Introduction

1. The purpose of this paper is to consider some of the questions and problems which are most commonly encountered by trustees in the course of the administration of trusts and to provide some guidance as to what the answer to those questions might be, or at least to where those answers may be found.

General Themes

2. Let me set the scene by considering some general themes, which are likely to be familiar to many, but which I hope will assist in putting the paper in context.
3. Trusteeship is undeniably an onerous office. Trustees must act for the benefit of the beneficiaries. The law therefore imposes on trustees several duties, which are strictly enforced by the courts – in some circumstances perhaps even in a counter-intuitive way: e.g. the infamous case of Boardman v Phipps [1967] 2 AC 46.
4. On the other hand, in light of the existence of these onerous duties and to provide trustees with some assistance in carrying out their office properly, the law allows trustees to seek guidance from the court as to what to do in various different situations of doubt – a supervisory jurisdiction which is peculiar to trustees and which is very different from the court’s habitual role of referee in adversarial disputes.
5. The trust is a very flexible device, which is nowadays employed and encountered in many different contexts ranging from co-ownership of a home to complex on- and offshore estate tax planning. Accordingly, the types of problems that trustees are likely to encounter will

1 And to other categories of persons who are under an obligation to act for the benefit of someone else, such as personal representatives and attorneys.
vary greatly depending on the nature of the particular trust in question. For the purposes of this paper, I will consider four general areas common to most trusts in which trustees may be faced with various kinds of questions and problems: appointment, disclosure, investment and distribution.

**Appointment**

*Have I been validly appointed?*

6. Perhaps the first question every trustee should ask himself is: have I been properly appointed? The answer may of course be straightforward, most obviously in cases where the trustee in question has been expressly appointed by the settlor in the trust instrument.

7. However, where the trust has been in existence for many years and there has been a long chain of retirements and appointments, the answer may not be quite that easy. The consequences of an invalid appointment, particularly fiscal, can be disastrous: see e.g. *Jasmine Trustees Ltd v Wells & Hind (a firm)* [2008] Ch 194. Accordingly, it is suggested that before taking any step in office, a newly-appointed trustee should carefully consider whether it is clear that his appointment is valid.

*Should I accept or disclaim my appointment?*

8. A person who has been appointed as trustee may for one reason or another not in fact wish to accept the office. Nobody (save for the Public Trustee) can be compelled to accept the office of trustee. However, if a person wishes to disclaim his trusteeship he must do so before taking any steps which could be interpreted as an acceptance of office. Though not strictly required, it is generally advisable to disclaim by deed at the earliest possible opportunity. This is likely to minimise the risk of confusion, particularly in relation to possible arguments as to whether a period of inactivity should be interpreted as an implied acceptance or an implied disclaimer.

9. In the case of professional trustees, the main factors to be considered when deciding whether to accept the trusteeship are likely to include the size of the trust fund, the complexity of the trust, the existence and terms of remuneration and exculpation clauses and the trustee’s ability to retire voluntarily.

10. A separate cause for concern may be an actual or potential conflict of interest. A trustee must not place himself in a position in which his own interests conflict with those of the beneficiaries. In cases where there is potential for conflict it is suggested that the prudent option is to disclaim. A less extreme measure may be to disclose the nature of the potential conflict to the settlor or to the person or persons who have the power to appoint new
trustees. However, it is not entirely clear from the case law whether this will provide the trustee with a full defence.²

11. **Bayley v SG Associates** [2014] EWHC 782 (Ch) provides a recent example of how a trustee should not behave. The same individual in that case was (i) a director of the trustee company, (ii) a director of the company which provided the trustee company with investment advice (SGA) and (iii) the chairman of a company in which the trustee company invested a significant portion of the trust fund on advice from SGA. The judge described the conflict of interest as “clear”.³

12. Another possible danger is the risk that someone may successfully challenge the validity of the trust, for example on the grounds that the settlor lacked capacity or was subject to undue influence, that the settlor was not the owner of the property purportedly settled or that settling it was a breach of fiduciary duty by the settlor, that the trust is a sham or is void for uncertainty. A successful challenge of this nature is likely to have an impact on the trustee’s ability to recover his costs and, if relevant, remuneration from the trust fund and accordingly a trustee should try to make what enquiries he can as to whether there is a risk of such a challenge being launched.

**Once I have accepted my appointment, what are my first duties?**

13. Once they have accepted their trusteeship, newly-appointed trustees “are bound to inquire of what the property consists that is proposed to be handed over to them, and what are the trusts. They ought also to look into the trust documents and papers to ascertain what notices appear among them of incumbrances and other matters affecting the trust.”⁴

14. So the short, general answer is: take an active role and make enquiries – do not sit back and do nothing.

15. Generally, a trustee should check that:
   - he has all the trust papers, in particular the trust instrument and any instruments relating to the chain of trusteeship;
   - he has sufficient information to know or ascertain who the beneficiaries are;
   - he has sufficient information to know or ascertain what the terms of the trust are;
   - he has control of all the trust property.

16. In respect of the latter, a trustee must actively take control of the trust property, if necessary by court action.⁵ The formalities to be complied with will depend on the nature of the trust property in question. In general, if the appointment is made by deed the

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³ [2014] EWHC 782 (Ch) at [30].
⁴ *Hallow v Lloyd* (1888) 39 Ch D 686 at 691 per Kekewich J.
⁵ *Re Brogden* (1888) 38 Ch D 546.
statutory vesting provision\textsuperscript{6} is frequently relied on. The same statute also provides that \textit{"On the appointment of a trustee for the whole or any part of trust property...any assurance or thing requisite for vesting the trust property, or any part thereof, in a sole trustee, or jointly in the persons who are the trustees, shall be executed or done."}\textsuperscript{7} It should be remembered that land has its own rules in relation to registration of title.

2. Disclosure

What do I have to disclose?

17. We have already considered the duties to disclose any conflict of interest to a settlor or appointor before accepting a trusteeship. However, the issue of disclosure is often more complicated in relation to beneficiaries. What, if anything, are they entitled to?

18. Information relating to the trust which a beneficiary may want to obtain can be broadly divided into two categories. The first, more limited category is information relating to the existence of the trust and the beneficiary’s interest thereunder (“Category A”). The second (“Category B”) comprises more detailed information regarding the trust, such as trust accounts, details of the property comprised in the trust fund and – perhaps the most frequent source of controversy – the trustees’ reasons for exercising a discretion in a particular way.

19. Trustees should bear the distinction in mind when asked for information, as the duties of disclosure are very different in relation to each category.

To whom do I have to disclose?

Category A

20. A beneficiary who is entitled to an interest in possession (which for present purposes may be defined as a present right to present enjoyment) under the trust has a right to be told that the trust exists, that he has an interest under it and the extent of that interest.\textsuperscript{8} Trustees have a duty to voluntarily disclose this information to such beneficiaries, and therefore should not wait to be asked – indeed, a beneficiary may be wholly unaware that a trust exists until he is told by the trustees.

\textsuperscript{6} This is contained in section 40(1)(b) of the Trustee Act 1925, which provides: \textit{Section 41(1) Where by a deed a new trustee is appointed to perform any trust, then—}

\textit{(b)} if the deed is made after the commencement of this Act and does not contain [a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust], the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates interests and rights with respect to which a declaration could have been made.

\textsuperscript{7} Section 37(1)(d) of the Trustee Act 1925.

\textsuperscript{8} See e.g. Hawkesley v May [1956] 1 QB 304.
21. The position is less clear in relation to beneficiaries with more remote interests, such as a contingent or defeasible interest, or to beneficiaries who are the object of a discretionary power. It is suggested that, subject to any issue of confidentiality, it will generally be prudent for trustees to disclose this limited information to these classes of beneficiaries as well. Moreover, in the event that they have not already disclosed it voluntarily, trustees should be willing to disclose this type of information if asked to do so by a beneficiary.

22. How trustees decide to disclose this information will often depend on the number of beneficiaries and the nature of the trust. It is suggested that a letter explaining that a trust exists and the nature of the beneficiary’s interest under it will generally suffice, particularly if accompanied by the trustees’ contact details and an indication that the beneficiary may contact the trustees for further information.

Category B

23. The law governing disclosure of more detailed information regarding the trust was considered by the Privy Council in Schmidt v Rosewood Trust Ltd [2003] 2 AC 709. It is suggested that in summary the position is as follows.

24. A trustee must always keep up to date trust accounts. Beneficiaries are entitled to inspect and obtain copies of trust accounts, and trustees should willingly provide these.\(^9\)

25. The same general approach should be taken by trustees in relation to the trust instrument and documents supplemental to it. However, if it is thought that issues of confidentiality arise (for example in relation to the interests of other beneficiaries under the trust), it might be appropriate for trustees to seek confidentiality undertakings from the requesting beneficiary before this type of document is disclosed.

26. On the other hand, trustees have a discretion, but are not under any obligation, to disclose their reasons for exercising a discretionary power in a particular manner.\(^10\) Documents of this nature typically include minutes or other records of trustees’ meetings setting out their deliberations as to the manner in which their discretionary power should be exercised and their reasons for doing so. This is frequently misunderstood by trustees faced with threats of proceedings by disgruntled beneficiaries who are dissatisfied with the way in which a discretion has been exercised. Trustees should, of course, take a practical and pragmatic view when deciding whether to disclose their reasons, but if there are good reasons not to disclose, trustees can properly resist the beneficiaries’ pressure.

3. Investment

\(^9\) As a result of the decision in Schmidt v Rosewood Trust Ltd [2003] 2 AC 709 there is some debate as to the proper legal basis on which a beneficiaries may ask for accounts. Whatever the proper answer to that question, it is suggested that in practice trustees should have accounts and willingly disclose them to beneficiaries.

\(^10\) Re Londonderry’s Settlement [1965] Ch 918, which was approved and followed in Schmidt v Rosewood Trust Ltd [2003] 2 AC 709.
27. In recent years disputes between beneficiaries and trustees appear to have increased, due perhaps to a combination of an increased awareness on the part of beneficiaries of trustees’ duties in relation to investment and a volatile economic climate which has in certain cases resulted in losses of a magnitude which beneficiaries are less likely to ignore or passively accept. It is therefore increasingly important for trustees to understand their duties in relation to the investment of the trust fund.

**What are my investment powers?**

28. The starting point is the trust instrument, which may contain express provisions in relation to investment. Trustees must always ensure that they are acting within the scope of any powers of investment they have been expressly granted and therefore also in accordance with any restriction imposed on such powers. An investment made outside the trustees’ powers is a breach of trust, even if the investment proves a good one.

29. The Trustee Act 2000 places on statutory footing what the statute labels “the general power of investment”, which is expressed as follows in section 3(1) of the Act:

Subject to the provisions of this Part, a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.

30. It is suggested that two points should be borne in mind. The first is that, whilst the general power of investment applies in addition to powers conferred on trustees otherwise than by the Act, it applies subject to “any restriction or exclusion imposed by the trust instrument or by any enactment or any provision of subordinate legislation”. Once again, therefore, any restriction in the trust instrument should be carefully borne in mind.

31. Secondly, separate provisions exist in respect of investment in land. Section 3(3) of the Act expressly prevents trustees from making “investments in land other than in loans secured on land”. However, this applies subject to section 8 of the Act which allows a trustee to “acquire freehold or leasehold land in the United Kingdom (a) as an investment, (b) for occupation by a beneficiary, or (c) for any other reason.” It will be noted that there is no statutory power to invest in land abroad: whether this power exists at all must be carefully considered before any such investment is made.

**What are my duties when exercising my investment powers?**

32. Once again, the starting point is the trust instrument. This may direct the trustees, for example, to invest the trust fund in a particular category of asset, such as shares in a specific type of company. Trustees must ensure that they are investing in accordance with any specific direction given to them by the trust instrument.

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11 Section 3(2) of the Trustee Act 2000.
12 Section 6(1) of the Trustee Act 2000. Legislation disappplies the general power of investment in relation to pension funds, authorised unit trusts and certain charity funds.
33. Subject to any such direction, the general law imposes on trustees a duty (a) not to delay unreasonably in investing the trust fund and (b) to invest prudently. Whilst the former is fairly self-explanatory, the latter needs further explanation.

34. In 1882 Jessel MR famously explained the general manner in which a trustee should go about exercising his duties as follows:

It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound because he is a trustee to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way. If it were otherwise, no one would be a trustee at all.

35. As a general statement, this remains good law. Moreover, the main duties imposed on trustees in relation specifically to investment have now been collected and codified by the Trustee Act 2000. Section 4 of the Act provides:

(1) In exercising any power of investment, whether arising under this Part or otherwise, a trustee must have regard to the standard investment criteria.

(2) A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

(3) The standard investment criteria, in relation to a trust, are—

(a) the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

36. One sees that the provision therefore codifies the duty to (a) review a portfolio of investment from time to time and (b) to diversify investments.

37. It is now well-established that when deciding how to invest the fund trustees must give appropriate weight to the interests of both beneficiaries with an immediate right to income and to those with a more remote interest in the capital. As Cotton LJ once put it:

[trustees must have regard] not only to the interests of those who are entitled to the income, but to the interests of those who will take in future. That is to say, it is not like a

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13 *Speight v Gaunt* (1882) 2 Ch D 727 at 739-740, approved by the House of Lords at (1883) 9 App Cas 1 at 19, where Lord Blackburn emphasised that the important caveat to this general principle is that a trustee must act within in accordance with the powers given to him by the trust instrument, a restriction which does not apply to the “ordinary prudent man of business”.

14 *In re Whiteley* (1886) 33 Ch D 347 at 350.
man simply investing his own money where his object may be a larger present income than he can get from a safer security; but trustees are bound to preserve the money for those entitled to the corpus in remainder, and they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present.

38. In addition, section 5 of the Act provides:

(1) Before exercising any power of investment, whether arising under this Part or otherwise, a trustee must (unless the exception applies) obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power should be exercised.

(2) When reviewing the investments of the trust, a trustee must (unless the exception applies) obtain and consider proper advice about whether, having regard to the standard investment criteria, the investments should be varied.

(3) The exception is that a trustee need not obtain such advice if he reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

(4) Proper advice is the advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial and other matters relating to the proposed investment.

39. Finally, the Trustee Act 2000 also imposes a general duty on trustees to:

exercise such care and skill as is reasonable in the circumstances, having regard in particular (a) to any special knowledge or experience that he has or holds himself out as having, and (b) if he acts as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.\(^\text{15}\)

40. This duty applies to a trustee when exercising the general power of investment conferred by the Act or any other power of investment however conferred,\(^\text{16}\) and when a trustee is taking steps to comply with his duties under section 4 (duty to have regard to the standard investment criteria) and section 5 (duty to take advice in relation to investments).\(^\text{17}\)

41. It should be noted that even before the Trustee Act 2000 a higher standard of care was expected of a professional trustee who held himself out as specialising in trust management.\(^\text{18}\)

42. Needless to say, how exactly a trustee must go about complying with these duties will be very much determined by the nature of the trust. Although a disgruntled beneficiary may face difficulties in proving loss and/or causation (as in Nestle v National Westminster

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\(^\text{15}\) This duty is codified in section 1(1) of the Trustee Act 2000, although other provisions of the Act determine when the duty of care applies.

\(^\text{16}\) Paragraph 1(a) of Schedule 1 to the Trustee Act 2000.

\(^\text{17}\) Paragraph 1(b) of Schedule 1 to the Trustee Act 2000.

\(^\text{18}\) See Bartlett v Barclays Bank Trust Co Ltd [1980] 2 WLR 430 at 444.
Bank plc [1994] 1 All ER 118), trustees are nevertheless likely to want to take steps to ensure that they have acted properly and can prove it, so as to avoid having to go anywhere near a courtroom.

**What can I do to protect myself from potential future claims by disgruntled beneficiaries?**

43. Some suggestions have already been given above: act within your powers; don’t delay; have regard to the standard investment criteria (suitability and diversification of investments) and review investments regularly; take into account the different types of interest the various beneficiaries have under the trust fund; obtain proper advice.

44. In relation to the latter, trustees may be under an obligation (imposed by section 5) to obtain advice as to how to exercise their powers of investment in terms of suitability and need for diversification, and as to whether existing investments should be varied. This type of advice will generally be financial. On the other hand, trustees may also wish to take advice as to the scope of their power of investment and whether a particular proposed investment is within such power, which is likely to be in the form of legal advice from an appropriate solicitor or counsel.

45. Two additional routes are worth mentioning briefly. Trustees may come under pressure from the beneficiaries to invest in a particular manner which is outside the scope of their powers. Whilst this would constitute a breach of trust, trustees may agree to follow the beneficiaries’ wishes provided the latter expressly agree to this, thereby precluding themselves from later being able to sue the trustees for breach of trust. For this to work the beneficiaries whose interest will be affected must be of full age and capacity and give some form of unambiguous written consent to the proposed investment. It will be appreciated that this avenue has its dangers and trustees should generally seek proper legal advice before agreeing to this course. It should also be borne in mind that beneficiaries cannot compel trustees to invest the fund in a particular manner and trustees should accordingly ensure that they are not committing a breach of trust merely to appease one or more beneficiaries.

46. On the other hand, trustees may wish to invest in a particular manner in circumstances where they do not have the power to do so and the beneficiaries’ consent cannot be obtained. In these circumstances they may apply for the court’s blessing under section 57 of the Trustee Act 1925, which provides:

> Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order

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19 See e.g. *Re Brockbank* [1948] Ch 206.
confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

4. Distributions

47. Trustees can pay monies out of the trust fund to beneficiaries in a variety of situations. The first question trustees should ask themselves is:

**Do I have an obligation or only a discretion to make a distribution?**

48. In many cases the trust instrument will make clear the circumstances in which the trustees must make a distribution to the beneficiaries, as opposed to those in which the trustees may do so. In the standard example of a trust “to A for life, remainder to B” it is clear that on A’s death the trustees must pay the fund to B (provided he is of full age and capacity).

49. On the other hand, the trust instrument may not be quite this clear. Take for example a trust “to A for life, remainder to such of B, C and D as my trustees may in their absolute discretion determine”. On A’s death the trustees have an obligation to distribute, even though there is an element of discretion (in the sense that the trustees can choose how to divide the distribution among B, C and D). This type of power, which the trustee is compelled to exercise, is often referred to as a “trust power”.

50. Finally, discretionary powers often take the form of powers of appointment, as in the case of a trust “to A for life, remainder to B” where trustees are given an overriding discretionary power to make such appointments of income and/or capital in favour of C and/or D as they in their absolute discretion think fit. Here the trustees have an obligation to hold the trust fund for A for life and then distribute it to B on A’s death, but in the meantime they have a discretion to make distributions to C and/or D. A trustee is not under a duty to exercise this type of power, which is known as a “mere power” (to distinguish it from a “trust power” discussed above).

**If I have an obligation to distribute, when does it arise?**

51. As illustrated by the above examples, the trust instrument will generally make it clear when an obligation to distribute arises. The trustees may have no discretion as to how the distribution is to be effected, or may be obliged to distribute but be given a discretion as to how they choose to do so (a “trust power”).

52. It should also be borne in mind that an obligation to distribute income may also arise by operation of section 31 of the Trustee Act 1925. This will occur when a minor beneficiary who does not have a vested interest in the income of the trust, but whose interest carries the
right to intermediate income, attains the age of 18. The typical example is where the trust fund is held for A upon attaining the age of 25, which is created when A is a minor. Although at first glance the trustees’ duty to distribute to A would appear to arise only upon A attaining 25, section 31 obliges the trustees to distribute the income of the fund to A when A attains 18 (subject to any contrary intention expressed in the trust instrument).\(^{20}\)

**If I only have a discretion to distribute, when can I exercise it?**

53. A discretionary power (in the sense of a “mere power”) may be expressly granted to trustees by the trust instrument. If so, trustees must ensure that they act within the scope of that power, as a purported exercise of a power beyond its scope (*ultra vires*) will constitute a breach of trust for which trustees will generally be personally liable.

54. A discretionary power in relation to capital may also arise under section 32 of the Trustee Act 1925. This applies subject to any contrary intention expressed in the trust instrument. In practice, many trust instruments do not exclude the statutory power, but on the contrary extend it to 100% of the beneficiary’s interest in the capital (whilst section 32 itself only allows advancement of up to 50% of such interest).

55. Trustees must exercise this statutory power “*for the advancement or benefit...of any person entitled to the capital of the trust property or of any share thereof*”.\(^ {21}\) These words have been given a wide interpretation by the courts so as to include for example a donation to charity in discharge of a moral obligation felt by a wealthy beneficiary\(^ {22}\) and a loan to allow the beneficiary’s husband to set up a business.\(^ {23}\) It is suggested that the guiding questions should always be (i) is X entitled to the capital of the trust or any share of it? and (ii) is the proposed distribution for X’s “*advancement or benefit*” within the meaning of section 32(1)?

**If I only have a discretion to distribute, do I have to exercise it?**

56. Trustees may come under pressure from beneficiaries who need cash and who want a distribution to be made to them. In such circumstances, it may be useful for trustees to remind themselves of the duties they have in relation to mere powers (which are of course quite different from their duties in relation to trust powers considered above).

57. Where a trustee is given a mere power, he “*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.*”\(^ {24}\)

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20 Section 69(2) of the Trustee Act 1925.
21 Section 32(1) of the Trustee Act 1925.
22 *Re Clore’s Settlement Trust* [1966] 1 WLR 955.
23 *Re Kershaw’s Trusts* (1868) LR 6 Eq 322.
24 *Re Hay’s Settlement Trust* [1983] 3 All ER 786 at 792 *per* Sir Robert Megarry V-C.
58. Accordingly, whilst the trustees are likely to want to keep beneficiaries happy and there may be good reasons for the trustees to exercise their power as requested by the beneficiaries, trustees cannot generally be compelled to do so. Moreover, trustees must at all times exercise their power responsibly, in good faith, impartially and for a proper purpose (and not, for example, to obtain a benefit for themselves).

59. Finally, obvious as this may sound, trustees must actually exercise their power, i.e. be active in their decision making process, and not simply do what they are told by the beneficiaries or the settlor. This is illustrated by the rather extreme case of *Turner v Turner* [1984] Ch 100, in which the trustees had simply signed three appointments which the settlor had put in front of them without giving the matter any thought. The court held that the trustees had not exercised their power at all and that the purported appointments were accordingly all void.

Footnote: *Pitt v Holt, Futter v Futter: how does this affect me?*

60. The so-called ‘rule in *Re Hastings-Bass*’ was considered by many to provide a readily-available ‘morning-after pill’ for trustees who had exercised a power in a manner which had resulted in unexpected and undesirable consequences, generally in the form of a large tax bill. Provided the trustees could prove to the court that they had failed to take into account a relevant consideration (generally the unexpected tax consequences), or had taken into account an irrelevant consideration, or both, the court would normally set aside the transaction, effectively turning back the clock and making the undesirable consequences disappear.

61. However, in May last year the Supreme Court in the conjoined appeals in *Pitt v Holt* and *Futter v Futter* [2013] UKSC 26 upheld the Court of Appeal’s decision that in fact no ‘*Re Hastings-Bass* jurisdiction’ as commonly understood exists. Accordingly, if a particular exercise by the trustees of their discretion has had unexpected and undesirable (tax) consequences, it will be for the beneficiaries to ‘grasp the nettle’ and sue the trustees for breach of trust.

62. What are the implications of the decision from a trustee’s perspective?

63. There is no longer an effective ‘morning after’ pill which the trustees themselves can take. If the trustees have acted within the scope of their powers after taking suitable (albeit wrong) advice, the trustees are generally unlikely to themselves be able to ask the court to set the exercise aside.

64. If the trust has suffered a loss, the disgruntled beneficiaries are likely to want to make the trustees bear the loss. However, disgruntled beneficiaries are generally unlikely to be able

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to establish that the trustees have committed a breach of trust if the trustees acted within their powers and took suitable (albeit wrong) advice.\textsuperscript{26}

65. It is therefore suggested that a practical consequence of this is that trustees should be even more careful to take suitable advice before exercising their powers, as this is likely to reduce (albeit not eliminate) the risk of the trustees themselves being held liable for breach of trust if the proposed transactions turns out to have unexpected consequences (and indeed failing to take advice may itself constitute a breach of trust by the trustee). Moreover, an additional practical advantage of taking suitable advice is that trustees who find themselves on the receiving end of a breach of trust claim are likely to be able to look to their advisers (and their advisers’ insurers) instead of having to face the claim alone.

\textsuperscript{26} See in particular [78]-[80].