specific advanced beneficiary. It is only in exceptional circumstances that an application of a trust fund as in *Re Clore* could be said to be beneficial to any particular beneficiary whose personal and direct interest in the trust fund is actually being extinguished thereby. Similarly, even if the creation of discretionary trusts by means of an advancement is not an unauthorized purpose *per se*, it is probably only in unusual cases that it could be justified as a proper exercise of the relevant power.[232] On the other hand, it is unclear how far the request or approval of the advanced beneficiary would itself be an important, if not crucial, factor in justifying such unusual forms of advancement and decisions such as *Re Clore*. There might be a significant difference between (a) the creation of a discretionary trust under which the advanced beneficiary has no rights or interest whatsoever, but which that beneficiary requested the trustees to create and which he was otherwise minded to create out of his own free resources, and (b) the same kind of discretionary trust created unilaterally by the trustees, against the wishes of the advanced beneficiary himself. Whereas (a) is more easily justified under well-established, if not ancient, principles,[233] it would probably require extreme circumstances before (b) could be supported.[234] This does not mean that trustees have no power to pursue purpose (b). Nor does it mean that they would be acting properly if they merely gave effect to the wishes of the advanced beneficiary: the decision in *X v A* makes this clear. However, this does highlight the fact that there may be two separate factors at play here, namely the subjective wishes of the beneficiary and the need for the trustees to be satisfied that the proposed action is objectively of 'benefit' to him or her. The trustees must give proper consideration to both.

9.46 It is also unclear whether the decision in *X v A*[235] supports or undermines the somewhat expansive interpretation of *Re Clore*. Where the background context is one where the advanced beneficiary is already sufficiently wealthy and would otherwise transfer his own assets into a discretionary trust, under which he himself is not an object, then there seems to be nothing compelling in *X v A* to render impossible the achievement of the same outcome by means of an advancement. Certainly, the possibility exists in principle: the precise factual 'benefit' would need to be established, as in all cases. However, if this is the case, some additional difficult questions then arise. Is it then appropriate to say that the beneficiary's moral obligation to provide for his family is of a different order from (and presumably more important than) his moral obligation to support charity? Does one say that any such moral obligation (whatever it may be) can be discharged in this way only if the

[232] This seems to be implicit in Viscount Radcliffe's remarks about 'extravagant' trusts in *Pilkington* at 641.

[233] See paras 9.15–9.16 above.

[234] It is very difficult to suppose that trustees would be acting properly if they decided, eg, to discharge a moral obligation which the beneficiary himself did not feel he owed.

[235] [2006] 1 WLR 741.

beneficiary already has financial assets of his own (and there is then a 'like for like' form of relief) but not if he is poor? Does it depend on whether the discretionary objects are exclusively members of his family and include no charitable objects, or whether there is an acceptable balance of different objects, or simply on the amount or proportion of the fund transferred? Would such an advancement be easier to justify if the advanced beneficiary himself were an object of the discretionary trust or at least had powers of disposition thereunder? There is no absolute rule in relation to any of these possibilities, but it remains the case that, if an advancement for the 'benefit' of a beneficiary can be made at all where that beneficiary himself does not necessarily receive any of the advanced funds (as *Pilkington* seems to suggest), then the creation of discretionary trusts in favour of members of that beneficiary's family must surely also be, in principle, a proper exercise of the power. However, this can not be taken to be entirely beyond dispute. In *Re Hunter*,[236] for instance, Cross J expressed the view that a power of appointment enabling trustees to declare trusts 'for the respective benefit' of objects could not authorize the creation of discretionary trusts, because that would be for their *collective* benefit.[237] This view could be said to apply *a fortiori* to a power of advancement, which by its nature is exercisable only for the 'benefit' of 'any person entitled to the capital of the trust property or of any share thereof'. Nevertheless, in the absence of a clear judicial pronouncement on the question, only the brave, and perhaps the desperate, would actually create discretionary or protective trusts by means of an exercise of a common-form power of advancement. In any event, the question of immediate relevance remains: where there is such a liberal interpretation of the scope of a power of advancement, when (if ever) can it sensibly be said that a particular exercise of such a power in favour of 'non-objects' might actually be fraudulent?

(2) Powers to appoint for the 'benefit' of an object

9.47 Even if a wide view is correct in relation to a power of *advancement* (and analogous powers), it still does not necessarily resolve the broader question of whether the same can be said in relation to a power of *appointment* which is similarly expressed to be exercisable for the 'benefit' of an object or objects.[238] Should such a power be construed more narrowly than a power of advancement? Several arguments have been put forward in favour of the continuation of the distinction between the two kinds of power. First, an advancement, unlike an appointment, is said to remove the advanced funds entirely out of the original settlement for all purposes, and any trusts created of such funds are not read back into the settlement (except for perpetuity purposes).[239] An appointment, by contrast, is said not to have such an effect.[240] However, this argument seems to presuppose that which has to be established. These may indeed be the effects where the powers in question are in simple form, but such consequences need not always follow. A power of advancement[241] may be exercised so as to make only minor amendments to the trusts of a settlement, for example, by postponing the age at which a beneficiary acquires a vested interest; and an appointment may

[236] [1963] Ch 372, 379.

[237] See paras 6.48–6.49 above.

[238] Again, the expressions 'power of appointment' and 'object' are used here in a technical sense to refer to cases where powers may be exercised in favour of persons who, prior to any such exercise, have no 'interest' of any kind in the appointable property and merely have a *spes* or hope of benefit, and perhaps a right to be considered.

[239] *Re Gossett's Settlement* (1854) 19 Beav 529; *Lawrie v Bankes* (1858) 4 K & J 142; *Re Fox* [1904] 1 Ch 480; *Re Pilkington's Will Trusts* [1959] Ch 699, at 705; *Pilkington v IRC* [1964] AC 612, 639; and *Re Marquess of Abergavenny's Estate Act Trustees* [1981] 1 WLR 843.

[240] *Muir v Muir* [1943] AC 468.

[241] Arguably, an 'advancement' (properly so-called) does take the advanced funds out of the settled property, but an application of funds for the '*benefit*' of a beneficiary does not necessarily do so. However, given the width of s 32 of the Trustee Act 1925 and of common-form powers of advancement, such a distinction would seem to have little relevance now.

remove funds into a completely separate settlement. Whether any one of these things is possible depends on the scope of the power in question and not on the possible effects of its exercise. Secondly, a power of advancement is said to be exercisable only for the benefit of the individual beneficiary who is being advanced.[242] An appointment, on the other hand, may benefit an entire class of objects, some of whom may not even have been born. However, this argument would seem to favour a more liberal interpretation of the word 'benefit' in the context of an appointment, rather than an advancement, and not the reverse.

9.48 Perhaps the most obvious difference between powers of appointment and powers of advancement is that no object of a power of appointment has any interest in the appointable property unless and until the power is exercised in his favour, whereas a common-form power of advancement applies to and operates in respect of a particular beneficiary's interest in the capital of the trust fund. In the case of an appointment, the interests of those entitled in default are divested or defeated (wholly or *pro tanto*)—and this, of course, is for the benefit of others and of no advantage to them.[243] A similar effect can be brought about by the exercise of a power of advancement. However, the same objection cannot be taken here, at least not in relation to the statutory power of advancement, because section 32 itself provides expressly that the interest in capital of an 'advanced' beneficiary may be contingent or defeasible, in remainder or in reversion.[244] Consequently, there may be good reason to distinguish between a power which is exercisable for the '*benefit*' of a beneficiary who already has some interest (even if it is only a presumptive or contingent interest) in the property which is subject to the power, on the one hand, and a power which is exercisable for the '*benefit*' of its objects, who do not as yet have any such interest in such property, on the other. After all, the word '*benefit*' need not bear the same meaning irrespective of the context in which it appears. Indeed, the particular context and the purpose for which the particular power was created will also require consideration of (often disparate) factors. However, although there is a strong argument for the view that mere powers of appointment are fundamentally different from powers of advancement and, consequently, ought to be subject to different considerations and rules, it does not seem to have been addressed directly in the cases; and it may well be found to be a distinction without a difference.

9.49 As we have seen, it is well established that an exercise of a power of appointment in favour of a stranger, (that is, someone who is not a member of the class of objects of the power) is excessive and void (either wholly or *pro tanto*).[245] In *Re Boulton's Settlement Trusts*,[246] for instance, an appointment on protective trusts by the non-fiduciary donee of a special power of appointment was held void, on the grounds that it involved an unauthorized delegation of the power and because it also introduced a stranger (an object's wife) to the class of discretionary objects.[247] This restrictive approach, if applied universally, will present difficult problems for many trustees in familiar situations, for example, in cases where they have a power to permit a beneficiary to occupy a house comprised in the trust fund, and the question arises whether the beneficiary's spouse can also live

[242] See, eg, *Re Abrahams' Will Trusts* [1969] 1 Ch 463, 484–5.

[243] It may also be the case that the courts are more reluctant to countenance the possibility that a power to defeat existing interests can be delegated to another. See, eg, *Re Joicey* [1915] 2 Ch 115, 123 (where the power was objected to because its exercise could convert a contingent interest into an absolute one).

[244] Where an express power of advancement is used, its scope must be determined according to the terms used.

[245] See, eg, *Re Hoff* [1942] Ch 298; *Re Brinkley* [1968] Ch 407; and see Ch 8 generally.

[246] [1928] Ch 703.

[247] However, although the terms of the power are not specified in the report, it would appear that it was simply a power to appoint 'to all or any' of the objects (and not for their benefit): *ibid.*, 707.

in it, or continue to live in it after the beneficiary's death.[248] On the other hand, as we have also seen, upon the exercise of a power of advancement, persons who are not objects of the power may be benefited and, indeed, the beneficiary who is or may become entitled to the capital which is the subject of the advancement may be excluded altogether.[249] Although this may seem to indicate a material difference between the nature of the two kinds of power, it is not clear that this is indeed so. The doctrine of *excessive* execution applies to a power of advancement as it does to a power of appointment: in neither case can the power be exercised purely and simply in favour of a stranger, without regard to the object(s) of the power. In each case, the donee can exercise the power only if it is of benefit to a proper object. The manner in which either power is exercised, or the way in which that object is benefited (and, therefore, whether a stranger can derive some benefit from the exercise) depends on the terms, and therefore the scope, of the power and not, it seems, on some inherent characteristic of that particular power. It then becomes a question of construction: what and whom, in the particular context, is the word 'benefit' intended to encompass? On this approach, if a power of appointment is exercisable for the '*benefit*' of its objects, and if this question is simply one of construction, there would seem to be no obvious reason why it should be construed more narrowly than a power of advancement.[250] Coincidentally, the word 'benefit' also appears in section 1 of the Variation of Trusts Act 1958, where it has again been interpreted widely.[251]

9.50 The statutory power of advancement (and usually any express power of advancement) is conferred only on trustees[252] However, analogous powers to pay or apply capital for the '*benefit*' of a beneficiary may also be conferred on a person who is not a trustee.[253] For example, a power of appointment is often conferred on a protector of the settlement, in which case it is likely to be fiduciary in nature, but not necessarily so.[254] Similarly, such a power may be conferred on a life tenant to appoint the trust fund amongst his children or remoter issue. Although such a power is not a fiduciary power, it is arguable that it is even less likely that the exercise of the power itself may be delegated than in the case of a power conferred on a trustee.[255] However, if it is accepted that a power of appointment which is exercisable for the '*benefit*' of an object authorizes an exercise of that power for any of the purposes which would be authorized by a power of advancement in similar terms (including delegation, re-settlement, and the introduction of strangers), then it is difficult to argue that such a power, when conferred on a non-fiduciary, should be construed in a more restricted manner. In other words, upon the exercise of such a power by the donee, he may create

[248] Although it would seem absurd to conclude that the relevant power does not, by implication, authorize such a course, other objects of the power (eg children of an earlier marriage), whose own enjoyment of the property may then be delayed, might well take a different view.

[249] *Re Kershaw's Trusts* (1868) LR 6 Eq 322 (power to apply capital for a daughter's 'advancement or otherwise for her benefit' exercised so as to set up her husband in business); *Pilkington v IRC* [1964] AC 612; *Re Clore's Settlement Trusts* [1966] 2 All ER 272.

[250] It could be said that all powers must be exercised for the '*benefit*' of their objects and that, because such requirement is necessarily implied in any event, the inclusion of an express reference to '*benefit*' adds nothing. If so, many of the appointments found to have been excessive in past cases ought to have been decided differently. However, this still does not explain or justify a difference in approach to powers of appointment and of advancement respectively.

[251] In the latter context, in *Re Holt's Settlement* [1969] 1 Ch 100, 121, Megarry J expressed the view that the 'word "benefit" is . . . plainly not confined to financial benefit, but may extend to moral or social benefit'. See also *Re T's Settlement Trusts* [1964] Ch 158; *Re Weston's Settlements* [1969] 1 Ch 223; *Re CL* [1969] 1 Ch 587; *Re Remnant's Settlement Trusts* [1970] Ch 560. See also paras 9.72–9.76 below.

[252] See also s 68(17) of the Trustee Act 1925.

[253] *Re Boulton's Settlement Trusts* [1928] Ch 703.

[254] *Rawcliffe v Steele* [1993] MLR 426, Hegarty JA (HC, Isle of Man); *Re Z Trust* [1997] CILR 242 (GC, Cayman Islands); *Re Bird Charitable Trust* [2008] WTLR 1505, [82].

[255] *cf.* paras 6.04–6.05 above.

new powers which are exercisable thereafter by another, and thereby effectively delegate any future disposition or dealing with the property which is the subject-matter of the power. *Re Boulton*[256] does not appear to be inconsistent with this view, for, although the terms of the power are not specified in the report, it would appear that it was simply a power to appoint '*to all or any*' of the objects and not for their benefit. On the other hand, such a broad conclusion clearly tends to undermine the notion of an excessive exercise of the relevant power.

9.51 There is much to be said for adopting the same approach to special powers of appointment, powers of advancement, powers of maintenance and, indeed, any powers which are expressed to be for the 'benefit' of an object. The two questions, in all cases, would then be (a) who can exercise the power or discretion in question (and can such exercise be delegated to another)?; and (b) irrespective of the answer to (a), do the terms of the power authorise the delegation of future dispositions of, or dealings with, the property in question to another? If the power is expressed to be exercisable for the '*benefit*' of a beneficiary or object, there would then be no obvious reason why one should presume that an application by way of re-settlement cannot be beneficial; and, if this is conceded, it seems to be implicit in the power that it permits delegation, that it authorizes the introduction of non-objects, and that, in appropriate circumstances, it even allows the total exclusion of the particular object, as in the case of a power of advancement. It is difficult to see how the decision in *Re Hunter*[257] could have survived *Pilkington* (in which it was apparently not cited). In fact, in *Re Hunter*, Cross J considered himself bound by the Court of Appeal's decision in *Re Morris*.[258] In any event, the power under consideration in *Re Morris* was not one to 'benefit' anyone, and the decision in that case was not directly in point in either *Re Hunter* or in *Pilkington* (in which it was cited). However, the position remains unclear. Indeed, in view of the past reluctance shown by the courts to equate powers of appointment and powers of advancement in this context, the only prudent counsel must be to ensure that the intended scope of any power is made clear by express terms.[259]

9.52 It is also arguable that a continuing adherence to the restrictive construction of special powers of appointment,[260] epitomized by cases such as *Re Hunter*, may well be pointless. As we have seen, it is well established that even a narrow power (for example, one exercisable 'in such manner and form') may be exercised in such a way that a standard-form power of advancement may be created over or in respect of the appointed fund. *Pilkington* has established that a power of advancement may be exercised in such a way that powers and discretions may be delegated. As a result, the personal discretion which is said to be inherent in a special power of appointment may effectively be delegated to another by means of two operations, namely a limited exercise of the power of appointment followed by an exercise of the newly-created power of advancement.[261] It would be very difficult, in practice, to establish that the entire transaction should be struck down as being an excessive appointment, or a fraud on the original power (for example, because non-objects are introduced on the advancement), particularly if the two stages are separated by a reasonable period of time. Moreover, it is often the case that trustees have power to appoint new trustees of their own choosing, in respect of the whole or a segregated part of their trust fund (under an express power

[256] [1928] Ch 703, 707.
[257] [1963] Ch 372.
[258] [1951] 2 All ER 528.
[259] See, however, *Re Hampden's Settlement Trusts* [1977] TR 177: paras 9.53–9.56 below.
[260] This discussion is confined, of course, to the question of construction of the word 'benefit'. It does not seek to suggest that there are no differences at all between powers of appointment and powers of advancement.
[261] See, however, *Re Joicey* [1915] 2 Ch 115.

or under sections 36 and 37 of the Trustee Act 1925). This, too, arguably undermines the notion that the delegation of discretions or powers is impermissible.

9.53 The question whether there is any remaining difference of substance between a power of advancement and a special power of appointment exercisable for the benefit of a certain object—at least in relation to delegation—does not seem to have been addressed directly in any reported case.[262] As we have seen, in 1871, in the context of a statutory benevolent fund, a power to pay or apply a fund 'for the benefit of' certain objects was held to have been exercised effectually notwithstanding that a non-object had been introduced and the appointment made to the trustees of a separate settlement. More recently, a similar power was considered in the context of a family settlement, in *Re Hampden's Settlement Trusts*.[263] The relevant power read as follows:

> Notwithstanding the trusts and powers hereinbefore contained the trustees . . . shall have power from time to time and at any time before the closing date to pay transfer or apply the whole or any part or parts of the capital of the Trust property to or for the benefit of all or such one or more exclusive of the other or others of the capital beneficiaries for the time being living as the trustees shall in their absolute discretion think fit.

The 'capital beneficiaries' were defined as the descendants of any degree of the Seventh Earl (other than the Eighth Earl), together with their spouses, widows, and widowers. Significantly (or so it was argued), under the power in question, the trustees were limited to making payments or applications of trust property for 'the benefit of capital beneficiaries for the time being living', which, in the circumstances of the case, effectively limited the range of objects to a named 'designated heir' (A) and his infant daughter (B). However, he and the trustees were of the view that it would be beneficial to him if an application were made in favour of all his children, including those who were not yet born (and who were therefore not existing objects of the power).[264]

9.54 The trustees executed a deed of appointment which declared that the trust property should thenceforth be held upon trust 'for such of [B] and the children hereafter to be born to [A] as shall be living on the closing date or earlier attain the age of 25 years and if more than one in equal shares absolutely'. The crucial question was whether it was proper for the trustees to decide to benefit [A] by re-settling the trust property on his children, including unborn children. Counsel submitted four propositions of law to the court, namely:

(1) That the power in question to apply capital for the benefit of somebody was the widest possible formulation of such a power.
(2) That under such a power the trustees can deal with capital in any way which, viewed objectively,[265] can fairly be regarded as being for the benefit of the object of the power, and which, subjectively they believe to be so.
(3) That such benefit need not consist of a direct financial advantage to the person who is being benefited. It may be that he is benefited by benefiting a near relation or by relieving him of moral responsibilities.

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[262] See, however, the exchanges of Upjohn J and Danckwerts J in *Re Wills' Will Trusts* [1959] Ch 1, 12–13; *Pilkington's Will Trusts* [1959] Ch 699, 705, 706–07; and *Re Pilkington's Will Trusts* [1961] Ch 466, 490.

[263] [1977] TR 177; [2001] WTLR 195.

[264] The main benefits were set out in the affidavit sworn by one of the plaintiffs, eg the beneficiary himself was already well provided for and a distribution in his favour would simply increase an estate which was already likely to be subject to a heavy tax liability: see [1977] TR 177, 179.

[265] Walton J indicated that this is often a question of degree. This was seized upon by Hart J in *X v A* [2006] 1 WLR 741, 751–2, in support of his conclusion not to uphold the proposed advancement in that case.

(4) That, in the present case, the application of capital was designed to relieve an object from the legal obligation to maintain his children or, alternatively, from the moral obligation to do the same.

In support of these propositions the cases of *Pilkington v IRC*,[266] *Re Kershaw's Trusts*,[267] *Re Clore's Settlement*,[268] and *Re CL*[269] were cited. The first three of these involved a power to advance or benefit, and the fourth concerned 'benefit' under the Variation of Trusts Act 1958.[270] These four propositions were broadly accepted by other counsel. However, the appointment was challenged on two grounds: first, that it was not possible to benefit *unborn* persons in any way whatsoever; secondly, that the words 'pay transfer or apply' did not justify a simple re-settlement in the manner contained in the appointment. Walton J concluded that there was nothing in this latter point. 'It really cannot be the law that if the trustees had themselves set up a settlement in precisely the same terms as the deed [actually executed] and thereby settled £10 they would have been in order in transferring to the trustees of that settlement the whole of the trust property, but that they cannot possibly reach the same result by the short cut they have in fact taken.'[271] He was more than willing to believe that the draftsman of the head settlement may never have contemplated 'the kind of resettlement which is here in question', but it was nonetheless warranted by the wording used.[272]

9.55 It is not clear whether the power under consideration was regarded as analogous to a power of advancement. It was a power to 'pay transfer or apply . . . for the benefit of' certain objects which, to all intents and purposes, may be said to have been indistinguishable from a special power of appointment which is exercisable 'for the benefit' of certain objects. Significantly, the 'designated heir' (A), for whose 'benefit' the exercise was made, did not have any subsisting interest of any kind in the capital of the trust fund. Apart from the power in question (of which A was an object), the trustees also had a power to pay or apply trust income for the benefit of members of a class of 'income beneficiaries' until the 'closing date' (defined by reference to a 'royal lives' clause); and, at and after the 'closing date', they were to hold the trust fund for such of the 'capital beneficiaries' as they had appointed beforehand. No such appointment had been made; and the gift over in default of appointment was in favour of two named charities. Nevertheless, the authorities cited in support of the 'appointment' were clearly held to be equally applicable to the power in question, notwithstanding that not one of them was concerned with a special power of appointment. The main thrust of the argument against the validity of the exercise focused on the fact that it was intended to benefit objects not 'for the time being living' ('the living hands' point) and not applicability of authorities on powers of advancement to what was essentially a power of appointment. Thus, in the absence of additional words to cut down or limit the scope of the power,[273] there seems to be no compelling reason, in principle, why the power should not have been capable of creating discretionary or protective trusts, and thereby involve the delegation of powers and discretions. Indeed, by analogy, such a power could also be exercised in such a way that a non-object

[266] [1964] AC 612.
[267] (1868) LR 6 Eq 322.
[268] [1966] 1 WLR 955.
[269] [1969] 1 Ch 587.
[270] The word '*benefit*' under the 1958 Act does not have a narrower meaning than the same word in the context of advancement: *Re CL* [1969] 1 Ch 587, 600.
[271] [1977] TR 177, 180.
[272] *ibid.*, 181, *per* Walton J.
[273] In *Re Hunter* [1963] Ch 372, 379, eg, Cross J thought that a power to declare 'trusts for the *respective* benefit' of objects could not authorize the creation of discretionary trusts, because that would be for their *collective* benefit. This view might be said to apply *a fortiori* in the case of a power of advancement.

is benefited even to the exclusion from benefit of the original object(s). The central question in relation to any particular appointment would then simply be whether the proposed exercise was truly beneficial to the original object(s). It would not be unusual to find such a benefit in the introduction of non-objects (for example, an appointment in favour of an object's spouse and children, where they are not original objects of the power). It is more unusual, but certainly not unheard of, to appoint on discretionary or protective trusts under which the object may not be an object as such, but where he possesses (say) a power to add others (including himself) to the class of objects and a range of 'controlling' powers, such as a power to remove and appoint trustees. Only in rare cases, however, is it likely to be beneficial to exclude the original object altogether. Nevertheless, this is a question of appropriateness of the proposed exercise, which is an issue of fact (and in relation to which the wishes of the object himself would be highly relevant, but not binding). It does not affect the basic question of principle, which is whether the scope and purpose of the power authorizes such a course of action in the first place.

9.56 However, *Re Hampden* is not the clearest of authorities on such propositions. There was no direct argument on, or analysis of, questions such as whether there is indeed a fundamental difference in the nature of powers of advancement and powers of appointment,[274] or the extent of the freedom of action available to the trustees in the exercise of the power, or the interrelationship of the doctrines against excessive or fraudulent executions of powers and the construction placed on the power by the court, or the precise status of pre-*Pilkington* cases such as *Re Hunter* and *Re Morris*. In *X v A*,[275] in which *Re Hampden* was cited, it was assumed, without question, that powers of appointment and powers of advancement which are exercisable for the 'benefit' of an object may be approached in the same way. Indeed, the first two submissions made by counsel in *Hampden*[276] were apparently approved. Thus, by a process of tacit acceptance, powers of appointment and powers of advancement for the 'benefit' of a particular beneficiary or object could be said to be essentially the same, in the sense that they can both now be said to authorize delegation (and the creation of discretionary trusts). On the other hand, as we have seen,[277] the advancement in *X v A* was actually not sanctioned by the court. Thus, the question could equally be said to remain uncertain in English law; and the only prudent course is to ensure that appropriate express provision is made in order to put matters beyond doubt.

9.57 The issue arose and was addressed more recently by the Supreme Court of New Zealand in *Kain v Hutton*.[278] The facts of the case are too complex to rehearse here. However, in the course of his judgment, Blanchard J stated:[279]

> A power of appointment amongst discretionary objects (a special power) is a power to select whether and to what extent and at what time one or more of the discretionary objects will receive any part of the trust fund, perhaps with the result that other discretionary objects will miss out entirely. It is often

[274] See paras 9.47–9.48 above, 9.57–9.61 below.

[275] [2006] 1 WLR 741, [38]; [2006] WTLR 171.

[276] See para 9.54 above.

[277] See paras 9.42–9.46 above.

[278] [2008] NZSC 61; [2008] 3 NZLR 589 (SC). The Supreme Court also reaffirmed the principle that, where trustees had attempted to use a power they did not in fact enjoy, the courts would not treat their action as if they had been exercising a different power that they did actually possess. A court of equity would not exercise a power which a donee had a discretion to exercise but had failed to exercise. A resettlement which failed as the exercise of a power of advancement could not therefore be treated as the exercise of a power of appointment. *Re Lawrence's Will Trusts, Public Trustee v Lawrence* [1972] 1 Ch 418, 430 and *Re Gossett's Settlement* (1854) 19 Beav 529 adopted. *Re Morris's Settlement Trust* [1951] All ER 530 and *Collins v AMP Superannuation Ltd* [1997] ALR 243 considered. *Re Eardley Wilmot* (1861) 29 Beav 644 distinguished.

[279] [2008] NZSC 61, [33], [34], [36]–[38]. See also [59], [60].

> under a modern trust deed the most significant or fundamental power which the trustees have at their disposal. In contrast, a power of advancement is a purely ancillary power enabling the trustees to anticipate by means of an advance under it the date of actual enjoyment by a beneficiary, and it can only affect the destination of the trust fund indirectly in the event of the beneficiary failing to attain a vested interest. Crucially, s 41 [of the Trustee Act 1956, which is substantially in the same terms as section 32 of the Trustee Act 1925] requires that the beneficiary in question must already have at least a contingent interest in the capital of the fund, although in many cases there may be the potential for that interest to be defeated in the manner described in the section, namely by the exercise of a power of appointment or revocation, or by being diminished by the increase of the class to which the beneficiary belongs.
>
> The decision to be made on an *advancement* is therefore of a different character from a decision on an appointment: not whether the selected object is to benefit at all, but whether that person should receive his or her entitlement at an earlier time and possibly in a different manner and perhaps to the disadvantage of someone else who already has an interest in the fund. In the case of an *appointment* among discretionary objects, the other objects in that class ordinarily are not being deprived of anything more than their mere hope of an exercise of discretion in their favour. . . .

Tipping J expressed similar views:[280]

> The second point I wish to address is the apparent equation by the Court of Appeal of a power of advancement with a power of appointment. The two are materially different and different considerations apply to the exercise of one power as against the other. The objects of a power of appointment generally have no legal or equitable interest in the property the subject of the power unless and until it is exercised in their favour. Before that they have only a hope that the power may be exercised in their favour. On the other hand, a power of advancement under s 41 of the Trustee Act or any cognate express power of the same kind may be exercised only for the maintenance, education, advancement or benefit of a person who does have an interest in the property concerned, whether vested or contingent, albeit their interest is not yet enjoyed in possession.
>
> Importantly, a power of advancement may be exercised only if there is some 'good reason' to exercise it at the time and in the manner proposed. That good reason must of course be of benefit to the person the subject of the advancement. But in spite of the width of the concept of benefit, *Pauling*'s case[281] shows that it is insufficient simply to make an advancement on the basis that any receipt of money or other property ahead of the date of vesting in possession must be of benefit to the recipient. The concept of benefit is wide but not wholly unrestricted. . . .
>
> In this respect powers of advancement are different from powers of appointment. A person exercising a power of appointment is exercising a discretionary power to select who should take from a group of potential beneficiaries. That is a materially different task from that required of someone exercising a power of advancement. There, the essential question is whether a distribution should be made ahead of the time at which the beneficiary would otherwise receive possession of property in which they already have an interest.[282]

9.58 That there is a distinction between a power of advancement and a power of appointment is indeed indisputable. The status of a person with an actual interest of some kind in the capital of the trust fund is clearly different from that of a mere object of power of appointment; and, in the exercise of either power, the material considerations that the trustees must take into account are likely to differ accordingly. However, the distinction should not be over-emphasized. The position of those entitled in default of appointment, whose interests are defeated upon the exercise of a power of appointment, is actually not markedly different from that of a capital beneficiary whose interest is

[280] [55]–[59].

[281] *Re Pauling's Settlement Trusts* [1964] Ch 303, 333.

[282] See also *Inglewood v IRC* [1983] 1 WLR 366, 373: A power of advancement is 'auxiliary. It is given as an aid to enable the trust property to be used for the fullest benefit of the beneficiary . . . it is similar to an administrative power. Its purpose is to aid the beneficial trusts and not to destroy them.'

limited or defeated on an advancement.[283] Moreover, there must clearly be as much of a 'good reason' for exercising a power of appointment as for exercising a power of advancement, even if those reasons are likely to be different. Indeed, the terminology (and perhaps also the logic) of the above observations seems to suggest that a stricter test of some sort ought to be applied to an advancement rather than an appointment, in which case it would seem to follow that delegation of a power of appointment ought to be less of a concern than delegation of a power of advancement. This, however, does not accord with English decisions on this issue[284] and, if there is a difference at all, the approach would be the reverse of this. In any event, none of these decisions (not even the post-*Pilkington* ones) is actually a clear authority to the effect that what is of 'benefit' to an advanced beneficiary or appointee (as the case may be) should continue to be construed differently. It is suggested that, while acknowledging the differences between the two kinds of power—their core purposes, the circumstances in which they are likely to be exercised and, of course, the fact that often a power of appointment may be conferred on a non-trustee whereas a power of advancement is seldom so conferred—there may be little logic or sense in distinguishing between them on the basis of a narrow point of construction.

9.59 Another issue is whether an expansive interpretation of 'benefit' in decisions such as *Re Clore* and *Kain v Hutton* effectively renders the notions of an excessive or a fraudulent execution of a power irrelevant or, at least, of marginal relevance only, in this particular context. If the power can properly be exercised for the benefit of non-objects, in what circumstances can it be said that it has been exercised excessively or for an improper purpose? The dilemma is encapsulated in some observations of Tipping J in *Kain v Hutton*:[285]

> The appointor may decide that object A should be the subject of an appointment. Object A is aware of the proposed appointment. She wants to pass the benefit of the appointment on to a family trust. She does not want to be left with the conveyancing and potential gift duty implications of receiving the property herself and then transferring it to the trust. Provided she is fully informed of her rights and is not subject to any improper pressure, I consider it would be too narrow a view to insist on the appointment being made to object A herself, despite her wish to direct the appointment elsewhere.

On this basis, it has been argued[286] that *Kain v Hutton* has 'swept away the delicate set pieces of nineteenth century caselaw' and curtailed 'the more restrictive aspects of the fraud doctrine'; and as a result 'even direct appointments to non-objects, which might formerly be impugned as an excessive execution, may now be rationalised benignly . . . The donor's mandate in defining discretionary objects is effectively subordinated to the donee's role in making future decisions.' The overall result is that 'the fraud doctrine has been compromised to the point that the original discretionary scheme can be readily subverted, with appointor and appointee effectively at liberty to re-define the beneficial interests'; and the decision 'has enlarged the function of discretionary selection to a point where only the more egregious abuses will attract judicial scrutiny'. Although *Kain v Hutton* has merely persuasive authority in England, these questions which it has highlighted are equally applicable in relation to *Re Clore* and also to the issue whether full-blown discretionary trusts can properly be created by a power to 'benefit' an object.

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[283] This point is less relevant, of course, where there is a discretionary trust under which there is no-one entitled in default of an appointment.

[284] It is also unclear whether *Kain v Hutton* is consistent with *Wong v Burt* [2004] NZCA 174: see [2010] NZLR 506 (P Devonshire).

[285] [2008] NZSC 61; [2008] 3 NZLR 589, [52]. Such a transaction was said not to be fraudulent: *ibid.*, [52].

[286] The following points come from [2010] NZLR 506, 513–18 (P Devonshire).

9.60 It is suggested, in fact, that neither *Kain v Hutton* nor *Re Clore* has altered the underlying principles governing excessive or fraudulent exercises of a power. Let us reconsider briefly the interrelationship between these doctrines. For example, if the power authorizes 'payment to' one or more of a class of objects (A to E), or is a power of selection from A to E *simpliciter*, a payment to X would be excessive and void. If the power is wider and authorizes the application of funds for the 'benefit' of one or more of A to E, the authorities clearly suggest that, as long as the particular exercise actually 'benefits' a member of that class, then benefiting X is permissible. In this sense, it could be said that the exercise is not excessive, because X, though not explicitly identified as an object himself, is nonetheless an object by implication, that is, anyone towards whom (say) A owes a financial or moral obligation (be it a member of his family or a charity) is impliedly included as an object of the power.

9.61 However, such an analysis would not be correct, for a direct appointment to, or in favour of, X would then be permissible and it would be difficult to see how there could ever be a question of fraudulent exercise. There simply would not be any point in exercising the power, ostensibly in favour of A, but with a real purpose of benefiting X. Alternatively, if X is regarded as a non-object (which is the correct view) then, as long as A has been informed of and approved the decision to benefit X, it is argued that there is no basis upon which a fraudulent execution could be alleged, that is, an antecedent collusive agreement between the appointor and A is no longer significant. However, such interpretations simply do not reflect the underlying purposes of the various doctrines and rules or the manner in which they actually operate. There is a distinction, admittedly not often articulated, between the person who may properly be benefited, on the one hand, and the manner in which he may properly be benefited, on the other. There are other ways, no doubt, of stating the same point, for example, that any benefit enjoyed by non-object X (whether it is incidental or substantial) must necessarily be a derivative benefit: it can only come to X because it is actually of benefit to object A.[287] All this may be illustrated as follows. Suppose, by way of example, that A[288] is a drug addict. Providing him with money to fund his habit would undoubtedly be beneficial to him in his own eyes, but the donee of the power (certainly if the donee is a fiduciary)[289] could not make such a payment because objectively it is not of 'benefit' to A. X, on the other hand, is a Samaritan who runs a drug clinic. The donee can not pay money to X to fund his good work, simply because X is not an object: it would be an excessive exercise of the power. If the donee wishes to fund X's clinic because, upon objective considerations, it is the best place for A to be treated for his addiction, then, in principle, this would be an application for the benefit of A. It is not particularly relevant whether A himself requested, or approved of, this course of action, although the donee's case is surely strengthened if A had actually done so. If the donee believes that A is a reckless addict who will simply dissipate any money he may receive in the future, but X's clinic is something worthy of financial support, then the crucial question is one of motive: if the funds are paid primarily to benefit X, with no obvious benefit (or perhaps a marginal benefit) to A (as opposed to the other way around), it is a fraud on the power, for the focus of the donee's decision-making is in the wrong place entirely. Finally, if A is a wealthy individual and feels a strong moral obligation towards X and his clinic, the power could properly be exercised so as to

[287] One could also refer to the primary beneficiary or object and the secondary one.

[288] Whether A is an object of a power of appointment or the beneficiary to be advanced is immaterial here.

[289] It is assumed here, for ease of illustration, that the donee is a fiduciary. The duties of a non-fiduciary donee are usually said to be different, and possibly non-existent. However, this is not a view shared by this book. It is difficult to conclude, eg, that an application of funds in the *Re Clore* manner could ever be upheld in the absence of prior careful, rational, and objective consideration. Otherwise, the exercise would almost certainly be regarded as excessive or fraudulent in any event.

transfer funds directly to X (or to A in the knowledge that he will pass the funds on to X), provided that the donee is satisfied, on rational and objective grounds, that such a course is motivated by and primarily for the benefit of A. Again, it is immaterial whether A himself requested any of the above-mentioned applications, in the sense that it is the donee who must make an independent assessment of the circumstances and take the actual decision. A's request would be a material consideration which the donee would be expected to take into account, but it remains the case that what A wants is not necessarily what A gets. Thus, even in *Kain v Hutton*, the Supreme Court of New Zealand upheld an *appointment* in favour of an object,[290] where that object immediately re-settled the appointed assets on discretionary trusts in favour of herself and non-objects, because she continued to retain a sufficient degree of control over the new trust. Crucially, perhaps, the discretionary trust was effectively controlled by her and she could give herself a beneficial interest if she so wished. In broad terms, that which might be of 'benefit' to an object of a family trust must be assessed in the light of that object's general circumstances, taking into account her non-trust assets and including (moral as well as financial) claims on her that members of her family might have. This seems to be an orthodox rather than a novel approach. Clearly, there are difficulties of proof here in ascertaining the actual motive behind the exercise of the power, but this, too, has been a problematic feature of the doctrine of fraud on a power for centuries. Fraudulent and excessive executions of a power certainly overlap and there is also considerable scope for different courts to come to different evidential conclusions in seemingly identical circumstances; but, in principle, their functions and the boundaries between them remain reasonably clear.

F. Fraud on a power and company directors

9.62 A director of a company must act in accordance with the company's constitution and exercise his powers only for the purposes for which they are conferred.[291] Of course, this simple statement gives rise to several preliminary questions. What *are* the objects of the company and the purposes which may properly be pursued? What *are* the powers of the directors which enable them to pursue those purposes? And how does one determine whether a particular provision in the company's constitution creates an object (or purpose) or merely a power? These questions have already been touched upon earlier—in the context of the capacity of a company,[292] approaches to the construction of a company's constitution,[293] and also, briefly, in relation to the excessive exercise of a power.[294] They will also be mentioned briefly below, in the discussion of the effects of a fraudulent exercise of a power[295] and in relation to powers of amendment.[296] Nevertheless, the crucial distinctions between 'object' and 'power', and between 'capacity' to act and 'abuse of power', are also relevant here, because it is essential that the issue under discussion is correctly identified. A brief outline of these fundamental distinctions therefore warrants some repetition.

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[290] A parallel exercise of a power of advancement was held void, however, as an excessive exercise.

[291] Companies Act 2006, s 171(a) and (b). This statutory duty in (b) is a positive formulation of the 'proper purposes' rule, in contrast with the negative equitable rule (not to act for a collateral purpose) found in decisions such as *Re Smith and Fawcett Ltd* [1942] 1 Ch 304. There is a separate positive statutory duty (in s 172(1)) directing that a director 'must act . . . to promote the success of the company'. See also *Punt v Symons & Co Ltd* [1903] 2 Ch 506; *Hogg v Cramphorn Ltd* [1967] Ch 254; and *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; *Dalby v Bodilly* [2004] EWHC 3078 (Ch); [2005] BCC 627; *Exp Harries* [1989] BCLC 383; *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch); [2010] 1 BCLC 367. *cf. CAS (Nominees) Ltd v Nottingham Forest FC Plc* [2002] BCC 145; [2002] 1 BCLC 613.

[292] See paras 7.59–7.66 above.

[293] See paras 2.62–2.65 above.

[294] See para 8.35 above.

[295] See paras 9.88–9.89 and 9.92–9.97 below.

[296] See paras 16.34–16.38 below.

9.63 If an act is outside the *capacity* of the company, it is null and void.[297] It is in this sense that a company is properly said to be acting *ultra vires*.[298] It is irrelevant whether a third party had notice of the invalidity; and the act cannot be ratified by the shareholders. However, if the act merely involves an abuse of power, it is not *ultra vires* the company itself, but merely *ultra vires* the directors who exercised the relevant power.[299] In such a case, a third party's position depends on whether he had notice that the act was such an abuse;[300] and the act can be ratified by the shareholders. An *abuse* of power may take different forms. For example, the directors may simply be acting irrationally;[301] or their exercise of a power may have been excessive;[302] or there may be a dishonest or fraudulent exercise of the relevant power, that is, an exercise for an improper purpose.[303] There can be no such 'abuse', however, if there is no power to exercise at all. It is important, therefore, that a company's powers (and their scope) are identified separately from its objects or purposes.

9.64 Powers conferred on a company, whether in its constitution or by statute, ought to be exercisable only for the purposes for which they were created, which, in broad terms, means the promotion of the stated objects and best interests of the company.[304] 'A corporation cannot do anything except for the purposes of its business, borrowing or anything else; everything else is beyond its power, and is *ultra vires*. So that the words "for the purposes of the company's business" are a mere expression of that which would be involved if there were no such words.'[305] 'The basic rule,' as Slade LJ expressed it in *Rolled Steel Products (Holdings) Ltd v British Steel Corpn*,[306] 'is that a company incorporated under the Companies Acts only has the capacity to do those acts which fall within its objects as set out in its memorandum of association or are reasonably incidental to the attainment or pursuit of those objects.' Browne-Wilkinson LJ, also in *Rolled Steel Products*,[307] expressed the same view: 'A company, being an artificial person, has no capacity to do anything outside the objects specified in its memorandum of association. If the transaction is outside the objects, in law it is wholly void. But the objects of a company and the powers conferred on a company to carry out those objects are two different things.'[308] It does not, however, follow that any act is beyond its capacity unless expressly authorized by its objects clause. Any such company is treated as having

[297] This must now be read subject to the provisions of the Companies Act 2006: see paras 9.92–9.96 below.

[298] 'If confusion is to be avoided, it seems to me highly desirable that, as a matter of terminology, the phrase "*ultra vires*" in the context of company law should for the future be rigidly confined to describing acts which are beyond the corporate capacity of a company': *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246, 297, *per* Slade LJ. See also 302–03, *per* Browne-Wilkinson LJ. In fact, it seems that the expression '*ultra vires*' has been employed to describe at least three different situations, namely (a) acts beyond the corporate capacity of the company; (b) acts which are improper exercises of directors' powers; and (c) decisions by a majority in general meeting to force measures on a dissentient minority: *Kaye v Croydon Tramways Co* [1898] 1 Ch 358, 371, 374–5; *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016, 1035–6. See also *Peters' American Delicacy Co Ltd v Heath* [1939] HCA 2; (1939) 61 CLR 457; *Gambotto v WCP Ltd* [1995] HCA 12; (1995) 182 CLR 432, 444–5. *cf. Arakella v Paton* [2004] NSWSC 13.

[299] *Re David Payne & Co Ltd* [1904] 2 Ch 608, 613, as explained in *Rolled Steel*, above, 291, 295–6.

[300] See paras 9.92–9.96 below.

[301] *Mallone v BPB Industries Ltd* (also known as *Mallone v BPB Industries Plc*) [2002] EWCA Civ 126; [2003] BCC 113; [2002] ICR 1045; [2002] IRLR 452. For the irrational exercise of a power, see paras 10.184–10.194 above.

[302] This is illustrated by the common case where a company has power to borrow, but subject to a fixed, maximum limit.

[303] *Re George Newman & Co* [1895] 1 Ch 674.

[304] There is also no consistent usage of the expressions 'best interests' or 'benefit' of the company. Sometimes, it means 'benefit' of the company as a corporate entity, sometimes 'the company as a whole', sometimes 'as a commercial entity, distinct from the corporators', sometimes as 'the corporators as a general body' and sometimes 'the shareholders as a whole': see, eg, *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286, 291; *Parke v Daily News* [1962] Ch 927, 963; *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016, 1035.

[305] *Re David Payne & Co Ltd*: [1904] Ch 608, 612, *per* Buckley J.

[306] [1986] Ch 246, 295.

[307] *ibid.*, 303.

[308] He referred to *Cotman v Brougham* [1918] AC 514, 520, 522.

implied powers to do any act which is reasonably incidental to the attainment or pursuit of any of its express objects, unless such act is expressly prohibited by the memorandum.[309]

9.65 Therefore, the objects and powers of a company ought logically to be distinguished. However, this has seldom been the case in practice.[310] Consequently, the courts have struggled with questions of construction of provisions as 'objects' or 'powers' and have produced various unhelpful and confusing classifications, such as 'substantive objects', 'independent objects', 'separate objects', provisions which are '*ultra vires* in the narrow sense' or '*ultra vires* in the wider sense'.[311] As Slade LJ pointed out, in *Rolled Steel Products (Holdings) Ltd v British Steel Corpn*:[312]

> Strict logic might therefore appear to require that any act purported to be done by a company in purported exercise of powers ancillary to its objects conferred on it by its memorandum of association, whether express or implied, (e.g. a power to borrow) would necessarily and in every case be beyond its capacity and therefore wholly void if such act was in fact performed for purposes other than those of its incorporation.

However, this is not the position, for, as Slade LJ went on to say, 'the practical difficulties resulting from such a conclusion for persons dealing with a company carrying on a business authorised by its memorandum would be intolerable.' This difficulty was illustrated by Buckley J in *Re David Payne & Co Ltd*:[313]

> A corporation, every time it wants to borrow, cannot be called upon by the lender to expose all its affairs, so that the lender can say, 'Before I lend you anything, I must investigate how you carry on your business, and I must know why you want the money, and how you apply it, and when you do have it I must see you apply it in the right way.' It is perfectly impossible to work out such a principle.

In *David Payne* itself, the company concerned had express power under its memorandum of association 'to borrow and raise money for the purposes of the company's business'. It borrowed money and issued a debenture to secure the loan. Its liquidator claimed that the debenture was *ultra vires* and void because there was evidence that the borrowing had not in fact been made for the purposes of the company's business. Buckley J and, subsequently, the Court of Appeal, held that the borrowing was not void. A lender is not bound to inquire into the purposes for which the money is intended to be applied, and the misapplication of the money by the borrowing company does not avoid the loan, in the absence of knowledge on the part of the lender that the money was intended to be misapplied. The 'critical distinction', therefore, is between acts done in excess of the *capacity* of the company (and which would be a nullity and wholly void), on the one hand, and acts done *in excess or abuse of* the powers of the company, on the other.[314]

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[309] [1986] Ch 246, 287, *per* Slade LJ; *Re Horsley & Weight Ltd* [1982] Ch 442, 448, per Buckley LJ. See also *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473, 478, *per* Lord Selborne LC: the doctrine of *ultra vires* 'ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*'.

[310] *Cotman v Brougham* [1918] AC 514, 522–3, *per* Lord Wrenbury, referring to the (even then) long-standing 'pernicious practice' of 'confusing power with purpose': 'the function of the memorandum is taken to be, not to specify, not to disclose, but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms'.

[311] See, eg, *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1982] Ch 478; [1986] Ch 246, 276–8, 302; *Progress Property Co Ltd v Moore* [2010] UKSC 55; [2011] 1 WLR 1; *Re Horsley & Weight Ltd* [1982] Ch 442, 449, 450, 454, 455.

[312] [1986] Ch 246, 290.

[313] [1904] 2 Ch 608, 613.

[314] *Rolled Steel*, above, 304, *per* Browne-Wilkinson LJ.

Thus, 'the first step must be to determine what are the objects (as opposed to the powers) of a company.'[315] This is a matter of construction of the company's memorandum. However, it is not always a straightforward matter. As Browne-Wilkinson LJ pointed out, in *Rolled Steel*:[316] **9.66**

> Not all activities mentioned in the objects clause are necessarily objects in the strict sense: some of them may only be capable of existing as, or on their true construction are, ancillary powers: see *Cotman v Brougham* [1918] AC 514 and *Introductions Ltd v National Provinical Bank Ltd* [1970] Ch 199; and this may be the position even if the memorandum of association contains the usual 'separate objects' clause; such a clause is not capable of elevating into an object of the company that which is in essence a power: see *Introductions Ltd v National Provinical Bank Ltd* If, on construction of the objects clause, the transactions fall within the objects (as opposed to the powers), it will not be *ultra vires* since the company has the capacity to enter into the transaction. If the objects clause contains provisions (whether objects or powers) which show that a transaction of the kind in question is within the capacity of the company, that transaction will not be *ultra vires*.

Whether a particular act is unlawful and *ultra vires* the company is a matter of substance and not form: the essential issue is how the transaction is to be characterized and the label attached to the transaction by the parties is not decisive.[317]

There are very useful summaries of the relevant principles in the judgments of both Slade LJ and Browne-Wilkinson LJ in *Rolled Steel Products (Holdings) Ltd v British Steel Corp*,[318] both of which are worth quoting in full. Having reviewed a large number of relevant authorities, Slade LJ summarized his conclusions as follows:[319] **9.67**

(1) The basic rule is that a company incorporated under the Companies Acts only has the capacity to do those acts which fall within its objects as set out in its memorandum of association or are reasonably incidental to the attainment or pursuit of those objects. Ultimately, therefore, the question whether a particular transaction is within or outside its capacity must depend on the true construction of the memorandum.

(2) Nevertheless, if a particular act . . . is of a category which, on the true construction of the company's memorandum, is capable of being performed as reasonably incidental to the attainment or pursuit of its objects, it will not be rendered *ultra vires* the company merely because in a particular instance its directors, in performing the act in its name, are in truth doing so for purposes other than those set out in its memorandum. Subject to any express restrictions on the relevant power which may be contained in the memorandum, the state of mind or knowledge of the persons managing the company's affairs or of the persons dealing with it is irrelevant in considering questions of corporate capacity.

(3) While due regard must be paid to any express conditions attached to or limitations on powers contained in a company's memorandum (e.g. a power to borrow only up to a specified amount), the court will not ordinarily construe a statement in a memorandum that a particular power is exercisable 'for the purposes of the company' as a condition limiting the company's corporate capacity to exercise the power; it will regard it as simply imposing a limit on the authority of the directors: see the *David Payne* case [1904] 2 Ch 608.

(4) At least in default of the unanimous consent of all the shareholders . . ., the directors of a company will not have actual authority from the company to exercise any express or implied power other than for the purposes of the company as set out in its memorandum of association.

(5) A company holds out its directors as having ostensible authority to bind the company to any transaction which falls within the powers expressly or impliedly conferred on it by its

[315] *ibid.*, 305.
[316] *ibid.*
[317] *Progress Property Co Ltd v Moore* [2010] UKSC 55; [2011] 1 WLR 1.
[318] [1986] Ch 246.
[319] *ibid.*, 295–6.

> memorandum of association. Unless he is put on notice to the contrary, a person dealing in good faith with a company which is carrying on an *intra vires* business is entitled to assume that its directors are properly exercising such powers for the purposes of the company as set out in its memorandum. Correspondingly, such a person in such circumstances can hold the company to any transaction of this nature.
>
> (6) If, however, a person dealing with a company is on notice that the directors are exercising the relevant power for purposes other than the purposes of the company, he cannot rely on the ostensible authority of the directors and, on ordinary principles of agency, cannot hold the company to the transaction.

Browne-Wilkinson LJ summarized his conclusions along similar lines and even gave greater emphasis to the distinction between a company's objects and its powers:[320]

> (1) To be *ultra vires* a transaction has to be outside the capacity of the company, not merely in excess or abuse of the powers of the company. (2) The question whether a transaction is outside the capacity of the company depends solely upon whether, on the true construction of its memorandum of association, the transaction is capable of falling within the objects of the company as opposed to being a proper exercise of the powers of the company. (3) Notwithstanding the fact that the provision authorising the company to enter into the particular transaction is found in the objects clause and there is a provision requiring each paragraph to be construed as a separate object, such provision may be merely a power, and not an object, if either it is incapable of existing as a separate object[321] or it can only be construed as a power ancillary to the other objects in the strict sense.[322] (4) If a transaction falls within the objects, and therefore the capacity, of the company, it is not *ultra vires* the company and accordingly it is not absolutely void. (5) If a company enters into a transaction which is *intra vires* (as being within its capacity) but in excess or abuse of its powers, such transaction will be set aside at the instance of the shareholders. (6) A third party who has notice—actual or constructive—that a transaction, although *intra vires* the company, was entered into in excess or abuse of the powers of the company cannot enforce such transaction against the company and will be accountable as constructive trustee for any money or property of the company received by the third party. (7) The fact that a power is expressly or impliedly limited so as to be exercisable only 'for the purposes of the company's business' (or other words to that effect) does not put a third party on inquiry as to whether the power is being so exercised, i.e. such provision does not give him constructive notice of excess or abuse of such power.

Thus, the preliminary question—namely whether or not a particular act is beyond the capacity of the company—is a matter of construction of the company's memorandum, difficult though this process may be sometimes.

9.68 Only when this preliminary question has been resolved does it make sense to address the issue whether the purported execution of a relevant power is an improper (or 'abusive') exercise which is open to challenge on the grounds of being for an improper purpose. If there is no power in the first place, its purported exercise would simply be automatically void. Hence the need to identify precisely the question that is being addressed when corporate decisions are being challenged. As Oliver J cautioned, after an extensive review of the authorities, in *Re Halt Garage (1964) Ltd*:[323]

> I cannot help thinking, if I may respectfully say so, that there has been a certain confusion between the requirements for a valid exercise of the fiduciary powers of directors (which have nothing to

[320] *ibid.*, 306–07.
[321] See, eg, *Introductions Ltd v National Provincial Bank Ltd* [1970] Ch 199.
[322] See, eg, *Introductions Ltd v National Provincial Bank Ltd* [1968] 2 All ER 1221, 1224.
[323] [1982] 3 All ER 1016, 1029–30.

> do with the capacity of the company but everything to do with the propriety of acts done within that capacity), the extent to which powers can be implied or limits be placed, as a matter of construction, on express powers, and the matters which the court will take into consideration at the suit of a minority shareholder in determining the extent to which his interests can be overridden by a majority vote. These three matters, as it seems to me, raise questions which are logically quite distinct but which have sometimes been treated as if they demanded a single, universal answer leading to the conclusion that, because a power must not be abused, therefore, beyond the limit of propriety it does not exist.

Shareholders in general meeting cannot, for example, authorize acts which are beyond the company's capacity, but they can authorize acts which are simply *ultra vires* the directors or officers of the company. They may, however, be restrained from acting on their resolution in appropriate circumstances, such as oppression or fraud on a minority.[324] On the other hand, shareholders, unlike directors, do not owe fiduciary duties to the company.[325] Therefore, whenever any question arises as to the validity of a 'corporate' act or decision, it is clearly essential that the correct actor and grounds for challenge are identified, for different tests and different requirements will apply in each case. This brief discussion is by way of background, however. Here, we are concerned with the situation where the relevant act or decision is not *ultra vires* the company itself but the exercise of the power which effected that act or decision is alleged to have been improper.

9.69 The position of directors of companies has also been affected greatly by statute. Section 170(3) of the Companies Act 2006 declares that the general duties of directors 'are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director'. In other words, statutory duties have replaced common law rules and equitable principles; and actions against directors must now be based on breaches of statutory duties. However, section 170(4) then provides that these general duties are to 'be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties'. The courts are required, therefore, to interpret and apply the statutory duties in the same broad manner as existing common law rules and equitable principles and also to have regard to developments in such corresponding rules and principles. A director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to the considerations listed in section 171(1) of the Companies Act 2006. Of more immediate relevance is the fact that the general law in relation to the exercise of directors' powers—and specifically the application of the doctrine of fraud on a power—continues to be relevant. In this context, as in so many others, company directors occupy a position which is analogous to that of trustees. Section 172(1) of the Companies Act 2006 directs that a director 'must act in the way he considers, in good faith, would be most likely to promote *the success of the company* for *the benefit of its members as a whole*'.[326] This again echoes the general law, under which their powers 'must be exercised not only in the manner required by law

[324] *Clemens v Clemens Bros* [1976] 2 All ER 268.

[325] *Phillips v Manufacturers' Securities Ltd* (1917) 86 LJ Ch 305.

[326] Emphasis added. If the interests of the company as a separate entity conflict with the interests of its members, or some of them, the directors must pursue and prefer the former over the latter: *Mutual Life Assurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11, 21; *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155, 251. See also *London Ashford Airport Ltd v Deir* [2011] EWHC 354 (QB).

but also *bona fide* for the benefit of the company as a whole'.[327] Originally, this test—acting in 'the interests of the company'—seems to have been regarded as a subjective test: directors were required to exercise their discretion in good faith 'in what they consider—not what the court may consider—is in the interests of the company'; and there would be no basis for the court's interference if they acted on the basis of 'a *bona fide* consideration of the interests of the company as the directors see them'.[328] This was soon qualified somewhat. As Dixon J stated, in *Mills v Mills*:[329] 'Directors of a company are fiduciary agents, and a power conferred upon them cannot be exercised in order to gain some private advantage or for any purpose foreign to the power'; and in *Richard Brady Franks Ltd v Price*,[330] he said that directors' powers 'must be exercised honestly in furtherance of the purposes for which they are given'. The point was made again, in *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL*:[331] 'Directors in whom are vested the right and the duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes is not open to review in the courts.' This became known as the 'foreign purpose' test or, later, the 'proper purpose test'—which applies irrespective of whether the director honestly thought he was acting in the best interests of the company, or indeed whether, viewed objectively, it actually was in its best interests.[332] The courts have remained reluctant to review judicially the commercial merits of business decisions,[333] but the 'proper purpose test' (which has now been formulated as a positive statutory duty)[334] allows them to intervene where the exercise of the power was for an improper purpose or, in other words, where directors have committed a fraud on their power.

9.70 Examples of the intervention of the courts on this ground are relatively numerous. For instance, in *Re a Company, ex p Glossop*,[335] Harman J emphasized that 'it is . . . vital to remember that actions of boards of directors cannot simply be justified by invoking the incantation "a decision taken *bona fide* in the interests of the company". . . This is an application, in a sense, of the principle affirmed in so many local government cases and usually called "the *Wednesbury* principle". . .' Similarly, in *Byng v London Life Association*,[336] where a company's AGM was convened at a place too small to accommodate all those attending, and the chairman adjourned the meeting until later in the day at a different and larger location, the Court of Appeal held that the chairman had not

[327] *Richard Brady Franks Ltd v Price* (1937) 58 CLR 112, 135, per Latham CJ; and *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 492, 493.

[328] *Re Smith and Fawcett Ltd* [1942] 1 Ch 304, 306, 309, *per* Lord Greene MR; *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016, 1039; *European Assurance Society* (1873) 17 Sol Jo 745; *Spackman v Evans* (1868) LR 3 HL 171; *Re Esparto Trading Co* (1879) 12 Ch D 191; *Kerry v Maori Dream Gold Mines Ltd* (1898) 14 TLR 402.

[329] (1938) 60 CLR 150, 185.

[330] (1937) 58 CLR 112. See also *Ngurli Ltd v McCann* (1953) 90 CLR 425, 439–40.

[331] (1968) 121 CLR 483, 493.

[332] *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598.

[333] As Lord Eldon observed almost two centuries ago: 'This court is not to be required to take the management of every playhouse and brewhouse in the Kingdom': *Carlen v Drury* (1812) 1 Ves & B 154, 158, 35 ER 61, 63. Similarly, in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832, the Privy Council said: 'There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.' See now s 172(1) of the Companies Act 2006. See, too, *Regentcrest Plc v Cohen* [2001] 2 BCLC 80, 105; *Smith v Fawcett* [1942] 1 Ch 304, 306; *Extrasure Travel Insurance Ltd v Scattergood* [2003] 1 BCLC 598, [90], [97]; *Re McCarthy Surfacing Ltd* [2008] EWHC 2279 (Ch); *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493; *Wayde v New South Wales Rugby League Ltd* (1985) 3 ACLC 799; and (2008) 2(3) Journal of Equity 177 (GW Thomas).

[334] Companies Act 2006, s 171(b); and see n 291 above.

[335] [1988] BCLC 570; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598.

[336] [1990] Ch 170.

exercised his discretion to adjourn validly.[337] In *Advance Bank v FAI Insurances*,[338] the directors had acted in good faith and honestly in what they regarded as the best interests of the company, but Kirby J (in the Court of Appeal of New South Wales) still held[339] that they had abused their powers and exceeded their authority in not promoting a 'fair election by an informed electorate of shareholders'; and Mahoney JA similarly stated:[340] 'what was done pursuant to the directors' purposes went beyond what could properly be done in pursuance of them'. In *Whitehouse v Carlton Hotel Pty Ltd*,[341] a director exercised a power to issue shares so that, on his death, control of the company passed to his son. He acted in the best interests of the company. Nonetheless, it was said that 'the exercise of a power for an ulterior or impermissible purpose is bad notwithstanding that the motives of the donee of the power in so exercising it are substantially altruistic'. 'It is simply no part of the function of directors as such to favour one shareholder or group of shareholders by exercising a fiduciary power to allot shares for the purpose of diluting the voting power attaching to issued shares held by some other shareholder or group of shareholders.'[342] Such observations could equally have been directed at trustees or any other fiduciaries.

9.71 It must also be remembered that, just as trustees of different trusts run a serious risk of a conflict of interests (and duties) in that they are required to pursue the specific (and perhaps inconsistent) purposes of each individual trust, directors of several companies must also look primarily at the separate purposes and interests of each one. Thus, each company in a group is a separate legal entity; and the directors of each subsidiary are not entitled to sacrifice the interests of that subsidiary for the benefit of the parent (or another member of the group).[343] (This becomes apparent when one considers the case where the particular company has separate creditors.) Some kind of indirect or derivative benefit may suffice, of course, so that company A may support company B, so as to enable the latter to continue trading, if it is a shareholder in company B and anticipates derivative benefits from the continued trading of company B. The question is whether the directors of A viewed the transaction solely in terms of the interests of and benefits to company A. If they viewed it from the perspective of company B or because they regarded it as beneficial to the group as a whole, they may well be in breach. 'The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director

[337] These cases also illustrate that there is a close parallel between a fraudulent exercise of a power and (i) the so-called *Wednesbury* principles in public law, named after *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 228–31; and (ii) acts or decisions which are simply *ultra vires*. As to (i), see *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 Ch; [2005] 1 BCLC 175; *Edge v Pensions Ombudsman* [2000] Ch 602, 627–8; and see also paras 10.130–10.131 below. As to (ii), there is a clear distinction between acts done in excess of the capacity of the corporation (which are necessarily a complete nullity and can not be ratified) on the one hand and acts done in excess or abuse of the powers of the company on the other (which may be ratified): *Rolled Steel Products (Holdings) Ltd v British Steel Corporation* [1986] 1 Ch 246, 304–05, *per* Browne-Wilkinson LJ; and *Haugesund Kommune, Narvik Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [134]–[135] *per* Aikens LJ. See also ss 170–177 of the Companies Act 2006; *West Coast Capital (Lios) Ltd Petr* [2008] CSOH 72, [21]; *Eastford Ltd v Gillespie* [2010] CSOH 132, [11]–[14].

[338] (1987) 12 ACLR 118.

[339] *ibid.*, 137.

[340] *ibid.*, 147.

[341] (1987) 11 ACLR 715, 721.

[342] *ibid.*, 718.

[343] *Charterbridge v Lloyd's Bank* [1970] Ch 62, 74, applied in *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; *Equiticorp Finance (in liq) v Bank of New Zealand* (1993) 11 ACSR 642, 684. See also *Re Lee, Behrens & Co Ltd* [1932] 2 Ch 46; *Re David Payne & Co Ltd* [1904] 2 Ch 608, 612, 613, 615, 617, 618; *Industrial Equity v Blackburn* (1977) 137 CLR 567; *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch); *Hawkes v Cuddy* (also know as *Re Neath Rugby Ltd*) [2009] EWCA Civ 291; [2009] 2 BCLC 427; *Qintex Aust Finance Ltd v Schroders Australia* (1990) 3 ACSR 267; *Re Enterprise Goldmines Ltd* (1992) 10 ACLC 136. See also *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30; [2003] JBL 449 (Lee); (2004) 10 Fordham J Corp and Fin Law 79 (Padfield); (2008) 29 Comp Law 290 (Keay).

of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.'[344] A similar approach applies to trustees, especially when investigating the actual motives and purposes of trustees and directors, subject, of course, to the different contexts and environments in which they operate.[345]

G. Fraud on powers and the Variation of Trusts Act 1958[346]

9.72 It is common to find trusts in favour of A for life (sometimes protective trusts for life) with power for A to appoint in favour of his children and remoter issue. If A were to appoint in favour of (say) his adult children, he and they, together, could then terminate the trust, thus cutting out all other objects and those entitled in default of appointment. If such an exercise is carried out in pursuance of an agreement or arrangement between the parties concerned, the effect of the appointment is that the power has been exercised deliberately for an unauthorized purpose and, as such, the exercise is likely to be fraudulent and void.[347] If there is no such agreement, but the same result is achieved by means of two separate and independent transactions, there is no element of fraud and the transaction should stand. However, if A has a protected life interest, or if he appoints in favour of infant children, the approval of the court must be obtained for the arrangement, either on behalf of 'any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined', or on behalf of the infant beneficiaries, or both.[348] It is reasonable to expect that the court would not exercise its discretion and approve any arrangement which has been, or needs to be, facilitated by a fraudulent exercise of a power of appointment. This is indeed the case, although the authorities are not as clear as one would like them to be.

9.73 *Re Robertson's Will Trusts*[349] is typical of the cases which have been found unobjectionable. Here, A had a protected life interest and had exercised his special power of appointment in favour of his three children equally. The intention was that the fund be divided between them all on an actuarial basis. One result of the arrangement would be that A would be able to purchase an annuity which would yield a better income than his life interest. Russell J stated that the court would not approve an arrangement if it clearly involves an appointment which is a fraud on the power. Nevertheless, he concluded that, on the evidence, the appointor intended to benefit his children rather than himself and therefore approved the arrangement. (It became apparent that the arrangement would benefit the appointor only at an intermediate stage.) In similar circumstances, in *Pelham Burn*[350] the Court of Session approved an arrangement on the basis that the liferentrix obtained no more than the actuarial value of her interest, and any benefit to her was incidental and not the purpose of the appointment.[351] And again, in *Wyndham*[352] although the Court of Session refused to approve the arrangement under which the liferentrix/appointor obtained capital in excess of the

[344] *Charterbridge v Lloyd's Bank* [1970] Ch 62, 74, *per* Pennycuick J; *Introductions Ltd v National Provincial Bank Ltd* [1970] Ch 199; *Re Horsley & Weight Ltd* [1982] Ch 442; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1982] Ch 478; *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016; *Walker v Wimborne* (1976) 137 CLR 1, 6–7.

[345] See paras 9.77–9.89 below.

[346] See generally Thomas and Hudson, paras 24.21–24.47.

[347] *Re Brook's Settlement* [1968] 3 All ER 416, 423.

[348] Variation of Trusts Act, 1958, s 1(1)(d), (2); and s 33 of the Trustee Act 1925.

[349] [1960] 1 W.LR 1050; see, too, *Re Merton's Settlement* [1953] 2 All ER 707.

[350] (1964) SLT 9.

[351] See especially 12–13.

[352] (1964) SLT 290, especially 293.

actuarial value of her interest, it indicated that it would approve an amended arrangement under which she received only the actuarial value of that interest.

9.74 At first sight, these cases seem to suggest that, if the life tenant receives no more than the actuarial value of his interest, he will have committed no fraud on his power. However, this would clearly not accord with earlier authorities on fraudulent execution, for the guiding factor is not what the appointor may have gained from his appointment—indeed he may have derived no benefit at all—but the purpose or intent which he entertained when he executed the power. It is a question of fact whether his intention was fraudulent or not, and there is nothing in the Variation of Trusts Act which modifies that rule. Certainly, none of the parties before the court in an application under the Act is likely to allege fraud, so of necessity it falls to the court, in the exercise of its discretion, to ensure that fraud is not present. Nevertheless, although the fact that the appointor receives no benefit at all or receives no more than the actuarial value of his interest is evidence—and may well be cogent evidence—of the absence of any fraud, this is not conclusive. The above authorities on the 1958 Act should therefore be viewed as decisions confined to their own particular facts.

9.75 This question was developed further by Megarry J in *Re Wallace's Settlements*:[353]

> But between plain fraud, on the one hand, and no fraud, on the other hand, there is a wide spectrum, ranging from strong though not conclusive evidence to far-fetched suspicion. At what point should the Court draw the line? . . . It cannot be right to say that the Court will grant its approval in every case unless the parties have been incautious enough to provide evidence of a *prima facie* case of a fraud on the power. On the other hand, I do not think that it would be right to withhold approval merely by reason of far-fetched suspicions of a possible fraud on the power. If as a result of either the presence of evidence or its absence the Court comes to the conclusion that there is a fair case for investigation whether a fraud on the power is involved, approval should be withheld until such investigation has been made and satisfactorily resolved. In reaching the decision whether there is a fair case for investigation, I would disregard remote possibilities or fantastic suggestions; equally, I would not require cogent evidence. In my judgment, if to a fair, cautious and enquiring mind the circumstances of the appointment, so far as known, raise a real and not merely a tenuous suspicion of a fraud on the power, the approval of the Court ought to be withheld until that suspicion is dispelled.[354]

In *Wallace* itself, an inalienable, defeasible life interest was replaced by an absolute interest in capital; also, the actuarial valuation was that of an alienable and indefeasible life interest. Such facts gave rise to a case calling for investigation, but, in the event, the evidence showed no real substance in the suspicions.[355] In other words, there was a clear finding here that the appointment in question was not fraudulent.

9.76 On the other side of the line is *Re Brook's Settlement*.[356] Here again, A had a protected life interest, and had exercised his power of appointment in favour of his two children, one of whom was a minor. The court was asked to approve the arrangement (for the division of the trust fund between A and the two children) on behalf of both the minor child and those interested as potential discretionary objects in the event of the forfeiture of A's life interest. Stamp J refused to do so, holding that the execution of the power of appointment was fraudulent. The known effect of the appointment was to produce, by defeating the interests of future children, a state of affairs under which the court might be expected to approve a division more favourable to the tenant for life than would have been the case if the division had had to be shown to be for the benefit of the after-born

[353] [1968] 2 All ER 209.
[354] *ibid.*, 213–14.
[355] *ibid.*, 214. See too the explanation of *Wallace* in *Re Brook's Settlement* [1968] 3 All ER 416, 422, *per* Stamp J.
[356] [1968] 3 All ER 416; [1968] 1 WLR 1661.

children; and the tenant for life here was anxious to obtain all he could on the division. Thus, the facts of the case led to the conclusion that there was fraud. However, Stamp J made it plain that, in his view, none of the earlier authorities had established that there could not be fraud where the life tenant simply received the actual value of his life interest.

> . . . if you find an appointment such as is here in question and, on the contemplated division of the fund, the appointor takes no more of the appointed fund than the value of his life interest, the appointment is not invalidated by the mere fact that it is made in contemplation of the division. It does not in my judgment, however, follow that an appointment made by one entitled to a life interest not with an entire and single object of benefiting the appointee, but with a view also to having part of the capital of the appointed fund to spend, would be unobjectionable if the capital to be received was less than the market value of the life interest. The question must be one of fact. If my view of the earlier high authorities[357] is correct and it is the purpose and the object of the appointment which is the test of its validity or invalidity, it must, I think, follow that, an appointment made partly for the purpose of enabling part of the capital of the appointed fund, however small, to be put in the pocket of the appointor is a fraud on the power: for if that be part of the motive for the appointment there is not the absence of an ulterior object necessary to support it.[358]

This, it is submitted, is the correct formulation of the principle which should apply in such cases. It is entirely consistent with *Wallace*.[359] Thus, if it can be shown that the appointment was a separate and independent transaction made irrespective of the scheme of division sought to be achieved, there would probably be no vice and it would stand.[360] An appointment which facilitates the division of the trust fund is likely to raise a suspicion of fraud which merits investigation. And if the appointor has negotiated for as much as he could fairly get out of a division of the fund and has clearly exercised his power simply in order to bring that about, there is at least a strong case for inquiry, and the execution is likely to be fraudulent and void.[361]

H. Burden of proof

9.77 What the court looks to is the intention or purpose of the appointor at the date of the exercise of the power.[362] It is this that distinguishes a fraudulent from a merely excessive exercise.[363] The burden of proving a corrupt intention or purpose—of an ulterior motive—lies on the person seeking to avoid the transaction.[364] Proof of intention may be difficult to establish,[365] particularly in the absence of a bargain,[366] and especially where (as in many cases) the appointor may have died, and where no presumptions or inferences are made in favour of the impeacher (at the initial stages at least). 'Fraud, improper motives, intentions, objects, or purposes, ought not to be presumed, they must be proved'.[367] Or, in the words of Jessel, MR: 'Fraud is not lightly to be presumed or inferred. In all cases in which fraud is inferred there must be such cogent facts that the Court

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[357] *Duke of Portland v Lady Topham* (1864) 11 HL Cas 32; and *Vatcher v Paull* [1915] AC 372.
[358] [1968] 3 All ER 416, 423.
[359] See para 9.75 above.
[360] [1968] 3 All ER 416, 422.
[361] *ibid.*
[362] *Re Crawshay* [1948] Ch 123, 135, propositions (3) and (5), based on *Re Wright* [1920] 1 Ch 108, 117. It must be noted, however, that these propositions were not subject to argument in the Court of Appeal.
[363] See paras 9.08–9.12 above.
[364] *Askham v Barker* (1853) 17 Beav 37.
[365] See, eg, *Grant v John Grant & Sons Ltd* (1950) 82 CLR 1, 46; *Mills v Mills* (1938) 60 CLR 150.
[366] *Re Crawshay*, above, 135.
[367] *Henty v Wrey* (1882) 21 Ch D 332, 354, *per* Lindley, MR

cannot reasonably come to any other conclusion.'[368] Mere suspicion will not suffice.[369] The position was summarized by Kindersley V-C in *Re Marsden's Trusts*:[370]

> Unless it can be shown that the trustee having the discretion exercises the trust corruptly or improperly, or in a manner which is for the purpose not of carrying into effect the trust, but defeating the purpose of the trust, the Court will not control or interfere with the exercise of the discretion. There may be a suspicion that the trust has been exercised in a particular manner and from a certain motive, which, if it could be proved, would be held not to be a proper motive; but if it be mere suspicion—though the suspicion is ground for jealous investigation—if it be mere suspicion, and not matter amounting to a judicial inference or conviction from the facts, the Court will not act upon it. But if, on the other hand, it can be proved to the satisfaction of the judicial mind that the power has been exercised corruptly or for a purpose which defeats instead of carrying into effect the purpose of the trust, then the Court will not permit such an exercise of the power to prevail.

9.78 The purpose or intention must be ascertained as a matter of substance, and not solely by analysing the effect of the exercise of the power.[371] Fraud will not necessarily be inferred by the court from, for instance, the mere fact that the donee (or any other non-object) is found in possession of the appointed property at some later date,[372] although it may raise a case for inquiry.[373] Evidence is admissible as to the state of mind of the appointor, including statements by the appointor which go to show his or her state of mind at the material date. Such statements may be material though they are not contemporaneous with the date of the exercise of the power.[374] However, notwithstanding references to the appointor's 'state of mind'[375] or 'motive',[376] evidence of *motive*—such as anger and resentment—under which it is alleged the exercise took place is apparently not sufficient by itself to establish fraud, for 'there would be no end to such objections, if they were to be admitted as grounds for questioning appointments: in almost all cases, where there has been an inequality in the appointment, something of that kind has existed'.[377] 'It is one thing,' said Turner LJ,[378] 'to examine into the purpose with which an act is done, and another thing to examine into the motives which led to that purpose': examining into the motives involved both 'danger and inconvenience'.

9.79 It may well be, however, that *motive* may be relevant and thus be investigated in one category of fraud on a power. In *Re Wright*,[379] PO Lawrence J stated:

> In cases where it is not suggested that the donee of a special power has exercised the power with the intention of benefiting himself or some other person not an object of the power the Court will not as a rule examine into the motive which may have induced the donee to exercise the power in favour of

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[368] *ibid.*, 350.

[369] *Campbell v Home* (1842) 1 Y & C Ch Cas 664; *M'Queen v Farquhar* (1805) 11 Ves 467; *Pares v Pares* (1863) 10 Jur NS 90; *Henty v Wrey* (1882) 21 Ch D 332; *Re De Hoghton* [1896] 2 Ch 385; *Re Boileau* [1921] WN 222; *Re Merton* [1953] 1 WLR 1096.

[370] (1859) 4 Drew 594, 599–600.

[371] *Re Burton* [1955] Ch 82, 100, *per* Upjohn J.

[372] *Re Merton* [1953] 1 W.LR 1096, 1110, *per* Wynn Parry J.

[373] *Jackson v Jackson* (1840) 7 Cl & Fin 977: the creation of a charge in favour of the appointor immediately after the appointment.

[374] *Re Crawshay*, above, 135, approving proposition (6). See also *Redman v Permanent Trustee Company of NSW Ltd* [1916] HCA 47; (1916) 22 CLR 84. In the nature of things, extrinsic evidence is crucial on the question of 'motive' and, indeed, is likely to be the only kind of evidence available.

[375] *Re Crawshay*, 135.

[376] *Re Marsden's Trusts*, above, 599–600.

[377] *Vane v Lord Dungannon* (1840) 2 Sch & Lef 118, 130, *per* Lord Redesdale. Farwell, 469, states that 'motives . . . are not to be adverted to', but this is an overstatement.

[378] *Topham v Duke of Portland* (1863) 1 De GJ & S 517, 571; approved in (1869) 5 Ch App 40, 57.

[379] [1920] 1 Ch 108, 117–18.

> a particular object of the power. The donee is entitled to prefer one object to another from any motive he pleases, and however capriciously he exercises the power the Court will uphold it.[380] But in my opinion this rule does not apply where the motive is corrupt or improper even although the appointment is made in favour of an object of the power and the intention and purpose of the appointor is that the appointee should take the whole of the appointed fund unconditionally for his own benefit. An example of such a corrupt or improper motive, where the intention and purpose of the appointment itself cannot be said to be otherwise than in accordance with the end designed by the donor of the power, is to be found in the case of a bribe being given or promised to the donee of the power in order to induce him to make an appointment in favour of the objects of the power to the exclusion or detriment of the others.

Although this is unquestionably an example of a fraudulent exercise of a power, it is difficult to see how these *dicta* could carry much weight on the question of the relevance of 'motive'. They are certainly inconsistent with earlier authorities.[381] Moreover, it is not correct to say that, in such circumstances as those postulated by PO Lawrence J, the purpose of the appointment 'cannot be said to be otherwise than in accordance with the end designed by the donor of the power'. Such a conclusion ignores the substance of the transaction in favour of its form or effect: the donor of the power conferred it on the donee in the expectation that it would be exercised, if at all, in good faith. It also ignores the rights which other objects of the power or those entitled in default of appointment may have to see the power properly and honestly exercised.[382] In any event, it is not necessary that the donee of the power (or any other non-object) should derive some benefit from the appointed property itself.[383] Acceptance of a bribe, from the appointee or from a third party, would be sufficient to constitute a corrupt *purpose* or intention, so that investigation of motive would thus be unnecessary, though it would clearly have high probative value.[384]

9.80 A further difficulty arises from the fact that *Re Crawshay*[385] approved the observations made in *Re Wright*.[386] If, by referring to the appointor's 'state of mind', Jenkins LJ[387] intended no more than the state of mind in relation to purpose or intention, there is indeed no conflict with *Topham* and the earlier authorities, for evidence of motive alone still cannot establish fraud. However, if he intended to suggest that motive (or any ground which might found mere suspicion) could do so, he was clearly going beyond the law as laid down in those cases. Mere suspicion, or some indication of improper motive, are themselves not sufficient to support a charge of fraud. Such matters might be admissible as part of the overall evidence, but the party alleging fraud would succeed only by submitting more cogent evidence.[388] On the other hand, if such evidence exists, it is difficult to see how evidence of motive could be useful.

9.81 In any event, the general rule is well established: it is for the person alleging fraudulent exercise of a power to prove that allegation, as a matter of substance. Nevertheless, the circumstances may be such that the burden of proof may shift easily. Certainly, there are instances where the court held that it was for those seeking to uphold an appointment to prove that the power had been

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[380] This is certainly not the case where the power is a fiduciary power, however, and may not even be true where the donee is an ordinary individual.

[381] See para 9.78 above.

[382] See paras 9.10–9.19 above.

[383] *Cochrane v Cochrane* [1922] 2 Ch 230.

[384] The evidence in *Re Wright* seems to have pointed clearly to the existence of a bargain, in fact. *Topham* was not referred to in the case, but it seems clear that PO Lawrence J was fully aware of the principles it had established.

[385] [1948] Ch 123.

[386] Although the relevant propositions were not argued before the court, in fact.

[387] *Re Crawshay*, 135.

[388] See also *Re Wallace's Settlement* [1968] 2 All ER 209, 213–14, *per* Megarry J (cited in para 9.55 above).

properly executed. For example, where there is proof that the appointor at one time intended a benefit to accrue to himself, or indeed if a corrupt intention is shown to have ever been entertained, it is for those who seek to uphold the appointment to prove that such an intention no longer existed at the time of the appointment.[389] And where one appointment has already been set aside, a second appointment by the same donee in favour of the same object cannot be upheld in the absence of 'clear proof that the later appointment is completely free from the original taint which avoided the first'.[390]

9.82 It is uncertain whether and, if so, how far these propositions as to a shifting of the onus of proof have survived. The Court of Appeal, in *Re Crawshay*,[391] adopted a more flexible approach. An argument was put to the court that, if a corrupt intention is shown ever to have been entertained, the burden of proof lies upon those who support the appointment. This proposition was based on *Re Wright*, which in turn based itself on *Humphrey v Olver*.[392] However, in *Re Crawshay*, Jenkins LJ[393] concluded that, in *Humphrey v Olver*, only Turner LJ had based his decision on the question of onus, while Knight Bruce LJ had reached his conclusion on the basis of the evidence as a whole. The Court of Appeal preferred the latter approach, 'recognizing that the cogency of the inference drawn from the proof of intention must largely depend on the length of the period that elapses between the date as at which the intention is proved and the date on which the power is exercised and on what has happened in the meanwhile'.[394] This clearly does not override all questions of burden of proof. It remains the case that the person alleging fraudulent execution of a power must prove it.

9.83 However, this method appears to rule out any question of a shifting onus of proof. The proper approach, it has been suggested, is to consider all relevant, admissible evidence and to see whether the inferences which may be drawn from it, without reference to any presumption or shift in onus, support the fraud which has been alleged.[395] However, although this approach seems reasonable and desirable, it seems inconsistent with *Topham*,[396] which was not cited in either *Re Crawshay* or *Re Wright*. The matter may perhaps be resolved by distinguishing between the burden of proof imposed by law and the provisional burden which is raised by the state of the evidence. Although the legal burden remains throughout on the person alleging fraud, he goes some way towards discharging it by producing evidence of prior fraudulent conduct; there is then a provisional presumption of fraud, which is by no means conclusive.

> As the case proceeds, the evidence may first weigh in favour of [one view] and then against it, thus producing a burden—sometimes apparent, sometimes real—which may shift from one party to the other as the case proceeds, or may remain suspended between them. That is, however, not a legal burden, but only a provisional burden—a burden raised by the state of the evidence—from which the Court may draw an inference one way or the other, but it is not bound to do so.[397]

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[389] *Humphrey v Olver* (1859) 5 Jur NS 946; and *Re Wright*, above, 120. But see *Re Crawshay*, para 9.66 above.

[390] *Topham v Duke of Portland* (1869) 5 Ch App 40, 62; also see 58–9. See also *Redman v Permanent Trustee Co of NSW* (1916) 22 CLR 84.

[391] [1948] Ch 123.

[392] (1859) 28 LJ Ch 406.

[393] [1948] Ch 123, 137.

[394] *ibid.*, 137–8.

[395] Hardingham and Baxt, 107–10. Perhaps evidence of motive might be relevant in this approach.

[396] See para 9.81 above.

[397] *Huyton-with-Roby UDC v Hunter* [1955] 1 WLR 603, 609, *per* Denning L.J.; *Brown v Rolls Royce Ltd* [1960] 1 WLR 210, 215, *per* Lord Denning; and *Robins v National Trust Co* [1927] AC 515, 520, *per* Viscount Dunedin. None of these cases involved the execution of a power, but the principle is of general application. See also (1945) LQR 375 (AT Denning).

9.84 It must also be borne in mind that the donee of a power is generally not obliged to give reasons or explanations for the decisions he has reached or the manner in which he has exercised his discretion. This principle (which is discussed more fully below)[398] is not confined to the donees of non-fiduciary powers but applies also to trustees, of both family settlements[399] and occupational pension schemes.[400] Thus, documents such as the minutes and agenda of trustee meetings or correspondence, which might evidence a fraudulent exercise of a power, cannot be demanded by any beneficiary or object as of right. Of course, this does not prevent beneficiaries and objects from commencing hostile litigation against trustees, alleging fraudulent exercise of a power (or some other impropriety), and appropriate evidence of such fraud (or other impropriety) may emerge during the pre-trial process of discovery.[401] However, they must have some evidence of fraud before any such action is commenced: they cannot make speculative allegations based on mere suspicion and then invoke the process of discovery in order to ascertain whether or not a cause of action actually exists.[402]

I. The degree of fraudulent intent or purpose

9.85 It is not entirely clear from the cases whether the presence of *any* fraudulent intent or purpose is sufficient to avoid the exercise of a power, notwithstanding that there may also be present a perfectly honest and sincere intent to benefit one of the objects, or to further one of the purposes, of that power. In other words, would an exercise of a power for 'mixed' purposes fail or not? A power has to be exercised 'with an entire and single view to the real purpose and object of the power',[403] and this suggests that the presence of any other purpose, no matter how insignificant, would be fatal and would invalidate the exercise of the power. In some cases, the exercise of a power has been said to be fraudulent if it was not made 'with the *sole object* of benefiting the appointee . . . [or] *not confined* to benefiting the appointees themselves'.[404] Indeed, the fact that a fraudulent intent on the part of only one donee of a joint power will render void an exercise of that power[405] tends to support this stricter view. On the other hand, the view has also been expressed that a power of appointment, for instance, has been fraudulently exercised if a non-object received a 'material' benefit,[406] which implies that where such benefit is *de minimis* the exercise will be upheld. In yet other cases, an alternative test has been adopted, namely whether or not the particular exercise would have been made 'but for' the fraudulent purpose.[407] Both of these latter views suggest that, provided it is of secondary importance and probably also a merely trivial consideration, the presence of a fraudulent purpose will not necessarily invalidate a particular exercise of a power. It is doubtful, however, whether these formulations are essentially inconsistent with each other.

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[398] See Ch II generally and esp paras 11.41–11.65 below.

[399] *Re Londonderry's Settlement Trusts* [1965] Ch 918.

[400] *Wilson v Law Debenture Trust Corporation plc* [1995] 2 All ER 337.

[401] See, eg, *Compagnie Financière et Commerciale de Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, especially 63, *per* Brett LJ; *Re Londonderry's Settlement Trusts*, above, 939 (court order); and also (1965) 81 LQR 196 (RE Megarry). On discovery generally, see H Malek and P Matthews, *Discovery* (London, 1993).

[402] *Karger v Paul* [1984] VR 161; *Hartigan Nominees Pty Ltd v Rydge* (1002) 29 NSWLR 405.

[403] See, eg, *Duke of Portland v Topham* (1864) 11 HLC 32, 54; *Re Greaves* [1954] Ch 434, 447.

[404] *Re Simpson* [1952] Ch 412, 416, 417 (my emphasis).

[405] *Lawrie v Bankes* (1858) 4 K & J 142; *X v A* [2006] 1 WLR 741.

[406] *Re Greaves* [1954] Ch 434, 447.

[407] See, for instance, *Pryor v Pryor* (1864) 2 De GJ & Sm 205, 210; *Re Turner's Settled Estates* (1884) 28 Ch D 205, 217, 219; *Birley v Birley* (1858) 25 Beav 299, 307.

9.86 It is also probable that the test for fraud varies according to the particular context. It does not necessarily follow that the exercise of a (fiduciary or non-fiduciary) power in a commercial context should be examined with the same scrutiny as might be appropriate for (say) a discretionary distribution by a trustee. In *Meretz Investments NV v ACP Ltd*,[408] it was acknowledged that it would be an improper exercise of a mortgagee's power of sale if no part of his motive for exercising that power was to recover the debt secured by the mortgage. However, if a mortgagee had mixed motives for exercising that power and one of the motives was to recover the debt secured by the mortgage, his exercise of the power of sale would not be invalidated. The basic facts of the case were that the claimants (M and B) had brought an action against the defendants (X, F, and T) in connection with the purported sale by F to T of a long lease of a partially completed penthouse development on the roof of a block of flats. M and B were subsidiaries of the same parent company. B owned the freehold of the block of flats and M was the leaseholder of one of the flats. B had granted X a long lease of the roof so that X could develop it. X granted F, its parent company, a first charge over the development lease. F was therefore the mortgagee of the development lease and X was the leaseholder. F had purported to sell the lease to T, a private individual who was interested in acquiring one of the penthouses. The parties had fallen into dispute, and the issues for determination centred on (i) the transfer of the development lease to T; (ii) the leaseback option contained in the original agreement between B and X; (iii) whether economic torts had been committed by X, F, and T. Lewison J allowed the appeal in part. Two of the claimants' arguments were barred by issue estoppel. However, it was not an abuse of process for the claimants to argue that the power of sale was in fact exercised for improper purposes. It would be an improper exercise of a mortgagee's power of sale if no part of his motive for exercising that power was to recover the debt secured by the mortgage. On the other hand, if a mortgagee had mixed motives for exercising that power and one of the motives was to recover the debt secured by the mortgage, his exercise of the power of sale would not be invalidated.[409] Here, F had exercised its power of sale for a proper purpose and was not in breach of any equitable duty owed to M. Even if F had exercised its power of sale for an improper purpose, T would not have been affected by that impropriety as he had had no knowledge of F's motivation.[410] (In addition, F and X lacked the necessary intention to injure B and they believed that the agreements into which they had entered were lawful. T also lacked the necessary intention to injure. F's exercise of the power of sale was not tortious or, if otherwise tortious, any interference with a prior contract was justified.) It does not follow, of course, that a trustee—or someone with no commercial interest of his own to protect—would or should not face a stricter test of his motives. The particular context and the nature of the duties owed would affect the evidential burden of proof, if not the test itself. It remains the case, however, that it is the person alleging 'fraud' who must be able to provide a *prima facie* case in support of his allegation.

9.87 The central question, as is generally recognized, is simply whether the donee of the particular power intended to achieve some ulterior purpose by its exercise. It is a matter of substance and not effect.[411] It is the donee's intention to benefit a non-object or to further an unauthorized purpose that is crucial, and not the result actually achieved, although, of course, the effects of any exercise

[408] [2006] EWHC 74 (Ch); [2007] 1 WLR 197.

[409] See also *Downsview Nominees Ltd v First City Corp Ltd* [1993] AC 295; *Nash v Eads* (1881) 25 SJ 95; *Belton v Bass Ratcliffe and Gretton Ltd* [1922] 2 Ch 449.

[410] See also *Corbett v Halifax Building Society* [2002] EWCA Civ 1849; [2003] 1 WLR 964; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2001] UKHL 1; [2003] 1 AC 469; *Strover v Harrington* [1988] Ch 390.

[411] *Re Burton's Settlements* [1955] Ch 82, 100; *Re Halt Garage (1964) Ltd* [1982] 3 All ER 1016, 1039, *per* Oliver J: 'The real test must, I think, be whether the transaction in question was a genuine exercise of the power. The motive is more important than the label.'

may provide clear evidence of a fraudulent intent. If the power is executed with a corrupt or foreign purpose, the exercise is fraudulent; and it is then irrelevant that the purpose never takes effect,[412] or that the appointee was not even aware of it.[413] In some cases, benefiting a non-object will simply be an excessive exercise of the power. In others, as we have seen, [414] the power in question (for example, a power of advancement which is exercisable for the 'benefit' of an object) may be so wide and flexible in scope that the fact that a non-object (even the appointor himself)[415] benefits incidentally (or even substantially) will not necessarily be fatal.[416] As Tipping J pointed out, in *Kain v Hutton*:[417] 'An appointment which secures a benefit for a non-object is not for that reason alone a fraud on the power. The focus should rather be on whether the purpose of the appointment was truly to benefit an object. If that is so, it does not matter that a non-object also obtains a benefit.' There can, of course, still be a fraud on such a power, for example, where the exercise is induced by a bribe, or where the paramount intention behind the exercise is to benefit the stranger and not the object himself. The real question is whether the power was exercised, in substance and not just in form, with the intention and purpose of benefiting the appointee (in which case it will be good) or simply in order to enable the distribution of the property to a stranger, the appointee being regarded merely as a conduit for that purpose.[418] Similarly, if the appointor hoped that the appointee would dispose of the appointed property in favour of a stranger, but where there was no bargain or understanding that the appointee would do so, and the appointor would still have exercised the power in the same manner irrespective of any dispositions which the appointee was free to make and may have made, the exercise will not be fraudulent.[419] Indeed, even the existence of a bargain between appointor and appointee as to the destination of the appointed property will not necessarily avoid the appointment: it must be shown that, but for the bargain, the appointment would not have been made.[420] In all these cases, the relevant question is whether the power in question would have been exercised *but for* the *intent* to achieve an ulterior purpose or whether the actual exercise would have been made in any event. Thus, the 'but for' test seems more appropriate and more consistent with the reported cases.

Application to company directors[421]

9.88 As we have seen, parallels between trustees and directors of companies can be useful in this context. The 'purpose' for which a director exercises a power is a question of fact and depends on the context.[422] It is determined by 'collecting from the surrounding circumstances all the materials which genuinely throw light on that question'.[423] As with trustees, this can be a very difficult process, especially as motives cannot easily be separated out. As Fullagar J stated, in

[412] *Re Crawshay* [1948] Ch 123, 135.

[413] *Re Marsden's Trusts* (1859) 4 Drew 594.

[414] See paras 9.37–9.61 above.

[415] If the power is a fiduciary power, and not a beneficial one, the rule against conflicts of interest may apply, however: see Ch 12 below.

[416] *Cooper v Cooper* (1869) LR 8 Eq 312.

[417] [2008] NZSC 61, [49]. His quote from Lord Parker's speech, in *Vatcher v Paull* [1915] AC 372, tends to misrepresent what his Lordship actually meant, though.

[418] Farwell, 475.

[419] *Re Crawshay* [1948] Ch 123, 135.

[420] *Re Turner's Settled Estates* (1884) 28 Ch D 205.

[421] See also paras 9.62–9.71 above; and (2008) 2(3) *Journal of Equity* 177 (GW Thomas).

[422] *Re a Company, ex p Glossop* [1988] BCLC 570, 577; *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; *Howard Smith Ltd v Ampol Ltd* [1974] AC 821; (1972) 2 NSWLR 850, 858; *Peskin v Anderson* [2001] 1 BCLC 372; *Criterion Properties plc v Stratford UK Properties plc* [2004] UKHL 28; [2004] 1 WLR 1846.

[423] *JD Hannes v MJH Pty Ltd* (1992) 7 ACSR 8, 12, *per* Sheller JA.

Grant v John Grant & Sons Ltd,[424] for example, it is 'quite impossible to divide motives into mutually exclusive watertight compartments'; and, as Dixon J stated, in *Mills v Mills*:[425] 'When the law makes the object . . . or purpose of a body of men, the test of the validity of their acts, it necessarily opens up the possibility of an almost infinite analysis of the fears and desires, proximate and remote, which, in truth, form the compound motives usually animating human conduct'. According to Dixon J,[426] the court should focus on identifying 'the substantial object the accomplishment of which formed the real ground of the board's action'; and, if the power would not have been exercised but for that improper purpose, its exercise would be regarded as invalid. The 'preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the [exercise of the power] will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, the power would not have been exercised'.[427] Was the improper purpose the 'moving cause'?[428] In the words of Viscount Finlay, in *Hindle v John Cotton Ltd*:[429]

> Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.

The assertions and statements of the directors as to their motives and purposes are, of course, relevant, but they are not conclusive: they are matters for the court to determine objectively, as they are in the case of trustees.[430]

9.89 However, for a variety of different reasons, the tests have tended to be applied to directors of companies in a more liberal manner than to trustees, reflecting the radically different contexts in which they are sought to be applied. As Dixon J stated, in *Mills v Mills*:[431] 'The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment.' Directors are expected to exercise business judgement, often under pressure, against an ever-changing commercial background. A decision which is clearly commercially disadvantageous may lead to an inference that the directors had some ulterior motive or purpose in entering into it,[432] but generally when determining the credibility of the directors' assertions, the court will look no further than whether the course of action was commercially justifiable. The courts will not examine the business or commercial judgement of directors—they 'will respect their judgment as to matters of management'[433]—unless lack of due care or improper purpose is shown. As the Privy Council

[424] (1950) 82 CLR 1, 46.
[425] (1938) 60 CLR 150, 185.
[426] *ibid.*, 186.
[427] *Whitehouse v Carlton Hotel Pty Ltd* (1987) 11 ACLR 715, 721.
[428] *Hindle v John Cotton Ltd* (1919) 56 SLR 625, 631.
[429] *ibid.*, 630–1; approved in *Howard Smith Ltd v Ampol Ltd*, above, 835. See also *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598; *Advance Bank v FAI Insurances* (1987) 12 ACLR 118, 137; *Condraulics Pty Ltd v Barry & Roberts Ltd* [1984] 2 Qd R 198, 206; *Mills v Mills* (1938) 60 CLR 150, 186.
[430] *Advance Bank v FAI Insurances* (1987) 12 ACLR 118, 137.
[431] 60 CLR 150, 185–6; adopted by Lord Wilberforce in *Howard Smith Ltd v Ampol Ltd* [1974] AC 821, 835–6.
[432] See, eg, *Pine Vale Investments v McDonnell & East Ltd* (1983) 8 ACLR 199, 209; *Winthrop Investments v Winns* (1979) 4 ACLR 1, 12.
[433] *Howard Smith Ltd v Ampol Ltd* [1974] AC 821, 835.

stated, in *Howard Smith Ltd v Ampol Petroleum Ltd*:[434] 'There is no appeal on merits from management decisions to courts of law: nor will courts of law assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at.' 'Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations, and their judgment, if exercised in good faith and not for irrelevant purposes, is not open to review in the courts.'[435] Moreover, although a director is required to act with due care, this is such care as is reasonably to be expected, having regard to the director's knowledge and experience.[436] Therefore, the conduct of the director will presumably be assessed according to whether he is an executive or non-executive director; or whether he is a nominee director who has, for example, advanced the interests of the person who nominated him, rather than the interests of the company itself.[437] Decisions of directors are also more readily ratifiable by shareholders. As Lindley LJ observed in *Browne v La Trinidad*:[438] 'I think it is most important that the Court will hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules where the irregularity complained of can be set right at any moment.' A similar liberal approach would seem to be warranted also in relation to parties in any commercial arrangement, such as joint ventures or partnerships, and where there is doubt or uncertainty as to the exercise of powers for allegedly 'improper' purposes. In such cases, issues of construction, implication and intended purpose would need to be assessed on the basis of a requirement to give business efficacy to the arrangement or transaction. Such a liberal approach is seldom evident in relation to trustees, however. The principles may be common to all, but their application and effect will clearly differ according to the specific context.

J. Effect of fraudulent execution of a power

(1) Execution is void not voidable

9.90 Where a fraudulent execution of a power is established, the effect is that the execution is wholly void.[439] It is irrelevant, as we have seen, that the appointee was entirely ignorant of the appointor's intentions or otherwise innocent.[440] And an appointment in exercise of a joint power will be fraudulent where only one of the appointors is infected with a fraudulent intent.[441] What the court acts upon is the intention of the donee of the power to exercise it for some foreign purpose. The question to be asked in each case is: would the appointment have been made if it had not been for the improper intention of the appointor? It thus follows that the appointment remains invalid

[434] *ibid.*, 832. See also *Carlen v Drury* (1812) 1 Ves & B 154, 158, *per* Lord Eldon: 'This court is not to be required to take the management of every playhouse and brewhouse in the Kingdom.'

[435] *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493; *Wayde v New South Wales Rugby League Ltd* (1985) 3 ACLC 799; *Darvall v North Sydney Brick & Tile Co* (1989) 15 ACLR 230, 250.

[436] *Re Brazilian Rubber Plantations Estates Ltd* [1911] 1 Ch 425, 437.

[437] *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 1 AC 187, 222. Similarly, it will matter whether the power was exercised by a director or a manager of the company.

[438] (1887) 37 Ch D 1, 17. See also *Re Sunrise Radio Ltd* [2009] EWHC 2893 (Ch), [7]; [2010] 1 BCLC 367; and *Rock (Nominees) Ltd v RCO Holdings plc* [2003] 2 BCLC 493.

[439] *Re Marsden's Trust* (1859) 4 Drew 594; *Cloutte v Storey* [1911] 1 Ch 18; *Vatcher v Paull* [1915] AC 372, 378. *cf. Preston v Preston* (1869) 21 LT 346. See also *Pitt v Holt, Futter v Futter* [2011] EWCA Civ 197, [97]–[98].

[440] *Re Marsden's Trust*, above; *Scroggs v Scroggs* (1755) Amb 272.

[441] Farwell, 459; *Lawrie v Bankes* (1858) 4 K & J 142.

even if the appointee, upon being appealed to by the appointor to effectuate the improper purpose, refuses to do so.

> If the appointee refuses to give effect to the wishes of the appointor, he gets what it was never intended he should have, and enjoys property which, if his conduct could have been forseen, might and probably would have been given to another. But the case is exactly the same whether the consent or the agreement to act as desired be given or entered into before or after the appointment. The Court also would be placed in this dilemma:—If it did not enforce compliance with the wishes of the appointor, it would be sanctioning the appointee in taking property never intended for him; and if the Court were to enforce it as binding in conscience on the appointee, the Court would enforce the execution of a power in favour of persons who were not objects of it.[442]

Consequently, it would not matter if (say) the ailing child to whom an appointment had been made[443] were to recover; or if the appointee were to refuse to perform his side of a bargain with the appointor.

(2) Agents

9.91 This basic principle, namely that a fraudulent exercise of a power is void and not voidable, is also said to apply to other fiduciaries, although the exceptions to the principle are so numerous and significant that such a conclusion may not actually be supportable. The fact that the fiduciary has exercised his powers for an improper purpose may have the same effect as between him and his principal. However, the transaction in question may still have legal effect in relation to an innocent third party. Where an agent, for example, has acted within the terms of a written authority given to him by his principal, but the existence of which was not known to the other party to the contract, the principal cannot, if the other party has acted in good faith, repudiate liability on the ground that the agent acted in his own interests and not those of his principal.[444] If the act done under a power of attorney is warranted by the terms of the power, it is immaterial that the agent is in fact abusing the power by using it for his own purposes. The apparent authority is the real authority.[445] There is a distinction between 'want of authority' and 'abuse of authority'; and 'an act of an agent within the scope of his actual or apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests'.[446] There is some debate, it seems, as to whether this rule applies to actual authority as well as apparent authority, or just to cases of apparent authority. In *David John Hopkins v T L Dallas Group Limited, T L Dallas & Company Limited*,[447] for example, Lightman J stated:

> The grant of actual authority to an agent will not normally include authority to act for the agent's benefit rather than that of his principal and therefore, without agreement, the scope of actual authority will not include this. The grant of actual authority should be implied as being subject to a condition that it is to be exercised honestly and on behalf of the principal: *Lysaght Bros & Co Ltd v. Falk* (1905) 2 CLR 421. It follows that, if an act is carried out by an agent which is not in the interests of his principal, for example signing onerous unconditional undertakings, then the act will not be

[442] *Topham v Duke of Portland* (1862) 31 Beav 525, 541, *per* Sir John Romilly, MR.

[443] *Lady Wellesley v Earl Mornington* (1855) 2 K & J 143. See also *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517, 555.

[444] *Hambro v Burnand* [1904] 2 KB 10.

[445] *Reckitt v Barnett, Pembroke and Slater, Limited* [1928] 2 KB 244, 258; *Bank of Bengal v Fagan* (1849) 5 Moo Ind App 27; *Bryant, Powis, & Bryant v Quebec Bank* [1893] AC 170; *Lloyd v Grace, Smith & Co* [1912] AC 716.

[446] *Macmillan Inc v Bishopsgate Investment Trust Plc and Others (No 3)* [1995] 1 WLR 978, 984, *per* Millett J.

[447] [2004] EWHC 1379 (Ch), [88]–[89]; [2005] 1 BCLC 543.

within the scope of the express or implied grant of actual authority. As a result there cannot be actual authority:

'the agent is simply not authorised to act contrary to his principal's interests: and hence that an act contrary to those interests is outside his actual authority. The transaction is therefore void unless the third party can rely on the doctrine of apparent authority'[448]

. . . *Bowstead* suggests that this statement of the law should be limited to apparent authority i.e. that acting fraudulently or in furtherance of [his] own interests will by its very nature nullify actual authority, but not apparent authority. I respectfully agree.

The third party can only rely upon the doctrine of apparent authority if he does not know that the agent has no actual authority. Thus, if he knows the agent is acting contrary to the commercial interests of his principal, he is unlikely to be able credibly to assert that he believed the agent had actual authority.[449] If the agent is purporting to act on behalf of both parties to a transaction, for example, it is self-evident that the third party must be taken to know of the lack of authority of that agent to act for his principal.[450]

K. Company directors

9.92 Many of these principles were worked out in the context of dealings between companies and third parties, to which the so-called 'rule in *Turquand's Case*' applies.[451] Any person who has expressly been appointed as agent for a company may bind that company by any act within the 'usual' authority of such an agent. A third party dealing with such an agent does not have to inquire into whether authority to enter into that particular transaction has actually been conferred on that agent, for example, whether formalities required by the company's articles have been complied with.[452] The third party may assume that this is the case, provided he acts in good faith.[453] Company directors are, of course, essentially agents for their company and whose authority, as with all agents, may be actual, apparent, or ostensible. As Lord Denning MR stated in *Hely-Hutchinson v Brayhead Ltd*:[454]

. . . actual authority may be express or implied. It is *express* when it is given by express words,[455] such as when a board of directors pass a resolution which authorises two of their number to sign cheques.

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[448] Quoting *Bowstead on Agency* (15th edn, 1985), para 8.218.

[449] *Criterion Properties Plc v Stratford UK Properties LLC* [2004] UKHL 28, [28]–[31]; [2004] 1 WLR 1846; *Ford v Polymer Vision Ltd* [2009] EWHC 945 (Ch); [2009] 2 BCLC 160; *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Lloyd's Rep 9, 17.

[450] *Re Capitol Films Ltd (In Administration)* [2010] EWHC 2240 (Ch); *Lexi Holdings (In Administration) v Pannone & Partners* [2009] EWHC 2590 (Ch). See also *Wrexham Associated Football Club Ltd (In Administration) v Crucialmove Ltd* [2006] EWCA Civ 237; [2007] BCC 139; [2008] 1 BCLC 508; *Rolled Steel Products (Holdings) Ltd v British Steel Corp* [1986] Ch 246; *Reckitt v Barnett Pembroke & Slater Ltd* [1929] AC 176; and *A-G of Zambia v Meer Care & Desai (A Firm)* [2008] EWCA Civ 1007; [2008] Lloyd's Rep FC 587.

[451] *Royal British Bank v Turquand* (1856) 6 El & Bl 327. See also *Mahony v East Holyford Mining Co* (1875) LR 7 HL 869; *Bargate v Shortridge* (1855) 5 HLC 297, 318; *Re Land Credit Co of Ireland* (1869) LR 4 Ch 460, 469; *Duck v Tooweer Galvanising Co* [1901] 2 KB 314; *Gillies v Craigton Garage Co Ltd* 1935 SC 423.

[452] *Kreditbank Cassel GmbH v Schenkers Ltd* [1927] 1 KB 826, 844. See also *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711 (usual authority of company secretaries).

[453] One company does not automatically have notice of any irregularity in the internal affairs of another company with which it is dealing simply because the two companies have common directors or a common secretary: *Re Marseilles Extension Co* [1867] WN 68; *Re Hampshire Land Co* [1896] 2 Ch 743; *Re Fenwick Stobart & Co* [1902] 1 Ch 507; *Young v David Payne & Co* [1904] 2 Ch 608. The same applies to partnerships with a common partner: *Campbell v McCreath* 1975 SC 81; 1975 SLT 5.

[454] [1968] 1 QB 549, 583.

[455] See also *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 502, *per* Diplock LJ: 'An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they

> It is *implied* when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be managing director. They thereby impliedly authorise him to do all such things as fall within the usual scope of that office. Actual authority, express or implied, is binding as between the company and the agent, and also as between the company and others, whether they are within the company or outside it.
>
> Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the 'holding-out.' Thus, if he orders goods worth £1,000 and signs himself 'Managing Director for and on behalf of the company,' the company is bound to the other party who does not know of the £500 limitation, . . .[456] Even if the other party happens himself to be a director of the company, nevertheless the company may be bound by the ostensible authority. Suppose the managing director orders £1,000 worth of goods from a new director who has just joined the company and does not know of the £500 limitation, not having studied the minute book, the company may yet be bound.[457]

9.93 Thus, if the agent has been appointed, or is held out as having been appointed, to a particular office, a third party dealing with him is entitled to assume that the agent has the 'usual' authority of a person holding that office; and the third party is not defeated by any restriction which the principal has imposed on the agent's 'usual' authority. Moreover, 'usual' authority and 'ostensible' authority may co-exist: the third party may also rely on conduct of the agent permitted by his principal outside the scope of his 'usual' authority.[458] However, if the agent does not hold a particular office, or if he is acting outside the scope of his 'usual' authority, and the third party relies on ostensible authority, then he must prove, as against the company, that a representation was made to him (whether in the form of a statement or permitted actual conduct), by someone who himself had actual authority to enter into the transaction (or to authorize the same), to the effect that the agent had authority to enter into it on behalf of the company.[459]

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alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties.'

[456] See *British Thomson-Houston Co Ltd v Federated European Bank Ltd* [1932] 2 KB 176; *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, 499.

[457] *Morris v Kanssen* [1946] AC 459, 475, 476; *Hely-Hutchinson v Brayhead Ltd*, above, 564.

[458] *Ebeed v Soplex Wholesale Supplies Ltd* [1985] 2 Lloyd's Rep 36; [1985] BCLC 404. In some cases, it is sufficient for the third party to show that the agent had usual or ostensible authority to *communicate* to the third party a decision of those within the company who had authority to enter into the particular transaction: see *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194; [1993] BCLC 1409. See also *Habton Farms v Nimmo* [2004] QB 1; [2003] EWCA Civ 68.

[459] *Freeman & Lockyer*, above, 506; *British Thomson-Houston Co Ltd v Federated European Bank Ltd* [1932] 2 KB 176; *Cleveland Manufacturing Co Ltd v Muslim Commercial Bank Ltd* [1981] Com LR 247; *British Bank of the Middle East v Sun Life Assurance Co of Canada (UK) Ltd* [1983] 2 Lloyd's Rep 9; *Armagas Ltd v Mundogas SA* [1986] AC 717. The third party must have relied on such a representation. The fact that the company's articles provide that relevant authority *could* be conferred upon the agent is not in itself sufficient to establish ostensible authority: *Houghton & Co v Nothard, Lowe and Wills* [1927] 1 KB 246, 266; and [1928] AC 1, 14; *Rama Corporations Ltd v Proved Tin and General Investments Ltd* [1952] 2 KB 147; *Freeman & Lockyer*, above, 496.

9.94 If the question arises between the principal and the agent—either of them claiming against the other—actual authority must be proved. There is no question of ostensible authority as between those two parties, the principal and the agent. If the third party is claiming against the principal on a contract made by the agent professedly on behalf of the principal, he can succeed by proving actual or ostensible authority, but usually it is easier for him to prove ostensible authority and that is what he chooses to do.[460]

Companies Act 2006, section 40

9.95 In relation to companies and their directors, these general principles have, of course, been affected by legislation. In particular, section 40 of the Companies Act 2006[461] protects third parties dealing with a company by relieving them of the need to check limitations on the powers of directors contained in the company's constitution.[462] It provides:

> (1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorize others to do so, is deemed to be free of any limitation under the company's constitution.
> (2) For this purpose—
> (a) a person 'deals with' a company if he is a party to any transaction or other act to which the company is a party,
> (b) a person dealing with a company—
> (i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorize others to do so,
> (ii) is presumed to have acted in good faith unless the contrary is proved, and
> (iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution.
> (3) The references above to limitations on the directors' powers under the company's constitution include limitations deriving—
> (a) from a resolution of the company or of any class of shareholders, or
> (b) from any agreement between the members of the company or of any class of shareholders.

Thus, where meetings of directors had not been validly convened, the resolutions passed at them (to grant a debenture and option agreement and authorise any one director to execute them on the company's behalf) could not bind the company. However, provided a company director had the company's actual or ostensible authority to sign agreements on its behalf, the resulting instruments were binding on the company. For section 40 to apply so as to validate some transaction or other act to which a company was a party, notwithstanding that the act in question was beyond the powers of the directors under the company's constitution, it was necessary that the person dealing with the company had to deal 'in good faith', which has been said to be 'the touchstone'; and good faith was presumed unless the contrary was shown.[463]

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[460] *ibid.*, 593.

[461] Replacing s 35A of the Companies Act 1985.

[462] Section 41 of the 2006 Act makes provision for transactions between a company and one of its directors or a person connected with such a director. The effect of this provision is to render the transaction voidable at the instance of the company.

[463] *Ford v Polymer Vision Ltd* [2009] EWHC 945 (Ch); [2009] 2 BCLC 160 (rather oddly, applying s 40 despite the fact that it did not come into force until 1 October 2009) and *Criterion Properties Plc v Stratford UK Properties LLC* [2004] UKHL 28; [2004] 1 WLR 1846.

A detailed discussion of this provision (and associated provisions) may be found in the standard reference works on company law.[464] However, some brief observations on section 40 may be apposite in this particular context. **9.96**

- Section 40 does not validate acts of directors which are outside the capacity of the company. It is concerned with the validation of acts outside the authority of the directors, but within the capacity of the company itself.[465]
- Section 40 does not confer power to act on directors: it merely removes limitations which might otherwise restrict their power to bind (or authorize others to bind) the company. Whether directors possess such a power must still be determined under the above-mentioned agency principles, that is, whether the director had actual, implied, or ostensible authority, although this is not likely to be a difficult matter for a third party to establish.[466]
- Section 40 applies only to the power of directors (or those authorized by them) to bind the company. It does not apply to dealings entered into by other agents acting or purporting to act on behalf of the company. It may not even apply to the case where one director alone acts without authority. In such cases, where section 40 does not apply, a third party must still rely on the general principles of agency outlined above.[467]
- Section 40 protects third parties who acted in good faith. It does not remove other legal consequences of an excessive or unauthorized exercise of power by directors. Action may still be taken against those directors by the company itself or by its shareholders (acting individually or derivatively).[468] Third, the requirement that the third party has dealt with the company 'in good faith' is broadened in favour of the third party by declaring that he is not obliged to inquire into the extent of the directors' powers (thus eliminating constructive notice in this respect), and indeed by providing that actual knowledge on the part of the third party that the dealing is beyond the powers of the directors is not to be regarded on its own as a sign of bad faith, and also by reversing the burden of proof by requiring the company to prove bad faith on the third party's part. The intention and effect of these provisions are unclear so that it may remain the case, for example, that a third party who can clearly see that the dealing involves a conflict of interest and is manifestly disadvantageous to the company could not rely on them.[469]
- The significance (if any) of the change of wording in section 40 ('the directors'), compared with the wording ('the board of directors') in its predecessor in section 35A of the Companies Act 1985, is not at all clear. It may simply be intended to deal with a point made by Walker LJ in *Smith v Henniker-Major & Co*,[470] namely that a third party dealing with an inquorate board

[464] See, eg, *Palmer's Company Law*, Part 3C, paras 3.306–3.350. The provisions of s 40 apply in restricted form to charitable companies: see s 42.

[465] *Haugesund Kommune, Narvik Kommune v Depfa ACS Bank* [2010] EWCA Civ 579, [141], [2011] 1 All ER 190, *per* Etherton LJ.

[466] General management powers will almost certainly be conferred on the directors by the company's articles. See, eg, the Companies (Model Articles) Regulations 2008: SI 2008/3229.

[467] See paras 9.91–9.94 above. Section 40 also seems to require any limitation on the directors' power to be contained in the company's constitution.

[468] Companies Act 2006, s 40(4): proceedings are not possible, however, in respect of an act of the directors in fulfillment of a legal obligation of the company to the third party that has already arisen; and s 40(5), which reflects the directors' duties under s 171 to act in accordance with the company's constitution and only exercise powers for the purpose for which they were conferred.

[469] Thus, some of the irregularities which, in older authorities, put a third party on notice and deprived him of the benefit of the rule in *Turquand's Case* may still be sufficiently serious to constitute clear bad faith: see, eg, *EBM Co v Dominion Bank* [1904] AC 806; *AL Underwood v Bank of Liverpool* [1924] 1 KB 775; *Thompson v J Barke (Caterers) Ltd* 1975 SLT 67; *Rowlandson v National Westminster Bank Ltd* [1978] 1 WLR 798; *Hopkins v TL Dallas Group Ltd* [2004] EWHC (Ch) 1379, [89]; *Criterion Properties Plc v Stratford UK Properties* [2004] UKHL 28, [31].

[470] [2002] EWCA Civ 762; [2002] BCC 768.

could still rely on the statute.[471] It is equally unclear whether an individual director (as opposed to several directors) may now be able to commit the company to various obligations, provided the third party with whom he deals acts in good faith.[472]

9.97 In any event, subject to statutory provisions, the general principle remains the same, namely that a complete absence of authority results in a void act whereas an abuse of existing authority results in a voidable act (which, depending on the context, may or may not be ratifiable). This principle is discussed further in relation to the so-called 'rule in *Hastings-Bass*' in Chapter 10 below.[473]

L. Confirmation and ratification

9.98 An appointment under a common law power, or a power operating under the Statute of Uses, by which the legal estate passed, was voidable only. But an appointment in fraud of an equitable power (that is, not operating so as to pass the legal estate) was void. In the case of the former, the persons entitled in default of appointment could ratify or confirm the legal estate created by the appointment, because the legal estate had already passed at law.[474] However, ratification or confirmation of a fraudulent equitable appointment was not possible: 'when no estate has passed, "ratification" in the legal sense has no application: the legal estate has to be conveyed by the persons in whom it is vested, and the persons entitled in default of appointment establish the appointee's interest, not by ratifying or confirming his legal title, for he has none, but by conveying or directing the conveyance of the legal title vested in them or in trustees for them to him'.[475] The original appointment remains totally void. Thus, ratification or confirmation is not possible. What happens in the case of a fraudulent execution of an equitable power is that any purported 'confirmation' is construed as an assignment of their interest by the persons entitled in default of appointment, coupled with a release of his power by the appointor.[476] This would clearly pose problems where the appointor had no authority to effect a release.

9.99 Since 1925, most powers relating to property—and certainly all powers of appointment over, and powers to convey or charge, land or any interest therein—operate in equity only.[477] Thus, ratification or confirmation of an execution of a power is generally not possible. Nevertheless, in the case of those powers which remain legal, such as a power of attorney or the powers vested in a chargee by way of legal mortgage,[478] a fraudulent execution remains voidable. And a purchaser for value of a legal estate in the subject-matter of the power, without notice of the fraud, would not be affected by the fraudulent execution of a legal power.[479]

9.100 As we have seen,[480] in relation to companies, the question of ratification hinges on whether the act or decision in question was beyond the capacity of the company, in which case ratification by

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[471] At first instance, Rimer J had held that a quorate board was a necessary precondition for the application of s 35A.

[472] *Palmer's Company Law*, Part 3C, paras 3.308–3.310. It is not obvious, however, why the plural should not include the singular. The word 'directors' is also used in s 41 and it could not there be suggested that its provisions would not apply to a single 'director'.

[473] See paras 9.100 and 10.75–10.119 below.

[474] *M'Queen v Farquhar* (1805) 11 Ves 467; *Preston v Preston* (1869) 21 LT 346.

[475] *Cloutte v Storey* [1911] 1 Ch 18, 32, *per* Farwell LJ.

[476] *ibid.*, 25, *per* Neville J.

[477] See the Law of Property Act 1925, ss 1(7), 3, 205(1)(xi).

[478] *ibid.*

[479] There is limited statutory protection for a purchaser from an object of a fraudulent appointment in s 157 of the Law of Property Act 1925: see paras 9.122–9.123 below.

[480] See paras 7.59–7.66 and 9.63 above.

shareholders in general meeting is impossible, or whether it was simply *ultra vires* the directors or other officers of the company, in which case such ratification is possible. In principle, the same applies broadly to trustees. However, trustees are not statutory creations and their position can be both more difficult and much easier than that of companies and their directors. It is easier in the sense that unauthorized and improper acts of trustees, whether in the sense of being strictly beyond the powers conferred on them by the trust instrument (that is, excessive), or in the sense of being an abuse of existing powers, are capable, in principle, of being ratified by the beneficiaries of their trusts—either retrospectively or prospectively. In other words, what might manifestly be a breach of trust can be confirmed or excused by those affected. On the other hand, such ratification can properly be provided only by those affected beneficiaries who have reached the age of majority and have been fully informed of the nature and implications of the breach in question.[481] In very many cases, such as where there are infant or unborn beneficiaries, this is clearly not possible.

M. Severance

9.101 It is impossible in most cases for the court to sever appointments which are fraudulent, for it cannot know whether the power would ever have been exercised if it had not been for the corrupt purpose or improper intention. Thus, if a father were to appoint £3,000 to a child pursuant to an agreement that he take back £1,000, the appointment will not be good as to £2,000, but will fail *in toto*. It is impossible to say that the father was actuated by love of his child or by a wish to provide for himself; or, at least, it cannot be said that so much was to be attributed to such a purpose and so much to the intention to benefit himself.[482]

9.102 Nevertheless, there are exceptions to the general rule. Appointments may be severed to the extent that they are *bona fide* executions of the power, but bad as to the remainder, where (a) some consideration has been given which cannot be restored, or (b) the court can sever the intentions of the appointor, and distinguish the good from the bad.[483]

(1) Consideration which cannot be restored

9.103 The first exception is said to arise where some consideration has been given which cannot be restored.[484] However, the operation and scope—indeed the very existence—of this exception are obscure. The basic principle is simple: a fraudulent appointment is simply void.

> However, upon principle, I do not see how any part of a fraudulent agreement can be supported, except where some consideration has been given, that cannot be restored; and it has, consequently, become impossible to rescind the transaction *in toto*, and to replace the parties in the same situation . . . In ordinary cases of fraud, the whole transaction is undone, and the parties are restored to their original situation. If a partially valuable consideration has been given, its return is secured as the condition on which equity relieves against the fraud.[485]

Thus, in the straightforward case where one of a limited class of objects has provided consideration for an appointment in his or her favour, the appointment is totally void and the consideration will

[481] See, eg, *Boardman v Phipps* [1967] 2 AC 46 and Thomas and Hudson, Ch 29 generally.

[482] Farwell, 487–8; *Daubeny v Cockburn* (1816) 1 Mer 626; *Farmer v Martin* (1828) 2 Sim 502; *Askham v Barker* (1850) 12 Beav 499; *Agassiz v Squire* (1854) 18 Beav 431; *Rowley v Rowley* (1854) Kay 242; *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517; *Re Chadwick's Trusts* [1939] 1 All ER 850.

[483] Farwell, 488.

[484] *Loc. cit.*

[485] *Daubeny v Cockburn* (1816) 1 Mer 626, 643–4.

be restored. 'To say, it is to be supported to that extent, would be to say that the [object] shall have the full benefit of the fraudulent agreement . . . Either, then, you must hold that a child, giving a consideration for an appointment in its favour, is guilty of no fraud on the power; or you must wholly set aside the appointment procured by the fraud.'[486]

9.104 Where, however, the consideration could not be restored, the transaction could not be rescinded *in toto*, for the parties could not be replaced in their former situation. This, at least, is said to be the principle. But it is difficult to find any authority which illustrates its operation. *Daubeny v Cockburn* itself reveals little. Sir William Grant referred there[487] to *Lane v Page*,[488] where, he said, the subsequent marriage of the appointee provided such consideration. However, *Lane v Page* concerned a power of jointuring, which has always been regarded as exceptional in the context of fraudulent execution, and such a power could have been exercised in favour of one object only, namely the wife. It is doubtful whether the same rule would apply to a member of a class of objects. Much may depend on the nature of the agreement and who may be defrauded. If this exception has general application, it may be that other forms of consideration which cannot be restored could be covered, such as the case where an object may have acted to his detriment in reliance upon an appointment to him.[489] However, this is speculation: there seems to be no authority to that effect.

9.105 From the viewpoint of a stranger, the basic principle was equally simple. 'The payment of a money consideration cannot make a stranger become the object of a power created in favour of children.[490] He can only claim under a valid appointment executed in favour of some, or one, of the children.'[491] A payment of money might have the effect that an appointment ceased to be voluntary, which was of considerable significance if it was not to be avoidable under various statutes as being in fraud of creditors or purchasers,[492] but it could not in itself make the appointment cease to be fraudulent.[493]

(2) Severance of appointor's intentions

9.106 As a second exception to the rule that a fraudulent exercise of a power is totally void, the court may be able to sever the intentions of the appointor and distinguish a good intention from a bad one, as in the case where the fraud affects only one of two or more objects. In *Ranking v Barnes*,[494] the donee of a power to appoint in favour of children appointed two-sixths of the fund to a married daughter, one purpose being to enable her husband to use one-half of the appointed funds to pay a debt. The appointment was held invalid, but only as to one-half.[495] Similarly, in *Rowley v Rowley*[496] a husband had a power of appointment over a sum of £30,000 in favour of his younger children. Pursuant to an agreement with his wife, he fraudulently appointed a sum of £5,000 to one child. By a similar deed, dated the next day and reciting the earlier appointment, he appointed

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[486] *ibid.*, 644, *per* Sir William Grant V-C.
[487] *ibid.*, 643.
[488] (1754) Amb 233.
[489] *cf. Dillwyn v Llewelyn* (1862) 4 De GF & J 517.
[490] Or any other class of objects. Perhaps this may be read, however, as indicating that the principle did not necessarily apply where there was a sole object.
[491] *Daubeny v Cockburn* (1816) 1 Mer 626, 638.
[492] See para 9.121 below (especially n 546).
[493] *Daubeny v Cockburn*, above, para 638; *George v Milbanke* (1803) 9 Ves 190 (where the power was general) and comments thereon in *Halifax Joint Stock Banking Co v Gledhill* [1891] 1 Ch 31, 37–8.
[494] (1864) 10 Jur NS 463.
[495] See also *Harrison v Randall* (1851) 9 Hare 397.
[496] (1854) Kay 242.

the rest of the fund to his other child. Wood V-C held that the latter appointment was not so connected with the earlier, fraudulent appointment as to be invalid; nor, indeed, was the motive for the latter appointment the same as in the former case. The general rule against severance applies, it seems, only where the evidence does not enable the court to distinguish what is attributable to an unauthorized intention or purpose from that which is attributable to an authorized one. If the evidence enables the court to make that distinction (which is not often likely to be the case) the general rule will not apply and severance may be possible.[497]

9.107 Where there is an appointment to an object of the power, with a condition annexed, severance may well be easier and the appointee left to enjoy the property free from that condition. However, apart from this, there does not seem to be any reason to justify a distinction, in the context of fraudulent execution of a power, between cases involving annexed conditions (be they authorized or unauthorized by the terms of the power) and those which do not.[498] Most instances of severed conditions involve excessive, not fraudulent, execution of a power, and the general principle there is simply

> that an ulterior purpose of this kind, which is *ultra vires* only and not also a fraud on the power, though it may have operated as a motive for the appointment in the mind of the appointor, will, nevertheless not prevent an object of the power from taking for his own benefit the estate appointed to him, if the words used, according to their proper construction . . . are sufficient to execute the power and vest the property in the appointee.[499]

9.108 In relation to fraudulent execution of a power, there is no reason why an annexed condition could not have a sinister or bye purpose. Nor is there any reason why such a condition should be regarded differently from any other kind of fraud. The true principle, it is suggested, is that 'a condition, whether authorized or unauthorized in nature, and whether severable or inseverable, may be an integral part of a fraud on the power rendering the whole appointment bad; in other words, invalidity for fraud and invalidity for excess are not mutually exclusive terms'.[500] If the appointor's intention or purpose cannot be severed into the good and the bad, the execution fails entirely, notwithstanding that a condition annexed to the appointment could otherwise be easily severed.

N. Cases where the doctrine of fraud does not apply

(1) Release of a power

9.109 The doctrine of fraud on a power does not apply to the release of a power.[501] The donee of an ordinary (non-fiduciary) power can release that power by deed or contract not to exercise it,[502] even if he himself thereby acquires some benefit which he could not have obtained by an exercise of the power.[503] Thus, in *Re Somes*,[504] where a life tenant under a settlement had an exclusive power

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[497] *Per* Turner LJ in *Topham v Duke of Portland* (1863) 1 De GJ & Sm 517, 572.

[498] Farwell, 489, seems to claim that such a distinction has been made in the cases: but the authorities referred to do not support that view, and Farwell's own general conclusion seems to go against it.

[499] *Per* Lord Selborne, in *Macdonald v Macdonald* (1875) LR 2 Sc & Div App Cas 482, 492. Appointments which are excessive by reason of annexed unauthorized conditions are dealt with at paras 8.09–8.14 above.

[500] Farwell, 489. See also *Vatcher v Paull* [1915] AC 372, 378.

[501] The release of powers is dealt with more fully in Ch 17 below. See also (1968) 84 LQR 64 (AJ Hawkins).

[502] Section 155 of the Law of Property Act 1925. Note that the section has a purely negative effect on contracts: it does not authorize a donee to contract to exercise a power in a particular way. See paras 17.08–17.09 and 17.26–17.32 below.

[503] *Re Radcliffe* [1892] 1 Ch 227 (not following *Cunynghame v Thurlow* (1832) 1 Russ & My 436n).

[504] [1896] 1 Ch 250. See also *Smith v Houblon* (1859) 26 Beav 482; *Re Radcliffe* [1892] 1 Ch 227.

of appointment for the benefit of his daughter or her issue, the fund passing in default of appointment to the daughter absolutely, and the life tenant, being in want of money, released his power so that he and his daughter could subsequently mortgage their interests in the fund, the sum borrowed being applied for his own purposes, the release could not be impeached. As Chitty J stated:[505]

> . . . . there is a fallacy in applying to a release of a power of this kind the doctrines applicable to the fraudulent exercise of such a power. There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power; the donee of the power may, or he may not, be acting in his own interest, but he is at liberty, in my opinion, to say that he will never make any appointment under the power, and to execute a release of it.

The donee of such a power is under a duty to ensure that the (paramount) interests of those entitled in default of appointment are not divested otherwise than for the purposes and in the way limited by the donor of the power,[506] but he is not obliged to exercise that power at all, or even to consider its exercise.[507] Therefore, not only does the release of such a power not involve a breach of any duty but it also confirms or renders indefeasible those interests in default. Even so, it is difficult to believe that, in an extreme case, such as where the donee has been induced to release the power by means of a bribe from someone entitled in default of appointment,[508] such release cannot in principle be said to be fraudulent. It is one thing to say that a release merely leaves undisturbed the trusts intended by the donor of the power to take effect in the event of the non-exercise of the power, but it is another to conclude that an authority to release that power may, in effect, be exercised dishonestly.

9.110 Whether the same conclusion applies in respect of a power coupled with a duty (a fiduciary power) is unclear. The donee of such a power cannot release it in the absence of express authorization to do so.[509] If the power cannot be released in any event, then clearly no question of fraudulent release can arise. If release of the power is expressly authorized, the immediate effect of any such release is the same as in the case of a release of a non-fiduciary power: the interests of those entitled in default of appointment (and whose interests are still paramount) are simply confirmed and rendered indefeasible. A release, assuming it to be authorized, merely confirms an existing state of affairs and removes the possibility of change: the releasor 'leaves things as the donor of the power left them'.[510] However, other considerations arise on the release of a fiduciary power (and, in *Re Somes*, Chitty J carefully confined himself to non-fiduciary powers).[511] The fiduciary donee may be in breach of some acknowledged duty, for example, in deciding to release his power, he may not have taken into account all crucially relevant considerations or may have been swayed unduly by irrelevant ones, in which case his action may be voidable.[512] The release of a power by a fiduciary donee may also

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[505] *ibid.*, 255.

[506] *Re Greaves* [1954] Ch 434, 446, *per* Evershed MR (a case on revocation, not release: see below).

[507] See para 10.53 below.

[508] The person entitled in default may want a release sooner rather than later or not at all.

[509] *Re Eyre* (1883) 49 LT 259; *Re Mills* [1930] 1 Ch 654. See also Ch 17 below.

[510] *Re Greaves* [1954] Ch 434, 446, *per* Evershed MR.

[511] [1896] 1 Ch 250, 255.

[512] *Pitt v Holt, Futter v Futter* [2011] EWCA Civ 197, where the Court of Appeal held that the so-called 'rule in *Hastings-Bass*' (after *Re Hastings-Bass* [1975] Ch 25) is not a correct statement of the law. See further paras 10.75–10.132 below. *cf. Karger v Paul* [1984] VR 161.

be in breach of the rule against conflict of interests:[513] for example, the transaction under scrutiny in *Re Somes* might well have been impeachable if the releasor (and ultimate beneficiary) had been a trustee (or someone in a similar fiduciary position). In such cases, and certainly in the more extreme instances, such as where the release of a fiduciary power is induced by a bribe, there may be no need to invoke the doctrine of fraud on a power, for the act is clearly impeachable as a breach of fiduciary duty. Indeed, in the absence of a breach of some fiduciary obligation or rule of this kind, or unless the release is an intrinsic and inseparable part of a larger transaction which is itself impeachable under the doctrine of fraud,[514] it is difficult to see how the mere release of a fiduciary power, as a separate and individual act, could be fraudulent.

9.111 However, the contrary may be arguable in certain circumstances. As we shall see,[515] the objects of a fiduciary power have rights to be considered which objects of a non-fiduciary power do not. It might therefore be argued that, where a power is released only partially[516] or temporarily[517] for the benefit of some objects rather than others, in the furtherance of some corrupt purpose or pursuant to some bargain between the fiduciary appointor and the objects thus benefited, such release is fraudulent and void, for the 'excluded' objects have lost a valuable right to be considered as recipients of future bounty.[518] On the other hand, it might equally be argued that, although a subsequent distribution of income or capital to (or some act which confers a material benefit on) those who remain objects may itself constitute a fraud on a power, the earlier release does not: it may be a breach of some fiduciary duty towards the 'excluded' objects, but it is not subject to the doctrine of fraud on a power. It is suggested that the latter is the true analysis but this is not settled.

(2) Revocation of appointment

9.112 The doctrine of fraud on a power is also said not to apply to the revocation of an appointment.[519] Thus, in *Re Greaves*,[520] the revocation of an appointment by a life tenant in order to facilitate the implementation of a scheme of distribution of the capital of the trust fund subject to the power, and under which scheme she herself benefited, was not within the doctrine of a fraud on the power. The underlying reason is the same as that applicable to the release of powers. As Evershed MR stated:[521]

> *prima facie* at least, the appointor, having made a revocable power of appointment,[522] owes no duty to anyone if he revokes the appointment; if he revokes and does not re-appoint, no one can complain of what he has done, for no one can assert the misuse of a power, namely, the power of appointment. *Prima facie*, according to the ordinary use of language, if an appointment has been made subject to a power of revocation, then the appointor has reserved to himself a *locus poenitentiae*, a right to recall the selection or discrimination he has made, to wipe the slate, as it were, clean again, to go back whence he started and to decide afresh, not only what selection or discrimination he will make, but whether he will select or discriminate at all. If he repents of his original selection or discrimination, revokes the appointment he has made and then, without more, releases his power of appointment,

[513] See Ch 12 below.

[514] See the observations made in relation to a power of revocation in *Re Greaves* [1954] Ch 434, 450 (referred to below).

[515] See paras 10.05–10.53 below.

[516] *Re Brown's Settlement* [1939] Ch 944.

[517] See paras 17.22–17.25 below.

[518] *cf. Martin v Triggs Turner Bartons (a firm)* [2009] EWHC 1920 (Ch); [2009] WTLR 1339.

[519] The revocation of powers is dealt with more fully in Ch 15 below.

[520] [1954] Ch 434 (overruling *Re Jones' Settlement* [1915] 1 Ch 373).

[521] [1954] Ch 434, 447.

[522] It seems clear that this should read as either 'having made a revocable exercise of a power of appointment' or 'having made a revocable appointment'.

> he will have, on second thoughts, renounced the power vested in him. The persons entitled to take will be the persons designated by the creator of the trust in the precise event which has happened, that is, the event that the donee of the power to direct a different destination of the trust property will not have effectively availed himself of the opportunity granted to him. As already stated, he is under no positive duty to exercise the power at all. The only relevant duty which he owes is to the persons designated by the donor of the power to take in default of appointment, the duty not to exercise the power of divesting them save strictly to the extent and in the manner prescribed by the donor. No one can, therefore, complain of a fraud on the power if the power has been, in the end, repudiated.

9.113 The exclusion of the doctrine may not be absolute, however. The Court of Appeal could 'conceive of a case in which there is conferred a power to revoke previously declared trusts which is so closely related to a power of re-appointment that, as a matter of construction, the former power should be held to be only exercisable for the purposes of, and as an essential step towards, a re-appointment'. In such a case, 'if for any reason the re-appointment were ineffective, the revocation might fall with it so as to leave the original trusts persisting'.[523] How far this is a genuine exception to the general rule seems debatable. It clearly envisages the exceptional case where a power of revocation can only be validly exercised in the process of a valid re-appointment: if the latter fails, so too does the revocation itself. This does not affect the typical case where the two powers are independent, where the failure of the reappointment would not generally affect the validity of the revocation.

9.114 Different considerations arise, however, where the power of revocation is conferred on a trustee (or someone in an analogous fiduciary position). The power of revocation in *Re Greaves* was not a fiduciary power; and it is clear that, in reaching its conclusion, the Court of Appeal attached considerable significance to the fact that the donee of such a power owed no duty at all to its class of objects (as opposed to those entitled in default).[524] However, as we shall see,[525] where such a power is conferred on a trustee (or similar fiduciary), the position is different: the donee is obliged to consider the exercise of the power from time to time; and the objects have a right to be considered for receipt of bounty. Moreover, in exercising a power to revoke, a trustee must exercise a conscious discretion, must take into account crucially relevant considerations and exclude all irrelevant ones. The exercise of a fiduciary power of revocation may therefore be impeachable on the grounds that some such fiduciary obligation has been breached. It is possible, therefore, that the doctrine of fraud on a power may apply to the exercise of a fiduciary power of revocation, for example, where the revocation is induced by a bribe,[526] as in the case of a release; but it is also possible that there is no need for it to do so, because the exercise of that power can be more easily challenged as a breach of some fiduciary obligation.

(3) General and hybrid powers

9.115 As we have seen,[527] the doctrine of fraud on a power applies to special or limited powers: it does not apply to a general power:[528] it is of the nature of such a power that the donee could exercise the power in his own favour and then pass on the subject-matter of the power to anyone he pleases. Similarly, where the donee of a hybrid power[529] is himself an object of that power (or, indeed, of

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[523] [1954] Ch 434, 450.
[524] *ibid.*, 446.
[525] See paras 10.05–10.53 below.
[526] *cf. Att-Gen of Hong Kong v Reid* [1994] 1 AC 324; *Re Att-Gen's Reference (No 1 of 1985)* [1986] QB 491; *Lister v Stubbs* (1890) 45 Ch D 1.
[527] See paras 9.01–9.07 above.
[528] See para 1.16 above.
[529] See para 1.18 above.

any power which he may exercise in his own favour) the doctrine cannot apply.[530] However, subject to this, there is no reason why the exercise of a hybrid power for a corrupt purpose or pursuant to a bargain should not be subject to the doctrine. Thus, any exercise of such a power which is intended to benefit indirectly someone who is excluded from the class of objects (whether it is the donee himself or anyone else) is fraudulent and void.

(4) Power to jointure

9.116 A power to jointure—that is, a power for a husband to make provision for his widow—has always been regarded as 'a somewhat peculiar power'.[531] 'A power of jointuring,' it has been explained, 'is given for the purpose of enabling the husband to contract matrimony upon advantageous terms, and with a person of suitable fortune. It, in itself, contemplates a purchase. There was therefore, no objection to an arrangement between a husband and wife, mutually stipulating with respect to their properties in the same way as they might have done before marriage.'[532] To hold otherwise would have been to invalidate bargains so frequently made by which the husband and wife contracted on a settlement that the wife should get a jointure in consideration of the husband obtaining an interest in her property.[533]

9.117 The doctrine of fraud on a power applied to a power of jointuring in a modified form. Here, the rule was that if the husband exercised the power, which was conferred for the benefit of the wife, in such a manner that he (or someone else at his direction) derived a benefit from, or enjoyed an interest in, *the jointure itself*, then such execution was fraudulent; it might not be a grant of a jointure at all.[534] Moreover, the doctrine was also modified—or at least applied more leniently—in that there was a willingness to sever the execution notwithstanding that the power was exercised partly, or even mainly, for a fraudulent purpose. Thus, if there was a bargain between husband and wife 'dealing with the actual jointure itself, a bargain under which the wife only got part of the sum secured by the jointure and the residue of it was paid to some nominee or creditor of the husband', there was a fraudulent exercise of the power; but the jointure would be held good as far as the wife's portion was concerned.[535] Although this readiness to sever was criticized,[536] on the ground that a fraudulent purpose infected the entire appointment, it always prevailed, it seems.

9.118 However, where there was a bargain between the husband and wife that the wife, in consideration for the grant of a jointure to her by her husband, would dispose of her own property (or of an interest therein) to or for the benefit of a nominee or creditor of her husband, the execution of the power of jointuring in pursuance of that bargain was not a fraud on the power. It was also immaterial whether the execution of the power occurred after the marriage and not in pursuance of an ante-nuptial agreement.[537] Unlike all other powers, it was no objection to the validity of the jointure that the husband received consideration for exercising the power. This exceptional treatment was based entirely on the 'peculiar' nature of a power of jointuring, as explained above. There seems to be nothing to warrant the extension of this anomalous treatment to other powers, such

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[530] *Re Triffitt's Settlement* [1958] Ch 852, 863–4, *per* Upjohn J.

[531] *Saunders v Shafto* [1905] 1 Ch 126, 137, 138.

[532] *Baldwin v Roche* (1842) 5 Ir Eq R 110, 115, Brady CB. See also *Lord Tyrconnell v Duke of Ancaster* (1754) Amb 237.

[533] *Saunders v Shafto*, above, 137.

[534] *Baldwin v Roche*, above, 114, *per* Brady CB.

[535] *Saunders v Shafto*, above, 132–3; *Lane v Page* (1754) Amb 233.

[536] *Daubeny v Cockburn* (1816) 1 Mer 626; see also *Saunders v Shafto*, above, 134–5.

[537] *Lane v Page*, above; *Lord Tyrconnell v Duke of Ancestor*, above; *Saunders v Shafto*, above, overruling *Whelan v Palmer* (1888) 39 Ch D 648.

as a common-form power to appoint a life or lesser interest to a surviving spouse, for that is not a power to jointure at all.[538] This aspect of the law is, therefore, of historical interest only.

O. Liability of trustees[539] and other donees

9.119 A trustee who commits a fraud on a power is liable *qua* trustee and also personally liable.[540] Trustees ought also to be astute in suspecting fraud. If they part with the fund improperly, they will have to replace it. 'A trustee who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the act.'[541] Thus, in *Mackechnie v Marjoribanks*,[542] for example, the donee of a special power appointed the entire trust fund to her daughter, who was an object of the power. The daughter requested the trustee, by letter of even date with the appointment, to pay the fund into her mother's bank account. The trustee did so. The mother died insolvent, having used part of the monies for her own purposes. The trustee was held liable to replace the fund at the suit of those entitled in default of appointment, James V-C finding that the letter and the appointment were part of the same transaction. The measure of damage is not necessarily the amount of benefit received, but the entire loss to the trust fund. Thus, in *Re Deane*,[543] for example, where an appointor who appointed an insurance policy (on his own life) to his daughter, pursuant to an agreement that she would surrender the policy and pay the proceeds to the appointor himself, the court held that the appointor (then deceased) had committed a fraud on his power and his estate was liable for the entire loss to the trust fund.

9.120 If the trustees have been misled and innocently transferred the property in accordance with what appeared to be a proper and valid appointment, they cannot be made liable.[544] Indeed, trustees may be made to pay the costs if they raise untenable objections to acting upon appointments.[545]

P. Position of third parties

9.121 As a general rule, the payment of money cannot make an appointment cease to be fraudulent.[546] In ordinary cases, the whole transaction is undone and the parties are restored to their original situation. If valuable consideration has been given, its return is secured as the condition on which equity relieves against the fraud.[547] This principle applies, it seems, to anyone (object or non-object) who has given consideration for a fraudulent appointment. The recipient of property under a fraudulent execution of a power gets no title if the power is equitable only (as is likely to

[538] See *Re Nicholson's Settlement* [1939] Ch 11, and paras 9.29–9.32 above.

[539] See generally Thomas and Hudson, Ch 32.

[540] *Wong v Burt* [2005] 1 NZLR 91, [59] (NZ CA).

[541] *Harrison v Randall* (1851) 9 Hare 397.

[542] (1870) 18 WR 993; 39 LJ Ch 604.

[543] (1888) 42 Ch D 9. The surrender value of the policy was £897, but the sum payable on death, if it had been kept up, was over £5,000.

[544] *ibid.*, 18.

[545] Farwell, 470; *Campbell v Home* (1842) 1 Y & C Ch C 664; *Patterson v Wooler* (1876) 2 Ch D 576.

[546] Although it may make an appointment cease to be voluntary. This was important in the context of avoidance of conveyances (or other assurances) under the provisions of the Statutes of 13 Eliz. c. 5 (Frauds on creditors) (replaced by s 172 of the Law of Property Act 1925, itself replaced by s 423 of the Insolvency Act 1986) and 27 Eliz. c. 4 (Frauds on purchasers) (replaced by s 173(1) of the Law of Property Act 1925). See *May on The Law of Fraudulent and Voluntary Conveyances* (3rd edn, 1908), 252–3.

[547] *Daubeny v Cockburn* (1816) 1 Mer 626, 638, 643, 644.

be the case) even if he has no notice of the fraud; he will not have the security of the legal estate and will be a subsequent equitable claimant only.[548] The recipient thus holds that property on constructive trust for those lawfully entitled to it.[549]

9.122 However, section 157 of the Law of Property Act 1925 provides limited protection for purchasers of interests from objects of fraudulent appointments and for their successors in title.[550] The section, which applies to dealings effected after 1925,[551] provides:

> (1) An instrument purporting to exercise a power of appointment over property, which, in default of and subject to an appointment, is held in trust for a class or number of persons of whom the appointee is one, shall not (save as hereinafter provided) be void on the ground of fraud on the power as against a purchaser in good faith:
>
> Provided that, if the interest appointed exceeds, in amount or value, the interest in such property to which immediately before the execution of the instrument the appointee was presumptively entitled under the trust in default of appointment, having regard to any advances made in his favour and to any hotchpot provision, the protection afforded by this section to a purchaser shall not extend to such excess.
>
> (2) In this section 'a purchaser in good faith' means a person dealing with an appointee of the age of not less than twenty-five years for valuable consideration in money or money's worth, and without notice of the fraud, or of any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.

9.123 The protection thus afforded is clearly limited. There is no protection at all under this provision where there is only one person entitled in default of appointment. A purchaser may be fixed with constructive notice, even if he has no express notice of the fraud.[552] Marriage will not be sufficient consideration. And even if he succeeds in satisfying all conditions, he is protected only to the extent of the amount to which, at the date of the appointment, the appointee was presumptively entitled in default of appointment. Thus, if A has power to appoint £100,000 among his four children and any grandchildren and in default of appointment his children take equally, and he fraudulently appoints the entire sum to one child, a purchaser from that child is protected only to the extent of £25,000. If A fraudulently appointed to a grandchild, a purchaser from him would get no protection at all.

[548] *Cloutte v Storey* [1911] 1 Ch 18.
[549] Scott, 3135, §470.
[550] Section 157(3).
[551] Though whenever the appointment itself was made: s 157(4).
[552] For conflicting views on constructive knowledge in other areas, and especially in relation to third party liability for 'unconscionable receipt', see Thomas and Hudson, Ch 30.

10

THE DUTIES OF DONEES

10.01 All donees of powers and discretions owe some obligation to the objects of their powers. This is particularly the case in relation to fiduciary powers, which are, of course, subject to a wide range of duties. However, even non-fiduciary powers are subject to duties of some, albeit usually lesser, kind. Thus, a duty not to exceed the limits of the power (an excessive exercise), or a duty not to exercise the power for an improper purpose (a fraud on the power), or a duty not to delegate the power without authority, are common to all powers. However, other duties are attached only to fiduciary powers, and they do not arise at all in relation to a non-fiduciary power, for example, a general duty to act in the 'best interests' of the objects of the power, or a specific duty to consider the exercise of the power. Even in this context, not all fiduciaries are subject to the same duties. In relation to trustees, many such duties have evolved and apply in connection with the exercise of special and intermediate (or hybrid) powers[1] of appointment; and, although they may apply by analogy to other powers and to other fiduciaries, the same principles seldom apply directly to (say) company directors. It is often said that there is a duty to act 'honestly' or 'properly' in the exercise of a power.[2] However, such a general formulation, true though it is, is not particularly helpful, for it fails to distinguish the several elements and disparate strands of which such a duty is comprised, not all of which apply to all powers or to all donees. Moreover, what constitutes 'honesty' or 'propriety' may differ in each particular case.

10.02 In addition, powers, all of which necessarily confer discretion of some sort, may be expressly enlarged so as to be exercisable 'in the absolute and uncontrolled discretion' of the donees. In such cases, a tension may sometimes arise between the duties to which the donees are undoubtedly subject and the considerable (indeed, the seemingly unlimited) width of the discretion conferred upon them. Difficult questions may then arise as to the extent (if any) to which a particular exercise of the power may be open to review by, and interference from, the court. This associated question of the 'reviewability' of any such exercise and the potentially problematic interaction of overriding duties and absolute discretions are dealt with in Chapter 11 below. In this present chapter, we shall first consider some of the general duties imposed on donees in the exercise of their powers and discretions. In the nature of things, this survey focuses primarily on the duties owed by fiduciary donees and, in particular, on those imposed on trustees, although other fiduciaries (for example, company directors) and the donees of non-fiduciary powers will also be considered where appropriate.[3]

A. General duties of donees of powers

10.03 In broad terms, it may be useful, for the purposes of exposition at least, to distinguish between (i) those duties which ensure that the donee himself exercises the power or discretion conferred upon him and which arise (if at all) from the 'personal' nature of the discretion; and (ii) those duties which ensure that, when the donee actually exercises the power or discretion in question, he does so in furtherance of the purposes (and only those purposes) for which, or for the benefit of (and only for the benefit of) the objects in favour of whom, the power or discretion was conferred.

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[1] The donee of a general power can appoint the subject-matter of the power to himself and is accordingly regarded, in effect, as the owner thereof. He is therefore not under any duty to any object. Nor can he commit a fraud on the power. In *Re Beatty* [1990] 1 WLR 1503 (especially at 1506), Hoffmann J held that what appeared, at first sight, to be a general power conferred on trustees was, in fact, an intermediate or hybrid power: see paras 1.19 and 1.58 above and paras 10.30 and 12.16–12.18 below.

[2] See also para 11.03 below.

[3] The nature of the rights enjoyed by objects of powers and beneficiaries of discretionary trusts is itself an issue closely connected to the nature and extent of the duties of donees. This particular issue is dealt with in paras 3.80–3.91 above.

Thus, category (i) would include, for example, the duty not to act under the dictation of another person, and the duties not to fetter or delegate the discretion. Category (ii) would include, for instance, the duty not to benefit non-objects, and the duty not to act capriciously or unreasonably. It must be emphasised, however, that such a broad classification is not exhaustive: for example, the duty (if any) to consider whether or not the power or discretion should be exercised at all does not fit comfortably into either category. Moreover, there may be a considerable overlap between particular obligations and, in practice, it is often difficult, if not impossible, to segregate one duty from another. In some cases, the circumstances may be such that it is clear that a particular exercise of a power or discretion is open to challenge under several heads, and it may not be necessary to distinguish one from another. Nevertheless, it remains the case that different obligations may attach to different kinds of powers and in different contexts. Consequently, the nature and scope of the duties owed by a particular donee, the rights of the objects, and the effectiveness and consequences of a particular exercise of a power, depend not only on the status of the donee but also on the nature and form of the power or discretion conferred upon him and on the context in which the power is intended to operate. The donee of a power which is not fiduciary in nature, like the donee of a fiduciary power, cannot exercise that power or discretion excessively or fraudulently. However, the former, unlike the latter, can ignore the power or forget its very existence. Consequently, many of the duties discussed in this chapter may, in the nature of things, be applicable only to the donees of fiduciary powers (which, in this context, means primarily trustees and those in analogous positions) and cannot apply to non-fiduciary powers. This underlying limitation ought to be borne in mind throughout, although, at appropriate points, the similarities or differences in the position of non-fiduciaries are also referred to.

10.04 Many of the relevant duties are sufficiently substantial that they are dealt with in separate chapters of their own. This is the case in relation to the delegation of powers,[4] the excessive exercise[5] and also the fraudulent exercise[6] of powers. In this chapter, other duties will be analysed (many of which will be seen to overlap), namely:

(1) The duty to consider the exercise of a power or discretion (and the duty to inquire and ascertain).[7]
(2) The duty to exercise an active discretion.[8]
(3) The duty not to act under the dictation of another.[9]
(4) The duty not to fetter the discretion.[10]
(5) The duty to take account of relevant considerations and to ignore irrelevant ones (a duty of 'real and genuine consideration').[11]
(6) The duty to treat beneficiaries and objects impartially or even-handedly.[12]
(7) The duty to act in the 'best interests' of the trust and its beneficiaries (or the company).[13]
(8) The duty not to act irrationally or capriciously.[14]
(9) An implied duty of good faith (or of mutual trust and confidence).[15]

[4] See Ch 7 above.
[5] See Ch 8 above.
[6] See Ch 9 above.
[7] See paras 10.05–10.53 below.
[8] See paras 10.54–10.56 below.
[9] See paras 10.57–10.63 below.
[10] See paras 10.64–10.74 below.
[11] See paras 10.75–10.145 below.
[12] See paras 10.146–10.157 below.
[13] See paras 10.158–10.183 below.
[14] See paras 10.184–10.194 below.
[15] See paras 10.195–10.210 below.

B. The duty to consider the exercise of a power or discretion[16]

10.05 In broad terms, both the existence and extent of the duty to *consider* the exercise of a power or discretion depend on the nature of the power and the status of the donee. The donee of a power of appointment (or indeed any other power) who is *not* in a fiduciary position—such power being referred to in this work as a non-fiduciary mere power—is not subject to any such duty: he can simply ignore or even forget the existence of the power. By contrast, powers of appointment (and other powers) conferred on trustees *qua* trustees (or on other fiduciaries *qua* fiduciaries) carry with them a duty to consider periodically whether or not the power should be exercised. Of course, all powers conferred on trustees *qua* trustees are fiduciary powers.[17] However, dispositive powers conferred on trustees generally take one of two forms: (i) those powers in respect of which the trustee has a discretion as to whether he will actually exercise them or not (referred to in this work as 'fiduciary mere powers', but sometimes also referred to as 'trust powers'); and (ii) those powers which are coupled with a duty to exercise them, where the trustee has no discretion as to whether or not to carry out the, duty—indeed, he will be liable for a breach of trust if he fails to do so—but he has a discretion as to which of the objects are to benefit, or the manner in which or the time at which the duty will be performed (referred to in this work as 'discretionary trusts', but often referred to as 'powers in the nature of a trust' or even 'trust powers').[18] In both cases, however, the trustee is under a duty to consider the exercise of the relevant power. Indeed, the nature and content of that duty is similar in both cases. However, it is not identical and it is convenient, therefore, to deal with them separately, even if this involves an element of repetition.

(1) Fiduciary mere powers

10.06 The archetypal case here is that of a trustee who has a power of appointment.[19] Here, the trustee holds the trust fund on trust for those entitled in default of appointment, subject to any distribution by the trustee in exercise of the power of appointment conferred upon him *qua* trustee (and which power he therefore holds in a fiduciary capacity). Such a power may be a special power, an intermediate power, or even a qualified general power.[20] Although the trustee is not obliged to *exercise* such a power, he is, nonetheless, under a duty to *consider* from time to time whether or not such a power ought to be exercised. As Lord Reid stated in *Re Gulbenkian's Settlements*:[21]

> It is a [mere] power given not to individuals who happen also to be trustees but to the trustees as such so that new trustees duly assumed or appointed can exercise it. In my view it must follow that the trustees are to act in their fiduciary capacity. They are given an absolute discretion. So if they decide in good faith and at appropriate times to give none of the income to any of the beneficiaries the court cannot pronounce their reasons to be bad. And similarly if they decide to give some or all of the income to a particular beneficiary the court will not review their decision. . . . But their 'absolute

[16] See generally Hardingham and Baxt, Chs 2 and 5; DM Maclean, *Trusts and Powers* (1989), 17–25; (1971) 87 LQR 31 (JW Harris); (1974) 38 Conv (NS) 269 (McKay); [1982] Conv 432 (A Grubb).

[17] See paras 1.46–1.49 above.

[18] See paras 1.46–1.60 above for the meaning of the terms used; and also paras 3.57–3.79 above for different kinds of 'trust powers'.

[19] The same principles (no doubt with appropriate modification) apply to *any* power, whether dispositive or administrative, conferred on a trustee.

[20] See *Re Park* [1932] 1 Ch 580; *Blausten v IRC* [1972] Ch 256; *Re Manisty's Settlement* [1974] Ch 17; *Re Hay's Settlement Trusts* [1982] 1 WLR 202. See also *Re Beatty* [1990] 1 WLR 1503, where the power in question authorized the trustees to distribute 'among such persons . . . as they think fit', and the trustees exercised the power in favour of themselves. Hoffmann J held that the power was a fiduciary power and not a general power 'in the sense of the traditional classification which equates such a power with an outright beneficial disposition'.

[21] [1970] AC 508, 518.

> discretion' must, I think, be subject to two conditions. It may be true that when a mere power is given to an individual he is under no duty to exercise it or even to consider whether he should exercise it. But when a power is given to trustees as such, 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 judgment to be exercised. And they cannot give money to a person who is not within the classes of persons designated by the settlor . . .

Similarly, in *Re Hay's Settlement Trusts*,[22] Megarry V-C stated:

> That brings me to the second point, namely, the extent of the fiduciary obligations of trustees who have a mere power vested in them, and how far the court exercises control over them in relation to that power. In the case of a trust, of course, the trustee is bound to execute it, and if he does not, the court will see to its execution. A mere power is very different. Normally the trustee is not bound to exercise it, and the court will not compel him to do so. That, however, does not mean that he can simply fold his hands and ignore it, for normally he must from time to time consider whether or not to exercise the power, and the court may direct him to do this.

10.07 Precisely what the 'duty to consider' consists of is not at all clear, however. In one sense, it seems to be merely a more positive formulation of other, well-established negative obligations imposed on the holder of a fiduciary power. Certainly, imposing a positive duty to consider reinforces the general principle that such a power may not be released, a principle which might otherwise be breached *de facto* by persistent inaction on the part of the donee. Similarly, a duty to consider underlines the importance of the duty not to delegate the exercise of a power to another. In this sense, it could be said that the donee is simply under a duty to remind himself periodically that he is the holder of a fiduciary power, which he (and no one else) ought to consider exercising. An alternative view is that Lord Reid's observations in *Re Gulbenkian* (cited above) were intended to refer to the well-recognised cases of failure to consider the exercise a discretion in specific instances (such as *Klug v Klug*),[23] rather than a more general and continuing positive duty to consider. If this is all that there is to the duty to consider, it is difficult to see what it adds to other existing duties and obligations, all of which already have their own well-developed rules and principles.[24]

10.08 It is reasonably clear, however, that there is more to it than this. The duty to consider implies a positive requirement to take some active steps, to take an affirmative decision from time to time whether or not the power is to be exercised.[25] Moreover, given that any consideration of the exercise of the power cannot realistically take place in the abstract, the duty to consider also seems to require the donee not just to inquire into and examine, in broad terms at least, the size and composition of the class of objects, but also to address those considerations which might make a possible exercise of the fiduciary power appropriate or inappropriate in the then existing circumstances. The duty to consider, then, can properly be referred to as a duty to inquire and ascertain.

10.09 However, a mere statement that there is a duty to consider does not, in itself, indicate how the trustee is supposed to discharge that duty. Where and how does he begin? This clearly depends on the nature, scope, and purpose of the particular power. At one end of the spectrum of possibilities, the trustee may be required only to take a decision or form an opinion in relation to a very specific matter, for example whether to give consent to the proposed action of another, or whether

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[22] [1982] 1 WLR 202, 209, 210. See also *McPhail v Doulton* [1971] AC 424, 449; *Gartside* v *IRC* [1968] AC 553, 606; *Re Gestetner* [1953] Ch 672, 687–8.

[23] [1918] 2 Ch 67, 71.

[24] Both the delegation and the release of powers are dealt with separately: see Ch 6 above and Ch 17 below respectively.

[25] See, eg, *Jeffrey v Gretton* [2011] WTLR 809 (failure to review the trust portfolio regularly).

a particular event or contingency has occurred. One common example is the case where trustees of a pension scheme are called upon to decide whether a member of the scheme is entitled to an ill-health or disablement pension, which essentially means that they must consider whether the medical and other evidence submitted to them is sufficient to satisfy the requirements of the definition of 'disablement benefit' (or the equivalent) in the pension scheme documentation.[26] At the other end of the spectrum, there are powers of appointment exercisable in favour of members of classes comprised of millions of objects. Where and how is the duty of the trustee to inquire and ascertain to be fulfilled in this case? His first duty, no doubt, is to consider the width of the class of objects, to inquire into and ascertain its composition, by category, group, and size. But he ought then to move on to consider the claim to priority of any particular category or the claim to benefit of any particular individual.

> He must first consider what persons or classes of persons are objects of the power within the definition in the settlement or will. In doing this, there is no need to compile a complete list of the objects, or even to make an accurate assessment of the number of them: what is needed is an appreciation of the width of the field . . . Only when the trustee has applied his mind to 'the size of the problem' should he then consider in individual cases whether, in relation to other possible claimants, a particular grant is appropriate. In doing this, no doubt he should not prefer the undeserving to the deserving; but he is not required to make an exact calculation whether, as between deserving claimants, A is more deserving than B . . .
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> . . . the duties of a trustee which are specific to a mere power seem to be 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. . . .[27]

Although this threefold classification segregates the duty to consider exercising a power from the duty to consider the range of objects and the duty to consider the appropriateness of individual appointments, it is often neither necessary nor fruitful to do so. Considering the exercise of a power is not an abstract exercise: it cannot properly take place in a vacuum. Proper consideration cannot usually be given to any exercise of a power unless consideration is also given (either beforehand or contemporaneously) to the range of its objects and to the appropriateness of a specific appointment. In short, these three duties are but aspects—albeit different aspects—of the same exercise, namely considering whether or not to exercise a power of appointment: they often overlap and merge into one another.

10.10 In any event, a broad description of the duty to consider, useful though it is as a starting point, does not say much about what it is that a trustee ought to 'consider' in any particular instance. If the trustee is permitted to accord priority to one group of objects as opposed to others, upon what basis does he do so? What 'considerations' is he supposed to consider? This seems to be such an open-ended question that it might seem pointless to try to find an answer to it. However, in recent years,[28] the duty of a trustee to take into account relevant considerations has come to the fore as one of the most contentious duties of all. In particular, transactions entered into by trustees and others (for example, company directors) have been challenged and set aside under the so-called

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[26] See, eg, the observations in *Tonkin v Western Mining Corporation Ltd* (1998) 10 ANZ Ins Cases 61-397, 74.270, which were quoted extensively by Finn J in *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2009] FCA 53, [24]: see para 10.118 below.

[27] *Re Hay*, above, 210, *per* Megarry V-C.

[28] Up until the recent decisions of the Court of Appeal in the joint appeals in *Pitt v Holt, Futter v Futter* [2011] EWCA Civ 197. The full impact of this decision remains to be worked out: see paras 10.75–10.132 below.

'rule in *Hastings-Bass*',[29] precisely because the trustees were said not to have taken into account some highly relevant consideration (or taken into account an irrelevant one). The underlying assumption in all these cases was that, if the transaction were not set aside, the trustees would be liable for breach of trust. The question of what may constitute a failure to 'consider', therefore, requires some attempt at clarification and analysis, even if there can be no definitive rules or guidelines for every case. When and in what circumstances can the trustee properly decide, for example, to attach greater importance (say) to the education of infant objects rather than the welfare of objects in receipt of meagre pensions? To what extent (if at all) are these matters left to the subjective preferences of the trustee or controlled by the objective criteria which the donor of the power intended should apply; and, in either case, upon what basis is the trustee able to decide? To these questions, there is seldom a precise answer. Some guidance or limitation (or none) may be discernible from the terms of the power, the broader context of the instrument by which it was conferred, and also the wider surrounding circumstances (the 'factual matrix') which led to its creation in the first place. This is essentially a process of construction and, where necessary, implication. This process is dealt with in detail elsewhere.[30] The broad aim is to find the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties, including anything which would have affected the way a reasonable man would have understood it, but excluding previous negotiations and declarations of subjective intent. The meaning which a document would convey to a reasonable man is what the parties using its words against the relevant background would reasonably have been supposed to mean. The process of construction is generally a quest for objective meaning. However, an element (often a substantial element) of subjectivity is unavoidable, particularly where the question involves the exercise of an absolute discretion conferred upon the trustee.[31] On the other hand, this clearly does not mean that the trustee has a completely free hand in such matters.

10.11 The nature and extent of the trustee's 'duty to consider' in relation to a power of appointment conferred on him *qua* trustee clearly varies with the circumstances of each case and with the nature of the power, for example whether it is dispositive (and be it special, hybrid, or general)[32] or administrative, whether it is found in the context of a private family trust or a pension scheme, or whether it is ancillary to a commercial agreement, such as a joint venture. Every power must be exercised only for the purpose for which it was conferred, or, at least, in accordance with what the trustees honestly consider to have been the purpose.[33] The particularity with which that purpose may be described or ascertained will vary from case to case. The trust instrument itself may specify or indicate a specific or general purpose, for example to maintain or educate, or to provide retirement benefits, or some order of priority or preference amongst the objects.[34] In some cases, the donor expressly accords priority to some objects, for example by specifying a 'primary' and a 'secondary' class, or by directing that primary regard is to be had to one beneficiary, such as an eldest son, or by restricting the scope of the power in a particularly detailed manner.

10.12 In the absence of an express provision to this effect, the terms of the particular power and the context in which it is conferred may, by clear implication, provide some guidance to the trustees

[29] *Re Hastings-Bass* [1975] Ch 25.
[30] See Ch 2 above.
[31] See Ch 11 below for a discussion of absolute discretions.
[32] See, eg, *Re Beatty* [1990] 1 WLR 1503.
[33] *ibid.*
[34] See, eg, *Richardson v Chapman* (1760) 7 Bro PC 318.

with regard to the proper mode of considering how to exercise it.[35] For example, where a special power of appointment is conferred in favour of a limited number of objects (for example, the children and grandchildren of the settlor), the trustees are able, and may be expected, to inquire into and ascertain and compare the personal needs, merits, and circumstances (including age, state of health, educational requirements, financial circumstances, employment, and so forth) of all, or virtually all, of the objects, both as individuals and as members of the family as a whole.[36] Indeed, in the case of a power of maintenance or of advancement—which are said to be powers with only one object, namely the person maintained or advanced[37]—the trustees would be expected to consider all such matters in relation to that one object.[38] Similarly, trustees must make appropriate inquiries before exercising their discretion in respect of any 'death benefit' payable under the provisions of a pension scheme, especially if such exercise will override the terms of any nomination which they have received affecting that benefit. In *Wild v Smith*,[39] for example, a member of a pension scheme had completed a nomination indicating that he wished his 'death benefit' to be paid as to one half to his son and one half to his daughter. After his death, the trustees, in exercise of their discretion, paid out a substantial sum to a friend of the deceased member, with whom he had been living. The son complained of maladministration to the Pensions Ombudsman who upheld the complaint on the ground that the trustees had not made proper inquiries before deciding to override the nomination, and the exercise of the discretion was set aside. Carnwath J upheld the Ombudsman's decision. The mere fact that a person lives with a member of a pension scheme and that he pays for joint expenses is not sufficient to establish dependency for these purposes; nor is the giving up of financial independence sufficient where it is a matter of choice and not of necessity. Another example, from a different context, is seen in *Re Boston's Will Trusts*,[40] where trustees for sale applied to the court for directions as to how far they were entitled, in the exercise of the powers conferred on a tenant for life under the Settled Land Act 1925 (and conferred referentially on the trustees by section 28 of the Law of Property Act 1925), to pay for repairs out of capital rather than income,[41] and where Vaisey J stated:

> I cannot myself see that it would be wrong for trustees to take into consideration such matters as the comparative wealth or poverty of the parties entitled to the income and of the parties entitled to the capital of the settled property, or (for example) any benefits which either of them may have conferred on the settled property. I do not think that it should be a matter of mere arithmetic with no reference to the personal elements in the situation which, indeed, it may be very difficult for a trustee to disregard, even if he tried to do so.

Similarly, in *Nestlé v National Westminster Bank*,[42] where the trustee's duties to invest and to act fairly between beneficiaries came under review, Hoffmann J stated:

> They are, for example, entitled to take into account the income needs of the tenant for life or the fact that the tenant for life was a person known to the settlor and a primary object of the trust whereas the remainderman is a remoter relative or stranger. Of course, these cannot be allowed to become the

[35] *Re Manisty's Settlement* [1974] Ch 17, 25, *per* Templeman J.

[36] See, eg, *Maberley v Turton* (1808) 14 Ves 499.

[37] See *Re Abraham's Will Trusts* [1969] 1 Ch 463, 484–5.

[38] *Re Pauling's Settlement Trusts* [1964] Ch 303, 333; *Pitt v Holt* [2011] EWCA Civ 197, [102]–[109], [114]–[118]; [2011] 2 All ER 450.

[39] [1996] PLR 275. See also *Harris v Lord Shuttleworth* [1994] ICR 989, 999; and *Packwood v Trustees of Airways Pension Scheme* [1995] OPLR 369.

[40] [1956] Ch 395, 406.

[41] Settled Land Act 1925, s 73(l)(iv). Section 28 of the Law of Property Act 1925 has been repealed by the Trusts of Land and Appointment of Trustees Act 1996, s 25(2) and Sch 4.

[42] (1988) [2000] WTLR 795, 802. See also [1994] 1 All ER 118, 136, *per* Staughton LJ.

> overriding considerations but the concept of fairness between classes of beneficiaries does not require them to be excluded. It would be an inhuman rule which required trustees to adhere to some mechanical rule for preserving the real value of capital when the tenant for life was the testator's widow who had fallen on hard times and the remainderman was young and well-off.

In such cases, the relevant duties are not reformulated, but actual circumstances alter their content.

10.13 Even where the class of objects is large and comprised of several different categories, the terms of the power may sometimes imply an order of priority or preference, as was the case in *Re Gulbenkian's Settlement*,[43] for example, where it was clear that the trustees were expected to have regard to the best interests of one named beneficiary (Nubar Gulbenkian). In yet other cases, the relevant purpose may be ascertainable only by process of construction (taking account, where necessary, of such extrinsic evidence as may be admissible). As Templeman J pointed out, in *Re Manisty's Settlement*,[44] the donees will endeavour to give effect to the wishes and intentions of the donor, and they 'will derive that intention not from the terms of the power necessarily or exclusively, but from all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited'. Thus, in many instances, the trustees may have to rely on knowledge acquired by them outside the trust instrument (for example, changes in the circumstances of the family) or even on the consent of a third party, such as the settlor himself.[45]

10.14 In addition, the trustees would probably also be expected to take into account wider considerations which may affect the objects or the trust fund, such as anticipated changes in government policy or tax legislation. Such expectations must be reasonable, however. As Stamp LJ observed, in *IRC v Cookson*,[46] 'in construing a deed of settlement, there is no presumption that a settlor's advisers know the fiscal law and a draftsman of a deed should not be taken to be aware of the fiscal consequences of what he is doing'. A similar approach may apply to trustees, provided they are not professional trustees and have not held themselves out to have expertise in tax matters. Indeed, fiscal considerations often impel trustees to look closely at their trust instruments and trigger the process of consideration generally, and thus lead to a consideration of an appropriate course of action in individual cases. Moreover, none of these considerations remain fixed and immutable. Both the immediate purpose of a power and the identity of the preferred objects may change from time to time, for example because the members of a primary class (say, the settlor's children) all die or become less well qualified (for example on grounds of financial need) than a secondary class (say, the settlor's grandchildren).[47] The nature and content of the duty to consider may therefore vary with the passage of time, as the range of objects and their circumstances alter.

10.15 In some cases, the class of objects may not only be relatively large but also be comprised of several different (and perhaps seemingly unconnected) groups or categories. In *Re Manisty's Settlement*,[48] Templeman J not only provided an illustration of such a class but also made some observations on the nature of the trustees' duty in such a case:

> If a settlor creates a power exercisable in favour of his issue, his relations and the employees of his company, the trustees may in practice for many years hold regular meetings, study the terms of the

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[43] [1970] AC 508.

[44] [1974] Ch 17, 26.

[45] See generally *Re Manisty's Settlement* [1974] Ch 17 at 26. See also *Re Coates* [1955] Ch 495; *Blausten v IRC* [1972] Ch 256, 273.

[46] [1977] 1 WLR 962, 969.

[47] If the objects or beneficiaries are sufficiently defined so as to be capable of ascertainment at the date of the settlement, the settlement cannot be subsequently invalidated because some of the class may have disappeared or become impossible to find or it has been forgotten who they were: *Re Hain's Settlement* [1961] 1 WLR 440.

[48] [1974] Ch 17, 25.

> power and the other provisions of the settlement, examine the accounts and either decide not to exercise the power or to exercise it only in favour, for example, of the children of the settlor. During that period the existence of the power may not be disclosed to any relation or employee and the trustees may not seek or receive any information concerning the circumstances of any relation or employee. In my judgment it cannot be said that the trustees in those circumstances have committed a breach of trust and that they ought to have advertised the power or looked beyond the persons who are most likely to be the objects of the bounty of the settlor. The trustees are, of course, at liberty to make further inquiries, but cannot be compelled to do so at the behest of any beneficiary. The court cannot judge the adequacy of the consideration given by the trustees to the exercise of the power, and it cannot insist on the trustees applying a particular principle or any principle in reaching a decision.

This, of course, is an illustration of a power in favour of a wide class and, judging by the terms of the power alone, the objects as a whole clearly do not share common features or attributes. Nevertheless, it is reasonable to infer that the power itself indicates a degree of priority among the several different groups or categories of objects. After all, it is perfectly reasonable, indeed natural, for trustees to assume (in the absence of evidence to the contrary) that the terms of such a power evince an intention on the part of the settlor to accord priority (perhaps exclusive priority) to the issue of the settlor ('the persons who are most likely to be the objects of the bounty of the settlor'), rather than his employees or more distant relations. In addition, although a composite class of issue, relatives and employees may constitute a large class, each of the sub-groups would not only have some connection with the settlor but also a common nexus within itself (whether it be relation by blood to some individual, or by contract of employment with a specified company, for example). It may even be possible to ascertain, within groups, which objects ought to be given priority of consideration, for example, close relatives rather than distant ones, or pensioners whose pensions are less favourably calculated than those of others. In other words, the class of objects as a whole has already been sub-classified and categorized by the terms of the power; and the trustees have not been required or left to formulate categories of their own, according to their own subjective criteria. Those terms also assist, by reasonable implication, in the process of according priority to some groups rather than others and of apportioning between and within categories, if this seems necessary. Thus, in Templeman J's example, a considered decision to give (or to continue to give) priority (indeed exclusive priority) to the settlor's issue could therefore easily be justified.

10.16 However, Templeman J seems to be suggesting that the trustees, having decided periodically to exercise their power in favour of one group of objects (the settlor's issue here), would not be under any obligation to address the claims, or seek any information concerning the circumstances, of any other group of objects. Such a view echoes that of Harman J, in *Re Gestetner*,[49] to the effect that:

> there is no obligation on the trustees to do more than consider—from time to time, I suppose—the merits of such persons of the specified class as are known to them and, if they think fit, to give them something . . . I cannot see here that there is such a duty as makes it essential for these trustees, before parting with any income or capital, to survey the whole field, and to consider whether A. is more deserving of bounty than B.

The trustees did not have to 'worry their heads to survey the world from China to Peru, when there are perfectly good objects of the class in England'. Certainly, the trustees are expected, irrespective of the width of the class of objects, to consider such requests as are actually made by objects (irrespective of which sub-group or category they may fall into) for the power to be exercised in their

[49] [1953] Ch 672, 688, 689.

favour, and to consider the claims and needs of those who are actually known to them.[50] In addition, the trustees are required to consider the circumstances and position of those who are entitled in default of appointment, whose interests will be defeated or divested by any appointment. However, this does not necessarily imply that the interests and claims of all objects, other than those at hand or those in a favoured category, can be ignored entirely. Such a view would seem to be at odds with the views of Lord Wilberforce in *McPhail v Doulton*,[51] and with statements in *Re Baden's Deed Trusts (No 2)*[52] (which, admittedly, concerned discretionary trusts, rather than mere powers)[53] and they directly contradict the conclusion of Megarry V-C, in *Re Hay's Settlement Trusts*,[54] that 'the trustee must not simply proceed to exercise the power in favour of such of the objects as happen to be at hand or claim his attention'.

10.17 It has been argued[55] that this is too onerous and that, in circumstances such as those in *Re Hay* (where the class of objects was extremely wide), the trustee need not go forth and search out worthy candidates, and that he would be discharging his duty if he were simply to consider the claims of 'those who press claims and present themselves for inspection', perhaps as a result of advertisement. However, this proposition is probably appropriate only in relation to the widest of powers (to which we shall return below)[56] and cannot be the yardstick where the class of objects is small or comprised of but a few groups or categories. It is difficult to see why the trustee should not be under some duty—even if its extent is not great (as would be the case where the class of objects is very large)—to make some effort to do more than just find out who may be comprised in the class of objects. There is surely some duty, even if, in relation to a wide power, it must be broadly described and be somewhat nebulous in character, to inquire into the composition of the class of objects and into the connection between the various categories and the donor of the power and between each other, and also to ascertain from time to time whether the claims of members of some other category or sub-group in the general class has become stronger, and so forth. Circumstances change with time, and any suggestion of an order of priority implied by the terms of the power itself may well become outdated or inappropriate. It is only by periodically addressing their minds to the wider context of the class of objects generally that the trustees would be able to carry out their duty to consider properly, even if the outcome is simply to confirm that their current practice remains appropriate.

10.18 Although the boundaries within which the trustees must operate may be (and usually are) well defined, it is of the essence of a mere power that some degree (and usually a substantial degree) of discretion is conferred on the trustees. Indeed, the intention behind the relevant disposition can only be carried into effect by means of such discretion. Even in relation to a small group of objects (such as the settlor's children), they will have to form judgments of their own as to which considerations and factors should be given priority: this is of the essence of the power. Similarly, trustees who have a power to distribute surplus funds under an occupational pension scheme must decide over what part of the surplus their power should be exercised and what part should be free from the power; and they must balance the claims of impoverished pensioners, of those whose employment had been terminated, and of the employing company (and perhaps its creditors). All such

[50] *Re Manisty's Settlement* [1974] Ch 17, 25, *per* Templeman J.
[51] [1971] AC 424, 449, 457.
[52] [1973] Ch 9, especially 20, 27.
[53] Where the duty to consider is probably greater: see paras 10.21–10.22 below.
[54] [1982] 1 WLR 202, 209–10. See also *Turner v Turner* [1984] Ch 100, 109–10; *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1613.
[55] [1982] Conv 432, 437 (A Grubb).
[56] See paras 10.23–10.43 below.

considerations necessarily involve a substantial discretionary element.[57] Indeed, in *Re Gestetner*,[58] it was said to be impossible to derive any assistance from the terms of the power, which:

> did not in themselves indicate whether and on what grounds one employee might be considered, whether by reference to services rendered to Gestetner Ltd or to the settlor or by reference to age, health or any other criterion. The terms of the power did not in themselves indicate whether and on what grounds one relation out of many was to be considered, whether by reference to his proximity to the settlor, poverty, educational requirements or any other circumstances. The terms of a special power do not necessarily indicate in themselves how the trustees are to consider the exercise of the power. That consideration is confided to the absolute discretion of the trustees.[59]

10.19 However, even in such a case, the broad criteria are set: the initial categorization of objects is established by the terms of the power. In the exercise of their discretion, the trustees are fully aware of the donor's broad intentions: the terms of the power may not provide guidance as to the specific criteria of selection which the trustees should apply, but they do establish the parameters within which the trustees must carry out their duty to consider and within which any exercise of their power must be confined. Moreover, the general purposes of the settlement and the trustees' own knowledge (inherited or acquired, as Templeman J put it)[60] of prevailing circumstances provide them with additional broad criteria with which to approach the execution of their duties. Indeed, the trustees of discretionary trusts—and certainly those trusts with very large classes of objects—will almost certainly be provided with letters of wishes which set out the desires and objectives of the settlor. Such letters are usually in non-binding form (although they may be) and merely provide confidential guidance to the trustees as to how they should consider exercising, and perhaps how they should actually exercise, their powers and discretions. Such letters also form part of the 'factual matrix' which may perhaps be taken into account if it appears that the trust instrument itself is somewhat imprecise as to the criteria which the trustees ought to consider.[61] In addition, the trustees clearly cannot act in a capricious manner. The court may not be prepared to examine or question a *bona fide* exercise of discretion by trustees,[62] but it will consider an allegation that such an exercise was irrational or perverse, or that it was flawed in that it was based on a completely irrelevant factor or, alternatively, failed to take into account some crucially relevant factors. In the latter cases, the claim may be for breach of trust or for setting aside a particularly disadvantageous transaction. In either case, the allegation is that there has been a fundamental flaw in the decision-making process itself (as opposed to the 'correctness' of the decision itself) and the trustees must then be able to explain the principles on which they have acted.[63] However, the fact remains that the duty to consider, or to inquire and ascertain, is variable and flexible and necessarily founded on, and rendered workable by, the trustees' discretion; and, in each case, the degrees of variation,

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[57] *Re William Makin & Son Ltd* [1993] OPLR 171, especially 178.

[58] [1953] Ch 672. It was said of the objects: 'all . . . are equal but some are more equal than others'.

[59] *ibid.*, 25.

[60] See para 10.13 above.

[61] See, eg, *Breakspear v Ackland* [2009] Ch 32, [61]. See also Thomas and Hudson, paras 12.20–12.23. For the 'modern' approach to construction, see Ch 2 above. Whether letters of wishes and similar documents can be taken into account in resolving a question of 'uncertainty of objects' is a different, and more difficult, question. This, too, is a question of construction, so the same approach might be thought to apply. However, letters of wishes generally indicate (or direct) *how* the trustees are expected to act and do not provide specific and accurate identification of beneficiaries or objects.

[62] This issue is dealt with in Ch 11 below.

[63] The question of the reviewability of the exercise of a trustee's discretion is dealt with in detail in Ch 11 below, but see also paras 10.184–10.194 below. Of course, if the court is being asked to sanction a particular proposed exercise of a power or discretion by a trustee, the trustee must be able to explain and justify the reasons for his proposed conduct.

flexibility, and discretion will depend on the intentions of the donor as evidenced by the terms, nature, and purpose of the particular power.

10.20 In any event, the question remains as to whether it is meaningful in any sense to say that trustees are under a duty to consider the exercise of a power where the class of objects extends to millions of people. Where the class of objects is enormously wide and seemingly not constituted of any identifiable categories or sub-groups (or, perhaps, constituted of disparate, unconnected categories), it would seem to be impossible for the donee of a power (especially a trustee) to discern from the terms of the power itself, or even from the context in which it is found or the surrounding circumstances, precisely what the intentions of the donor may have been. Can a valid special power be created, for example, in favour of a class of objects comprising hundreds of thousands or even millions of people; or an intermediate power in favour of everyone in the world, save for a few named individuals? If so, what are the duties imposed on the donee of the power and how does he properly discharge them? Indeed, does it make sense to talk in terms of a 'duty' to consider the exercise of (say) a wide intermediate power of the kind under scrutiny in *Re Hay's Settlement Trusts*?[64] To whom is such a duty owed and is its enforcement by the court possible, in case of any default by the donee?[65] These questions are of even greater significance in another, related context, namely that of 'administrative workability' in relation to discretionary trusts. The issue of 'size of the class' and the difficulties which may then arise will therefore be dealt with separately,[66] after the trustees' duty to consider in relation to a discretionary trust has been discussed.

(2) Discretionary trusts

10.21 In the case of a 'discretionary trust',[67] the trustee is obliged to exercise the power and his discretion is therefore limited to the selection of those objects who are to benefit and the manner in which, or the time at which, they will do so. As in the case of a mere power, the trustee is under a duty to make such a survey of the range of objects or possible beneficiaries as will enable him to carry out his fiduciary duty.[68] The underlying principle is the same in each case, but there is a difference of degree. In the case of a discretionary trust, a wider and more comprehensive range of inquiry is called for.[69] In simple terms, the trustee has to do more and try harder. This duty of inquiry and ascertainment was described by Lord Wilberforce in the following terms:[70]

> . . . a trustee with a duty to distribute, particularly among a potentially very large class, would surely never require the preparation of a complete list of names, which anyhow would tell him little that he needs to know. He would examine the field, by class and category; might indeed make diligent and careful inquiries, depending on how much money he had to give away and the means at his disposal, as to the composition and means of particular categories and of individuals within them; decide

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[64] [1982] 1 WLR 202.

[65] See (1974) 38 Conv (NS) 269 (L McKay). In *Re Gulbenkian's Settlements* [1970] AC 508, 524, Lord Upjohn said that 'it may be quite impossible to construct even with all the available evidence anything like a class capable of definition'. Whatever he may have meant, it does not seem to be related to the present issue, namely the effect (if any) of the size of the class. He referred to *Re Sayer* [1957] Ch 423. However, the question in that case concerned conceptual certainty and Upjohn J himself held that such certainty existed. Earlier (518) Lord Reid, having referred to the need for conceptual certainty, stated: 'It may be that there is a class of case where, although the description of a class of beneficiaries is clear enough, any attempt to apply it to the facts would lead to such administrative difficulties that it would for that reason be held invalid.' However, it is not clear what he had in mind.

[66] See paras 10.23–10.43 below.

[67] See paras 1.42 and 3.74–3.79 above for the meaning of 'discretionary trust'.

[68] *cf. Re Hain's Settlement* [1961] 1 WLR 440.

[69] *McPhail v Doulton* [1971] AC 424, 457.

[70] *ibid.*, 449.

> upon certain priorities or proportions, and then select individuals according to their needs or qualifications. . .
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> . . . Such distinction as there is [between discretionary trusts and fiduciary mere powers] would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund's income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants. But just as, in the case of a power, it is possible to underestimate the fiduciary obligation of the trustee to whom it is given, so, in the case of a trust (trust power), the danger lies in overstating what the trustee requires to know or to inquire into before he can properly execute his trust. The difference may be one of degree rather than of principle. . .

The precise manner in which a trustee would be expected to carry out this process of inquiry and ascertainment will therefore vary from case to case. As Sachs LJ pointed out, in *Re Baden's Deed Trust (No 2)*,[71] when it is said that trustees must make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty, the word 'range' has 'an inbuilt and obvious element of considerable elasticity, and thus provides for an almost infinitely variable range of vision suitable to the particular trust to be considered'. Where the range or class of objects is relatively large (as it was in *Re Baden*), 'it may be sufficient to know whether the range of potential postulants runs into respectively dozens, hundreds, thousands, tens of thousands or even hundreds of thousands'.[72]

10.22 Alternatively, in a case where the class is very small, the trustee may well be expected, in practice (though not as a legal requirement), to compile a complete list of the objects and to inquire into and ascertain the relative position, circumstances, and needs of each of them. In short, the trustee's duty in this regard will vary according to the nature of his trust, the purpose for which the discretion was conferred, the range of the class of objects and the size of the funds at his disposal. All those factors which a trustee might take into account in considering the exercise of a mere power—some of which have already been referred to above[73]—are also equally relevant in considering the exercise of a discretion under a discretionary trust, but in the latter case he must 'make a wider and more systematic survey'. 'Assessing in a businesslike way "the size of the problem" is what the trustees are called on to do.'[74] It is also the case that, in relation to discretionary trusts as in the context of mere powers, the degree of discretion conferred on the trustees (and it is usually a considerably enlarged discretion) determines the extent of their freedom of action and the degree of flexibility which is available to them. The fact that discretionary trustees may have been endowed with a wide discretion does not, in itself, relieve them from a duty to consider periodically the exercise of that discretion, or to ensure that, upon its exercise, crucially relevant considerations are taken into account and that materially irrelevant ones are ignored.

(3) Size of the class and administrative workability

10.23 Given that the nature and extent of the trustees' duty to consider varies according to the size of the class, it may reasonably be asked whether a class may be so large as to dilute that duty to the point at which it becomes meaningless even to refer to it as a 'duty' at all. If so, is it then the case that the

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[71] [1973] Ch 9, 20.

[72] *ibid.* Note, however, that the class of objects in *Baden*, large though it was, comprised several identifiable categories and was not in any sense similar to the wide intermediate powers under scrutiny in *Re Manisty's Settlement* [1974] Ch 17 and *Re Hay's Settlement Trusts* [1982] 1 WLR 202.

[73] See paras 10.05–10.20 above. See also *Re Manisty's Settlement* [1974] Ch 17, 25 (quoted in para 10.15 above) in particular.

[74] *Re Baden's Deed Trust (No 2)* [1973] Ch 9, 20, *per* Sachs LJ.

power conferred on the trustees remains valid, but that there is no duty to consider (or, at least, only a nebulous and negligible duty); or is the power void on the basis that such a duty cannot effectively and properly be discharged? The answer to this question, it is said, is that neither the size of the class of objects nor what might be called 'administrative difficulties' (which are probably different factors) will in itself prevent a trustee upon whom *a mere power* has been conferred from carrying out his duty to *consider* the exercise of that power. Certainly, neither factor will render the power invalid. Moreover, it can be said with some certainty that the position may be different in relation to *a discretionary trust*: that which has been called (somewhat inelegantly) 'administrative unworkability' may render a discretionary trust void. However, the reasoning behind these conclusions is far from clear or convincing. Indeed, it is not entirely clear what the expression 'administrative unworkability' is intended to cover. Moreover, even if a wide intermediate power conferred on trustees may be said to be valid, it is difficult to see how or why the trustees could or should be said to be under any duty to consider its exercise.

10.24 One thing, at least, is clear: *a mere power* conferred on a *non-fiduciary* will not be held invalid on the ground that the class of objects is too large. As Megarry V-C stated, in *Re Hay's Settlement Trusts*,[75] 'it is plain that if a power of appointment is given to a person who is not in a fiduciary position, there is nothing in the width of the power which invalidates it *per se*'. Such a power could be a special power with a large class of objects; it could be a hybrid or intermediate power authorising appointment to anyone save a specified number or class of persons; or it could be a general power. 'Whichever it is, there is nothing in the number of persons to whom an appointment may be made which will invalidate it.'

10.25 In *Re Park*,[76] for example, a testator directed the Public Trustee, as sole executor and trustee of his estate, to pay the annual income of his residuary estate 'to such person (other than herself) or persons or charitable institution or institutions and in such shares and proportions' as his sister (who was not a trustee) should from time to time direct in writing; and, after her death, to pay the capital and income to a named charity. Clauson J held that, on the true construction of this provision, there was an absolute gift to the named charity, with a proviso that, during her lifetime, the sister could by writing divert the income to any object other than herself. He stated:[77]

> It is clearly settled that if a testator creates a trust he must mark out the metes and bounds which are to fetter the trustees or, as has been said, the trust must not be too vague for the Court to enforce, and that is why a gift to trustees for such purposes as they may in their discretion think fit is an invalid trust; there are no metes and bounds within which the trust can be defined, and unless the trust can be defined the Court cannot enforce it. The trust here created seems to me to be perfectly definite and marked out by definite metes and bounds. If [the sister] designates a definite object in writing, that will be the object to which the trustees or the Court will apply the income: in so far as there is no such direction the charitable gift. . . .will operate.

Precisely how much can be read into *Re Park* on its own is unclear. The power to designate objects was conferred on someone who was not a trustee and the potential width of the ultimate class was therefore not seen as problematic. However, the trustee was clearly under a duty to pay income to all such persons as the sister might have nominated, a class which potentially included everyone in the world except herself and one which would be far too large to enable the trustees to fulfil their duty. It would seem, therefore, that the court must have taken account of practical limitations,

[75] [1982] 1 WLR 202, 208.
[76] [1982] 1 Ch 580.
[77] *ibid.*, 583.

that is, despite the terms of the power, the sister would not, in practice, nominate a large and unworkable class of beneficiaries. In any event, in *Re Jones*,[78] a testatrix conferred a protected life interest on her son and directed that, after his death, the fund should be held in trust 'for such person or persons living at the death of [the son] . . . as [he] shall by will or codicil appoint'. Vaisey J held that this was neither a general power nor a special power, but construed it as equivalent to a subtraction from the generality of objects of (i) all corporate bodies, charities, and the like, and (ii) all individuals not actually in existence at the time of the son's death. On the authority of *Re Park* and *Re Byron's Settlement*[79] the power was nonetheless a valid power of appointment.

10.26 Therefore, it has long been settled law that an intermediate power or a wide special power can validly be conferred on a person not in a fiduciary position. The reasoning behind this is precisely because such a donee owes no duty to anyone when deciding whether or not to exercise his power. For some time, however, there was some doubt as to whether such a power could validly be conferred on trustees as such. The trustees would be faced with the difficulty of exercising their fiduciary duty to consider whether and in what circumstances to exercise a power so widely framed that it did not in itself afford any indication which could guide them.[80] As Megarry V-C put it, in *Re Hay's Settlement Trusts*:[81] 'The difficulty comes when the power is given to trustees as such, in that the number of objects may interact with the fiduciary duties of the trustees and their control by the court.'

10.27 The relevant authorities in which this issue has been raised are not entirely consistent. In *Blausten v IRC*,[82] there was a discretionary trust of income for members of a 'specified class' and a power to pay or apply capital to or for the benefit of members of that class. The trustees also had power 'with the previous consent in writing of the settlor' to appoint any other person or persons (except the settlor) to be included in the 'specified class'. It was argued that this latter power was so wide that it was bad for uncertainty. The basis of the contention was that trustees are under a duty to consider from time to time whether they should exercise their powers, and that such consideration was impossible where the power was of such a wide nature that almost anyone in the world could be included in the specified class. Buckley LJ stated:[83]

> If the class of persons to whose possible claims they would have to give consideration were so wide that it really did not amount to a class in any true sense at all no doubt that would be a duty which it would be impossible for them to perform and the power could be said to be invalid on that ground. But here, although they may introduce to the specified class any other person or persons except the settlor, the power is one which can only be exercised with the previous consent in writing of the settlor and . . . could only be exercised in the lifetime of the settlor. Therefore on analysis the power is not a power to introduce anyone in the world to the specified class, but only anyone proposed by the trustees and approved by the settlor.

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[78] [1945] Ch 105.

[79] [1891] 3 Ch 474 (which was in fact a decision that such a power, not being general, was not exercised by means of a general devise under s 27 of the Wills Act 1837).

[80] *Blausten v IRC* [1972] Ch 256, 273, *per* Buckley LJ; *IRC v Schroder* [1983] STC 480, 498.

[81] [1982] 1 WLR 202, 208–09.

[82] [1972] Ch 256. See also *Re Edward's Will Trusts* [1947] 2 All ER 521, where, under a settlement, a custodian trustee was directed to hold the capital and income of the trust fund 'upon trust to pay the income and to transfer the capital in specie or otherwise to such persons . . . as the settlor shall by any memorandum under his hand direct and in default . . . upon trust to pay or transfer the same . . . to such persons . . . as the managing trustee shall in his absolute and uncontrolled discretion think fit'. Jenkins J does not seem to have considered this fiduciary power to be void in itself. However, there was an attempt to make a future unwitnessed testamentary disposition which was held void. See now *Re Beatty's Will Trusts* [1990] 1 WLR 1503.

[83] [1972] Ch 256, 272. Orr LJ concurred generally (274); so, too, it seems, did Salmon LJ (275) (although he dealt specifically with the point of construction).

Thus, for Buckley LJ, a description of objects could indeed be so wide as not to form anything like a 'class', in which case the power would be so wide that the trustees could not possibly consider, from time to time, as was their duty, whether to exercise it or not. He concluded, however, that this was not the case in relation to the power under consideration in *Blausten* itself, because the class of objects (or those who could be added to the class) was not, in reality, comprised of almost everyone in the world but only of those persons approved by both the trustees and the settlor. There are several reasons why Buckley LJ's observations may be said to be unconvincing. First, they were clearly *obiter*. The case was actually decided on a point of construction (namely that a wife could not be added to the class of objects by an exercise of the trustees' power). Secondly, although Buckley LJ referred to *Re Gulbenkian's Settlements*,[84] it is clear that he did not attempt to distinguish mere powers conferred on trustees (of the kind under consideration in *Blausten*) from discretionary trusts; and, indeed, in support of his view, he cited the remarks of Lord Wilberforce in *McPhail v Doulton*,[85] to the effect that 'the definition of beneficiaries is so hopelessly wide as not to form anything like a class' (and which were, of course, made in relation to a discretionary trust, where different considerations may apply). Thirdly, other authorities in which wide powers conferred on trustees had been upheld were either not considered in Buckley LJ's judgment (such as *Re Abrahams' Will Trusts*)[86] or not even cited to the court (such as *Re Eyre*).[87] Fourthly, as Megarry V-C pointed out, in *Re Hay's Settlement Trusts*,[88] there is no explanation as to why mere numbers should inhibit the trustees from considering whether or not to exercise their power, as distinct from deciding in whose favour to exercise it. Moreover, it is not clear why or how the requirement of the settlor's consent (in *Blausten*) would result in any class being narrowed: such a requirement made no difference to the number of persons potentially included.[89] Nor did it make it possible to treat 'anyone in the world save X' as constituting any real sort of a class.

Subsequently, in *Re Manisty's Settlement*,[90] Templeman J declined to follow Buckley LJ. In that case, trustees were empowered to declare that any person, corporation or charity, other than a member of an excepted class or a trustee, was to be included in the class of beneficiaries. The question at issue was whether this power was void for uncertainty. Templeman J held that it was valid: **10.28**

> The conduct and duties of trustees of an intermediate power, and the rights and remedies of any person who wishes the power to be exercised in his favour, are precisely similar to the conduct and duties of trustees of special powers and the rights and remedies of any person who wishes a special power to be exercised in his favour. In practice, the considerations which will weigh with the trustees will be no different from the considerations which will weigh with the trustees of a wide special power. In both cases reasonable trustees will endeavour, no doubt, to give effect to the intention of the settlor in making the settlement and will derive that intention not from the terms of the power necessarily or exclusively, but from all the terms of the settlement, the surrounding circumstances and their individual knowledge acquired or inherited. In both cases the trustees have an absolute discretion and cannot be obliged to take any form of action, save to consider the exercise of the power and a request from a person who is within the ambit of the power. In practice, requests to trustees armed with an intermediate power are unlikely to come from anyone who has no claim on the bounty of the settlor. In practice, requests to trustees armed with a special power in favour, for example, of issue, relations and employees of a company are unlikely to come from anyone who has no

[84] [1970] AC 508.
[85] [1971] AC 424, 457. These remarks are dealt with in greater detail below: see paras 10.34–10.36 below.
[86] [1969] 1 Ch 463.
[87] (1883) 49 LT 259. See also *Re McEwen* [1955] NZLR 575.
[88] [1982] 1 WLR 202, 210–12.
[89] *cf.* the power to nominate beneficiaries (to whom the trustee then had to pay income) conferred on a non-trustee in *Re Park* [1932] 1 Ch 580: see para 10.25 above.
[90] [1974] Ch 17.

> claim on the bounty of the settlor, or has no plausible grounds for being given a benefit from property derived from the settlor. The only difference between an intermediate power and a special power for present purposes is that a settlor by means of a special power cannot be certain that he has armed his trustees against all developments and contingencies.

Provided the ambit of the excepted class was certain and the trustees could establish with certainty whether any given individual was or was not a member of the class, the mere width of the power did not make it impossible for the trustees to exercise the power or prevent the court from determining whether the trustees were in breach of their duties. However, even Templeman J could not escape entirely from the influence of Lord Wilberforce's observations in *McPhail v Doulton*,[91] for he suggested that a power to benefit 'residents of Greater London' might be capricious, 'because the terms of the power negative any sensible intention on the part of the settlor'.[92] It seems clear that, by these remarks, he was referring back to his earlier observations on the capricious *exercise* of a power (that is, where trustees 'chose a beneficiary by height or complexion or by the irrelevant fact that he was a resident of Greater London')[93] and suggesting that the same objection might extend to the *creation* of a special power. Thus, even if objection might be made to his choice of examples of capricious objects or purposes (especially 'residents of Greater London'),[94] the basic idea is not without some merit (although it is not likely to have much practical significance).[95] In any event, it seems clear that this objection to validity is not the same as (nor, indeed, necessarily associated with) any difficulty in relation to the size or width of the class of objects: size of the class alone was clearly not considered by Templeman J to be fatal to a special or an intermediate power.

10.29 Both *Blausten* and *Manisty* were reviewed by Megarry V-C in *Re Hay's Settlement Trusts*.[96] In that case, trustees held a trust fund 'for such persons or purposes . . . as the trustees shall by any deed . . . appoint', other than the settlor, any husband of hers, and any past or present trustee. The question was whether this power was valid. Megarry V-C reviewed earlier authorities[97] and, having concluded that the duties of the trustees included a duty to consider periodically whether or not they should exercise their power, to consider the range of objects of the power, and also to consider the appropriateness of individual appointments, went on to ask whether there is something in the nature of an intermediate power which conflicts with these duties.[98] He considered Buckley LJ's observations in *Blausten* and rejected them. There was no ground on which the power in question could be said to be void. It was administratively workable (the words of Lord Wilberforce in *McPhail v Doulton*[99] being held to be directed at discretionary trusts, and not mere powers). Nor was the power capricious.[100] He added that, 'if there is some real vice in a power, and there are real

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[91] [1971] AC 424, 457. See para 10.28 above and paras 10.34–10.42 below.

[92] *Re Manisty's Settlement* [1974] Ch 17, 27.

[93] *ibid.*, 26.

[94] See, eg, Megarry V-C's remarks in *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 212.

[95] Is it likely, for instance, that a power to appoint in favour of red-haired people would be held valid? Perhaps the expression 'red-haired people' might be said to be conceptually uncertain. If not, is it not capricious? Similarly, a power to appoint amongst a class comprised of 'all those who crossed the Greenwich meridian today' is conceptually certain; and it could also be established, evidentially, whether any given individual qualified as an object or not. However, it is suggested that such a power would be too capricious; and the court would surely not be prepared to assist in upholding it.

[96] [1982] 1 WLR 202.

[97] Principally *Re Gestetner Settlement* [1953] Ch 672; *Re Gulbenkian's Settlements* [1970] AC 508; *McPhail v Doulton* [1971] AC 424; *Re Baden's Deed Trusts (No 2)* [1973] Ch 9.

[98] Ibid, 210. See also para 10.09 above.

[99] [1971] AC 424, 457.

[100] *ibid.*, 212. He questioned Templeman J's example of a power to benefit the 'residents of Greater London' as one of capriciousness, but pointed out that Templeman J had indicated that this consideration did not apply to an intermediate power in any event.

problems of administration or execution, the court may have to hold the power invalid' (although no examples of such problems were given), but the court 'should be slow to do this'.[101] (There is no mention of the possibility that a letter of wishes, where there is one, might also be capable of providing the solution to any problem of administration or execution, but this, too, would presumably be a material consideration.)

10.30 The powers in question in *Blausten*, *Manisty*, and *Hay* were all contained in *inter vivos* settlements. However, in *Re Beatty*,[102] a similar power conferred by will was also upheld. Here, a testatrix had bequeathed all her personal chattels to her trustees, directing that, within two years of her death, they 'shall . . . [distribute] the chattels . . . among such . . . persons . . . as they think fit and any [remaining chattels] shall fall into and become part of [her] residuary estate'. She also requested her trustees to give effect to her wishes 'of which they shall be aware', but not so as create a trust or legal obligation with regard to them. She also bequeathed a sum of £1.5 million to her trustees in terms similar to the bequest of chattels. Within two years of her death, the trustees distributed chattels to about 87 people and most of the money to about 50 people in accordance with her wishes. The residuary beneficiaries challenged these distributions. Hoffmann J held that the will did not impose any trusts to distribute. It conferred instead fiduciary powers which required the trustees to give consideration to whether they should be exercised and to act in accordance with what they honestly considered to have been the purpose for which the testatrix created the powers. These powers, 'being fiduciary, are not general powers in the sense of the traditional classification which equates such a power with an outright beneficial disposition to the donee himself. Nor are they special powers in the traditional sense. The objects of the powers can hardly be described as a class. They are intermediate or hybrid powers of the kind considered in *Re Park*[103] . . .'[104] Such powers would have been valid if created by deed, delegating to the trustees the disposal of the testatrix's property in accordance with her known wishes; and there was no rule of law invalidating the powers merely because they were contained in a will. Hoffmann J held, accordingly, that the powers were valid.

10.31 Although all these authorities are decisions at first instance,[105] it seems to be well-established that a mere power (whether conferred on a trustee or an ordinary individual) will not be invalid simply on the basis that the class of objects is exceptionally large. It also seems that the size of the class is not regarded as an obstacle to the carrying out by the trustees of their duty to *consider* the exercise of their power (and, of course, no such duty is owed by a non-fiduciary). It will not prevent them from administering such obligations as have been imposed upon them. Indeed, it seems clear (*Blausten* apart) that the objects of such a power need not constitute even a loose 'class'. This, however, raises the question as to whether it makes any sense, in these circumstances, to say that the trustees are under a *duty* to consider the exercise of their power. To whom do they owe such a duty? It is suggested below[106] that the objects of a mere power conferred on trustees have a right to be considered as potential recipients of some bounty and to enforce the duty to consider the exercise of the power. If this is correct (and it seems to be so), it would seem to follow that, in the case of an intermediate power of the kind at issue in *Re Manisty* and *Re Hay*, any person in the world (save for a handful of excluded individuals) could claim standing to compel the trustees to carry

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[101] *ibid.*, 212.

[102] [1990] 1 WLR 1503. See also *Re Nicholls* (1987) 34 DLR (4th) 321. *cf. Tatham v Huxtable* (1950) 81 CLR 639 and *Horan v James* [1982] 2 NSWLR 376.

[103] [1932] 1 Ch 580.

[104] [1990] 1 WLR 1503, 1506.

[105] *Blausten v IRC* [1972] Ch 256 was decided in the Court of Appeal, but Buckley LJ's views were entirely *obiter*.

[106] See para 3.82 above and paras 10.44–10.46 below.

out their duty to consider. It has already been noted[107] that the duty to consider is variable, depending on the nature of the disposition and the width of the power. It might be reasonable to conclude, therefore, that, by conferring a power which is exercisable in favour of such a large number of objects, the donor has impliedly diluted[108] the duty to consider to the point where it has little practical significance.

10.32 However, this still leaves considerable uncertainty as to the point at which the duty becomes so diluted that it can effectively be ignored (or at which it may cease to exist altogether) and also as to the considerations which would determine where that point should lie: should it be a question of numbers alone, for example, or of the range of different unconnected categories and sub-groups in the class? It is suggested that it might be more useful to distinguish between special powers and intermediate powers and to assert that a duty to consider exists and must be capable of being complied with in relation to special powers (however large the class of objects might be, or how it might be constituted), but that no such duty exists in relation to intermediate powers (having been excluded by implication if not expressly). Buckley LJ's observations in *Blausten* would then be applicable to special powers and, if the class of objects was so wide that 'it really did not amount to a class in any true sense',[109] the trustees could not properly carry out their duty to consider and the power would be invalid. A difference of degree in the carrying out of that duty would still exist as between a mere power and a discretionary trust. Moreover, the trustees would still be obliged to consider the claims of those objects who are known to them or who present themselves for consideration. It is true that both Templeman J, in *Re Manisty's Settlement*,[110] and Megarry V-C, in *Re Hay's Settlement Trusts*,[111] thought that the trustees were under a duty to consider even in relation to the wide powers under scrutiny in those cases. Indeed, Templeman J stated that the duties of trustees of an intermediate power were 'precisely similar' to the duties of trustees of special powers.[112] However, this is difficult to sustain, given the infinitely variable sizes and compositions of classes of objects. Indeed, if the duty to consider is held to apply, and if (as would then seem inevitable) that duty must require the trustees to categorise and classify the objects themselves, the paradoxical result might be that the trustees of a mere intermediary power would be obliged to do more than the trustees of a discretionary trust. It may be argued that, in theory, the dividing line between a special power (the objects of which may constitute a very large class, in terms of both numbers and different categories) and an intermediate power might be somewhat arbitrary (and might possibly have to be determined by process of construction, although this is not likely to be a difficulty in practice). However, this distinction already exists, and it seems more sensible to focus on this distinction, rather than attempting to make sense of a 'sliding scale' of obligation which applies to both kinds of power. In other words, there may be no need to distinguish between special and intermediate powers for the purpose of determining *validity*, but it does not necessarily follow that no such distinction should be made when the question is one of the trustees' duty to consider its exercise.

10.33 It remains to be considered, however, whether or not the 'range' of the class of objects may be such as to cause *a discretionary trust* to fail. There certainly seems to be a well-established principle that

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[107] See paras 10.11–10.14 and 10.19 above.

[108] Perhaps he may be said to have wholly annulled any duty to consider. However, if there is no duty to consider at all, it may then be questioned whether the trustees can release their power; but this seems to be contrary to *Re Eyre* (1884) 49 LT 259 and *Re Abrahams* [1969] 1 Ch 463. See also (1975) 49 ALJ 7 (IJ Hardingham).

[109] See para 10.27 above.

[110] [1974] Ch 17.

[111] [1982] 1 WLR 202.

[112] See para 10.28 above.

a discretionary trust cannot be created in favour of a class of objects which is virtually without limit. In *Yeap Cheah Neo v Ong Cheng Neo*,[113] for example, the Privy Council held that a trust of residue 'to apply and distribute the same, all circumstances duly considered, in such manner and to such parties as to them [the executors] may appear just' failed 'for want of adequate expression of it'. Similarly, in *Re Carville*,[114] a gift of residue 'to be disposed of as my executors shall think fit' was held invalid on the ground that the testatrix had failed to define 'the manner in which the distribution is to take place, or the object of the share'. And in *Re Chapman*,[115] a gift of residue to be 'applied for charitable purposes, as I may in writing direct, or to be retained by my executor for such objects and such purposes as he may in his discretion select, and to be at his own disposal', was held by Eve J to be neither an exclusively charitable gift nor a trust sufficiently definite for the court to execute.[116] In all these cases, the executor or trustee (as the case may be) could not take beneficially. The fatal flaw in each case, it seems, was the absence of any specificity in the form or nature of the trusts: there were no identifiable criteria which the trustee had to observe or which the court could use to enforce the trust.

10.34 This, it seems, is the kind of situation that Lord Wilberforce envisaged in *McPhail v Doulton*,[117] where, as we have seen, having emphasised the distinction between conceptual certainty and evidential certainty, he added:

> There may be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form 'anything like a class'[118] so that the trust is administratively unworkable or in Lord Eldon's words one that cannot be executed (*Morice v Bishop of Durham*, 10 Ves Jr 522, 527). I hesitate to give examples for they may prejudice future cases, but perhaps 'all the residents of Greater London' will serve. I do not think that a discretionary trust for 'relatives' even of a living person falls within this category.

Although he referred to 'the definition' of the beneficiaries as being hopelessly wide, it seems clear that he was not referring to conceptual uncertainty. Rather, what he envisaged was something which would make a trust 'administratively unworkable', a phrase which he regarded as synonymous with a trust which Lord Eldon considered 'cannot be executed'. In *Morice v Bishop of Durham*, the question at issue was the validity of a purported discretionary trust in favour of 'objects of benevolence and liberality'. At the point in the report to which Lord Wilberforce referred, one finds counsel for the next of kin arguing that the residue had been given 'upon a trust so vague and indefinite that it cannot be executed'; and Lord Eldon intervened to make the following observations:

> If a testator expressly says, he gives upon trust, and says no more, it has been long established that the next of kin will take. Then if he proceeds to express the trust, but does not sufficiently express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said he gave upon trust and stopped there . . .

In the event, the objects of the trust were held not to be exclusively charitable; and they were also held to be too indefinite to be executed by the court. Therefore, the specific issue at which Lord Eldon's remarks were directed was similar to that which arose subsequently in *Yeap Cheah*

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[113] (1875) LR 6 PC 381, 390–2.

[114] [1937] 4 All ER 464, especially 467: the residue passed to the statutory next of kin under a partial intestacy.

[115] [1922] 1 Ch 287.

[116] See also *Re Park* [1932] 1 Ch 580, 583; *Re Pugh* [1967] 1 WLR 1262; *Re White* [1963] NZLR 788; *Re Hollole* [1945] VLR 295.

[117] [1971] AC 424, 457.

[118] The phrase 'anything like a class' is itself somewhat ambiguous. A 'class' comprised of everyone in the world, or everyone save a few excepted individuals, is as much a 'class' as one which is comprised of a small number.

Neo v Ong Cheng Neo,[119] *Re Carville*,[120] and *Re Chapman*.[121] In one sense, the issue may be characterised as one of conceptual uncertainty ('objects of benevolence and liberality')[122] in which case it may be wondered whether a description of a class which is 'hopelessly wide' differs in any real sense from one which is simply too vague to be enforceable. What else is this but conceptual uncertainty? Indeed, it might be argued that 'the residents of Greater London' is itself an example of a conceptually uncertain class. However, the main issue in *Morice* was almost certainly the absence of any human beneficiary who could enforce the trust. Consequently, it is probably this aspect of the case that Lord Wilberforce had in mind when he referred to 'the residents of Greater London'.

10.35 It is reasonably clear that the two pivotal ideas in Lord Wilberforce's statement are (i) *administrative* difficulties[123] and (ii) *execution* of a discretionary trust by the Court. As we have seen,[124] in *McPhail v Doulton*,[125] the House of Lords held that, in the event of default by the trustees of a discretionary trust, the court need not distribute the trust fund amongst the beneficiaries in equal shares (although it could still do so), but could, instead, ensure that the trustees' duty was carried into effect by a variety of other means, such as by directing an unequal distribution, by removing the defaulting trustees and appointing new trustees, or by sanctioning a scheme of distribution prepared by the beneficiaries. The fact remains, however, that discretionary trustees (whether original or substituted) are obliged to give effect to their trust, and, in the event of any default, a discretionary trust may have to be executed by the court. A discretionary trust differs from a mere power in this respect. As Megarry V-C indicated in *Re Hay's Settlement Trusts*:[126] 'The essence of that difference, I think, is that beneficiaries under a trust have rights of enforcement which mere objects of a power lack.' It is therefore essential that, if an enforceable duty is to be imposed on the trustees, that duty must be one which they can actually carry out, and one which, if the trustees default, the court can enforce. There must be some reference point, some guiding principle, to enable the trustees and the court to identify what it is that they *have* to do. It may be clear that the settlor intended to create a trust of some sort (rather than a mere power) but, in the absence of any such indication, the obligation which he intended to impose cannot be ascertained or carried out. This, it would seem, is the difficulty which Lord Wilberforce had in mind.

> The distinction is based on the quite discrete reason that the court cannot exercise the trust because the settlor has purported to impose an obligation but has failed to give the court enough objective criteria to enforce it. The court will execute a trust to exhaust a fund, and be very flexible in doing so, but it cannot write an instrument for the settlor. It may be that the instrument as a whole or admissible extrinsic evidence will give the court some criteria to appoint by. But if there are no such criteria, the exhaustive discretionary trust will be held void. It is void because there is not enough information to enable a court to frame an order which executes the obligation without resorting to guesswork. The court may be asked to fulfil a nonjusticiable function.[127]

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[119] (1875) LR 6 PC 381, 390–2.

[120] [1937] 4 All ER 464, especially 467: the residue passed to the statutory next of kin under a partial intestacy.

[121] [1922] 1 Ch 287.

[122] Amongst the authorities referred to in the case was *Brown v Yeall* (1791) 7 Ves Jr 50n, where the purpose was to provide 'such books . . . as may have a tendency to promote . . . the happiness of mankind': it was held void for uncertainty.

[123] There is nothing in his speech to suggest that he thought that he was referring to the only kind of administrative difficulty which might exist. See also paras 4.89–4.97 above.

[124] See paras 4.12–4.14 above.

[125] [1971] AC 424.

[126] [1982] 1 WLR 202, 213–14.

[127] (1974) 37 MLR 643, 652 (Y Grbich).

On this basis, Megarry V-C indicated, in *Re Hay's Settlement Trusts*,[128] that he would, if necessary, have held an intermediate *trust* in favour of such a wide class as that before him void as being administratively unworkable.

10.36 As we have seen,[129] in *Re Manisty's Settlement*,[130] Templeman J attempted to explain Lord Wilberforce's observations by reference to capricious purposes. His attempt was subsequently questioned by Megarry V-C in *Re Hay's Settlement Trusts*.[131] It has also been questioned elsewhere.[132] However, even if it may not actually be what Lord Wilberforce had in mind, it may nonetheless be an appropriate way to describe the same phenomenon. It seems clear that Templeman J regarded a power to benefit 'the residents of Greater London' as a capricious power only because, in his view (rightly or wrongly), the class constituted 'an accidental conglomeration of persons who have no discernible link with the settlor or with any institution'. If this is applied to a discretionary trust,[133] it seems to be another way of expressing the view that the description of the class of objects is such that it is impossible to discern the guiding principle by which the trustees are intended to carry out their duties; or, as Stamp LJ put it in *Re Baden's Deed Trusts (No 2)*,[134] no principle can be discerned by which any survey of the range of objects or possible beneficiaries could be conducted or to indicate where it should start or finish. Therefore, it may reasonably be said, in defence of Templeman J, that it may well be capricious to purport to impose a duty on trustees which they cannot possibly implement, or which the court could not enforce. There may be other, different examples of capriciousness, but it is not at all obvious why this should not be one too. The observations of Megarry V-C in *Re Hay's Settlement Trusts*,[135] do not affect Templeman J's view, for the latter was clearly referring to 'an accidental conglomeration' of persons who have 'no discernible link' with the settlor, whereas Megarry's example (where the settlor was a former chairman of the Greater London Council) and also the intended trust in *West Yorkshire* (see below) are both clearly cases where there is such a 'discernible link'.

10.37 In only one case thus far, it seems, has 'administrative unworkability' been an issue, namely *R v District Auditor, ex p West Yorkshire Metropolitan County Council*.[136] Here, a local authority which anticipated its abolition and, in exercise of powers conferred on them by section 137(1) of the Local Government Act 1972 to incur expenditure 'which in their opinion is in the interests of their area or any part of it or all or some of its inhabitants', resolved to create a trust under which the trustees were directed to apply the capital and income of a trust fund in such manner as they thought fit 'for the benefit of any or all or some of the inhabitants of the County of West Yorkshire' in four specified ways. These were

(i) to assist economic development in the County in order to relieve unemployment and poverty;
(ii) to assist bodies concerned with youth and community problems;
(iii) to assist and encourage ethnic and other minority groups; and

[128] [1982] 1 WLR 202, 213.
[129] See para 10.28 above.
[130] [1974] Ch 17, 27.
[131] [1982] 1 WLR 202, 212.
[132] See, eg, (1975) 49 ALJ 7, 10 (IJ Hardingham).
[133] It is not entirely clear that Templeman J did not have a discretionary trust in mind. Other observations earlier in his judgment, together with the fact that he actually held valid the wide intermediate power in question, clearly show that he did not think that an enormously wide class would be fatal to a mere fiduciary power.
[134] [1973] Ch 9, 28.
[135] [1982] 1 WLR 202, 212.
[136] [1985] RVR 24. See also [1986] CLJ 391 (C Harpum).

(iv) to inform all interested and influential persons of the consequences of the proposed abolition of the Council (and other metropolitan councils) and of other proposals affecting local government in the County.

The disposition was held to create a discretionary trust and not a power,[137] but it was not a charitable trust. The class of objects numbered some two-and-a-half million people. Lloyd J was prepared to assume, without deciding the point, that the class was defined with sufficient clarity (although it was open to argument what was meant by 'an inhabitant').[138] Nevertheless, he concluded that it was invalid as an express private trust because, being in favour of a class of this size, it was 'quite simply unworkable'. He referred to the remarks of Lord Wilberforce (also cited above) in *McPhail v Doulton*[139] and concluded that the facts of this case fell squarely within them. He also referred to Templeman J's observation, in *Re Manisty's Settlement*,[140] to the effect that a power in favour of the residents of Greater London would be bad, not on the ground of width, but because the settlor would have no sensible intention to benefit an accidental conglomeration of people. This objection did not apply here, for the Council had every reason to benefit the inhabitants of West Yorkshire. However, the definition of beneficiaries was so hopelessly wide as to be incapable of forming anything like a class.

10.38 *West Yorkshire* is not a satisfactory authority, however. Lloyd J clearly concluded that the trusts in question were, in fact, non-charitable purpose trusts which, as he rightly pointed out, are, subject to certain exceptions, void. None of the purposes in question fell within the traditional, recognised exceptions. Consequently, in order to be valid, they had to fall within the scope of the supposed principle established in *Re Denley's Trust Deed*[141] and *Re Lipinski's Will Trusts*,[142] namely that the prohibition of non-charitable purpose trusts was confined to purposes which were abstract or impersonal and did not extend to purposes which were, in substance if not in form, for the benefit of ascertained or ascertainable beneficiaries. In fact, this analysis has subsequently been questioned.[143] Nevertheless, even if it is good law, it cannot be invoked in support of anything other than a clear and specific purpose. The provision of a sports ground for employees of a company (as in *Re Denley*) is one thing. A non-charitable purpose described or expressed in ambiguous terms is another. Purposes which may be described as 'benevolent' or 'liberal' are uncertain,[144] not just because they are not synonymous with 'charitable' purposes, but also because they are inherently vague and ambiguous (or 'abstract', to use the word in *Re Denley*); the *Re Denley* principle cannot save them. Some of the purposes stipulated in *West Yorkshire* would seem to fall within this category and would therefore have been held void even if the class of objects had been smaller or more precisely defined. On this basis, there was no need to decide on the validity of the trusts by reference to 'administrative unworkability'.

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[137] It would seem, however, that the trust was regarded as an invalid non-charitable purpose trust.

[138] An argument in support of conceptual uncertainty would be difficult to sustain, however, given that the word appeared in a statutory provision.

[139] [1971] AC 424, 457. He also referred to certain observations made by Lord Reid (cited above) in *Re Gulbenkian's Settlements* [1970] AC 508, 518, although these seem to have been directed at a different point.

[140] [1974] Ch 17.

[141] [1969] 1 Ch 373.

[142] [1976] Ch 235.

[143] See *Re Grant's Will Trusts* [1980] 1 WLR 360, where Vinelott J concluded that, in substance, *Re Denley* actually involved a trust in favour of ascertainable human beneficiaries; and *Re Horley Town Football Club* [2006] EWHC 2386 (Ch), [2006] WTLR 1817. See also Thomas and Hudson, Chapter 6; *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54; and (1985) 101 LQR 269, 280–2 (PJ Millett).

[144] *Morice v Bishop of Durham* (1805) 10 Ves Jr 522.

10.39 In any event, the decision in *West Yorkshire* is unsatisfactory on a number of other grounds. It is clear that Lloyd J was influenced (perhaps unduly) by the similarity between the class of objects which he had to consider and the example given by Lord Wilberforce in *McPhail v Doulton*[145] (the 'residents of Greater London') despite the fact that there is no universal agreement as to the appropriateness of that example.[146] As Lloyd J himself acknowledged, his decision was reached without hearing full argument.[147] In particular, there is no clear indication why the trust was 'administratively unworkable'. Lloyd J conceded that there was nothing capricious about it: the local council had every reason to benefit the inhabitants of its area. The terms of the disposition identified categories and groups of objects to which the trustees were to have regard, that is, the unemployed, the poor, bodies concerned with youth and community problems, and ethnic groups. In this sense, there were criteria by which the trustees would be directed in carrying out their obligations. If the class had been restricted to these specific categories, the trust might well have been valid. However, there were also other, more ambiguous categories: for example, one of the purposes required the trustees to inform all interested and influential persons on the consequences of the proposed abolition of the Council,[148] a purpose and a group of individuals which could hardly be given a clear unambiguous meaning. Therefore, the trust could be said to have been conceptually uncertain (or to have had some abstract purposes, if this is different), in which case it must again be asked why the issue of 'administrative unworkability' needed to be made the centrepiece of the decision.

10.40 Nevertheless, unsatisfactory though *West Yorkshire* may be, it seems clear that, in principle, a discretionary trust, unlike a mere power, may be declared invalid on the ground that it is 'administratively unworkable'. It is not entirely clear, however, whether the sheer size of the class alone, the simple question of numbers or potential numbers, may be a relevant factor in determining invalidity on this ground. In *Re Baden's Deed Trusts (No 2)*,[149] Sachs LJ clearly did not think that numbers alone would be fatal, for he seems to have referred to two potentially large classes, namely 'those who have served in the Royal Navy' and 'the wide-ranging discretionary trusts . . . of the Army Benevolent Fund', as examples of classes which were clearly valid. However, even these examples do not come close to the size of the classes of objects of the intermediate powers at issue in *Re Manisty's Settlement*[150] and *Re Hay's Settlement Trusts*.[151] In principle, it is not difficult to envisage a case where the settlor has purported to create discretionary trusts in respect of a very small trust fund in favour of a very large class of objects, in which case the administration of the trusts may prove well-nigh impossible and the size of the class would be a significant factor. Indeed, it may be that this is a question of degree, depending on the purpose of the trust.[152] Nevertheless, the real vice is not so much the size of the class as the absence of identifiable criteria or clear principles to guide the trustees in the performance of their duties. As Lord Wilberforce pointed out, in *McPhail v Doulton*,[153] in relation to the trustees' duty to inquire and ascertain, 'in each case the

[145] [1971] AC 424, 457.

[146] See, eg, *Re Manisty's Settlement* [1974] Ch 17, 24–5; *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 212; and (1974) 38 Conv (NS) 269 (L McKay).

[147] *Re Hay's Settlement Trusts* [1982] 1 WLR 202, eg, does not seem to have been cited.

[148] Such a purpose has a similar flavour to that in *Brown v Yeall* (1791) 7 Ves Jr 50n, where the purpose was to provide 'such books . . . as may have a tendency to promote . . . the happiness of mankind'.

[149] [1973] Ch 9, 20.

[150] [1974] Ch 17.

[151] [1982] 1 WLR 202.

[152] *cf.* the approach suggested by Lord Cross for determining whether the potential beneficiaries of a trust constitute 'a section of the public' for charitable purposes: *Dingle v Turner* [1972] AC 601, 624.

[153] [1971] AC 424, 457.

trustees ought to make such a survey of the range of objects or possible beneficiaries as will enable them to carry out their fiduciary duty'. Earlier,[154] he had described what this entailed:

> The trustee [should] examine the field, by class and category; might indeed make diligent and careful inquiries, depending on how much money he had to give away and the means at his disposal, as to the composition and needs of particular categories and of individuals within them; decide upon certain priorities or proportions, and then select individuals according to their needs or qualifications.

This suggests that, if a 'class' does not comprise one group of objects, all of whom possess a common nexus or defining characteristic, it is at least already categorized and sub-classified by the terms of the trust. The trustees' duty, therefore, seems to be one to examine and survey such categories and sub-classes, to determine priorities, to apportion and select. Where such broad criteria are identified, this duty can be carried out even in relation to a large class of objects, such as that in *Re Gestetner*[155] (which included named individuals, descendants of two named persons, named charities and employees of various companies). In contrast, it cannot be executed in relation to a class of 'all the residents of Greater London', which is comprised of persons who are not categorised by the relevant disposition, and who have no obvious connection with each other or with the settlor, or with some institution (such as a company or a charity) favoured by the settlor, other than the accidental and arguably irrelevant fact of their residence in a geographical area: they are, as Templeman J put it, in *Re Manisty's Settlement*,[156] 'an accidental conglomeration of persons who have no discernible link with the settlor or with any institution'. In such a case, no principle has been provided by which the trustees could conduct a survey of the objects or know where or with whom to begin or finish.[157]

10.41 The very nexus which qualifies objects to be members of the class suggests in itself what the relevant criteria ought to be. Thus, in the case of issue, age, health, poverty, wealth, family and social circumstances, disabilities, educational requirements, and so forth, would all be relevant factors; and in the case of employees, other factors, such as loyalty, length of service, and perhaps the nature of the employment, might also be relevant. The purpose of the trust would also clearly be an important pointer, for example whether it is a family trust, or a trust to provide pensions and retirement benefits for employees. The trustee would be exercising his discretion in attributing priority to some rather than others, but, even then, the priorities would change with time and circumstances and would not remain immutable. On the other hand, in respect of a huge class, running into millions, where there is no obvious link between them and the settlor, it is impossible for the trustee to begin to apply such criteria. There is no reasonable basis upon which the trustee could conclude that the settlor intended to benefit primarily those who were poor, or those who were disabled, or those who were old, and so on. It is, of course, a matter of degree depending on the numbers and on the circumstances of the case. Nevertheless, for the purpose of categorization, it is the settlor's way of looking at things that matters and not the way which the trustees might themselves prefer. The trustees' duty to inquire and ascertain must therefore involve a duty of a different character from the duty to categorise per se. Otherwise, the trustees would be exercising their discretion in respect of a narrower class than that actually described in the trust instrument. The trustees cannot survey the entire class because they have not been provided with a sufficiently

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[154] *ibid.*, 449.
[155] [1953] Ch 672. See para 10.18 above.
[156] [1974] Ch 17, 27.
[157] *Re Baden's Deed Trusts (No 2)* [1973] Ch 9, 28, *per* Stamp LJ.

clear principle or reference point to guide them in making that survey; and he cannot simply select such a principle or reference point themselves.[158]

10.42 It has been suggested that the duty to consider, or to inquire and ascertain, is just as capable of being fulfilled in relation to 'the residents of Greater London' as in any discretionary trust of the *Baden* type. The trustees themselves could select particular qualifying features (such as poverty or physical disablement, or kinds of employment, or age groups) and categorize the general class in accordance with the chosen criteria. Even in the case of a discretionary trust in favour of such of the settlor's issue as the trustees in their absolute discretion think fit, the trust instrument itself does not indicate whether poverty, health, length of service, loyalty or any other criteria which the settlor might have in mind as the basis on which the trustees should exercise their discretion. Such a trust could be valid only if the trustees themselves provide the criteria for selection. However, it is doubtful whether the two situations postulated here are similar. In one case, the exercise by the trustees of their discretions performs a secondary function, which in broad terms is the selection of particular objects from a pre-existing defined class. If a 'class' of objects can be said to be comprised of those who have some common attribute, for example relatives (who are connected by blood relationship with the settlor and presumably with each other), or employees (all of whom are connected by their common employment) or, alternatively, of different groups or categories, each of which has such a common attribute (within itself), the class (and each of its component groups) will automatically provide the boundaries within which a selection may be made and also the broad criteria which may be relevant to a selection within that class. In making such a selection, universal factors such as age, health, length of service, and so forth, will all be relevant considerations which must be taken into account, but they will then perform a secondary function only. The weight to be accorded to some factors rather than others will no doubt depend on the purpose of the trust (which is always paramount) and the prevailing circumstances. It cannot be the case (in the absence of some contrary indication) that the trustees would be exercising their discretions properly if they themselves were to determine upon one single criterion (or even a few criteria) for the purpose of making their selection, to the exclusion of other relevant factors, for they would then effectively be redefining the class of objects (say, the settlor's issue) as a much narrower class (say, the settlor's poor or disabled issue). In the other case ('the residents of Greater London') the trustees might be doing precisely this *ab initio*: they would be exercising their discretion for the primary purpose of constituting or categorising the class of objects itself. Any class can be grouped or categorised in different ways, but it is the way in which the settlor did it, and the purpose for which he did it, that matters. Without this initial (if broad) categorization of objects or groups of objects, the trustees have no reference points from and by which they can discern either the broad intentions of the settlor or the lines along which they are to conduct their survey. The dividing line is admittedly a fine one, but it is nonetheless a difference in kind rather than in degree.[159]

10.43 As for 'relatives', if this is defined as descendants of an unidentified common ancestor, there must be a question as to whether the class would be administratively unworkable. The Court of Appeal

[158] (1974) 38 Conv (NS) 269, 274 (L McKay).

[159] This is not intended to suggest that it will always be impossible, irrespective of the circumstances of the case, to have a valid *power* of appointment in favour of a class comprised of 'the residents of Greater London'. There may be sufficiently clear indications of how the donor intended the class to be categorized. See also Megarry V-C's remarks in *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 212 (which were, however, addressed to the claim that such a class might be 'capricious').

in *Re Baden's Deed Trusts (No 2)*[160] did not decide this question. It is clear that counsel arguing for invalidity expressly disclaimed relying on any suggestion that the relevant classes ('dependants' or 'relatives') was so large that the trusts were 'administratively unworkable'.[161] Sachs LJ referred[162] to 'the suggested numerative range' of the word 'relative' as 'a matter which strictly would only be relevant to the abandoned "administratively workable" point'. The point was apparently raised at first instance, but then not argued because the evidence on the point was incomplete.[163] Therefore, the point was not actually decided, but it was clearly regarded as an evidential matter and, indeed, one concerned with the size of the class. In *Re Scarisbrick*,[164] Lord Evershed MR observed, with regard to a class of 'relations': 'That class is, in theory, capable of almost infinite expansion, but proof of relationship soon becomes extremely difficult in fact.' This underlines the close relationship between—indeed the interdependence of—conceptual and evidential certainties (to which we have already adverted),[165] for the 'concept' by which the class is defined ceases to be 'relations' generally and becomes, in effect, 'those who can prove themselves to be relations'. On this approach, a class of 'relatives' would also seem to be administratively workable, for it provides a practical and realistic solution to what would otherwise be a potentially limitless number of members.[166] The same approach would not work in all cases, however. In the case of a class of objects which extends to many millions and is comprised of several different (and perhaps unconnected) groups and categories, the size of the overall class may still be too large, and the scale and scope of any duty to inquire and ascertain may still be too great, to enable discretionary trustees to fulfil their duties properly or at all.

(4) Objects' remedy where there is a failure to consider exercise

10.44 If a trustee is under an obligation to consider periodically whether or not to exercise a mere power of appointment conferred on him, it would seem to follow that, in the event that the trustee refused to carry out his obligation, any member of the class of objects of that power could complain. The trustee cannot 'simply fold his hands and ignore' the power: 'he must from time to time consider whether or not to exercise the power, and the court may direct him to do this'.[167] However, it is difficult to see how the trustee could be forced to consider exercising the power. Certainly, such a remedy would probably be of little value to the complaining object. His remedy, therefore, would seem to be the removal of the refusing trustee and his replacement by another. 'A member of the specified class [of objects] might, if he could show that the trustees had deliberately refused to consider any question at all as to the want or suitability of any member of the class, procure their removal.'[168]

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[160] [1973] Ch 9.

[161] *ibid.*, 14; and also 20, *per* Sachs LJ.

[162] [1973] Ch 9, 22.

[163] [1972] Ch 607, 619.

[164] [1951] Ch 622, 633.

[165] See paras 4.69–4.72 above.

[166] This may also provide support for the argument that 'administrative workability' is essentially no more than (or, perhaps, but one aspect of) conceptual certainty.

[167] *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209, *per* Megarry V-C. See also *Re Bryant* [1894] 1 Ch 324, 331–2, *per* Chitty J: 'If, however, . . . there is an obligation to entertain the question of duty to consider the matter, and then a discretion arising in the execution of the duty, then I may inquire whether the four trustees are acting honestly or not, in the discharge of their duty.'

[168] *Re Gestetner Settlement* [1953] Ch 672, 688, *per* Harman J. See also *Gartside v IRC* [1968] AC 553, 606, *per* Lord Reid; *Re Manisty's Settlement* [1974] Ch 17, 25, *per* Templeman J. See also *Tempest v Lord Camoys* (1882) 21 Ch D 571, 578, 579, 580. See also paras 3.80–3.91 above.

On the other hand, in *McPhail v Doulton*,[169] Lord Hodson made the following statement: **10.45**

> Where there is a mere power entirely different considerations arise. The objects have no right to complain. Where by the instrument creating the power the discretion is made absolute and uncontrollable the court cannot interfere . . . The trust in default controls and he to whom the trust results in default of exercise of the power is in practice the only one competent to object to a wrongful exercise of the power by the donee. Counsel did not profess to know of any successful application to the court by a person claiming to be an apparent object of a bare power. I exclude from consideration cases in which bad faith may be alleged.

This passage carelessly encompasses several different principles. Even in the case of a 'discretionary trust', if the element of discretion accorded to the trustees is 'absolute and uncontrollable', it is doubtful (to say the least) whether any object can challenge an exercise of that discretion: it is most unlikely that the court would interfere.[170] On the other hand, if the power or discretion in question is alleged not to have been exercised properly, that is, if there is some material flaw in the decision-making process as opposed to some alleged objection to the decision itself, the court can and may intervene.[171] Lord Hodson did not identify what he meant by 'wrongful exercise', other than to distinguish it from an exercise which involves bad faith. The decision-making process may, of course, be flawed because of the presence of bad faith. However, bad faith does not seem to be essential: a substantial, but innocent, misapprehension as to the nature or scope of the discretion, for example, may be sufficient. In any event, the issue of a 'wrongful exercise' is a separate question from a failure to exercise; and it is not entirely clear what point (if any) is being made of relevance to the latter question. It is difficult to see how it could be in the interests of a beneficiary entitled in default of appointment to complain of a failure to consider the exercise of the power (as opposed to an actual exercise which is, say, excessive or fraudulent), for an exercise could well defeat or divest that beneficiary of his interest. A failure to consider, viewed realistically, is the concern only of the objects and of those trustees who are willing to consider and who are not, therefore, failing in their own duty.[172] It also seems to be incorrect to say that there is no case in which an object of a mere power has complained successfully about an exercise of a mere power.[173] However, even if there is no clear authority for the proposition that an object of a mere power can complain on the grounds that the trustee is refusing to consider its exercise, there is no clear authority against the proposition either; and it seems to accord with common sense that he should, in principle, have standing to do so.

In principle, an object's complaint could take one (or both) of two forms. First, he could complain **10.46** that the trustee was refusing to give any consideration at all to the exercise of the power, for example by refusing to conduct any survey at all of the range of objects of the power. In practice, such a complaint would be difficult to establish, or even to get off the ground. A persistent failure by the trustee to make any distribution at all might be a relevant factor, but it could not in itself found a complaint, for the trustee could well have decided, in a proper exercise of his discretion, not to make any distribution. Secondly, the object could complain that the trustee was refusing to consider that object's own particular position and circumstances. In this case, it would seem to be

[169] [1971] AC 424, 441. See also *Re 90 Thornhill Road Tolworth, Surrey* [1970] Ch 261, 265; and *Re Earl of Stamford and Warrington* [1916] 1 Ch 404, 421.

[170] See generally Ch 11 below.

[171] See paras 10.75–10.145 and paras 11.08–11.11 below.

[172] See, eg, *Klug v Klug* [1918] 2 Ch 67.

[173] See, eg, *Re Roper* (1879) 11 Ch D 272 (where, however, the fund had apparently been paid into court). See also *Re Lofthouse* (1885) 29 Ch D 921; and *Re Hodges* (1878) 7 Ch D 754 (which seems to involve a direction to trustees, however).

a necessary prerequisite that the existence and circumstances of the object be known to, or have been brought to the attention of, the trustee. A mere power does not require a trustee to discover the identity of all its objects, nor to consider the circumstances of each and every object. Therefore, the fact that a particular object may not have been considered by the trustee is not necessarily sufficient in itself to found any complaint. In other cases, the trustee may have committed some act which itself indicates a failure to consider any exercise of the power, for example where he has purported to delegate or release the power without authority, or where he has exercised the power on what is a manifestly capricious basis. These heads are dealt with separately. The remedy available to a complaining object would seem to be the removal by the court of the trustee who is refusing to consider exercising the power and his replacement by another. The court could perhaps direct the refusing trustee to carry out this particular duty, but it is difficult to see how it could force him to do so or what sanction could be applied, other than his removal, in the event of his continued refusal. The same difficulty could apply, in principle, to a replacement trustee who 'might equally be inert or recalcitrant'.[174] Nevertheless, the difficulties facing a complaining object are essentially evidential difficulties; and there seems to be no obstacle, in principle, to the making of a complaint.

(5) Remedies of objects of discretionary trust on failure to distribute

10.47 A discretionary trust, unlike a mere power, imposes on the trustee a duty to consider exercising his discretion (or to inquire and ascertain) and also a duty to distribute the subject-matter of that discretion. These duties are owed to the objects of the power. There are no beneficiaries entitled in default of appointment in this case; and no duty is owed to the donor of the power.[175] If the trustee fails to carry out his duties, he is in breach of trust. Only the objects of the power (and any non-defaulting trustee) can complain to the court. The trustee cannot be compelled to make any distribution in favour of any particular object (whether he is the complaining object or not). It may be the case that he can not even be compelled to consider the position, circumstances and needs of every object, although this would seem to depend on the width or range of the class: there is no obvious reason why he should not be expected to do so where the class is small. In any event, each object can complain that the trustee is refusing to consider the exercise of his discretion under the discretionary trust, whether by failing to inquire into and ascertain the range of potential beneficiaries or to consider any particular claimant, and thereby failing to administer his trust properly. The court can then take steps to ensure that the duty is executed. The court may appoint a new trustee in place of the defaulting trustee;[176] it may direct the trustees to distribute (at least, where the proper basis for distribution is readily apparent);[177] it may direct that the subject-matter be distributed equally or unequally amongst the objects; or it may direct representatives of the different classes of beneficiaries to prepare a scheme of distribution or authorize them to distribute

[174] *IRC v Broadway Cottages Trust* [1955] Ch 20, 31. See also (1971) 87 LQR 31 (JW Harris).

[175] *Re Astor's Settlement Trusts* [1952] Ch 534, 542, *per* Roxburgh J.

[176] *McPhail v Doulton* [1971] AC 424, 457; *Re Gestetner Settlement* [1953] Ch 672, 688, *per* Harman J; *Rawcliffe v Steele* [1993] MLR 426, *per* Hegarty JA; *Mortimer v Watts* (1852) 14 Beav 616. See also *Gartside v IRC* [1968] AC 553, 606, *per* Lord Reid; *Re Manisty's Settlement* [1974] Ch 17, 25, *per* Templeman J. See also *Tempest v Lord Camoys* (1882) 21 Ch D 571, 578, 579, 580. In *IRC v Broadway Cottages Trust* [1955] Ch 20, 35, Jenkins LJ said that 'the Court would not be executing the trust merely by ordering a change in the trusteeship', but this statement must be confined to its particular context, namely one where there was uncertainty as regards the complete enumeration of all possible objects.

[177] See, eg, *Bennett v Honywood* (1772) Amb 708; *Re J Bibby & Sons Ltd's Pension Trust Deed* [1952] 2 All ER 483, 486. *cf. Re Astor's Settlement* [1952] Ch 534, 548.

in accordance with a scheme already prepared.[178] The precise remedy will vary according to the circumstances of each case, but the court will endeavour, in all cases, to execute the trust power 'in the manner best calculated to give effect to the settlor's or testator's intention'.[179]

(6) Powers of fiduciaries other than trustees

10.48 There is no reason, in principle, why fiduciaries who are not trustees, such as protectors of settlements[180] should not also be subject to a similar duty to consider from time to time the exercise of their powers. Indeed, this seems to be implicit in both the general principle that a fiduciary can not fetter the exercise of a power or release it[181] and in the general, overriding duty of a fiduciary to act in the 'best interests' of his principal (in the case of an agent) or his company (in the case of a director).[182] Moreover, for the purposes of the rule in *Hastings-Bass*[183]—which, until recently, held considerable sway and applied to fiduciaries other than trustees[184]—the failure of a fiduciary to take into account (that is, to consider) crucially relevant considerations was one of the fundamental requirements for the rule to apply. A fiduciary's powers are given to him in order to facilitate the discharge of his duties, and he is therefore under a continuing duty to consider their exercise. Thus, if a fiduciary is charged with the control or management of a company or of property, or the investment of funds, it seems reasonable to conclude that, even though he is not a trustee, he ought to consider what is expedient to be done from time to time and also that he might be liable for any loss that accrues as a result of his failure to do so.[185] For example, a 'deputy' appointed by the court of Protection, under the Mental Capacity Act 2005,[186] to make decisions on a patient's behalf, is in a fiduciary position, even though no property is vested in him or her.[187] It would be expected, therefore, that such a person would be required to keep the patient's interests and needs under constant review. It is also a basic principle that, in deciding whether to commit a company to a transaction, its director or directors have a duty to give consideration to the separate interests of the company and its creditors, distinct from the interests of other associated or group companies, or indeed any other companies in which they might be interested.[188] It is also trite law that if a company is insolvent, the directors of a company must have paramount regard to the interests of creditors when acting on behalf of the company. If, for example, they cause the insolvent company to transfer assets or pay away money without regard to the interests of the general body of creditors, the directors may commit a breach of duty to the company.[189] And in *Re Capitol Films Ltd (In Administration)*,[190] the court was not satisfied that a purported assignment of the rights of the assignor, now in administration, had been effective to transfer those rights to the

[178] See, eg, *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32. *cf. Re William Makin & Sons Ltd* [1993] OPLR 171; and *British Coal Corporation v British Coal Staff Superannuation Scheme Trustees Ltd* [1993] PLR 303; *Liley v Hey* (1841) 1 Hare 580; and (1971) 29 CLJ 68, 95–100 (J Hopkins).

[179] *McPhail v Doulton* [1971] AC 424, 457, *per* Lord Wilberforce.

[180] See para 1.58 above. It is not suggested that all protectors are necessarily fiduciaries. See also Thomas and Hudson, paras 23.34–23.36; and A Holden, *Trust Protectors* (Jordans, 2011); Ch 2.

[181] See, eg, *Ayr Harbour Trustees v Oswald* (1883) 8 App Cas 623, 639–40 (exercise of statutory powers); *Re Gestetner* [1953] Ch 672, 688.

[182] The 'best interests' duty is dealt with more fully at paras 10.158–10.183 below.

[183] [1975] Ch 25. This 'rule' is dealt with in Ch 12 below.

[184] *Hunter v Senate Support Services Ltd* [2005] 1 BCLC 175, [2004] EWHC (Ch) 1085.

[185] *Re Medland* (1889) 41 Ch D 476, 481–2.

[186] See paras 7.12–7.17 above.

[187] *Bunting v W* [2005] EWHC 1274 (Ch); [2005] WTLR 955; *Pitt v Holt* [2011] EWCA Civ 197, [147].

[188] *Colin Gwyer v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153, [72]–[76].

[189] *Liquidator of West Mercia Safetywear v Dodd* [1988] BCLC 250; See also *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242; *Hilton International Ltd v Hilton* [1989] 1 NZLR 442; *Re OPC Managed Rehab Ltd* [2010] WTLR 469, 494–5.

[190] [2010] EWHC 2240 (Ch).

agent has given negligent advice? Indeed, when advising agents are used and relied upon, whose duty is it to ensure, for example, that there are no sudden changes in circumstances and legislation? For example, in *Re Howe No 1 Trust, Leumi Overseas Trust Corporation Ltd v Howe*,[379] the trustee of a Jersey discretionary trust sought the setting aside of certain investments and loans to the UK resident and domiciled settlor of the trust. The transactions had been intended to avoid immediate liability to UK capital gains tax on the part of the settlor. The trustee took and acted upon the advice of accountants. However, after the advice was given but before the trustee entered into the transactions, UK tax law was changed, with the result that a substantial liability to capital gains tax fell on the settlor as a result of the transactions. Significantly, the settlor had a right to reclaim such tax from the trustee.[380] The trustee's application to the Royal Court of Jersey to have the transactions set aside was granted. Applying *Hastings-Bass*, the Royal Court held that they would not have been entered into if the trustee had been aware of the true tax consequences. The Royal Court considered at some length the requirement laid down by Lightman J, in *Abacus v Barr*,[381] that, for the principle to apply, there was an additional requirement that the trustee or its advisers should have been at fault or in breach of trust (rather than merely mistaken).[382] This was particularly relevant because there was no proven fault. It was not reasonable to expect the trustee to seek confirmation from the accountants before proceeding with implementation of the advice given. Were the accountants at fault for not updating their advice following announcement of the changes? This depended on the terms of their retainer (which were not known to the court); and, in any event, the accountants were not represented, so no finding of fault could be made. However, the clear implication is that, if the accountants had been found to have been at fault, the *Abacus* requirement would have been satisfied and that fault of the agent would have been attributed to the trustee. If the principles in *Pitt v Holt* were now applied to these facts, then it would seem that the result would be different (at least in England): there was no breach of trust and the transaction could not be set aside. The focus of the inquiry would shift, presumably, to an examination of the adviser's retainer, for otherwise there would be no means of ascertaining whether it was the adviser or the trustee who was at fault and in respect of what exactly.[383] It is not entirely clear, in fact, why the origin or source of the error should make any material difference. The relevant question would seem to be whether an existing, knowable fact or piece of information, that is, a 'relevant consideration', was actually considered by the trustee (as opposed to some future, unknown, and unpredictable event or information) and not the reason why it was no so considered. However, this is clearly not the case now. Of course, in the completely different case, where the advice is that the trustees have power to do what they wish to do and that advice is wrong, the trustees' action is simply void in any event: favourable advice clearly can not confer on them a power they never had.

(3) Voidable (not void) act

10.98 The other point from *Abacus* that was expressly approved by the Court of Appeal is that the decisions of fiduciares in these circumstances are voidable, not void. Indeed, this seems to follow from the conclusion that the issue is an improper exercise of an existing power and not one of absence

[379] [2007] JLR 660.

[380] How far such a right of indemnity was enforceable in Jersey was debatable, but it was clearly enforceable against the trust's assets in the UK.

[381] [2003] 2 WLR 1362.

[382] The court concluded that there was no requirement of 'fault' and decided not to follow *Abacus v Barr*: [2007] JLR 660, 669–75.

[383] The Royal Court also observed, in a complete contrast with the Court of Appeal in *Pitt v Holt*, that if a trustee acted on the basis of incorrect tax advice, an application under *Hastings-Bass* was preferable, as a matter of policy, to settling such a case by way of an action for negligence between the trustee, beneficiaries and advisers: *ibid.*, 668.

of power in the first place. Lloyd LJ summarized the position in relation to these two distinct situations as follows:[384]

> The purported exercise of a discretionary power on the part of trustees will be void if what is done is not within the scope of the power. There may be a procedural defect, such as the use of the wrong kind of document, or the failure to obtain a necessary prior consent. There may be a substantive defect, such as an unauthorized delegation or an appointment to someone who is not within the class of objects. Cases of a fraud on the power are similar to the latter, since the true intended beneficiary, who is not an object of the power, is someone other than the nominal appointee. There may also be a defect under the general law, such as the rule against perpetuities, whose impact and significance will depend on the extent of the invalidity. . . .
>
> By contrast with [these] types of case . . ., if an exercise by trustees of a discretionary power is within the terms of the power, but the trustees have in some way breached their duties in respect of that exercise, then (unless it is a case of a fraud on the power) the trustees' act is not void but it may be voidable at the instance of a beneficiary who is adversely affected. The interest of a beneficiary in the trust property continues until it is brought to an end by an act of the trustees done in accordance with the terms of the trust (or the general law). This is an incident of the beneficiary's right to have the trust duly administered in accordance with the provisions of the trust instrument and the general law: see *Target Holdings v Redfern* [1996] AC 421 at 434. If the act of the trustees which purports to alter or bring to an end the interest of a beneficiary is affected by a breach of fiduciary duty, then the beneficiary is entitled to restrain the trustees from acting on it, and to have it set aside, subject always to equitable defences and discretionary factors. Of course if a third party purchaser has acquired some relevant trust property as a result, he may have an indefeasible title, if he gave value without notice of the breach of fiduciary duty, but in such a case the beneficiary's interest would attach to the proceeds of the sale.
>
> If no relevant person takes any steps to have such an act by the trustees set aside, then it is as valid and effective as if there had been no vitiating factor. In that respect the position is the same as if a transaction is procured by misrepresentation, undue influence or fraud. The aggrieved party may seek to avoid the transaction but, first, avoidance is not a matter of right but is subject to a discretion on the part of the court, and secondly if there is no attempt, or no successful attempt, to avoid the transaction, it remains valid and effective as regards all concerned.

In principle, just as, at common law, there are few cases where a transaction is void, rather than voidable, so, too, cases where an act done by trustees which appears to be within their powers can be held to be void ought to be kept to a minimum. This would not only avoid what had been referred to, in *Scott v National Trust*,[385] as 'damaging uncertainty as to what has and has not been validly decided', but it would also make available equitable defences and enable the court to exercise its discretion as to the appropriate remedy, thereby making it easier to reach a just outcome while recognizing the defect in the transaction.

(4) Practical consequences

10.99 Various practical consequences are likely to arise as a result of the Court of Appeal's decision. One of them is that the number of applications to set aside an exercise by a trustee of a discretionary power will probably decrease significantly.[386] This seems an inevitable result of the demise of the 'rule in *Hastings-Bass*' and of the paramount need to establish a prior breach of duty on the part of the trustee. The nature of applications to set aside will also change. As Lloyd LJ pointed out, if in future it is desired to challenge such an exercise on the basis of failure to take account of a relevant matter, 'it will be necessary for one or more beneficiaries to grasp the nettle of alleging and proving

[384] *ibid.*, [96]–[97].
[385] [1998] 2 All ER 705, 718.
[386] Possibly applications for rectification will now increase instead.

a breach of fiduciary duty on the part of the trustees. Only rarely would it be appropriate for the trustees to take the initiative in the proceedings.'[387] This alone will be in sharp contrast to the nature of most recent applications made under *Hastings-Bass* itself. It might occasionally be appropriate for trustees to seek directions from the court 'if a beneficiary alleges breach of trust but does not bring his own proceedings', but this will surely be rare.[388] Moreover, the Revenue authorities, not having a direct interest in the trust fund, will have no standing to challenge a voidable act or decision: only in those rare cases where it is in excess of the power and therefore void will the Revenue be in a position to act. On a broader level, the protection afforded to beneficiaries by the *Hastings-Bass* rule—and it was accepted that the point of the principle was to protect beneficiaries rather than trustees—will be 'reduced significantly', as Lloyd LJ himself recognized. A claim for breach of trust by beneficiaries against the trustees themselves may often be precluded by an exoneration clause in the trust deed. It may also be that 'a claim against the professional advisers of the trustees would face problems even if liability can be established, because different loss may be suffered by different people, not all of whom may have a claim against the advisers'. Nevertheless, such practical considerations, though recognized, were not sufficient to displace the conclusion that a breach of trust had to be found in order to set aside an act of the trustees which is within their powers.

(5) Decisions on the rule in *Hastings-Bass*

10.100 One may also wonder whether those decisions which applied[389] the 'rule in *Hastings-Bass*' and set aside decisions and acts of trustees were wrongly decided; or, put another way, whether they would now be decided differently in the light of *Pitt v Holt* and *Futter v Futter*. Lloyd LJ observed that 'it seems likely that a number of the cases decided at first instance would have been decided differently', but concluded that it was 'not a useful exercise for present purposes to re-examine the earlier cases generally'; and he did not do so.[390] Indeed, this was the only pragmatic course of action open to him. The evidence submitted in these decisions was clearly directed at the question whether or not the requirements of the rule in *Hastings-Bass*, which was assumed to exist, were satisfied. It is difficult, if not impossible, therefore, to know how such evidence might have been presented or interpreted when considered in relation to a different question or, indeed, whether there might have been other available evidence relevant to this other (unargued) issue. *Green v Cobham*[391] (a family trust case) is perhaps a case in point. This involved deeds of appointment, executed when it was not appreciated that a will trust and an accumulation and maintenance settlements constituted a single composite settlement with a single body of trustees for capital gains tax purposes. Initially, the trustees were non-resident.[392] One of the trustees retired from practice as a solicitor, while remaining as a trustee, and as a result the majority of trustees of the composite settlement became resident in the UK, with ensuing adverse capital gains tax consequences for the settlement

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[387] [2011] EWHC 197 (Ch), [130].

[388] Lloyd LJ also pointed out that, presumably, proceedings by a beneficiary would generally need to be brought by a Part 7 Claim Form, 'since it should not be assumed that there will not be a substantial dispute of fact that needs to be resolved, and statements of case will be needed in order to set out the allegation of breach of trust and the answer to that case'.

[389] As opposed to simply discussed and then not applied, as, eg, in *Breadner v Granville-Grossman* [2001] Ch 523; [2001] WTLR 829 and *Smithson v Hamilton* [2008] 1 WLR 1453; [2007] EWHC 2900 (Ch) (the Court of Appeal approved a compromise: [2008] EWCA Civ 996), where, after a lengthy analysis in each case, Park J refused to apply the rule in *Hastings-Bass*.

[390] *ibid.*, [129].

[391] [2002] STC 820: judgment delivered on 19 January 2000.

[392] Under s 52(1) and (2) of the Capital Gains Tax Act 1979. See now s 69 of the Taxation of Chargeable Gains Tax Act 1992.

on its ceasing to be non-resident. Parker J held that the principle in *Hastings-Bass* applied to the appointments, which were void in their entirety. In *Pitt v Holt*,[393] Lloyd LJ said of this decision: 'I rather doubt whether *Green v Cobham* would have been decided the same way if this principle had been applied. The unfortunate tax consequences might have been found to be too remote from the discretionary exercise that the trustees of the will trust were considering, so that they might not have been within the scope of the matters that the trustees ought to take into account. In any event it might have been the duty of the trustees' solicitors to advise them on the point, or to see that they had the benefit of proper advice.' On the other hand, it seems that, at the relevant time, the trustees were primarily concerned about the income tax implications[394] and not the capital gains tax issues. Is it a case, therefore, where solicitors who were asked to advise on one tax were negligent in not advising on another, or simply a case of negligent trustees who failed to give the solicitors proper instructions? In other words, did the trustees commit a breach of trust or not? *Abacus Trust Company (Isle of Man) Ltd v NSPCC*[395] (another family trust case) might be more clearcut. As part of a complicated tax avoidance scheme in relation to a non-resident trust, new trusts had to be created before 6 April and an appointment in favour of charity made after that date. In the event, the deed of appointment in favour of charity was executed early (on 3 April) and, as a result, occasioned a charge to capital gains tax. Having referred to *Green v Cobham*, Patten J applied the rule in *Hastings-Bass* and held that the appointment was void. Here, the trustees had received detailed professional advice but had simply failed to follow it. There was thus a clear breach of trust.

10.101 On the other hand, many of these earlier decisions are on the borderline. In *Burrell v Burrell*[396] (another family trust case), for example, the trustees divided and appointed the trust fund into two parts, one of which consisted of shares in a private company. The purpose of the appointment of the shares was to secure the application of business property relief for inheritance tax purposes. However, in the particular circumstances of the case, such relief proved not to be available.[397] Mann J acceded to the trustees' application and applied *Hastings-Bass* so as to set aside the appointment as it affected the part dealing with the shares. He found that, in the circumstances of the case, both the trustees and their advisers were in breach of duty when they were considering the deed of appointment (so that the *Abacus v Barr* point about the need for a breach of trust was satisfied, if this was indeed required). The relevant trustee 'was aware that there was a tax point, but relied at least in part on his own imperfect understanding of the position, failed to give clear instructions to his solicitors (or anyone else) to consider the matter, and failed to appreciate that he had not asked for, and was not in possession of, a full picture of the tax consequences of what was proposed'. However, his solicitors clearly had fiscal matters in mind, but simply failed to address them properly. 'They had no reason to suppose that the trustees were in possession of proper tax advice, and probably had good reason to suppose that they were not. Their own notes indicated that the tax position had to be addressed, but [they] . . . omitted to do so. I expect it just got overlooked in the rush with which the trustees had presented them, but nevertheless, they should still have addressed the point.'[398] Thus, there was clear negligence on the part of the solicitors: the evidence clearly showed that tax was known to be a central issue; that the issue was mentioned at

[393] [2011] EWCA Civ 197, [129].
[394] Under s 740 of ICTA 1988.
[395] [2001] STC 1344: judgment delivered on 17 July 2001.
[396] [2005] EWHC 245 (Ch); [2005] STC 569.
[397] For such relief to be available, the transferor (here, the beneficiary with an interest in possession in the trust fund) needed to have held the shares for at least two years prior to the transfer—which was not the case.
[398] *ibid.*, [23].

the planning stage; and that no (or no adequate) advice was given before the appointment was executed. This was not a case where a trustee had failed to raise or seek advice on the tax implications of the transaction. Nor is it a case where the trustee had obtained appropriate advice and had simply decided or failed to implement it. It is difficult to see, therefore, how or in what respect there was a sufficient breach of trust here to satisfy the *Pitt v Holt* test. Therefore, *Burrell v Burrell* would probably now be decided differently. However, if it would not, then the threshold required in order to establish a sufficient breach of trust to satisfy the *Pitt v Holt* test seems rather low.

10.102 In *Sieff v Fox*,[399] trustees of a family trust had executed an appointment as part of a complicated series of steps in a tax-avoidance scheme. The trustees were advised that, although there would be a charge to capital gains tax when the relevant property passed from the old settlement to the new one, hold-over relief would be available (under TCGA 1992, section 260(2)) and no CGT would need to be paid. In fact, this was not entirely correct. Lloyd LJ held that the tax consequences of the appointment were matters which the trustees were under a duty to consider, which they did in fact consider, but to which they failed to give proper consideration due to wrong advice; that, had they received the correct advice, they would not have made the appointment; and that, accordingly, since the trustees would not have acted as they did had they known the true position as regards the charge to capital gains tax, their decision was vitiated and the appointment would be set aside. This would seem, therefore, to be a clear example of a decision that would not satisfy the *Pitt v Holt* test. The trustees did exactly what was required in order to fulfil their own duty, namely take, consider and follow expert advice. It was no fault of theirs that the advice was incorrect. However, there were also other potentially adverse features of the transaction that might have been given greater emphasis if *Pitt v Holt* had to be satisfied. For example, the consent of X (who was not a trustee and to whom, therefore, the rule in *Hastings-Bass* could not apply in any event) was required to the appointment and it was held that he had given it under a misapprehension as to the consequences in regard to both capital gains tax and inheritance tax. There was a possibility that, in the circumstances, X would derive a benefit from certain settled chattels, in contravention of a specific exclusion clause in the settlement, and also a danger that X's assignment of his contingent interest under the appointment would constitute a gift with reservation of benefit for inheritance tax purposes. Since he was ignorant of the terms of the settlement to which the interest appointed to him was to be assigned, the appointment was also void for mistake. X himself was entitled to have regard to those matters, and his mistake as to those consequences was relevant to the setting aside of his consent.[400] These factors alone might have been sufficient to have the appointment set aside. Alternatively, these were matters which the trustees ought to have been aware of, without the benefit of advice, in which case there may have been a breach of trust to trigger the application of the correct *Pitt v Holt* principle, with the same result.

10.103 Of course, these (and other) '*Hastings-Bass* cases' are no longer of direct relevance. Nonetheless, their fact situations highlight a number of uncertainties and difficulties that may still be relevant following *Pitt v Holt*. There must be breach of duty on the part of the trustee or other fiduciary. However, is it sufficient to make out a *prima facie* case of breach or will the court require the allegation to be proved? Most trustees will be able to invoke an exemption or exoneration provision in the trust instrument to relieve them from liability, but, presumably, this will not necessarily be a significant factor: it is the existence of the breach that is required and not whether liability for it is

[399] [2005] 1 WLR 3811; [2005] WTLR 891; [2005] EWHC 1312 (Ch). Lloyd LJ was sitting as a judge of the Chancery Division.

[400] *ibid.*, 3848, [115]–[117], [119(vii)]: applying *Scroggs v Scroggs* 1 Amb 272 and an *obiter dictum* of Lawrence Collins J in *AMP (UK) plc v Barker* [2001] PLR 77.

excluded or modified. Similarly, it ought to be irrelevant that a trustee may be excused from liability under section 61 of the Trustee Act 1925 on the grounds that, although he committed a breach, he acted honestly, reasonably, and ought fairly to be excused. Will the court simply accept an admission of breach by the fiduciary (which may well not be hazardous to the fiduciary who has the protection of an exemption clause), without investigating the matter in any detail? How will the relationship between fiduciaries and their advisers be altered? For example, solicitors and others who advise on most trust transactions must obviously provide a competent service in relation to the matters specifically identified in their instructions. However, they are also probably required to identify the broader implications (perhaps the tax implications) of any particular transaction and, if appropriate, to advise on them, or, alternatively, to make known that they are not providing such advice, which should therefore be sought elsewhere. Will it become more or less important, therefore, whether trustees continue to rely on high-street, 'family solicitors' or resort to several different experts, depending on the particular transaction? Higher standards will be required, presumably, of a professional trustee, as opposed to a layman.[401] Will the trustees be in breach if they themselves fail to seek advice on specific matters, rather than rely on their advisers to provide a comprehensive service? If so, this seems to demand a depth and breadth of knowledge on the part of a non-professional trustee which may well be unrealistic. The terms of an adviser's retainer in relation to each transaction may need to be scrutinized with care.[402] In any event, the conscientious and prudent trustee may well be at a disadvantage, as far as setting aside decisions is concerned, compared with a negligent and careless one. There is also a question of timing. Even if a trustee receives appropriate advice, he must act upon it (if at all) with reasonable dispatch: he may still be liable for a breach of trust if, by the time he considers and follows it, the advice is out-of-date.[403] In these circumstances, the action of a dilatory trustee may be set aside, it seems, but not that of the prudent trustee who later re-assesses the situation and seeks further advice which subsequently proves to be incorrect.

(6) Powers of appointment

10.104 *Pilkington v IRC, Re Abrahams, Re Hastings-Bass* and, indeed, *Futter v Futter*, all concerned powers of advancement, and not powers of appointment (let alone any other kind of power or discretion). At first sight, this would seem to be immaterial. (Many of the decisions applying 'the rule in *Hastings-Bass*, for example, clearly involved appointments, rather than advancements, but this was not considered a significant issue.) However, it is clear that Cross J, in *Re Abrahams*, considered the nature of the power to be a crucial factor.[404]

> . . . a power of advancement is certainly analogous to a special power of appointment, but it differs from an ordinary special power in this, that there is only one object of it . . .
>
> If one looks at the matter in that way, it seems to me reasonable to hold that the effect of the invalidity of some of the limitations in the settlement by reason of the rule against perpetuities may not be the same as it would have been had the settlement been created by the exercise of a special power of appointment under which all the supposed beneficiaries were objects. It is one thing to say that if a trustee has power to appoint a fund to all or any of a class of objects and he appoints a life interest to one object which is not void for perpetuity and remainders to other objects which are void, then the

[401] See, eg, *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* [1994] JLR 276 (Jersey RC): failure to take legal advice on scope of powers; rev'd (but not affecting this point) by the Court of Appeal: [1995] JLR 352. See also *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JLR 1. *cf. Dance v Goldingham* (1873) LR 8 Ch App 302.

[402] See, eg, the facts of *Re Howe No 1 Trust, Leumi Overseas Trust Corporation Ltd v Howe*, [2007] JLR 660: para 10.97 above.

[403] See, eg, *Stannard v Fisons Ltd* [1990] 1 PLR 179.

[404] [1969] 1 Ch 463, 484–5.

> life interest survives the invalidity of the remainders; but it is another thing to say that if a trustee has power to benefit A. in a number of different ways and he chooses to benefit him by making a settlement on him for life with remainders to his issue, which remainders are void for perpetuity, then A. can claim to obtain that part of the benefit intended for him which is represented by the life interest

Cross J went on to say, however, that the invalidity caused by the operation of the rule against perpetuities may be so small that the court might be prepared to say that the valid trusts and provisions remain intact. 'But here there is no doubt that the effect of the operation of the rule is wholly to alter the character of the settlement. In my judgment the result of that must be that there never was a valid exercise by the trustees of the power of advancement.'[405] In this way, he could distinguish the earlier Court of Appeal decision in *Re Vestey's Settlement*,[406] where trustees allocated trust income to infant beneficiaries, intending that it be accumulated under section 31 of the Trustee Act 1925 and also that it would thereby not be subject to surtax. The Court of Appeal held that the allocation of income was valid under the power in the settlement, but that such income was not accumulated but became the absolute property of the relevant beneficiaries. This raised the question whether, because of the erroneous belief of the trustees, the allocation of the income to the infant beneficiaries was valid and effective at all. Lord Evershed MR held that a power to distribute income among a large class had been effectively exercised because the result which was actually achieved was not 'substantially or essentially different from that which was intended'.

10.105 However, whether there is a material difference between a power of advancement and a power of appointment of the kind suggested by Cross J seems doubtful[407]—assuming, of course, that both powers are fiduciary. It is not necessarily the case that a special power of appointment has more than one object. Moreover, where there has been a partially ineffective exercise of a power of appointment, the courts have been prepared (as with powers of advancement) to sever (say) a valid life interest from invalid remainders.[408] On the other hand, where, instead of successive interests, trusts are appointed in favour of an open class and those trusts are partially perpetuitous, it may be more difficult to save those which are not, irrespective of whether those trusts are created by way of advancement or appointment.[409] It is true that an object of a power of advancement generally has an interest (properly so-called) in the trust fund, whether that interest be vested or contingent, defeasible or indefeasible, whereas an object (even a sole object) of a fiduciary power of appointment merely has a right to be considered for, and a hope of receiving, some benefit. In this sense, a power of appointment does not exist directly for the 'benefit' of its object: there is no equivalent of Captain Hastings-Bass. However, in the latter case, there will be someone entitled in default of appointment, whose interest must also be considered when the power of appointment is to be exercised. Thus, there may indeed be differences between the purposes and even scope of such powers, so that the relevant considerations that must be taken into account in their exercise will

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[405] *ibid.*, 485. See also paras 9.47–9.58 above.

[406] [1951] Ch 209, 221. According to Lloyd LJ, in *Pitt v Holt* [2011] EWCA Civ 197, [38] this was a case in which the trustees had exercised a power under the settlement for the benefit of the relevant beneficiaries, in a way which, in itself, could not be said to be outside the scope of the power. They had done so in terms which showed that they intended, or at least expected, a certain result to follow as a matter of law, but it turned out that it did not. The accumulation of the income was not of the essence of the trustees' decision; and the error in this respect did not vitiate the exercise of the discretion. It was therefore a question of construction rather than of any overriding general principle.

[407] This question has already been discussed in detail in another context (fraud on a power) in paras 9.47–9.61 above.

[408] *Re Turner* [1932] 1 Ch 31; *Wollaston v King* (1869) LR 8 Eq 165; *Morgan v Gronow* (1873) LR 16 Eq 1.

[409] *Leake v Robinson* (1817) 2 Mer 363; *Smith v Smith* (1870) 5 Ch App 342; *Pearks v Moseley* (1880) 5 App Cas 714; *Re Gage* [1898] 1 Ch 498; *Re Lord's Settlement* [1947] 2 All ER 685; *Re Hooper* [1948] Ch 586. See also paras 5.45–5.46 above.

also differ. However, this is no reason for applying different principles to different powers. The limitation imposed by Buckley LJ, in *Hastings-Bass*, on the scope of the decision in *Re Abrahams* was clearly intended to explain how the latter could be made consistent (if at all) with that in *Hastings-Bass*. There is no indication of any support for the distinction drawn by Cross J between different kinds of power. In particular, there is no mention of the point in the Court of Appeal in *Pitt v Holt* or *Futter v Futter* (where it might have been relevant); and, indeed, it seems clear that the analysis put forward by Lloyd LJ was intended to apply to any and all fiduciary discretionary dispositive powers. This is surely the only rational approach. The same principles should apply in all cases: is the proposed course of action one of a kind within the scope of the power; and, assuming that it is, was there a significant failure to take account of relevant considerations when that power was exercised?

(7) Other trustee powers and discretions

10.106 Indeed, there is no reason why the same principles should not apply to *all* powers and discretions conferred on a trustee, whether or not they are dispositive in nature. This is, after all, a duty whose underlying purpose is to ensure that fiduciary powers are exercised properly. In the exercise of powers of investment, for example, trustees must comply with the duties set out in the Trustee Act 2000, such as the duty to formulate and have regard to 'standard investment criteria' (requiring suitability and diversity of investments) and the duty to take and consider investment advice.[410] In addition, they are under a general duty to put on one side their own personal interests and views and must not refrain from making a particular investment by reason of the personal views that they hold.[411] They may even have to act dishonourably,[412] and, certainly, they must take into account the circumstances of their trust.[413] They must also take into account the varying claims or interests of, or indeed information concerning, all the classes of beneficiaries and objects of the trust, the extent and weight of such considerations being dependent, of course, on the nature of the trust and other purposes which the trustees may have decided to achieve. Trustees, including professional trustees, should also seek legal advice on the construction and extent of their powers (whether to invest or otherwise). In *Midland Bank Trust Company (Jersey) Ltd v Federated Pension Services*,[414] for example, the trustee of a pension scheme, on discovering that the pension fund was not invested as profitably as it might be, decided to place the fund with a new fund manager for investment on the Stock Exchange. The trustee mistakenly believed that it could not transfer the fund without the completion of a 'customer agreement' in accordance with the English Financial Services Act 1986. In fact, it could simply have transferred the sum without any such formality under the discretion to invest given by the terms of the trust itself. On the date fixed for the transfer of the fund, no customer agreement had been concluded and, without taking any legal advice, the defendant placed the sum in a deposit account rather than transferring it for investment, believing that it had no power to make the transfer. The deposit proved to be considerably less profitable to the pension fund than investing it on the Stock Exchange would have been. The trustee subsequently discovered and admitted its error. The failure to transfer the fund on the due date therefore amounted to a clear breach of trust, since the erroneous assumption could have been cured by seeking such advice. Other examples in relation to investment of trust

[410] Trustee Act 2000, ss 4, 5.
[411] *Cowan v Scargill* [1985] Ch 270, 287–9.
[412] *Buttle v Saunders* [1950] 2 All ER 193; *Re Wyvern Developments Ltd* [1974] 1 WLR 1097, 1106.
[413] *Balls v Strutt* (1841) 1 Hare 146, 149; s. 6(1) of the Trustee Investments Act 1964.
[414] [1994] JLR 276, 290–1, 293; [1996] PLR 179 (Jersey RC); [1995] JLR 352 (Court of Appeal). See also *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JLR 1.

funds are relatively common.[415] An improper or imprudent exercise of other administrative powers conferred on trustees, such as powers to buy and sell property, may also be open to challenge on the ground of failure to consider relevant considerations (although, of course, different considerations will apply in each instance).[416] In the pensions context, trustees of occupational pension schemes may be required to take into account the rights and interests of the employer as well as those of the scheme's members and beneficiaries,[417] not just in relation to the distribution of any surplus but also in any matter that may affect the employer's interests. Arguably, the implied duty of good faith which an employer must observe in his relations with his employees (and which is discussed below)[418] is also one of the relevant (often highly relevant) considerations that the trustees must take into when exercising particular discretions.

(8) What is a 'relevant consideration'?

10.107 This brings us back to the most basic question of all: what is it that a trustee ought to take into account when exercising a power or discretion? In his leading judgment in *Pitt v Holt*, Lloyd LJ stated that 'the decided cases do not give a great deal of guidance in detail as to what the trustees ought to take into account, in the case of a private discretionary trust'.[419] He also noted that 'pension trusts and charities may well each be different in some respects, as may be discretionary trusts for a very large class' (such as those in the *Baden* litigation), but did not deal with them further. There is also an associated question—not directly addressed in *Pitt v Holt*—as to the significance of, or weight to be attached to, a particular consideration. In other words, a failure to consider, or to give adequate weight to, some relevant but nonetheless marginal consideration should not constitute a breach of trust and render a trustee's action open to challenge. The unconsidered relevant factor must surely have a crucial or particularly material significance. The central question, therefore, should be expanded so as to read: what is it of crucial significance that a trustee ought to take into account when exercising a power or discretion?

10.108 The duties of trustees of large discretionary trusts of the *Baden* type have already been considered in detail earlier in this chapter,[420] albeit in relation to 'the duty to consider' in the sense of a 'duty to inquire and ascertain' (where the considerations are similar). The considerations that ought to be taken into account in the exercise of a power of advancement are also discussed earlier.[421] Pension trusts are considered further below.[422] So, too, is the 'best interests' duty[423] which requires trustees to act in the best interests of their trust, directors to act in the best interests of their companies, agents to act in the best interests of their principals, receivers to act in the best interests of 'patients', and so on. It is suggested below that this over-arching duty can not properly be discharged without taking into account relevant considerations (and excluding irrelevant ones) and it therefore overlaps with, if it does not actually absorb, the duty under consideration in this section.

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[415] See, eg, *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, 137. The 'rule in *Hastings-Bass*' was applied to an *administrative* discretion in Jersey: *Re Winton Investment Trust* [2008] WTLR 553; *Seaton Trustees Ltd v Morgan* (2008) 11 ITELR 1, 9; but the contrary has been hinted at in England: *Re Duxbury's Settlement Trusts* [1995] 1 WLR 425, where the issue seems no longer relevant.

[416] See, eg, *Hampden v Earl of Buckinghamshire* [1893] 2 Ch 531; *Re Hunt's Settled Estates* [1905] 2 Ch 418. *cf. Cowan v Scargill* [1985] Ch 270, 286–7 and *Edge v Pensions Ombudsman* [1998] PLR 15, 29–30.

[417] See, eg, *Re Imperial Foods Pension Scheme* [1986] 1 WLR 717; *Lock v Westpac Banking Corporation* [1991] PLR 167, especially 179; *Stannard v Fisons Pension Trust Ltd* [1991] PLR 225.

[418] See paras 10.195–10.210 below.

[419] [2011] EWCA Civ 197, [114].

[420] See paras 10.05–10.58 (and especially paras 10.21–10.22) above.

[421] See paras 10.12, 10.75 and 10.82–10.88 above.

[422] See paras 10.114–10.119 below.

[423] See paras 10.158–10.183 below.

Of course, general 'guidance' is the most that one could expect from past cases dealing with a failure to consider relevant factors: that which is relevant will vary from one situation to the next, even in cases where the same kind of standard-form power (such as a power of advancement) is being exercised. Nevertheless, a brief discussion of some illustrative decisions may be useful here.

10.109 At one end of the spectrum, perhaps, one could consider the Australian (Victorian) decision in *Karger v Paul*.[424] A testatrix had left her entire estate to her husband during his lifetime, with power to her trustees in their absolute and unfettered discretion and upon the request of the husband to pay or transfer the whole or part of the capital of the estate to the husband for his own use absolutely; and she directed that, upon the husband's death, the trustees were to pay the residue to the plaintiff for her own use absolutely. Here, then, there were only two beneficiaries and it was clear that the testatrix intended primarily to benefit her husband. There was only one object of the relevant power, which in itself rendered any challenge to the exercise of that power more difficult to sustain, for example the doctrine of fraud on a power does not always apply, it seems, to a power with only one object.[425] In any event, the husband made a written request to himself and his co-trustee to pay the entire capital of the estate to him and, in the exercise of the discretion conferred upon them, the trustees acceded to the request. The assets in the estate were transferred to him and, soon afterwards, he died. The plaintiff brought an action against the co-trustee and the executor of the husband's estate alleging that the trustees had acted wrongfully in paying and transferring the estate to the husband because, in so doing, they did not act honestly and in good faith and had acted without any fair and proper consideration as to whether they should do so. Thus, there were two legal issues at the heart of the claim. The first concerned the grounds on which the exercise by trustees of their discretion might be examined and reviewed.[426] The second issue concerned the state of mind of the respective trustees at the time they decided to exercise the power (or, indeed, at each time when they made a payment or transfer of capital). McGarvie J, dismissing the claim, held that the exercise of a discretion in such broad and unfettered terms will not be examined and reviewed by the court if the discretion is exercised in good faith, *upon real and genuine consideration* and in accordance with the purposes for which the discretion is conferred, and not for some ulterior purpose. He also held that it is open to the court to examine the evidence to decide whether there has been a failure by the trustees to exercise the discretion in good faith, *upon genuine consideration* and in accordance with its proper purpose. In conducting this examination, the court may look at the inquiries made by the trustees, the information they had and their reasons for, and the manner of, their exercise of the discretion. However, it is not open to the court to look at these matters for the independent purpose of impugning the exercise of the discretion on the grounds that their inquiries were inadequate, their appreciation of the facts wrong or their decision unwise, unless, presumably, the inadequacies and errors are so fundamental and far-reaching as to render the purported exercise of the power or discretion no real exercise at all. The court examines *whether* the discretion was exercised but does not examine *how* it was exercised. This question of how far, if at all, a court will examine or review an exercise of a power or discretion is examined separately below (where it will be seen that the dividing line between a valid decision-making process and a valid decision is a very fine one).[427] For present purposes, we are concerned

[424] [1984] VR 161 (Supreme Court of Victoria: McGarvie J).
[425] See paras 9.19, 9.25, and 9.29–9.34 above. This point was not taken in *Karger v Paul*, however.
[426] This question is dealt with in greater detail in Ch 11 below (and especially 11.08–11.11).
[427] See also *Edge v Pensions Ombudsman* [1998] PLR 15, 30.

simply with what will, or may, be regarded as constituting 'real and genuine consideration' in such a case.[428]

10.110 Many of the points raised in *Karger v Paul* could well have general application, in England as well as Australia, at least in relation to private family settlements.[429] For example, it was argued that it was to be implied, from the nature of the trusts and the circumstances of the case, that the remainderman was to be given a fair opportunity of making representations to the trustees before they exercised their discretion. After all, the plaintiff-remainderman was the only other beneficiary interested (and, prior to the exercise of the trustees' discretion, the sole capital beneficiary). Nevertheless, McGarvie J rejected this contention, holding that there was no good reason for importing rules of natural justice into the exercise of discretion by trustees. It was also argued that the inquiries made by the trustees were inadequate. As far as the husband was concerned, he was generally aware of the plaintiff's health difficulties and that taking the capital would deprive her of her interest. Nevertheless, his exercise of his discretion was not deficient simply 'because he acted on his general knowledge of [the plaintiff's] situation rather than on detailed information such as she gave in evidence'.[430]

10.111 As for the independent co-trustee, it was alleged that he had not made proper inquiries to ascertain facts which had a bearing on the exercise of the discretion: his inquiries, sources of information and his knowledge were inadequate and unreliable in respect of both the husband's situation and the reasons for making the request for distribution of capital (particularly for the whole estate) and also in respect of the plaintiff's situation. The only information possessed by the co-trustee concerning the husband's reasons for requesting the exercise of the discretion came from the husband himself and from knowledge acquired when acting as solicitor for the husband and the testatrix some years earlier. Moreover, his knowledge of the financial circumstances of the plaintiff arose entirely from a brief exchange with the husband in which the co-trustee had inquired whether the plaintiff was all right financially and the husband had replied 'yes'. Nonetheless, it was held that his erroneous beliefs did not play any significant part in leading him to exercise his discretion as he did. Indeed, it was held that he gave real and genuine consideration to the exercise of that discretion. One significant consideration, it seems, was the fact that the co-trustee had drafted the will in question (as well as the husband's own will) and knew, from discussions with the testatrix and her husband when taking their instructions, that their original shared intention was to leave their respective estates to the survivor absolutely; and that the substitution of a life interest coupled with a power to transfer capital in favour of the husband had been made after the co-trustee pointed out that, on the death of the survivor, his/her estate might pass to the State. Thus, it would seem that, even if the co-trustee had held some erroneous beliefs, he also had in mind some legitimate and relevant considerations (which, in his mind, outweighed the erroneous ones). It was accepted by McGarvie J that, if the gaps and errors in his information and belief upon matters relevant to the

[428] See, in particular, *Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Ltd* [1999] 1 VR 144; *Sinclair v Moss* [2006] VSC 130. The Australian 'duty of real and genuine consideration' is discussed further at paras 10.133–10.138 below, where it is suggested that it is, in essence, the same as English law's duty to take relevant considerations into account.

[429] There is a strong body of opinion, even in Australia, to the effect that the *Karger* principles are not relevant to pension fund trusts: see, eg, *Telstra Super Pty Ltd v Flegeltaub* [2000] VSCA 180; *Sayseng v Kellogg Superannuation P/L* [2003] NSWSC 945; and *Finch v Telstra Super Pty Ltd* [2010] HCA 36, [57]–[66], where the point was explicitly raised and discussed but the High Court declined to decide it.

[430] [1984] VR 161, 172. Moreover, the husband 'was not obliged to engage in the intellectual sophistry of keeping his mind free until he made a request of himself and [his co-trustee] and then for the first time commence to consider whether he should accede to the request': at 171.

exercise of discretion were sufficiently extensive or fundamental, it might have founded an inference that he had not been in a position to give real and genuine consideration to such exercise, but in the circumstances this was not the case here.

10.112 McGarvie J's observations also highlight one source of relevant considerations in particular, namely the wishes of the settlor himself. Lloyd LJ similarly noted, in *Pitt v Holt*:[431] '*Abacus v Barr* shows that the wishes of a settlor may well be one thing that trustees should take into account.' However, this is rather problematic. It seems a well-established practice for settlors to provide trustees with letters of wishes, by which confidential, informal, and (usually) non-binding instructions and guidance are given to trustees (especially of a discretionary trust) as to how they should carry out their duties or exercise their powers. Such letters apparently also form part of the relevant 'factual matrix' to which a court may have regard in matters of construction and execution of the trust.[432] However, although letters of wishes may be binding directives, in which case they constitute part of the relevant trust documentation, most of them are non-binding and, therefore, may be ignored entirely by the trustees. In practice, trustees are very likely to carry out such wishes, insofar as this is possible, but they can not be charged with breach of trust if they fail, or decide not, to do so. It is, therefore, very difficult to see why or how such a failure to consider the content of a non-binding letter of wishes could ever trigger an application, under the principles in *Pitt v Holt*, to have a trustee's decision or act set aside. This is a different situation from the need to take account of the wishes, circumstances and needs of beneficiaries, so far as made known to the trustees.[433] These considerations are likely to be highly material in the exercise of any dispositive discretion: indeed, dispositive powers generally can not be exercised properly, or at all, unless the circumstances and needs of their objects are first ascertained. It is well-established that trustees are entitled—and, indeed, ought—to 'take into consideration such matters as the comparative wealth or poverty of the parties entitled to the income and of the parties entitled to the capital of the settled property, or (for example) any benefits which either of them may have conferred on the settled property'. This should not 'be a matter of mere arithmetic with no reference to the personal elements in the situation which, indeed, it may be very difficult for a trustee to disregard, even if he tried to do so'.[434] Such matters, especially the 'personal' elements, can not be considered properly unless the wishes and circumstances of the beneficiaries or objects are first ascertained. This may even be relevant in relation to other powers as well—depending on the nature and purpose of the power.

10.113 One fairly clear-cut consideration that is likely to be significant in most situations is taxation. In *Sieff v Fox*,[435] Lloyd LJ had said that he was in no doubt that 'fiscal consequences may be relevant considerations which the trustees ought to take into account'. This reflected prior decisions applying the rule in *Hastings-Bass* which had come to the same conclusion.[436] He remained of this view in *Pitt v Holt* and stated:[437]

> Although it is often said that decisions as regards the creation and operation of trusts ought not to be dictated by considerations of tax, the structure and development of personal taxation in the UK over the past decades, the use of trusts in order to deflect or defer the impact of taxation, and in turn the

[431] [2011] EWCA Civ 197, [114].
[432] See, eg, *Breakspear v Ackland* [2009] Ch 32, [61].
[433] [2011] EWCA Civ 197, [114].
[434] *Re Boston's Will Trusts* [1956] Ch 395, 406, *per* Vaisey J. See also para 10.12 above.
[435] [2005] EWHC 1312 (Ch); [2005] 1 WLR 3811, [85]–[86].
[436] See, eg, *Green v Cobham* [2002] STC 820; *Abacus Trust Company (Isle of Man) Ltd v NSPCC* [2001] STC 1344, 1353; *Burrell v Burrell* [2005] EWHC 245 (Ch); [2005] STC 569.
[437] [2011] EWCA Civ 197, [115].

> development of taxation as it applies to property held by trustees, have been such that there can be few instances in which trustees of a private discretionary trust with assets, trustees or beneficiaries in England and Wales could properly conclude that it was not relevant for them to address the impact of taxation that would or might result from a possible exercise of their discretionary dispositive powers.

The impact and implications of taxation on a trustee's decisions and actions form a crucial consideration, irrespective of the kind of active trust, and these views clearly were not intended to be confined to discretionary trusts. As Patten J stated, in *Abacus Trust Company (Isle of Man) Ltd v NSPCC*:[438]

> . . . trustees, when exercising powers of appointment, are bound to have regard to the fiscal consequences of their actions . . . The financial consequences for the beneficiaries of any intended exercise of a fiduciary power cannot be assessed without reference to their fiscal implications. The two seem to me inseparable.

This would be true, in varying degrees, in most circumstances, depending on the nature of the power and the purpose for which it is exercised. Indeed, it is only in the most unusual situations that a trustee will not be in breach of trust if he fails to address his mind to fiscal considerations and, indeed, without appropriate tax advice from a qualified, reputable, professional expert. The nature and extent of the advice required will clearly vary from case to case. In *Nestle v National Westminster Bank plc*,[439] which concerned the proper investment of a fund rather than an exercise of a dispositive power, Staughton LJ held that the trustees were entitled and bound to take into account the fact that life tenants were not UK resident and that, therefore, if the fund was invested in exempt gilts, the trust income to which they were entitled would not be subject to deduction of UK income tax. In relation to trusts of this specific kind, this seems entirely appropriate and reasonable; and such a precisely formulated consideration will apply to many trustees who hold funds on similar trusts. However, in other cases, the relevant fiscal consideration will be entirely different and, in any event, will change as circumstances and objectives alter.

10.114 In a different context, namely that of pension trusts, different considerations will arise. This is due in large part to the hybrid nature of pension trusts, with their combination of private entitlements and 'commercial' underpinnings. The rights of beneficiaries of such schemes tend to be a mixture of vested and contingent interests and discretionary benefits; and such rights are usually 'earned' or paid for by the members—essentially as a by-product of a contract of employment—rather than the result of anyone's bounty.[440] Such trusts are therefore far removed from the trusts in cases like *Karger v Paul*; and the considerations relevant to an exercise by the trustees of any of their powers—dispositive or otherwise—are bound to be substantially different. The duty to take account of relevant considerations is bound to have a different content in cases where the objects or beneficiaries have given some form of consideration for their status.[441] In *Stannard v Fisons Pension Trust Ltd*,[442] for example, one employer (company A) had sold its business to another (company B),

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[438] [2001] STC 1344, 1353. See also *Green v Cobham* [2000] STC 820, [2000] WTLR 1101; *Sieff v Fox* [2005] 1 WLR 3811, [2005] WTLR 891; *Re Green GLG Trust* (2002) 5 ITELR 590 (RC of Jersey); *AMP (UK) plc v Barker* [2001] WTLR 1237; *Hearn v Younger* [2002] WTLR 1317.

[439] [1994] 1 All ER 118, 137.

[440] For a more detailed discussion of pension trusts, see paras 2.27–2.36 and 3.97–3.101 above.

[441] See, eg, the observations of Fox LJ in *Kerr v British Leyland (Staff) Trustees Ltd* (March 26,1986: unreported), cited by Knox J in *LRT Pension Fund Trustee Co Ltd v Hatt* [1993] OPLR 225, 255, and by Dillon LJ in *Stannard v Fisons Pension Trust Ltd* [1991] PLR 225, 233; *Wilson v Law Debenture Trust Corp* [1995] 2 All ER 337, 347–8, *per* Rattee J.

[442] [1991] PLR 225. See also *Harris v Lord Shuttleworth* [1994] ICR 989, 999; *Wild v Smith* [1996] PLR 275; *Packwood v Trustees of Airways Pension Scheme* [1995] OPLR 369; *Kerr v British Leyland (Staff) Trustees Ltd* (1986) [2001] WTLR 1071.

as a result of which some 2,500 employees were transferred to the employment of company B. They had formerly been members of company A's pension scheme but ceased to be so and became members of company B's scheme instead. The trustees of company A's scheme intended to transfer assets into company B's scheme in respect of the transferring employees. The transfer was duly made, but one of the transferring employees claimed that the transfer amount was not properly determined. The trustees, acting on the advice of actuaries, based the calculation of the transfer payment on what was called the Total Service Reserve method,[443] which produced a figure of £24.4 million as at 31 March 1982, and which showed that the fund was in deficit. The trustees then allocated investments as part of the impending transfer. The relevant members became members of the new scheme on 31 December 1982. By the time that the transfer payment was actually made (in March, 1983), the value of the relevant investments had risen to £31.7 million and the fund had moved into surplus. The trustees were not informed of the impact of the rise. Had they known of the surplus, another method of calculating the transfer payment would have been within their discretion; and it was argued that the trustees should have used the Past Service Reserve method. Warner J upheld the complaint and his decision was confirmed by the Court of Appeal.

10.115 The decision taken by the trustees was held to be flawed in that it had been taken in ignorance of the (crucially) relevant implications of the increase in the value of the fund.[444] Dillon LJ stated:[445]

> To give properly informed consideration to the discretion they had to exercise, they needed also to know the relevance of the value of the Fund to the problem in hand in relation to actuarial principles and the implications of their decision on future contributions. That information the actuaries could have given them (and in my opinion should have given them since it was the actuaries' duty to put the trustees in a position, so far as the actuaries could, to make a properly informed decision).
>
> If in December 1982 the Trustees had been told the current value of the Fund, and the implications of that, there are no doubt other matters which they would also have had to consider, such as how far a rise in stock market values could be regarded as a satisfactory basis for action. . .
>
> In the upshot, in my judgment, it might materially have affected the trustees' decision in December 1982 if they had been properly informed as to the then current value of the Fund and the implications of its value.

In fact, the actual sequence of events in *Stannard* is not entirely clear. The trustees apparently exercised their discretion in April, 1982; they appropriated assets in June, 1982, in preparation for the transfer in December; and the actual transfer was made in December. It is a general principle that, once a power or discretion has been exercised, that exercise cannot be revoked or altered (and the June appropriation suggests that a final decision had already been taken). It is not entirely clear, therefore, why, once they had made their determination, subsequent events should have had any effect on it. The decision must have been based, however, on the premise that the discretion was

[443] There were four methods of division canvassed in this case: (1) the Accrued Rights method (which would have something to recommend it in times of stable currency, and if it were assumed that an employee's wage remained the same throughout his working life; but it ignored the possibility of promotion, increases in wages, and times of inflation); (2) the Past Service Reserve method (assuming a transferring employee retires at the appropriate age and receives a pension based on what his salary is likely to be at that time, but taking into account only service with the original employer) allowed for inflation, but did not directly allocate a share of surplus as existing at time of transfer; (3) the Total Service Reserve method (the effect of which was to award any likelihood of increased benefits in the future, arising from the actuarial state of the fund, wholly to employees who remained with Fisons and did not transfer); (4) Share of the Fund (or Apportionment) method.

[444] It is not entirely clear from the report whether the trustees were at all aware of the increase in value. In any event, it seems clear that it was ignorance of the implications of any such increase that was considered important.

[445] *ibid.*, 233.

not actually exercised until December,[446] and that any decision taken before then was either not final or ineffective as an attempt to exercise their discretion in advance (that is, fettering it). Even if this conclusion had been different, it seems that there were other irregularities in *Stannard*, apart from ignorance of the implications of the increase in value of the fund. Some of these were not regarded as particularly important, for example the fact that the trustees had apparently made their decision under the wrong rule. However, others may have been more serious: there are suggestions, for instance, that the trustees may not have been aware that the decision was theirs, nor that they were required to make their own assessment of what was just and equitable.[447]

10.116 In any event, there can be no disagreement with the general conclusion that, in relation to the exercise of a discretion to make and determine a transfer payment out of a pension fund, one (and probably the most) crucially significant factor which must be taken into account is the value of the fund, together with some consideration of the implications of a possible rise or fall in its value in the future.[448] As Staughton LJ stated,[449] pension fund trustees must always be alive to the possibility of an improvement in the value of investments. This, of course, is not the sole factor. Other considerations to which such trustees ought to have regard might also include, as Staughton LJ pointed out, the following: would the employer be likely to decrease its contributions to their fund? Would a decrease lead to industrial unrest? Would the employer be weakened so that a decrease would be required? Is the power (or the employer's power to give consent) a fiduciary power? Was the fund likely to continue in surplus for the foreseeable future? Other examples might easily be suggested.[450] *Stannard* also underlines one particularly significant factor, namely that trustees must not only take and act upon advice but must also ensure that, when they do act, such advice is up-to-date and, therefore, continues to be 'relevant'. This, in turn, raises the question whether it is the duty of the trustee to maintain a watching brief on changes in circumstances (and, indeed, they are probably better placed than others to know about changes in the value of their trust fund) or whether they discharge their own fiduciary duty by relying completely on their advisers in relation to the implications of changes of circumstances as they affect the particular transaction.[451] In *Stannard*, Dillon LJ seemed to opt for the latter position.[452] However, if this is correct, then it is difficult to see how the decision in *Stannard* is consistent with that in *Pitt v Holt*, for in both cases the trustees relied on their advisers, but the outcomes were clearly different.

10.117 In *Edge v Pensions Ombudsman*,[453] another pension trust case, the issue was more akin to that encountered in a private trust. The trustees of a pension scheme which was in substantial surplus had amended the rules so as to reduce the surplus, reducing contributions from employers and active members, and increasing benefits for active members, but not for pensioners. Some pensioners complained to the Pensions Ombudsman, who held that the changes had been made in

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[446] There are slight indications to that effect in the report (at 233 and 235) but no clear statement to that effect. See, however, [1990] PLR 179, 204, *per* Warner J.

[447] Staughton LJ emphasized (at 237) that 'in a matter as important as this, where a very substantial sum was to be transferred from one fund to another, I think it right to insist on a correct procedure in the decision-making process'. Dillon LJ (with whom Ralph Gibson LJ agreed) attached less importance to these considerations (see 230 and 234).

[448] The editor of the report in [1991] PLR 225 concluded, however (at 240), that the decision was 'a desperately sad case' and was 'a testament to the failure of the legal system to solve commercial problems in a commercial way' (whatever that may mean).

[449] *ibid.*, 234–5.

[450] See, eg, *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch); [2010] ICR 553; [2009] PLR 379: not appropriate for trustee to take into account compensation available under the Pension Protection Fund when considering whether to buy out benefits of some scheme members.

[451] This assumes that there is no (improper) blanket delegation of duty to a third party.

[452] [1991] PLR 225, 233. See paras 10.114–10.115 above.

[453] [2000] Ch 602.

breach of trust because the trustees had not acted impartially between the different classes of beneficiaries, and that the amendments should be treated as not having been made. Sir Richard Scott VbC allowed the trustees' appeal, and this was upheld by the Court of Appeal. Chadwick LJ, giving the judgment of the court, said that the right of the beneficiaries (given that there was a surplus) was to have the question of an increase in benefits properly considered. He then referred to a number of matters which the trustees ought to take into account when deciding how to exercise a relevant power, the trustees being under a duty to consider such exercise (as would not normally be the case in a discretionary trust set up for a family). He then said:[454]

> The essential requirement is that the trustees address themselves to the question what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for them. Properly understood, the so-called duty to act impartially[455]—on which the Ombudsman placed such reliance—is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant.

Chadwick LJ acknowledged[456] that 'there is no doubt that the trustees' decision can be set aside if it can be shown that they failed to consider matters which were relevant, or took into account matters which were irrelevant'. However, in this particular instance, the trustees had reached their decision after giving full consideration to detailed reports of the actuary and the various options for reducing the surplus. They had discharged their duty of consideration properly; once they had done that, the final decision was theirs; and there was no breach.

10.118 Another example is the common case where trustees of a pension scheme are called upon to decide whether a member of the scheme is entitled to an ill-health or disablement pension, which essentially means that they must consider whether the medical and other evidence submitted to them is sufficient to satisfy the requirements of the definition of 'disablement benefit' (or the equivalent) in the pension scheme documentation. A very useful survey of the kinds of inquiries that such trustees ought to embark upon is provided in a decision of the Full Court of Western Australia in *Tonkin v Western Mining Corporation Ltd*;[457] and these observations are, it is suggested, equally applicable in England. Franklyn J stated:

> In my view, having regard to the terms of the Deed and the relevant definition, there is no obligation on the trustee, on an application for the TPD Benefit supported by evidence inadequate to give rise to the necessary opinion, to seek out, on its own initiative, evidence for its consideration and so strain to obtain evidence relevant to the formation of the necessary opinion, thereby attempting to bring within the definition a member not otherwise within its terms. It may, however, in the exercise of its fiduciary duty and as a matter of discretion, if it considers it appropriate, seek and obtain additional medical evidence. It may also, as a matter of discretion, require medical evidence to be submitted to it for the purposes of its consideration. As trustee, it is not an adversary either for or against an applicant for the benefit. Relevantly, it has a duty only to act in accordance with the trust. If it fails to perform the same, the court will compel it to do so or do so for it. It is not bound by any rules as to how it exercises a discretion conferred on it, save such as it is obliged to comply with by the terms of the Deed, provided always that it must act honestly and in good faith, on an informed view of whether or not to exercise its discretion, and exercise the power with due consideration for the purpose for which it was conferred and for no ulterior purpose. In the case of powers conferred on it

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[454] *ibid.*, 626–7.

[455] The duty to act impartially (or even-handedly) is discussed further at paras 10.146–10.157 below.

[456] [2000] Ch 602, 633.

[457] (1998) 10 ANZ Ins Cases 61-397, 74.270. These observations are quoted extensively by Finn J in *Kowalski v MMAL Staff Superannuation Fund Pty Ltd* [2009] FCA 53, [24].

> and as to whether it should do or refrain from doing something, it must exercise its judgment actively and honestly and act accordingly. The court will not control a trustee in the exercise of its purely discretionary powers unless it is acting *mala fide* or has misconceived the nature of its discretion and acted upon that misconception. When appointed to exercise a trust according to discretion, a trustee is not bound to state reasons for any conclusion at which it may have arrived and on which it has acted, but again the discretion must be exercised with an absence of indirect motive with honesty of intention and on a fair consideration of the issues. The duty of the court generally is to see that the discretion of the trustee has been exercised in this manner and not to deal with the accuracy of the conclusion at which it may have arrived.

As in *Tonkin* itself, it is at all times open to a claimant to submit further medical evidence to the trustee for its consideration. In such case, the trustee is bound to give them proper consideration. In the event of the trustee, having considered medical evidence before it, failing to form the necessary opinion there is nothing to inhibit the claimant from providing, for its further consideration, further medical evidence relevant to the formation of that opinion. Indeed, having regard to the fiduciary nature of the trustee's obligations, it is bound, if requested to do so, to consider such evidence relevant to formation of the opinion as may from time to time be put before it. Consequently, medical evidence, whether coming into existence prior or subsequent to any particular failure or refusal to form the necessary opinion, will necessarily have to be considered if made available by or on behalf of the claimant for that purpose.

10.119 It is seldom the case that a trust instrument regulates or identifies expressly the matters to which consideration must or must not be given, and the trustees are usually left to be the judges of what material is adequate for a particular decision to be made.[458] In each case, that which is relevant or irrelevant in the decision-making process will be limited by and dependent upon the nature of the power or discretion in question, the context in which it has been created, the circumstances in which its exercise is being proposed, and the end or purpose which such exercise is intended to achieve. This proposition applies in all cases, whether they are akin to *Stannard* or *Karger v Paul*, although what actually counts as a relevant or irrelevant consideration will almost certainly differ in each case. Most powers, whether they are dispositive or administrative, will have more specific and more clearly defined purposes than the power in question in *Karger*. In such cases, it ought to be easier to determine what is a relevant or irrelevant consideration and, in turn, whether a particular execution of any such power is impeachable or not. For example, where trustees of a pension scheme have a discretion to determine whether a particular member is entitled to benefits on the grounds of permanent incapacity, the scope and purpose of the discretion, and the considerations which are relevant to its exercise, are both limited and tolerably clear.[459] (Whether this is a true example of a 'dispositive' discretion is discussed below,[460] where the argument that it is not is canvassed. However, it illustrates the point made here about the scope of any necessary inquiry.) As we have seen, the range of relevant inquiries into the circumstances of objects and beneficiaries, and the consequent number of factors which ought to be taken into consideration and balanced against each other, are undoubtedly greater and more complex where there is a large class.[461] However, the greater the size of the class, the more difficult it is likely to be to challenge a particular exercise of a power in favour of some member(s) of that class on the grounds of failure to take into

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[458] *Lock v Westpac Banking Corporation* [1991] PLR 167, 179. *Midland Bank Trust Co (Jersey) Ltd v Federated Pension Services* [1994] JLR 276; [1996] PLR 179 (Jersey RC); [1995] JLR 352 (Court of Appeal).

[459] *Kerr v British Leyland (Staff) Trustees Ltd* (March 26, 1986: CA; unreported), referred to in *Stannard v Fisons Pension Trust Ltd* [1991] PLR 225, 233 and *LRT Pension Fund Trustee Co Ltd* v *Hatt* [1993] OPLR 225, 255; and *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522, 525; *Harris v Lord Shuttleworth* [1998] OPLR 79.

[460] See para 10.118 above and paras 11.35–11.37 below.

[461] See paras 10.05–10.53 above.

account what are alleged to be relevant considerations (or of considering irrelevant ones). Similarly, the width of a power, even if exercisable in favour of just one object (or a few objects), may be such that (as in *Karger*) it may be difficult to identify a relevant consideration which has been overlooked. Nevertheless, the underlying principle is broadly the same in all cases: any exercise of a power or discretion (irrespective of its width or of the purpose for which it was created) must be based on a real and genuine consideration, even if the implications of the principle may vary widely in different circumstances.[462]

(9) Weight or significance of the consideration

10.120 Moreover, it must be emphasised that the relevant considerations which have been ignored, or the irrelevant considerations which have been taken into account, must have been so influential and so fundamental in the decision-making process that the donee of the power cannot be said to have exercised his discretion for the purpose for which that power was conferred, or at all.[463] When the rule in *Hastings-Bass* held sway, this question gave rise to a somewhat inconclusive debate about whether the relevant fiduciary 'would' have acted differently if he had taken account of the relevant consideration (or not taken account of the irrelevant one) or whether it was sufficient that he 'might' have done so. In *Sieff v Fox*,[464] Lloyd LJ attempted to reconcile all the previous decided cases by drawing a distinction between those cases where the trustees were not under a duty to act (when it was necessary to show that they 'would' have acted differently)[465] and those where they were under such a duty (where it was sufficient to show that they 'might' have acted differently).[466] This was not an entirely successful way of reconciling the authorities. As Park J observed in *Smithson v Hamilton*,[467] the reference to 'a discretion' given to a trustee may be the commonest situation where the principle might apply but 'it can also apply where the trust imposes an obligation on the trustee to act but the precise way in which he acts is left for him to determine'. It also led to an unsustainable argument that there were fundamental differences between 'family trusts' and 'pension trusts' cases, when, in fact, there are not two different species of trust, each with its own distinct rules and principles, even if it is obvious that the considerations of material relevance to the trustees of a pensions trust when they exercise a discretion may be significantly different from those materially relevant to the trustees of a family trust.[468]

10.121 In any event, this particular point was not addressed directly by the Court of Appeal in *Pitt v Holt*. In one sense, there was no need to do so: if the 'rule in *Hastings-Bass*' was being declared not to exist, then sub-issues such as the debate whether trustees 'would' or 'might' have acted differently might seem irrelevant. However, the question remains crucial. It is surely not sufficient that a trustee (or other fiduciary) can be alleged or found to have acted in breach of the duty to consider relevant considerations simply because a marginally relevant consideration was ignored (or a marginally irrelevant was taken into account). A genuine and real consideration does not require that

[462] See also *Finch v Telstra Super Pty Ltd* [2010] HCA 36, [57]–[66]; and paras 11.35–11.38 below.

[463] See, eg *Wild v Smith* [1996] PLR 275. In this sense, the duty now under consideration could be subsumed under other heads, such as the doctrine of fraud on the power (eg, an exercise for a corrupt or bye purpose) or a failure to exercise the discretion at all.

[464] *Sieff v Fox* [2005] 1 WLR 3811, 3848.

[465] As in *Re Hastings-Bass* [1975] Ch 25 (as then interpreted) itself and *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1624.

[466] As in *Kerr v British Leyland (Staff) Trustees Ltd* (1986) [2001] WTLR 1071 and *Stannard v Fisons Pension Trust Ltd* [1991] PLR 225.

[467] [2007] EWHC 2900 (Ch); [2008] 1 WLR 1453, 1471–2. The Court of Appeal approved a compromise: [2008] EWCA Civ 996.

[468] See Thomas and Hudson, paras 20.57–20.58. *cf.* [2005] 69 Conv 229 (DJ Hayton).

(11) Relevant time

10.125 It would seem obvious that the duty of real and genuine consideration applies and must be discharged at the time the trustee actually exercises his discretion. The duty makes sense only if applied to the consideration of facts and circumstances which exist at the date of the exercise and which are then known or ought reasonably to have been known,[488] although this seemingly straightforward proposition has not always been observed in recent decisions.[489] Such facts and circumstances must also include what are reasonably foreseeable eventualities and possible contingencies, for that which is reasonably foreseeable is itself based on existing facts. On the other hand, a trustee can not reasonably be expected to take into account considerations which may turn out to be highly material to the action he has taken but which did not exist, and were not reasonably foreseeable, at the time such action was taken. This is an important factor in the context of tax avoidance, where there is almost always an inbuilt risk that the transaction will not work. A trustee is expected to take professional advice but, ultimately, all that he can be expected to consider is the nature and implications of the foreseeable risks. If things go wrong, then that is in the nature of the transaction and there is no obvious reason why that transaction should be set aside. Moreover, it ought to be irrelevant that a particular fact or matter can be proved to have existed at the date of the trustee's decision if it can not also be proved that such fact or matter ought reasonably to have been known to the trustees (by appropriate inquiries or otherwise). A failure to consider (or a mistake in relation to) such a matter in this context can be innocent or negligent,[490] but logically it cannot be a failure or mistake at all if that fact or matter could not have been known to the trustees. With the benefit of hindsight, trustees could often say that they would not have acted as they did had they known, or appreciated the significance of, a relevant consideration; and thus the finality of their decisions would always be provisional. Although the Court of Appeal did not address these issues directly in *Pitt v Holt*, it seems reasonably clear, especially from the emphasis on the absence of a breach of duty where incorrect advice has been acted upon, that the crucial time for assessing whether or not there has been such a breach is, indeed, the time leading up to and at the exercise of the power of discretion.

(12) Effects on third parties

10.126 As we have seen, where the act or decision of a fiduciary involves a breach of fiduciary duty, the decision in *Pitt v Holt* declares that it is voidable rather than void. Consequently, if it purports to alter or bring to an end the interest of a beneficiary affected by a breach of fiduciary duty, then the beneficiary is entitled to restrain the trustees from acting on it, and to have it set aside, subject always to equitable defences and discretionary factors. If a third party purchaser has acquired some relevant trust property as a result, he may have an indefeasible title, if he gave value without notice of the breach of fiduciary duty, but in such a case the beneficiary's interest would attach to

[488] This was also one of the submissions of counsel for the trustees in *Re Hastings-Bass* [1975] Ch 25, 31–2, based on *Re Pauling's Settlement Trusts* [1964] Ch 303, 333. This submission was quoted by Lloyd LJ in *Pitt v Holt* [2011] EWCA Civ 197, [51], but without explicit approval or disapproval.

[489] See, eg, *Re Griffiths* [2008] EWHC 118 (Ch), [2009] Ch 162, the conclusion in which was questioned by Lloyd LJ in *Pitt v Holt* [2011] EWCA Civ 197, [198]; and *Abacus Trust Company (Isle of Man) Ltd v NSPCC* [2001] STC 1344, where the advice was detailed and correct, but the trustees failed to follow it in time.

[490] This requirement does not mirror Lightman J's view in *Abacus v Barr* that a negligent trustee could invoke the principle but an innocent trustee could not. The point here is that either both or neither could invoke it, depending on what was known or knowable. A *deliberate* failure or mistake (which can only mean an intention to bring about the result complained of) on the part of the trustees would clearly be perverse or capricious in any event.

the proceeds of the sale.[491] This is not restricted, of course, to dispositive powers but applies equally to administrative powers as well. However, many (perhaps most) of a trustee's administrative powers (for example to buy and sell investments, to enter into contracts) will be exercised by way of contract with third parties and, as such, are probably more likely not to be capable of being set aside.[492]

(13) **Remaining uncertainties**

10.127 Although the Court of Appeal's decision in *Pitt v Holt* and *Futter v Futter* clarifies the law in many respects—not least in killing off 'the rule in *Hastings-Bass*'—there remain some uncertainties and peculiarities. It is not clear, for example, where in Lloyd LJ's analysis one places an exercise of a power or discretion which is utterly irrational or simply capricious. This is not a case of being unaware of the existence of the power (as in *Turner v Turner*). Nor is it necessarily a case of an excessive or fraudulent exercise. This is a case where the fiduciary is aware of his power but has exercised it irrationally or capriciously. The Court of Appeal did not address such a case directly and it is not included in either of Lloyd LJ's categories of void and voidable acts.[493] In addition, the distinction between cases where there is an 'absence of power' and those where there is simply a 'failure to exercise' an existing power may be clear, in principle; and, in most cases, it may be easy to apply in practice. However, in other cases, it may be very difficult to draw the dividing line. In those cases, the difference may simply be a matter of degree: the effects of the exercise of the power are so drastic, so far removed from what was intended, that the conclusion must be that what was done was not actually authorized by the power. As Robert Walker J said, in *Scott v National Trust*,[494] 'there is real difficulty in formulating the test for determining when a decision is so flawed as to be invalid. . . . There is also the question of how materially different the trustees' decision would or might have been . . .'. *Re Abrahams* and *Re Hastings-Bass* are themselves excellent examples of the difficulty: in the former, the effect of an exercise of a power of advancement was such that it was held that it could not be for the 'benefit' of the advanced beneficiary (that is, not authorized by the power), but in the latter, on very similar facts, the result was different (that is, authorized by the power).

10.128 Incorrect advice on the existence or scope of a power clearly can not confer a power which does not otherwise exist; and this is not the same as incorrect advice on the implications of an exercise of an existing or sufficiently wide power. Therefore, where a fiduciary receives advice relating to both questions (for example because they are inextricably linked, as would often be the case with powers of advancement), the difficulty of distinguishing between that which might be void and that which might not becomes more marked. It is also counter-intuitive, if not contrary to common sense, to hold that the acts or decisions of a negligent and careless fiduciary may be set aside but those of an innocent and conscientious fiduciary can not. If a solicitor negligently advises lay trustees to enter into a complex tax avoidance scheme, the transaction can not be set aside; but if the same transaction is entered into by the same solicitor, this time acting as the trustee himself and without independent advice, because he does not consider this necessary, then it may be set aside. The magnitude of the error is identical in each case; and it is the error that has caused the catastrophic result. It is still not entirely clear why the fault must be that of the trustee

[491] *Pitt v Holt* [2011] EWCA Civ 197, [99], referring to *Foskett v McKeown* [2001] 1 AC 102 at 127F–G; *Venables v Hornby* [2002] EWCA Civ 1277; [2002] STC 148, [27]; *Dance v Goldingham* (1873) LR 8 Ch 302.

[492] *cf. Donaldson v Smith* [2007] WTLR 421, 436, not applying the rule in *Hastings-Bass* to an equitable right of way.

[493] [2011] EWCA Civ 197, [96]–[97]: see para 10.96 above.

[494] [1998] 2 All ER 705, 718.

himself—nor, indeed, why the fault of his agent can not be attributed to him, as in *Abacus*. It is true that, in both cases, the beneficiary has a remedy—either directly against the trustee for breach of trust or, indirectly, through the trustee's claim against the adviser in negligence. However, it remains the case that the simpler and more effective remedy is available where there has been a breach of trust. It is also not entirely clear why trustees should be discouraged from applying to the court themselves. There may be cases where the trustees themselves are anxious to know whether they have committed a breach of trust or not, especially perhaps where there are infant or unborn beneficiaries involved.

(14) The rights of objects

10.129 Given that, in the exercise of their powers, trustees must ask themselves, and must consider, the right questions, and provided that their failure to do so amounts to a breach of trust,[495] then the beneficiaries of the trust or the objects of the power or discretion would have a right to challenge any such exercise. They are entitled to restrain the trustees from acting on it, and to have it set aside, subject always to equitable defences and discretionary factors. If the act or decision is set aside, the appropriate remedy, it would seem, would be to remit the matter to the trustees for fresh consideration.[496] If they then failed to carry out their duty, or again did so improperly, the objects could presumably apply to the court for their removal and for the appointment of replacement trustees.[497] In appropriate circumstances, it may be that the court would itself direct that the power be exercised in a particular way,[498] or sanction a scheme proposed by the objects themselves,[499] but this is considered most unlikely. In some circumstances, none of these solutions will be of use to a complaining object, for example because the time limit for the exercise of the power has expired. In *Wild* v *Smith*,[500] for example, a member of a pension scheme had completed a nomination indicating that he wished his 'death benefit' to be paid as to one half to his son and one half to his daughter. After his death, the trustees, in exercise of their discretion, paid out a substantial sum to a friend of the deceased member, with whom he had been living. The son complained of maladministration to the Pensions Ombudsman who upheld the complaint on the ground that the trustees had not made proper inquiries before deciding to override the nomination, and the exercise of the discretion was set aside. Carnwath J upheld the Ombudsman's decision. However, by that time, the relevant two-year time limit had expired: no appointment could therefore be made in favour of the friend and the 'death benefit' passed in default of appointment.

(15) Other fiduciaries

10.130 Similar principles apply to the exercise of fiduciary powers and discretions by others. The 'rule in *Hastings-Bass*' was applied to company directors in *Hunter v Senate Support Services Ltd*,[501] where it was noted that, although 'the analogy between directors (who are fiduciaries) and trustees as such is not an exact one', nevertheless there was 'some value in making the comparison'. A similar approach had been taken much earlier, without reference to *Hastings-Bass*, in *Re a Company*,

[495] In respect of which they will probably be able to rely on an indemnity clause in the trust instrument: see, eg, *Armitage v Nurse* [1997] 2 All ER 705; and *Midland Bank Trustee (Jersey) Ltd v Federated Pension Services Ltd* [1996] PLR 179.

[496] *Harris v Lord Shuttleworth* [1993] PLR 39, 47, *per* Judge Moseley: here, the function entrusted to the trustees was to consider whether they were satisfied that there had been a retirement occurring by reason of incapacity.

[497] Trustee Act 1925, s 41; *McPhail v Doulton* [1971] AC 424, 457.

[498] See, eg, *Klug v Klug* [1918] 2 Ch 67; *Re Bell Bros Ltd* (1891) 65 LT 245.

[499] *McPhail v Doulton* [1971] AC 424, 457; *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32.

[500] [1996] PLR 275.

[501] [2005] 1 BCLC 175; [2004] EWHC (Ch) 1085.

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Fifth Edition

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unnecessary where (as in the drafts in this book) there is a wide power of advancement.

C. POWER OF APPOINTMENT USED TO MAKE ADVANCE TO BENEFICIARY

§11.12 The power of appointment (or indeed the power of re-settlement) may be used so as to transfer trust capital to a beneficiary. But it will be easier to use the power of advancement for this purpose, since no formal deed is required. Trust money can simply be transferred by cheque.

D. POWER OF ADVANCEMENT USED TO CREATE NEW TRUSTS

§11.13 There is English authority permitting the power of advancement in a trust to be used:

(1) to transfer trust property to a new trust where it may be held on terms wholly[44] or partly[45] different from the original trust;

(2) to alter the terms of the existing trust so as to create new beneficial interests which may wholly or partly replace the existing beneficial interests; or[46]

(3) to alter administrative provisions.[47]

Ontario courts have followed the English authority,[48] and the generally accepted practice is that the power of advancement may be used broadly to the same effect as powers of appointment or re-settlement. This is particularly important where a trust is drafted badly, or inflexibly, because even badly drafted trusts generally contain a full power of advancement, which should allow matters to be put right.

The following example highlights such use of a power of advancement. In the discussion:

(1) It is assumed that under a trust ("the Original Settlement") trustees have

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the benefit of'. Of course, the context may show that an extended sense is meant.

[44] As in *Re Clore*, [1966] 1 W.L.R. 955 (transfer to charity). In the leading English case of *Pilkington v. I.R.C.* (1962), 40 T.C. 416, the new trusts were nearly, but not quite, exhaustive.

[45] In *Re Hastings-Bass*, the trustees transferred trust property to a new trust but created only a limited beneficial interest in income and no exhaustive beneficial trust of capital of the funds advanced. The new trustees held on the terms of the old trusts, which remained in effect to the extent that the new trusts were not comprehensive. See [1975] Ch. 25 at 42.

[46] In *Re Hampden*, the new trusts were nearly but not quite exhaustive. This important case is reported in [1977] T.R. 177 and also belatedly reported in [2001] W.T.L.R. 195 and accessible online: <http://www.kessler.co.uk/wp-content/uploads/2012/04/Hampden.pdf>.

[47] *Howell v. Rozenbroek* (U.K., December 14, 1999, unreported).

[48] *Hunter Estate v. Holton*, [1992] O.J. No. 401, 46 E.T.R. 178 (Ont. Gen. Div.).

power to apply capital for the benefit of an object, "O".

(2) The exercise of the power of advancement which results in a settlement of the funds advanced is called a "settled advancement" and the trusts created are called "advanced trusts".

(3) The beneficiaries of the trusts created by the settled advancement are called "Advanced Beneficiaries".

A typical case is where trustees, having power of advancement for the benefit of O, exercise that power by a settled advancement, in such a way that the trust fund is held on trust for O for life, with remainder over to O's family.

The starting point is to note that the Advanced Beneficiaries include persons other than the object, O — in this example, O's family. The advance must be for the benefit of O, but it is easy to see that this Settled Advancement may be an application of the trust fund for the benefit of O, since it will usually be for O's benefit that there should be funds to maintain O's family after O's death. It is not in the least relevant whether or not O's family are beneficiaries under the original settlement. They may be or they may not be, but the reason they become Advanced Beneficiaries is because this is for the benefit of O and not because of their status under the original settlement. O need not be an Advanced Beneficiary at all. All that matters is that the Settled Advancement is for the benefit of O.[49]

A settled advancement can only create trusts in a manner which is specifically for the benefit (albeit "benefit" in the wide sense) of the object, O.[50] If there is a power to advance for the benefit of O, one cannot normally create new trusts giving trustees a wide power of appointment in favour of O's siblings, or cousins, or more remote family, as that will not normally be for the benefit of O. The test is whether the trustees have O's interest and O's interest only, in mind. By contrast, the normal power of appointment can be used to create any type of trusts so long as the beneficiaries of the created trusts are objects of the power of appointment.[51] Where

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[49] Striking examples are *Re Clore*, [1966] 1 W.L.R. 955 (transfer to charity favoured by object of power of advancement) and *Re Hampden*, [1977] T.R. 177, also belatedly reported in [2001] W.T.L.R. 195, accessible online: <http://www.kessler.co.uk/wp-content/uploads/2012/04/Hampden.pdf> (transfer to trust for benefit of children of object of power of advancement).

[50] *Re Hampden*, [2001] W.T.L.R. 195 at 202:

> Under such a power the trustees can deal with capital in any way which, viewed objectively, can fairly be regarded as being to the benefit of the object of the power, and subjectively they believe to be so.

[51] This is all that Upjohn J. meant in *Re Wills*, [1959] Ch. 1 at 14:

> Trustees cannot under the guise of making an advancement create new trusts merely because they think that they can devise better trusts than those which the settlor has chosen to declare. They must honestly have in mind some particular circumstances making it right to apply funds for the benefit of an object or objects of the power.

it is not obvious that a proposed advance is for the benefit of the object, a possible course may be to exercise the power of advancement so as to confer powers of appointment which are exercisable by the object or which are exercisable with his consent or for his benefit. This brings out more clearly the benefit for the object. The next chapter sets out some precedents.

The commonest examples are a settled advance:

(1) to make provision for O's family; or

(2) to prevent O from becoming absolutely entitled to trust capital in circumstances where O is immature and irresponsible as regards money so that this would benefit O.[52]

It is considered that similar principles govern a common form power of appointment. For instance, a power of appointment in favour of the children of the settlor may be used to create trusts for the children for life with remainder to the grandchildren (not objects of the power, but assuming the provision for the grandchildren is regarded as a benefit to the children who are objects).[53]

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[52] This was grudgingly accepted in *Re T.*, [1964] Ch. 158 "only because a strong case on the facts is made out for protection of this nature". In Jersey, on the other hand:

> It is not in our judgment generally in the interests of young persons to come into possession of large sums of money which might discourage them from achieving qualifications and from leading settled and industrious lives to the benefit of themselves and of the community.

See *Re Gates*, [2003] 3 ITELR 113, online: <www.jerseylaw.je>. This view would be accepted now in England. Lord Eldon shared this sentiment: see Campbell's anecdote of Lord Eldon, online: <http://www.kessler.co.uk/wp-content/uploads/2012/04/Eldon_on_young_adults_income.pdf>. While the sentiment expressed would no doubt meet with the approval of many Canadian judges, the Canadian author is not as confident that they would permit so broad an exercise of the power of appointment in similar circumstances.

[53] The word "benefit" has two distinct meanings, a narrow meaning and a wide meaning:

(1) *Direct Financial Advantage only* — In the narrow sense, "benefit" means only a direct pecuniary benefit. In this sense it is not a "benefit", for example, to a person to pay his children's school fees.

(2) *Intangible Non-Financial Benefit also* — In the wide sense, "benefit" includes not only direct financial advantage, but also intangible non-pecuniary advantages including mental satisfaction. In this sense (only) it is for the benefit of a person:

  (a) to pay the children's school fees (assuming the person wishes to see his or her children privately educated); or

  (b) to provide a fund for their use (assuming the person wishes to see his or her children financially secure); or

  (c) to make a contribution to a charity which that person wishes to support.

A similar distinction is made in the law relating to a fraud on a power. An appointment with the motive of securing a financial benefit to the appointor is void, but an appointment