The office of trustee is onerous and “if faithfully discharged, attended with no small degree of trouble and anxiety,” so that “it is an act of great kindness in any one to accept it.”

*Knight v Earl of Plymouth* (1747) Dick. 120 at 126 *per* Lord Hardwicke LC.

“Who would be a trustee?”

Poor Mr Moore in an e-mail to his fellow trustee: see *Brudenell-Bruce v Moore and others* [2014] EWHC 3679 Ch at para 50.
I TAKING DECISIONS

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III PROTECTING TRUSTEES

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Trustees face a difficult job. If they get things wrong, they face personal liability. Even if they get things right, they can face unpleasant confrontations with intransigent beneficiaries and worries about the correctness of what they are doing. Recent cases, including the Savernake estate litigation\(^1\), suggest some common threads:

- Be aware of the rules that govern trustees UNLESS VARIED by the Trust Instrument;
- Make decisions on a proper basis and document them.
- Check the trust instrument carefully to see exactly what trustees are authorised to do;
- Seek the consent of beneficiaries to any alteration of the terms of the trust instrument and document that consent clearly;
- If the beneficiaries’ consent is not forthcoming, seek the court’s consent to alterations and ‘blessing’ where momentous decisions are being taken.

I TAKING DECISIONS

1. What do trustees need to consider?

Underhill and Hayton say at 57.1 that a trustee:

“(a) must consider from time to time the exercise of his distributive and managerial discretions;
(b) must not fetter the future exercise of his discretions;
(c) must consciously exercise his own discretion in good faith and not passively fall in with suggestions of the settlor or his co-trustees;
(d) must exercise his discretions only within the scope of the terms of the relevant power and, then, only for the purposes for which the discretions were conferred on him by the settlor and not perverse to any sensible expectation of the settlor, thereby keeping an even hand among all beneficiaries except in so far as he may properly discriminate between them\(^2\);
(e) must exercise his distributive discretions responsibly in informed fashion, taking account of relevant matters and ignoring irrelevant matters;

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\(^1\) The litigation concerns an estate at Savernake Forest in Wiltshire that the family of the Earl of Cardigan, has owned since soon after the Norman Conquest. It shows how very hard being a trustee can be. There are three main reported cases (and a mass of satellite litigation): *Brudenell-Bruce v Moore and others* [2012] EWHC 1024 (Ch); *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312; *Brudenell-Bruce v Moore and others* [2014] EWHC 3679 (Ch).

\(^2\) As where the settlor intends discretionary trusts and powers to benefit some more than others and some not at all, or intends his life tenant widow to be the main object of his bounty and not a wealthy remainderman.
must exercise his managerial discretions in accordance with the duty of care, so far as not ousted in the trust instrument;

must not exercise any discretions directly or indirectly for his own benefit unless authorised by the trust instrument or by statute;

must not commit a fraud on the powers conferred on him.

If he complies with the above duties the exercise of his discretions will be unchallengeable even if the court itself would have decided differently.

The trust instrument may provide that there is no obligation to balance competing interests and that the interests of one particular beneficiary are to be treated as paramount.

This is particularly common in the case of an IPDI created for a surviving spouse. Well drafted IPDIs include a power to apply capital for the benefit of the spouse and without such a clause (or guidance in a letter of wishes) trustees are in some difficulty deciding whether to exercise the power.

A discretionary trust will normally be accompanied by a letter of wishes. Trustees are not bound to comply with the stated wishes but should include them in the matters they consider when exercising a discretion.

Take the following example.

Example

Mother creates a discretionary trust in her will for the benefit of her improvident son and his (many) children. The children are currently all minors. She states that while she is happy for the trustees to assist her son with income and capital payments she very much hopes that the trustees will retain a significant proportion of the trust assets for the benefit of the children.

The son is asking the trustees for a very large capital sum to allow him to buy a substantial house in Kensington with additional funds to modernise it.

What proportion of the trust funds is the son asking for? If it’s the whole lot, this would leave nothing for the children and would not be taking the settlor’s wishes into account.

Even if the request is for a portion of the capital query whether it is the right course for the trustees to simply release trust capital to the son. Should they consider lending the money to the son and taking security over the house and any other assets he has or buying the property in the name of the trust? Should they charge interest and on what terms?
Unless the trust instrument provides otherwise, decisions must be made unanimously.  

2. Do trustees need to consult beneficiaries?

Not unless the trust instrument or statute requires them to do so.

*The trust instrument*

Where a trust contains a flexible life interest with overriding powers for the trustees to terminate the right to income, the consent of the life tenant is sometimes required.

This is not necessarily a good idea. One of the attractions of the overriding power to terminate is that it can be used in a case where the beneficiary is no longer mentally capable. If a consent requirement is included, it should be limited to apply only during such time as the beneficiary is mentally capable.

*Trusts of Land and Appointment of Trustees Act 1996*

Section 11(1) provides for consultation with beneficiaries as follows:

“The trustees of land shall in the exercise of any function relating to land subject to the trust:

(a) so far as practicable, consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land, and

(b) so far as consistent with the general interest of the trust, give effect to the wishes of those beneficiaries, or (in case of dispute) of the majority (according to the value of their combined interests).”

The requirements can be excluded by the trust instrument and it is standard to do so. Requirement (b) is particularly difficult where there is more than one beneficiary. STEP Special Provision 19 gives trustees an absolute discretion.

However, there may be cases where it would be appropriate to ask the trustees to consult, for example where a beneficiary is given a right of occupation. It might be appropriate to insert an express power or to exclude only (b).

3. What if a trustee is a beneficiary?

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3 This point was in issue in *Fielden v Christie-Miller* [2015] EWHC 87 (Ch), where it was alleged that a representation made by one trustee had created a proprietary estoppel. Sir William Blackburne J held that the unanimity principle meant that the claimant had to show that the trustee making the representation was the agent of his two co-trustees, in the sense either that they had authorised him to make the representations in question on their behalf, or they stood by knowing that he had made the representations and acquiesced in them, or by their actions they put him in a position in which he appeared to be authorised to make the representations on their joint behalf.
There is nothing wrong with appointing a beneficiary as a trustee although it may give rise to a conflict of interests which may produce unfortunate results.

See for example *Berger v Berger* [2013] EWCA Civ1305 where the remainder beneficiaries who had been appointed as trustees manipulated the trust assets to produce capital growth at the expense of income.

The appointment of beneficiaries may also produce tensions if the family is disunited. It may be sensible to try and ensure that different branches of family are represented. If the fund is large enough) consider the appointment of 1 or more professionals.

It is important to consider the rule against self-dealing.

### 3.1 The rule against self-dealing

Equity will not allow a person, who is in a position of trust, to carry out a transaction where there is a conflict, or possible conflict between his duty and his interest, unless he is expressly authorised to do so. (see *Wright v Morgan* [1926] AC 788, at 797).

Lord Herschell said in *Bray v Ford* [1896] AC 44, 51 to 52:

> “It is an inflexible rule of a court of equity that a person in a fiduciary position ... is not, unless otherwise expressly provided ... allowed to put himself in a position where his interest and duty conflict. ... I regard it [that is this rule] rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.”

The principle has generated certain well known rules applicable to specific commonly encountered situations. For example:

- a professional trustee may not charge for his services unless expressly authorised to do so and, if challenged by the beneficiaries, will have to repay unauthorised remuneration;

- a director trustee must account for remuneration earned as a director unless expressly or impliedly authorised to retain it;

- a trustee is not, generally speaking, able to exercise a power of appointment in his own favour unless expressly or implicitly authorised to do so; a purported exercise will be voidable by the beneficiaries;

- “if a trustee sells the trust property to himself, the sale is voidable by any beneficiary, however fair the transaction”. (Megarry V-C in *Tito v Waddell* (No 2) [1977] (Ch) 106);\(^4\)

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\(^4\) *Kane v Radley-Kane and Others* [1999] Ch 274 is a recent example. Mrs Radley-Kane’s husband died intestate. She was the sole PR and entitled to a statutory legacy and a life interest in half the residue. His 3 sons were entitled to the rest. She appropriated unquoted shares to herself which at
• If a trustee grants a lease to himself, it is voidable by the beneficiaries, however fair the terms *Brudenell-Bruce, Earl of Cardigan v Moore* [2012] EWHC 1024 (Ch)

### 3.2 Authorisation by trust instrument

Trustees can be authorised by the trust instrument to act even if they have a personal interest. It is essential to check what the trust instrument says as clauses authorising self-dealing vary considerably. A clause authorising the purchase of trust property will not assist a trustee who wishes to exercise a power in his own favour.

The STEP Standard Provisions 2nd edition say this:

“**9 Conflicts of interest**

9.1 **In this clause:**

9.1.1 “**Fiduciary**” means a Person subject to fiduciary duties under the Trust.

9.1.2 “**Independent Trustee**”, in relation to a Person, means a Trustee who is not:

(i) that Person;

(ii) a brother, sister, ancestor, descendant or dependant of the Person;

(iii) a spouse or Civil Partner of (i) or (ii) above; or

(iv) a company controlled by one or more Persons within (i) (ii) or (iii) above.

9.2 A Fiduciary may:

9.2.1 enter into a transaction with the Trustees, or

9.2.2 be interested in an arrangement in which the Trustees are or might have been interested, or

9.2.3 act (or not act) in any other circumstances even though his fiduciary duty under the Trust conflicts with other duties or with his personal interest.

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death were valued at £50,000 (the net estate was £93,000). She registered the shares in her name in April 1995 and sold the shares in January 1997 for £1,131,438. The appropriation was a sale to herself and, was caught by the self-dealing rules. The sons were able to set aside the transaction without any enquiry as to whether the appropriation had been at a correct valuation. She should have obtained the consent of the other beneficiaries.

The judge did say that there would be no objection to a PR satisfying his own legacy by transferring assets which are equivalent to cash such as government stock or quoted shares.
9.3 **Clause 9.2 has effect only in relation to administrative and not dispositive matters, and only applies if:**

9.3.1 **The Fiduciary first discloses to the Trustees the nature and extent of any material interest conflicting with his fiduciary duties, and**

9.3.2 **there is in relation to the Fiduciary an Independent Trustee in respect of whom there is no conflict of interest, and he considers that the transaction arrangement or action is not contrary to the general interest of the Trust.**

9.4 **The powers of the Trustees may be used to benefit a Trustee (to the same extent as if he were not a Trustee) provided that:**

9.4.1 **There is in relation to that Trustee an Independent Trustee in respect of whom there is no conflict of interest, or**

9.4.2 **The Trustees consist of or include all the trustees originally appointed under the Principal Document.**

Other express clause give a much more general exclusion:

"**Exclusion of the Self-Dealing Rule**

Any of the Trustees may exercise or concur in exercising any powers and discretions given by this settlement or by law notwithstanding that he has a direct or other personal interest in the mode or result of any such exercise but any such Trustee may abstain from acting except as a merely formal party in any matter in which he may be so personally interested and may allow his co-trustees or co-trustee to act alone in relation thereto."

It is clearly preferable if the authority is express but it can be implied where, for example, a settlor appoints a beneficiary as a trustee: see *Sargeant v National Westminster Bank plc* (1990) 61 P & CR 518. The Court of Appeal appeared to recognise this in *Loring v Woodland Trust* [2014] EWCA Civ 1314

3.3 **Authorisation by beneficiaries or by court**

The beneficiaries can authorise trustees to exercise powers in their own favour but they must have full information and be free from any pressure.

There must be clear evidence of the authorisation. See, for example, *Brudenell-Bruce v Moore* [2014] EWHC 3679 Ch where a trustee thought that he had been authorised to charge following an exchange of e-mails with a beneficiary but the court found that the exchange was too inconclusive.

The court has power to sanction a transaction which would otherwise constitute a breach of fiduciary duty. It will need to be convinced that the
trustee is not taking advantage of his position and was not influenced by the conflicting interest. Authorisation should, therefore, normally be sought in advance, as it is likely to be harder to convince the court after the transaction, particularly if the beneficiary opposes the transaction.

3.4 Limits on the rule against self-dealing

Not every conflict of interest gives the beneficiary a right to avoid the transaction. In *Public Trustee v Cooper* [2001] WTLR 901 Hart J had to consider whether the decision of the trustees to sell shares in a brewery business was vitiated by a conflict of interest. There were various areas of possible conflict. For example some trustees were members of the professional firms advising the trustees and two trustees had personal shareholdings in the company that they proposed to sell.

Having considered the principles governing recognised conflicts of interest, Hart J went on to say that:

“One must, however, beware of supposing, simply because the principle has bred these particular rules, that on every occasion on which the principle can be invoked in areas outside the ambit of the specific rules some similarly rigid rule either exists or should be crafted. There is in fact a surprising lack of English authority on the consequences of trustees acting or purporting to act in situations to which the developed rules do not in terms apply, but where actual or potential conflicts are alleged to exist.”

He then addressed the issue of what a trustee should do when faced with a possible conflict of this less obvious type. He identified three possible ways in which the conflict could be managed.

“One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.

Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court.

Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until
the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that their decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict.”

II PARTICULAR POWERS

1. Power to add further administrative powers

A sensible addition to the administrative provisions of the settlement is a clause allowing trustees to give themselves further powers should these be necessary. For example:

“Administrative Provisions
If in the administration of the Trust Fund any transaction is in the opinion of the Trustees expedient but the same cannot be effected by reason of the absence of any sufficient power for that purpose conferred by this deed or by law (or by any earlier exercise of the present power) then the Trustees may by deed confer upon themselves either generally or for the purpose of any particular transaction or transactions the necessary power and from the execution of such a deed the Trustees shall have such power as if it had been conferred by this deed.”

In the absence of such a power, it would be necessary to apply to court under Trustee Act 1925, s57 which allows the court to grant additional powers of management and administration if it is “expedient” to do so.

Trustee Act 1925, s57.

“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 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.”

Obviously such applications are inconvenient so it is desirable to have the express power. For a recent example of an application under s57 see Re Portman Estate [2015] EWHC 536 (Ch). The trustees sought the following powers all of which the court granted:
• to trade\(^5\);
• to provide guarantees for beneficiaries and cross-guarantees between different funds held on trust;
• to accept receipts for income from beneficiaries if 16 or older or from their parent or guardian if under 16;
• to hold property via nominees;
• to employ a person to advise on, manage or deal with trust property;
• to act as an officer of a company in which the trust fund was invested and receive remuneration for this role\(^6\).

The trustees had also wanted the court to grant them power to confer additional management or administration powers on themselves as required so as to avoid future time-consuming and costly applications. It was to be subject to a safeguard in that its exercised would require an opinion of counsel with 10 years High Court qualification that the addition was both necessary and in the interests of the beneficiaries.

Birss J indicated that he was not persuaded that the court should confer this power on the trustees. Counsel withdrew this part of the application so the point was not decided.

Birss J gave the following reasons for his opposition to the application:

• This power would put the Court's power under s57 into the hands of the trustees, subject to the safeguard of counsel's opinion.
• Necessarily it would permit the trustees to give themselves powers to carry out activity which was presently unforeseen. That had to be the case since in the current application the trustees had clearly thought through the manner in which they wished to administer the estate in future and had sought express powers in relation to all the matters they could foresee.

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\(^5\) There were specific transactions (such as the running of hotels) which it would be expedient for the trustees to be able to enter into. However, the trustees asked for, and got, a general power to trade so that they could avoid the need for continued applications to court and adapt to changing circumstances, in the light of professional advice at the relevant time.

\(^6\) In relation to this application Birss J said “Given that the trustees are professionals, they would expect to be remunerated for the tasks which they are undertaking and this will allow candidates of a suitable calibre to be recruited. If a fund is invested in a particular company, it is for the benefit of the beneficiaries to have a presence on the board of that company through one of the trustees so that decisions of the company properly take into account the interests of the beneficiaries, rather than the trustees being restricted to the powers of a shareholder. This will provide a more effective means of protecting the investment for the benefit of the beneficiaries. Trustees are more likely to be willing to act as director if that role can carry with it remuneration.”
• The powers conferred in the application were already wide in scope, for example a general power to trade.

• The power to add powers was not found in all trust precedents and so could not be regarded as entirely standard.

2. **Power to add and exclude beneficiaries**

Most modern settlements identify a relatively narrow class of beneficiaries (eg children and remoter issue of the settlor) but then give the trustees a power to add further persons (including charities) to the class\(^7\). They also give a power to exclude beneficiaries.

Spouses and civil partners of children are generally not included in the class on the basis that they can be added if there is a reason to do so.

It is still relatively common to exclude adopted and illegitimate children, relying on the power to add beneficiaries if appropriate. However, the increasing number of children born to non-married partners means that the definition of children should always be discussed with the settlor and the settlor should include details of his or her views on the subject in the letter of wishes.

The power to add or exclude is normally given to the trustees, although sometimes it is reserved to the settlor during his lifetime (on death it passes to the trustees).

Terms such as spouse, husband, wife, widow, widower do not include civil partners unless the instrument so provides. However, in the case of instruments created on or after 13 March 2014 when the Marriage (Same Sex Couples) Act 2013 came into force, such terms include same sex spouses unless the instrument states otherwise.

3. **Problems in relation to investment powers**

3.1 **Retain or sell?**

Very often trusts are set up to hold family assets such as landed estates or family companies in specie for an extended period.

The Trustee Act 2000, s4 requires trustees when exercising any power of investment (whether arising under the Act or otherwise) to have regard to the standard investment criteria which are:

\[
(a) \quad \text{the suitability to the trust of investments of the same kind as any particular investment proposed to be made or retained and of that particular investment as an investment of that kind, and}
\]

\[
(b) \quad \text{the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.}
\]

\(^7\) It is important in the case of lifetime transfers to state that the Settlor and spouse cannot be added although it is permissible to have power to add a widow or widower.
The section also requires trustees from time to time to review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

Trustees of family businesses often come under pressure from beneficiaries who are sentimentally attached to the business (or who earn their living in the business) to retain the shares when, in fact, they should be diversifying. However, if the value of the trust assets falls as a result, they are likely to face complaints from beneficiaries that they failed to carry out their duties correctly.

Gregson v HAE Trustees Ltd and Others [2009] 1 All ER (Comm) 457 is a useful case for trustees who are holding shares in a family business and who are concerned as to whether or not they should diversify.

The family that owned Courts plc had transferred its shares to a trust company, HAE Ltd. Courts eventually went into insolvent administration (with an estimated deficit of £70m), making the shares which constituted the property of the trust worthless.

An aggrieved beneficiary alleged that HAE was in breach of duty in failing to review the need to diversify the assets of the settlement and that had it done so, and taken appropriate professional advice, it would have diversified and avoided the losses suffered. The following points are of interest:

- The duty to have regard to the standard investment criteria applies to the retention of original assets as well as to new investments made by the trustees.
- There is no requirement to diversify. The requirement to consider diversification is subject to the qualification ‘in so far as is appropriate to the circumstances of the trust’. Hence, trustees can properly take into account matters such as the nature and purposes of the settlement, the terms of the trust instrument, any letter of wishes and the shareholdings of other family members.
- HAE had argued that the settlor had overruled the Trustee Act 2000 and had directed it to retain the shares: the combined effect of clause 2 of the settlement, which provided that property should: “remain in its actual condition or state of investment for so long as the Trustees may think fit …” and the letter of wishes, which suggested that the shares should not be sold except in the case of a takeover, was to oust the duty to consider diversification. The court accepted that the settlor could have insisted that the Courts shares were never be sold but he had not done so. The settlement gave HAE a complete discretion whether to keep the shares or convert or sell and invest the proceeds.
The reality was that the trustee could have sold the original trust property\(^8\).

The position is, therefore, that while a specific trust provision can override more general obligations to invest prudently or diversify, the wording will have to be clear and remove the trustees’ discretion completely. It is difficult to imagine any settlor really wishing to do this. If such a clause was included, the trustees might wish to apply to court to have it removed.

However, where a Settlor is creating a settlement intended to hold shares in the family business or historic land where the intention is that the assets are to be held unless there is a change in circumstance, it will be very helpful for the trustees if the terms of the settlement recite that the purpose of the settlement is to hold assets in specie and that the trustees are not intended to diversify.

### 3.2 What are the duties of trustees with a significant shareholding?

*Re Lucking’s Will Trusts* [1967] 3 All ER 726 and *Bartlett v Barclays Bank Trust Company* [1980] (Ch) 515 both dealt with the fact that a shareholding in a private company large enough to confer some measure of control brings special responsibilities.

It is not enough to leave the conduct of the business to the directors. Trustees are under a duty to keep themselves informed about the company’s affairs and the directors’ plans. They must be willing to act on the information and will be liable for a breach of trust if they fail to prevent the dissipation of the company’s assets in a speculative and ill-considered venture.

However, unless specially chosen for their expertise, trustees will not normally have the expertise to satisfy themselves that a trading company is being managed prudently.

It is, therefore, common to include so-called anti-*Bartlett* clauses. The protection afforded by such clauses will vary depending on how it is drafted. There is a very good discussion in *Lewin on Trusts* (18th edition) at 34.49 which sets out the following.

- The clause may give trustees power to leave the conduct of the company’s affairs to the directors. Such a power is exercisable for the

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\(^8\) The meaning of a restriction was also in issue in *Public Trustee v Cooper* [2001] WTLR 901. The settlement gave the trustees power to sell shares in a family brewing business but provided that “the Trustees shall not sell charge or otherwise dispose of any shares stock debentures or other securities of or in the Principal Company which may for the time being be held by the Trustees as trustees hereof unless in the opinion of the Trustees there are special circumstances which make it desirable to do so ...” Hart J held there was nothing in the the clause to suggest that the trustees were being authorised to hold an investment which on the investment criteria was perceived as being problematic. The natural inference to draw was that the trustees were being relieved of their duty to diversify, so long as the investment was not problematic with an escape route of a power to sell where the trustees felt the investment had, or might, become problematic.
benefit of the beneficiaries. Given directors who know their business, it is commonly for the beneficiaries benefit to allow the directors to manage the company. However, the clause will not relieve a trustee who gives no thought to whether or not to exercise any control. The power must be consciously exercised and the trustee may be attacked if he has no rational basis for his decision.

- More usually the clause will exclude the trustee’s duty to enquire and supervise. The protection is limited to excluding the preliminary duty of keeping abreast of what is going on. If the trustee does become aware of circumstances which call for enquiry and fails to do so, no protection is available.

- More sweeping clauses may impose a duty on the trustees not to interfere in the management of the company [in the absence of knowledge of dishonesty on the part of the directors]. These clauses will typically be accompanied by clauses allowing the settlor/protector to give binding directions to the trustees on the exercise of their shareholder rights.

3.3 Maximising trust income

As Megarry V-C explained in Cowan v Scargill [1985] Ch 270 (at 289), “the paramount duty of the trustees” is generally “to provide the greatest financial benefits for the present and future beneficiaries”. The main issue in that case was whether trustees were in breach of their fiduciary duties in refusing approval of an investment plan for the scheme unless it prohibited any increase in overseas investment, provided for the withdrawal of existing overseas investments at the most opportune time, and to prohibited investment in energies which are in direct competition with coal.

Megarry V-C said that he was not asserting that the benefit of the beneficiaries:

“inevitably and solely means their financial benefit, even if the only object of the trust is to provide financial benefits. Thus if the only actual or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainment, as well as armaments, I can well understand that it might not be for the "benefit" of such beneficiaries to know that they are obtaining rather larger financial returns under the trust by reason of investments in those activities than they would have received if the trustees had invested the trust funds in other investments. The beneficiaries might well consider that it was far better to receive less than to receive more money from what they consider to be evil and tainted sources. "Benefit" is a word with a very wide meaning, and there are circumstances in which arrangements which work to the financial disadvantage of a beneficiary may yet be for his benefit……. But I would emphasise that such cases are likely to be very rare, and in any case I think that under a trust for the provision of financial benefits the burden would rest,
and rest heavy, on him who asserts that it is for the benefit of the beneficiaries as a whole to receive less by reason of the exclusion of some of the possibly more profitable forms of investment. Plainly the present case is not one of this rare type of cases.”

In *Brudenell-Bruce v Moore [2014] EWHC 3679 (Ch)* (considered in more detail below) Lord Cardigan, one of the beneficiaries of a family trust, made various allegations of breach of trust in relation to failure to maximise trust income.

(a) A number of estate properties were occupied rent free by family members who were not beneficiaries of the trust. Lord Cardigan was originally totally opposed to the trustees’ suggestion that this policy be re-examined. However, he later changed his mind and alleged that the trustees were in breach of trust in not collecting commercial rent from his half-uncle.

Newey J agreed that the trustees should have sought rent. He said that it was easy to see why trustees might be reluctant to evict a family member from a longstanding home. However, as Megarry V-C noted in *Cowan v Scargill [1985] Ch 270* (at 288), trustees may “have to act dishonourably (though not illegally) if the interests of their beneficiaries require it”. In the circumstances, Lord Cardigan was entitled to say that it was incumbent on the trustees to ask for a market rent for an estate property and, if the occupier could not or would not agree to do so, to take steps to evict him.

Comment:
This is an example of the importance for trustees of remembering that they are managing other people’s money not their own. They cannot be generous with other people’s money unless they have obtained the consent of the other beneficiaries. Lord Cardigan had agreed to rent free occupation up until 2013 when he changed his mind. The trustees’ liability was, therefore, limited to the period from 2013.

(b) An estate property was let to Mr Pete Doherty, the well-known musician, at a rent of £2,950 a month. In December 2010 he vacated the. It was not, however, apparent to the Trustees at the end of 2010 that Mr Doherty had moved out. On 8 January 2011, they learned that a pipe had burst and a great deal of damage had been caused. The property was made weather tight but was not put into a lettable state.

Lord Cardigan maintained that the Trustees could and should have ensured that the property was prepared for re-letting and that their failure to do so has cost the estate a large amount in lost rental income.

See also *Harries v Church Commissioners [1992] 1 W.L.R. 1241* where Sir Donald Nicholls V-C said that the circumstances in which charity trustees are bound or entitled to make a financially disadvantageous investment decision for ethical reasons are extremely limited. The Church Commissioners’ policy of excluding certain investments which were likely to be morally offensive was a proper one since there remained open an adequate width of alternative investments. However, they were right to refuse to be more restrictive in their policy to an extent that might give rise to a risk of financial detriment to the proper object of the trusts.
Newey J agreed that the trustees were in breach and as a result the estate had lost 18 months’ rent which the trustees were ordered to make good.

4. **Power to charge**

Charging is simply one aspect of the rule against self-dealing considered above, but an important one. Trustees must act without remuneration unless authorized to charge by:

- the trust instrument,
- the beneficiaries,
- the court.

In *Brudenell-Bruce v Moore [2014] EWHC 3679 (Ch)* a lay trustee, Mr Moore, asked the court to ratify remuneration that he had been paid.

Mr Moore had agreed to become a trustee at the bequest of Lord Cardigan, a beneficiary of the trust holding the Savernake estate. Lord Cardigan had been a trustee but retired, following a settlement of an action for breach of trust brought against him by the then trustees. Lord Cardigan had assured Mr Moore that there would be virtually no work as he would be continuing to manage the estate.

Mr Moore was not authorised to charge under the trust instrument but, partly because of the Earl’s behaviour and partly because the estate was running on an overdraft, the job became extremely onerous. His fellow trustee (a professional) agreed that he should be paid. Between June 2009 and August 2012 Mr Moore submitted invoices amounting to about £117,000 which were ‘authorised’ by the professional trustee.

Mr Moore said he thought that the Earl had agreed that he could charge following an exchange of e-mails but the court found that the exchange was inconclusive.

Lord Cardigan wanted Mr Moore to repay the money he has received. Mr Moore asked the court to retrospectively authorise the payments to him on the basis that being a trustee proved to involve immensely more work than he had anticipated. During his oral evidence, Mr Moore commented that he “accepted an offer to do a certain job and the job changed out of all proportions”.

The Court has an inherent jurisdiction to authorise the payment of remuneration to a trustee and that that jurisdiction extends to a case where the work for which remuneration is sought has already been done (see *Lewin on Trusts*, 18th ed., at paragraphs 20-175 and 20-176). The jurisdiction lies in an inherent power to secure

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10 Trustee Act 2000, s29 introduced an exception for professional trustees to charge reasonable remuneration in the absence of a charging clause provided the co-trustees agree in writing. It is, therefore, of no use to sole trustees.
the good administration of trusts. However, the circumstances in which remuneration will be authorised are limited. Lewin states the following in paragraph 20-176):

“Awards of remuneration for work done are typically made in cases where work of an exceptional character is performed, for example in relation to the development or realisation of land, and it may not be practicable to assess the size of the task to be performed until after completion, nor might funds for payment of remuneration be available until completion. The administration of trusts might therefore be better promoted if the application is made after rather than before the work is done, when the court is able to assess the merits of the application with the benefit of hindsight. There may, however, be an additional principle which is relevant in such cases, namely that remuneration might be awarded if a trustee has performed services of an exceptionally onerous character which can properly be regarded as wholly outside the scope of any duties which could reasonably have been expected to be rendered by trustees in the normal course of their duties, and have resulted in financial gain to the trust, and for which recompense should be made, not on the basis that there is an implied contract to pay remuneration, but on the basis that the trustees cannot be reasonably expected to have acted as they did without remuneration and the beneficiaries would be unjustly enriched if no remuneration were paid, or that he who seeks equity must do equity. But as the office of trustee is, as such, gratuitous, it will never suffice merely to show that a trustee, even a professional trustee, has acted properly and done work which had to be done, nor merely that the trustee’s scale of charges has become outdated.”

For example in *Foster v Spencer* [1996] 2 All ER 672 the trustees of a cricket club were awarded remuneration for their services in bringing about the sale of the club’s ground for development.

He also maintained that the work he has undertaken as a trustee has saved the Estate a great deal of money. He was supported in this by Mr Cotton who said that without Mr Moore the work would have to have been carried out by the agents

Newey J found that, at the relevant times, Mr Moore (and Mr Cotton) believed that it was legally permissible for Mr Moore to charge for his services. However, he declined to authorise the payment.

(i) The office of trustee is, so far as lay trustees are concerned, normally gratuitous (see e.g. *Re Duke of Norfolk’s Settlement Trusts* [1982] Ch 61, at 79), and the jurisdiction to award remuneration “should only be exercised sparingly, and in exceptional cases” (see *Re Worthington* [1954] 1 WLR 526, at 528);

(ii) In the present case, Mr Moore said before he was appointed as a trustee that he would not take a salary, and he did not tell Lord Cardigan that he had changed his mind before rendering his invoices;
Mr Moore did not have particular qualifications or expertise of importance to the Estate;

Mr Moore was seeking to be paid for time spent on the affairs of the Estate generally rather than merely a specific project. The present case was thus very different from *Foster v Spencer*;

It would have been apparent to Mr Moore by the time he was appointed as a trustee that the role would involve more work than Lord Cardigan’s May initial e-mail indicated since it was no longer proposed that Lord Cardigan should play a part in the management of the estate;

The estate had been, and remained, short of money;

Mr Moore would, it appeared, have undertaken just as much work as a trustee even if he had not thought that he could be paid. During his oral evidence, Mr Moore said that he would have behaved in the same way as he in fact did if someone had told him at, say, the beginning of 2009 that he was not entitled to charge for anything he did as a trustee.

It was, not therefore, appropriate to authorise payment. Also the amount taken was excessive.

“In the end, while I acknowledge both the amount of time that Mr Moore has devoted to the Estate and that he has had to put up with a great deal of unpleasantness from Lord Cardigan, I have concluded that I should not authorise the payment of any remuneration to him. I should add that, even if I had decided to award remuneration, I would not have awarded it at the rate used for the purposes of Mr Moore’s invoices (viz. £150 an hour). An hourly rate of £25 would have struck me as more appropriate.”

**Comment:**
This is an example of the importance of obtaining clear consent from beneficiaries to any changes to the trust terms.

**Note:** Where a trust instrument authorises a professional trustee to charge “reasonable” remuneration. The question of what is reasonable is an objective one. The professional cannot simply charge the firm’s usual charge out rate unless the beneficiaries have agreed the amount.

See *Pullan v Wilson* [2014] EWHC 126 (Ch). The particulars of claim included a claim for Mr Cotton to repay to the Estate “such monies as the Court deems unreasonable remuneration”. This aspect of the case was adjourned to a Chancery Master for determination.
III PROTECTING TRUSTEES

1. Exemption Clauses

A lay trustee normally has the protection of an exemption clause which will cover everything except deliberate wrongdoing. A professional who is paid can also have the protection of such a clause but as a matter of professional conduct must bring the clause to the attention of the Settlor\(^\text{11}\).

STEP Standard Provisions

“12 Liability of Trustees

12.1 A Trustee shall not be liable for a loss to the Trust Fund unless that loss was caused by his own actual fraud or negligence.

12.2 A Trustee shall not be liable for a loss to the Trust Fund unless that loss or damage was caused by his own actual fraud, provided that:

12.2.1 the Trustee acts as a lay trustee (within the meaning of section 28 Trustee Act 2000); and

12.2.2 there is another trustee who does not act as a lay trustee.

12.3 A Trustee shall not be liable for acting in accordance with the advice of counsel, of at least five years’ standing, with respect to the Trust. The Trustees may in particular conduct legal proceedings in accordance with such advice without obtaining a court order. A Trustee may recover from the Trust Fund any expenses where he has acted in accordance with such advice.”

Other typical clause

“No Trustee shall be liable for any loss to the Trust Fund arising by reason of

(i) any mistake or omission made in good faith by such Trustee or by any of the Trustees [except in the case of negligence by a paid Trustee]; or

(ii) any other matter or thing except his own actual fraud”

\(^{11}\) See STEP Practice Rule which requires disclosure. The SRA Code of Conduct for solicitors does not deal with exemption clauses specifically but Principle 2 (acting with integrity) and 4 (acting in the client’s best interests) would be relevant.
2. **Is insurance a possibility?**

Insurance cover is routinely bought by companies for pension trustees and increasingly frequently for charity trustees. Historically, the Charity Commission disapproved of charities using charity funds to buy insurance for its trustees, but the Commission's most recent guidance, CC49, makes it clear that as a result of statutory provision charitable funds may now be used to protect individual trustees against liability. It is possible for trustees of private trusts to purchase indemnity cover, in line with that normally bought for pension and charitable trustees. See, for example, the trustee indemnity policy marketed by Castleacre which claims to protect a trustee for any ‘wrongful act’ which it defines as ‘an actual or alleged act, error, omission, misstatement, misleading statement, negligent act, negligent error, negligent omission or negligent breach of duty committed or attempted by a trustee acting in his or her capacity as a trustee.’

Query the extent to which the use of trust funds for such a policy is legitimate without express authority in the trust instrument or the consent of beneficiaries particularly where there is already an exemption clause.

3. **Authorisation from the court**

Trustees often have to take difficult decisions in the knowledge that beneficiaries may challenge the trustees after the event if their decisions turn out badly. To protect themselves, trustees can seek help from the court in advance of taking a decision. They have a choice: they can either:

- Surrender their decision making power to the court completely or,

- Ask the court to confirm that the decision they are making is within their powers and one which a reasonable trustee would make. Such advance “blessing” for the exercise of trustee powers is often referred to as a **Public Trustee v Cooper** application. These applications are becoming increasingly popular.

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12 At 5.10 *Trustee indemnity insurance (TII) covers trustees from having to personally pay legal claims that are made against them (by their charity or by a third party), for a breach of trust, or a breach of duty or negligence committed by them in their capacity as trustees. The main difference between TII and other types of insurance taken out for the benefit of the charity is that TII directly protects an individual trustee, rather than the charity itself. For that reason, TII is regarded as a form of personal benefit to a trustee and a charity will need a proper legal authority before it can buy it using its own funds. Many charities have long had this type of authority in their governing documents, but if not, s.189 of the Charities Act now provides a general power to buy TII using charity funds. The cost must be reasonable and trustees must be sure that TII is in the best interests of their charity.

13 **Public Trustee v Cooper** [2001] WTLR 901. This was the first reported case to discuss the principles governing such applications.
In *Public Trustee v Cooper* trustees wanted to sell a minority holding of shares in a brewery company. The trust was a provident fund set up to confer benefits on the employees of a brewing company. The trustees had been advised that the company was not financially viable and wished to sell to a major brewer. The employees wished the company to continue independently and argued that the company could be profitable as an independent in the future. The trustees made an application to court. They said that they were not, by seeking the court's assistance, intending to surrender their discretion in the matter to the court. They simply wanted confirmation that the step they were intending to take was a step that a body of trustees acting reasonably would be justified in taking.

Counsel for the employees questioned whether that was a permissible stance for the trustees to take. Hart J confirmed that it was. He said at page 925 that the duties of the court depended on the circumstances of each case, but that here it had to be satisfied, of three matters:

(a) that the trustees had in fact formed the opinion that they should act in the particular way relevant to that case;

(b) that the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at;

(c) that the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.

It was not necessary for the court to be convinced that the decision was the best or only decision possible. In *Hughes v Bourne* [2012] EWHC 2232 (Ch) (2012) the court said “It is not the function of the court, on an application of this nature, to form a view about the merits of the decision, or whether it was the best or only decision open to the trustees in the circumstances, provided only that the threshold test of reasonableness is satisfied.”

However, the court should proceed cautiously; in *Richard v Mackay* [2008] WTLR 1667 Millett J said at page 1671:

“It must be borne in mind that one consequence of authorising the trustees to exercise a power is to deprive the beneficiaries of any opportunity of alleging that it constitutes a breach of trust and seeking compensation for any loss which may flow from that wrong. Accordingly, the court will act with caution in such a case…”

In *X v A* [2006] 1 WLR 741 Hart J cited Millett J in *Richard v. Mackay* and emphasised the need for the court to act cautiously at para 30:

“I would add that an additional reason for caution is that for procedural and other practical reasons the adversely affected beneficiaries are likely to be at a relevant disadvantage in such proceedings (assuming even that they have been made parties, which will not always be the case) as compared with the position they might be in if pursuing a hostile action after the event either
against the trustees for breach of trust or designed simply to set aside the transaction as flawed. In particular the extent to which it is possible, or (while future discretions remain to be exercised) politic, to obtain full disclosure of all relevant deliberations of the trustees, or to subject evidence to cross-examination, is likely to differ in the two types of proceedings”.

The procedure was used recently in Cotton v Earl of Cardigan [2014] EWCA Civ 1312. The trustees proposed to sell the major house on the Savernake estate. It was agreed by all that the sale was essential because the estate was very short of funds and working on an overdraft. The argument was whether the sale should be on the open market or, as the marketing agents (GVA) advised, by private tender. The trustees proposed to follow GVA’s advice but the Earl, one of the principal beneficiaries thought this was wrong.

The Court of Appeal held that the trustees were entitled to proceed.

(1) GVA advised the trustees clearly and cogently that a limited, directed marketing strategy was appropriate. GVA gave good reasons for rejecting an open-market campaign if the targeted approach produced the desired results. Those reasons were, in essence, that the trustees needed a speedy, low-cost sale. The specialist bidders that a targeted approach produced would not be interested in the property if there were an open-market campaign, because they wanted the time and comfort of being allowed to work up their bids in a period of calm and confidence. While perhaps counter-intuitive, a property with the difficulties and dilapidations of this property might well secure a better price if marketed to those, and only to those, who had already expressed a real interest and had the money available. The trustees were entitled to take that advice. They were not obliged to second-guess the professional view of the experts they had instructed to market the property.

(2) Although the authorities stressed the need for caution in approving a trustee’s decision to undertake a momentous transaction, the need for caution had to be placed in context. The court would not approve a trustee’s decision without a proper evidential basis, but it should equally not deprive a trustee of approval without good reason. Were Lord Cardigan’s appeal to be allowed, it was likely that the trustees would be thrown into an open-marketing campaign which they could ill afford, and which would, very possibly, lose the specially interested purchasers who had done so much work to put their bids together. Moreover, the trust had no money and faced action from its bank. The effects of denying approval were potentially dire. The court was not a rubber stamp and had to be cautious to ensure that it was satisfied that the trustees were indeed justified in proceeding in accordance with their decision. But the court should not place insurmountable hurdles in the way of trustees. Caution cut both ways.

(3) Finally, the fact that the beneficiary is in a weaker position than he would be, after full disclosure and cross-examination at a trial of an action to challenge the trustees’ actions, cannot, by itself, mean that the court should withhold consent. It was true that court approval will prevent a later challenge. But if
the court is given sufficient and appropriate material on which to act, it should not withhold consent just in case something better might in the future turn up.

4. Equitable relief for mistakes

In **Futter v Futter; Pitt v Holt [2013] UKSC 26** the Supreme Court drastically limited so-called *Hastings-Bass* relief for trustee errors to cases where, either the trustees had:

- acted outside their powers, in which case their actions were void; or

- committed a breach of trust in which case their actions were voidable at the instance of the beneficiaries.

However, the Supreme Court relaxed the circumstances in which equitable relief for mistake could be granted removing the previous distinction between errors as to consequences as opposed to the effect of the transaction. The relief is available to individuals and to trustees.

**Kennedy v Kennedy [2014] EWHC 4129 (Ch)** is one of the first cases to apply the principles set out by the Supreme Court. Trustees had made an appointment from a trust not realising that it would trigger a large CGT liability.

**Facts**

Mr Kennedy had a life interest in possession in a pre-2006 settlement consisting of various shareholdings and £42m in cash representing the proceeds of sale of one holding. One holding of shares had substantial losses (£7m). The others showed gains. Most but not all of the gain shares qualified for CGT holdover relief. The loss would offset the gain on the non-holdover shares.

During the transitional period following Finance Act 2006 Mr Kennedy’s professional advisers, including his solicitor, Mr S, suggested that he appoint some of the assets in the settlement to create transitional serial interests for his children and grandchildren and the remainder to himself absolutely.

Mr S went into hospital and was away from work for three months. During this period Mr Kennedy instructed his accountants to sell the loss shares to offset gains he had made that tax year. He decided that (i) the non-holdover shares should be retained within the settlement to avoid triggering a CGT charge, (ii) some holdover shares
and all the cash would be appointed on trust for the children and (iii) the balance of the holdover shares would be appointed to himself absolutely.

In the following tax year (still within the transitional period) the solicitors, not knowing that the loss making shares had already been sold prepared deeds appointing additional trustees (Mr Kennedy’s wife and Mr S) and, after making the appointments to the children, appointing in clause 2.1(c) **ALL** the remaining trust assets to Mr Kennedy absolutely, thus triggering a substantial CGT gain on the non-holdover shares.

Each of the three trustees had been mistaken as to the effect of the appointment in different ways.

- Mr Kennedy said that he thought the appointment to him did not include the non-holdover shares. There was a letter from the solicitor’s stating that “[t]he remainder of the Trust Fund will revert to you absolutely”. Mr Kennedy’s evidence was that he believed the letter referred only to the cash in the settlement.

- Mrs Kennedy understood that the appointment was intended to be for the benefit of the children. She executed it in the mistaken belief that it gave effect to Mr Kennedy's intention and instructions to his professional advisers.

- Mr S believed that Mr Kennedy wished that, apart from the assets to pass to Mr Kennedy's children under the tax planning pursuant to FA 2006, all the other trust assets were to pass to him outright. He also believed that there were considerable CGT losses within the Settlement which would be more than adequate to preclude any possible CGT on the transfer of such assets to Mr Kennedy since he was not aware that the loss had been applied earlier.

As a result, the trustees now sought

1. a declaration that the relevant shares were not appointed; alternatively,
2. an order setting aside clause 2.1(c); alternatively,
3. rectification of the appointment by the addition of words excluding the relevant shares from the operation of clause 2.1(c).

HMRC did not challenge the application.

The judge agreed that the claimants were entitled to rescission for equitable mistake.

He referred to the principles applicable to rescission of a non-contractual voluntary disposition for mistake set out in the judgment of Lord Walker in *Pitt v Holt* which are as follows:

1. There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a “**misprediction**” relating
to some possible future event. Forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.

(2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.

(3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.

(4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected.

In the judge’s opinion the four elements were satisfied. Each of the trustees of the Settlement executed the October 2008 Appointment under a distinct mistake.

The mistakes made by the three trustees were causative and very serious. It was a fundamental feature of the TSI planning, as instructed by Mr Kennedy and understood by his professional advisers, that the appointment should not give rise to a charge to CGT. Had the trustees not been mistaken they would not have executed the appointment with the terms it contained. In particular, they would not have executed it with clause 2.1(c) included.

Lord Walker had commented in *Pitt v Holt* at paragraph [135] that in some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective or on the ground that discretionary relief should be refused on grounds of public policy.

In the judge’s opinion the appointment was not an artificial tax avoidance arrangement or part of one. It was executed as a perfectly legitimate way of conferring benefit on Mr and Mrs Kennedy’s children and grandchildren in a tax
efficient manner that was contemplated by express provisions in FA 2006. It would be unconscionable in principle to leave appointment uncorrected.

However, the precise nature of the correction required consideration.

The first head of relief was a declaration that the relevant shares “were not appointed upon the trusts” of the appointment, in other words the appointment was void. That was not possible. (i) The appointment under 2.1(c) included other assets which the trustees wanted to remain appointed; (ii) a Pitt v Holt mistake makes the voluntary disposition voidable in equity not void at law.

The result the trustees wanted could only be achieved by adding words excluding the relevant shares from clause 2.1(c). Rectification is the only remedy that would allow that result and rectification was not available on the facts.

Rectification cannot be granted unless the wording or legal effect of the document, as written, does not represent the true intention of the parties. Intention must be distinguished from motive. Mr S intended to include in clause 2.1(c) the wording which it actually contained. His intention was that clause 2.1(c) should have the legal effect which it had, namely to vest the whole of the remainder of the trust fund in Mr Kennedy absolutely. His mistake was in thinking that, for purely factual reasons extraneous to the document itself, clause 2.1(c) would not give rise to a charge to CGT and its inclusion would therefore be in accordance with Mr Kennedy’s wishes and instructions. That mistake is not a mistake which can found a claim for rectification.

The judge was willing to make an order setting aside clause 2.1(c) of the October 2008 Appointment. All three trustees had given evidence that, if they had been aware of their mistake, they would have omitted clause 2.1(c) from the appointment. There is authority that there cannot be partial rescission of a contract; it must be set aside as a whole and not only as to part: see De Molestina v Ponton [2002] 1 LL Rep 70, 286-289 and the cases cited there. That limitation makes sense in a contractual context and as preventing the court in effect imposing a different contract to the one the parties actually made. There was no reason why that limitation should apply to a self-contained and severable part of a non-contractual voluntary transaction. In such a situation the allied principle that rescission can only be granted if both sides can substantially be restored to their pre-contractual positions is irrelevant.