

Modern trustee decision-making: unpacking the duty of proper consideration¹

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Abstract

In the Supreme Court's judgment in *Pitt v Holt*, Lord Walker described cases where, in the exercise of fiduciary powers, trustees have failed to take only relevant, and no irrelevant, matters into account as cases of 'inadequate deliberation'. In departing from the 'rule in *Hastings-Bass*', the judgment now confirms that the law will only permit such decisions to be revisited if the inadequate deliberation in question is sufficiently serious to amount to a breach of fiduciary duty. In this article, Mark Studer of Wilberforce Chambers examines the trustees' duty of proper consideration and the consequences of breach as now established.

The General Confession of the Church of England requires penitents to admit that they have left undone those things which they ought to have done and have done those things which they ought not to have done, so that there is 'no health' in them; but it also calls upon the Almighty to 'spare . . . them which confess their faults' and 'restore . . . them that are penitent'. In the case of errant trustees, there was always rejoicing (if not in Heaven, at least amongst the ranks of interested beneficiaries) at the avoidance of loss as a result of the application of the old-style 'rule in *Hastings-Bass*'—the rule which conveniently supplied such trustees with what was colloquially referred to as a 'get out of jail free' card. However, that supposed rule—if not altogether consigned to history—has now

been much attenuated by the judgment of the Supreme Court in *Pitt v Holt*.² This decision tells us that, whilst the duty of trustees in exercising their fiduciary powers is to take only relevant, and no irrelevant, matters into account, their failure to do so in making decisions which are within the scope of their powers (what Lord Walker in the Supreme Court's judgment called cases of 'inadequate deliberation') will only permit such decisions to be revisited if the inadequate deliberation in question is sufficiently serious to amount to a breach of fiduciary duty. Errors of inadequate deliberation by trustees are to be contrasted with errors of 'excessive execution'. An error of excessive execution is one which goes beyond the scope of the trustees' relevant power and is absolutely void. Against this background, the present article aims to look at the ingredients of trustees' duty of consideration in relation to the exercise of their fiduciary powers.

In the first place, of course, it has to be remembered that it is only in relation to fiduciary powers that donees have a *duty* of consideration at all. Powers which are personal to a donee or which may be exercised for his or her own benefit, do not carry with them any such duty of consideration, nor even does a limited power which, whilst it is conferred for the benefit of beneficiaries other than the donee, is not as such fiduciary, although it must still be exercised in good faith for the purposes for which it has been given. It is only in relation to a *fiduciary* power that a donee is under an obligation to the objects of the power to consider its exercise.

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1. An earlier version of this article was the basis of a talk at the Wilberforce Annual Trust Litigation Day on 1 February 2016.

2. [2013] UKSC 26 [2013] 2 AC 108.

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The existence of the duty of consideration on the part of trustees means that they are obliged to turn their minds from time to time to whether or not they should exercise the relevant power³ and to come to a *bona fide* independent conclusion on the question.⁴ They cannot simply push aside the power and refuse to consider whether it ought in their judgment to be exercised.⁵ If, for example, a trustee refuses to exercise a power in favour of a particular beneficiary by reason of some personal prejudice (and without any reference to whether or not the relevant ground may or may not have been within the reasonable expectation of the settlor as a matter for consideration by the trustee), such opposition may well be tantamount to a refusal to perform the duty to consider at all.⁶

The fulfilment of a trustee's duty to consider exercising a fiduciary power requires him to apply his mind to the actual exercise of the power, so there must be the exercise of an 'active discretion'. In a case heard by the High Court of Australia,⁷ a testator's executor and trustee had been given a power not to press for payment of any debt which was owing to the testator's estate by a particular company, and the testator expressed his wish that the executor would grant the company such reasonable time for payment as it might require at such rate of interest as might be deemed fit. In the events which happened, the testator died in 1926 and the company failed to keep up an agreement for payment by instalments; in 1936 a further agreement was made to allow the debt to remain outstanding for another five years, but in 1938 the company went into voluntary liquidation and the

whole amount was lost. The executor pleaded his power under the relevant *Trustee Act*⁸ to allow any time for the payment of a debt without being responsible for loss occasioned by his doing so if it was done in good faith, but the Court held that the section involved the exercise of an active discretion, not the mere passive attitude of leaving matters alone, and no relief would be afforded where (as in the instant case) loss had arisen from sheer carelessness or supineness on the part of the executor.⁹

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The trustees' obligation of periodic consideration necessarily follows from the fact that (without suitable provision in the trust instrument) they may not of their own volition delegate or release a fiduciary power which has by the trust instrument been confided to them alone.¹⁰ Again, of course, trustees do not satisfy their obligation of due consideration if they exercise the relevant power upon the instruction or direction of the settlor or of some other third party, or *a fortiori*, if they are unaware that they have any independent discretion to exercise at all. In *Turner v Turner*,¹¹ a Wiltshire farmer had made a discretionary settlement which he did not understand, and appointed as trustees family friends who never realized that they had any responsibility at all except to do as the settlor asked. For their part, they thought that they would only be called upon if anything happened to the settlor or his wife, when they

3. *Re Hay's Settlement Trusts* [1982] 1 WLR 202, 209. In *Re Gestetner Settlement* [1953] Ch 672 at 688 Harman J said in relation to a power for trustees to appoint to members of a specified class first, that they were bound to consider its exercise 'at all times during which the trust is to continue', but subsequently qualified that to 'from time to time, I suppose'; see also *Wentworth v Rogers* [2003] NSWSC 472 per Miles AJ at para13.

4. *Re Gestetner Settlement* *ibid* 688.

5. *Re Gulbenkian's Settlement* [1970] AC 508, 518.

6. *Klug v Klug* [1918] 2 Ch 67, 71 (donee of power of advancement declining to exercise it in favour of her daughter, because she had married without her consent).

7. *Partridge v The Equity Trustees Executors and Agency Co Ltd* (1947) 75 CLR 149.

8. Section 15 *Trustee Act 1928* (Victoria).

9. *cf Re Greenwood, Greenwood v Firth* (1911) 105 LT 509.

10. *Lewin on Trusts* Sweet & Maxwell (19th edn 2015) para 29–320.

11. [1984] Ch 100.

would become responsible for safeguarding the family's interests: in the meantime, however, they believed that it would be intruding into the settlor's private affairs if they were actually to read the documents which they were asked to sign.¹² As Lord Walker remarked in *Pitt v Holt*,¹³ anyone who is familiar with the duties of trustees may find this scenario rather hard to contemplate,¹⁴ although (as he also noted wryly) it may well be that some offshore trustees come close to seeing their essential duty as unquestioning obedience to the settlor's wishes.¹⁵ A trustee who considers it to be his duty to ensure that the wishes of the settlor are adhered to in the administration of the trust has misconceived his role, and in an extreme case he may even be removed from office: and the same is true of a protector or anyone else who is the donee of a fiduciary power.¹⁶

It is for the kind of reasons specifically referenced in the *Turner* case¹⁷ that Lord Walker noted in *Pitt v Holt*¹⁸ that there may be a particular danger in relation to the operation of offshore trusts: these are usually run by corporate trustees whose officers and staff (especially if they change with any frequency) may know relatively little about the settlor, and even less about the settlor's family. The settlor's wishes are always a material consideration in the exercise of fiduciary discretions, but if they displace all independent judgment on the part of the trustees themselves (or in the case of a corporate trustee, by its responsible officers and staff), the trustees' decision-making processes will then be open to serious question. Nevertheless, it has always been the case that trustees are entitled to take serious account of the settlor's

wishes, and it is the better view that they are bound to do so.¹⁹

In *Pitt v Holt*,²⁰ Lord Walker specifically drew attention to the *Barr Trusts* case²¹ as illustrative of the potential difficulties of an unquestioning acceptance of the supposed wishes of a settlor. There the settlor had wanted the corporate Isle of Man trustee to exercise a power of appointment conferred on it under the trust to create discretionary trusts in respect of 40 per cent of the trust fund for the benefit of the settlor's two sons, to the exclusion of any interest of himself or any wife he might have, but the trustee's representative misunderstood (or misinterpreted) the settlor's wishes and informed the trustee and its solicitors that the settlor wished the appointment on discretionary trusts to extend to 60 per cent of the trust fund, which then controlled the appointment that was made. Lightman J found that the trustee had failed in its fiduciary duty to ascertain the true wishes of the settlor and would certainly have executed a different deed of appointment had it not so failed.

The periodic consideration of whether or not a fiduciary power should be exercised does not of course take place in the abstract. The intentions of the settlor are material, because they assist in interpreting the scope of the relevant fiduciary power; but even if there are no indications in the trust instrument itself, or the settlor has not given the trustees a specific memorandum or letter of wishes to guide them, the trustees may still derive their understanding of the settlor's intentions from the surrounding circumstances leading to the creation of the trust, and their

12. *ibid* 106–08.

13. [2013] UKSC 26, [2013] 2 AC 108 para 67.

14. As Mervyn Davies J did, [1984] Ch 109.

15. See (n 13).

16. *cf In the Matter of the A and B Trusts, Representation of C, D, E and F* [2012] JRC 169A (the case of a protector of Jersey trusts).

17. See (n 11).

18. See (n 13) para 66.

19. *Lewin on Trusts* (n 10) para 29–163, citing *Kain v Hutton* NZHC [2005] WTLR 977, 1024 para [301] ('The legal position with reference to a statement or letter of wishes is clear, namely that trustees must take serious account of the settlor's wishes but always appreciating that the ultimate decision is theirs'), on appeal [2007] NZCA 199 and [2008] NZSC 61: in fn 558 to para 29–163 the learned editors of *Lewin* deprecate the suggested distinction in *Underhill and Hayton, Law of Trusts and Trustees* (18th edn, 2010) between 'legally significant' letters of wishes, which have to be considered by the trustees and 'morally binding' ones, which do not: either the letter of wishes is a relevant consideration which should be taken into account, or it is an irrelevant one which should not.

20. *ibid*.

21. *Abacus Trust Co (Isle of Man) v Barr* [2003] Ch 409.

individual knowledge, acquired or inherited, of the underlying purposes of the trust.²²

Once the purposes of the trust are understood, the trustees' duty to consider the exercise of any fiduciary power thereby conferred upon them necessarily carries with it a duty to address the considerations that might make a possible exercise of the fiduciary power appropriate or inappropriate in the circumstances which obtain at the relevant time. The duty of trustees to give due consideration to the exercise of their fiduciary powers accordingly incorporates also both a *duty to inquire* and a *duty to ascertain*.²³ In appropriate cases, these duties may (as preliminaries to the exercise of the trustees' duty to consider) involve them in extensive trawling for information, which may even necessitate the seeking of orders for disclosure against one or more of their beneficiaries.²⁴

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How much trawling for information, however, should the trustees have to go in for? In the first place, the duties to inquire and to ascertain require the trustees to inquire into and examine, in broad terms at least, the size, and composition of the class

of beneficial objects of the trust. In this connection, the House of Lords established in *In re Gulbenkian's Settlements (No 1)*²⁵ that a power to appoint in favour of members of a class was valid if it could be said with certainty that any given individual was or was not a member of the class: it would not be invalid simply because it was impossible to ascertain every member of the class. Similarly, the duty of trustees to consider the size and composition of their beneficial class as a part of their duty to consider the exercise of a power of distribution does not mean that they '*must worry their heads to survey the world from China to Peru*',²⁶ if it is clear who are the prime candidates for the exercise of their discretion.

In the same way,²⁷ the test of inadequate deliberation by trustees does not require them in each case to have conformed to the highest possible standards of mature deliberation and judgment, provided that any failure of consideration on their part has not been so serious as to amount to a breach of duty.²⁸ In other words, it is not a requirement that the trustees must have taken account of *every* relevant consideration (which would be to '*set the bar too high*'²⁹), provided that they have had regard to such considerations as are sufficient in the circumstances. They are not expected to continue to seek more information indefinitely.³⁰ In an imperfect world, trustees (like other decision-makers) do often make decisions which are based on less than complete information and less than

22. *Re Manisty's Settlement* [1974] Ch 17, 26.

23. See *Thomas on Powers* 2nd edn, OUP (2012) para 10.08. Trustees are not, however, under any duty to inform themselves about matters outside their concern: *Power v Open Text (UK) Limited Group Life Assurance Trustees* [2009] EWHC 3064 (Ch), [2010] Pens LR 89 (pension trustees not liable for failing to consider approaching employer to exercise a power of amendment).

24. See *Re the R and RA Trusts, L M and N v Trustees* (Court of Appeal of Guernsey) Appeal No 470, Judgment 25/2014. These duties may also require the trustees to take professional advice and a failure to do so may amount to, or contribute to, a flawed decision-making process: See (n 13) para 80. This obligation to take necessary advice may be an onerous one, given the general rule that trustees cannot delegate their discretions, but they must assess the expert advice themselves as best they can: *Lewin on Trusts* (n 10) para 29–158 citing *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705 (see 717 where Robert Walker J gave the example of lay trustees having to digest and assess advice on a highly technical matter such as the disposal of actuarial surplus in a superannuation fund).

25. [1970] AC 508 (*sub nom. Whishaw v Stephens*). The test for the validity of discretionary trusts was assimilated to this by *McPhail v Doulton* [1971] AC 424.

26. The reference is to the opening lines of Dr Johnson's *The Vanity of Human Wishes, The Tenth Satire of Juvenal Imitated* (1749) and was first mentioned in a judgment by Harman J in *Re Gestetner Settlement* (n 3) 688–89, although sitting later in the Court of Appeal in *Re Baden's Deed Trusts (No 1)* [1969] 2 Ch 388 he mis-remembered the source and attributed it to Alexander Pope. It was correctly attributed to Dr Johnson by Lord Walker in *Schmidt v Rosewood Trust* [2003] UKPC 26, [2003] 2 AC 709 para 41.

27. And contrary to earlier expressions of the applicable principles: see *Sieff v Fox* [2005] 1 WLR 3811 per Lloyd LJ paras 80 and 119(iii), but recanted by him in the Court of Appeal in *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132 para 94.

28. See (n 13) paras 68, 73.

29. *ibid.* The trustees' duty does not extend to being right on every occasion, contrary to the apparent acceptance by Lloyd LJ in *Pitt* (n 27) para [123] of Counsel's submission that '*beneficiaries are entitled to expect their trustees to get it right*': see *Thomas on Powers* (n 23) para 10.121.

30. *Alcoa of Australia Retirement Plan Pty Ltd v Frost* [2012] VSCA 238 para [60]: a trustee is not '*expected to go on endlessly in pursuit of perfect information in order to make a perfect decision. The reality of finite resources and the trustee's responsibility to preserve the fund for the benefit of all beneficiaries according to the terms of the deed means that there must be a limit. ... I accept that a trustee is not under an obligation to go on endlessly seeking more and more information*'.

full analysis and discussion³¹ and to hold them to be in breach of duty for failing to consider every matter which they might sensibly regard as relevant would at best be burdensome on the trustees and, in cost and delay, on the beneficiaries; at worst it would paralyse decision-making.³²

The yardstick of adequate deliberation accordingly varies with the circumstances of each case and with the nature of the relevant power, whether it is found in the context of a private family trust or a pension scheme, or whether it is ancillary to a commercial agreement, such as a joint venture: every power must be exercised only for the purpose for which it was conferred, or at least in accordance with what the trustees honestly consider to have been that purpose.³³

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The trustees' decision-making process will be vitiated if any relevant considerations which have been ignored, or irrelevant considerations which have been taken into account, are so influential or fundamental to the decision-making process that the donee of the power cannot be said to have exercised his discretion for the purposes for which the power was conferred, or at all.³⁴ The trust instrument may itself direct the trustees to take some specific

matter into account;³⁵ otherwise, the relevance of any matter may be capable of being judged only in the light of the particular question or questions which the trustees have to ask themselves.³⁶

The bare fact that there was material that was not placed before the trustee and which the trustee might have taken into account is not to say that the trustee should have considered it; so proof that there was material not considered by the trustee, and which was material that the trustee might have taken into account, does not show that the decision itself was ill-founded.³⁷

The Court will not seek to intervene in the proper deliberations of trustees who are duly considering an exercise of their power: the discretion has by the trust instrument been confided to the trustees and not to the Court, and it is not for the Court to seek to displace the settlor's wishes in this respect.³⁸ Nevertheless, the Court may strike down a decision of trustees if they purport to exercise their power 'capriciously', or for reasons which are 'irrational, perverse or irrelevant to any sensible expectation of the settlor'.³⁹

In *Re Manisty's Settlement*,⁴⁰ Templeman J gave as examples of capricious decisions by trustees the selection by them of an object for distribution under a discretionary power according to his height, or his complexion, or by reference to the irrelevant fact that he was a resident of Greater London. This was qualified by Megarry V-C in *Re Hay's Settlement*

31. *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 718.

32. *Lewin on Trusts* (n 10) para 29–159, citing *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 718 (where Robert Walker J said that 'To impose too stringent a test may impose intolerable burdens on trustees who often undertake heavy responsibilities for no financial reward; it may also lead to damaging uncertainty as to what has and has not been validly decided').

33. See *Thomas on Powers* (n 23) para 10.11 citing *Re Beatty* [1990] 1 WLR 1503 (the relevant passage is 1506).

34. cf *Wild v Smith* [1996] Pens LR 275: in that case pension trustees who were deciding on the distribution of a lump sum death benefit made an award to a woman with whom the deceased had been cohabiting at his death in the absence of any evidence upon which they could reasonably have decided that she was financially dependent on him; the Pensions Ombudsman determined that this was a perverse decision improperly reached which therefore constituted maladministration.

35. *Lewin on Trusts* (n 10) para 29–161 citing *Re Fletcher Challenge Energy Employee Educational Fund* NZHC MD471/Sd02, [2004] WTLR 199 para [43] (trustees of an employee benefit trust required to consider source of funds and the particular employment history of the intended recipients of distributions) and *Sinclair v Moss* [2006] VSC 130 (will trustees required to take into account income received by the testator's widow from other sources).

36. *ibid.*

37. *Esso Australia Ltd v Australian Petroleum Agents & Distributors' Association* [1999] 3 VR 642, 652 para [41]. In Australia, the duty of donees of fiduciary powers is termed a 'duty of real and genuine consideration', but it is considered that this is essentially the same as the English duty to take into account relevant considerations: *Thomas on Powers* (n 23) paras 10.133 and 10.135 citing *Sinclair v Moss* [2006] VSC 130, which sets out a summary of the relevant principles.

38. *Gisborne v Gisborne* (1877) 2 App Cas 300. The Court does not sit to entertain appeals from trustees' decisions (*Re the Representation of A and B and Re the C Trust, A and B v Verite Trust Company Limited* [2012] JRC 086B), and it cannot substitute itself as trustee, because that would lead to every beneficiary disappointed by a trustee's decision coming to the Court in the hope of an alternative decision: *S, L and E v Bedell Cristin Trustees* [2005] JRC 109 per Birt, Bailiff para 21.

39. *Re Manisty's Settlement* (n 22).

40. *ibid.*

*Trusts*⁴¹ when he said that he did not think that Templeman J in *Manisty* had had in mind a case in which the settlor was, for instance, a former chairman of the Greater London Council: that, he thought, would properly be an instance of surrounding circumstances which could inform or illuminate the original intentions of the settlor.⁴² If the settlor intended and expected that the trustees would have regard to persons with some claim on his bounty or some interest in an institution favoured by the settlor, or if the settlor had any other sensible intention or expectation, he would not have required the trustees to consider only an accidental conglomeration of persons who had no discernible link with the settlor or with any particular institution.⁴³

The modern test of ‘*capriciousness*’ for the Court to strike down the exercise by trustees of a fiduciary power is to ask whether the decision in question is one which no reasonable body of trustees could have reached.⁴⁴ In a case in which an injured employee had applied for an incapacity pension that was payable to him as of right if he had left his employment in consequence of permanent incapacity arising from physical injury or ill health, trustees who rejected compelling medical evidence of his disability without giving any reasons were held to have acted perversely, because their conclusion was not one that could have been reached on the basis of the primary facts.⁴⁵ It necessarily follows from a decision that trustees have acted perversely that there can have

been only one rational answer to the question which was presented for their decision.⁴⁶ If the Court cannot conclude that no rational trustee would have reached the decision in question, it cannot strike it down as being beyond any sensible expectation of the settlor.⁴⁷

The modern test of ‘capriciousness’ for the Court to strike down the exercise by trustees of a fiduciary power is to ask whether the decision in question is one which no reasonable body of trustees could have reached

Recently Sir Michael Birt (sitting as a Commissioner of the Royal Court of Jersey) has examined this test of ‘*capriciousness*’ with some care.⁴⁸ He has reconfirmed that the holder of a fiduciary power must not exercise his power irrationally, that is to say he must not reach a decision which no reasonable holder of the power could have arrived at. The Court will declare an exercise of the power to be invalid if the decision is irrational (in this sense), because the Court exercises its supervisory jurisdiction in relation to trusts in order to protect the beneficiaries⁴⁹ and, as with the approach taken by the Court in blessing ‘*momentous*’ decisions, it will not do so (and therefore will not confer on trustees protection against a claim for breach of trust) where the decision is not one at which a reasonable trustee properly instructed could have arrived.

41. [1982] 1 WLR 202, 212.

42. In *R v District Auditor, ex p West Yorkshire Metropolitan County Council* [1985] RVR 24, [2001] WTLR 785 however a trust for the benefit of ‘*all or any or some of the inhabitants of West Yorkshire*’ was held by Taylor J to be void in law as being a non-charitable purpose trust, but he also considered that a trust with as many as 2.5 million beneficiaries was administratively unworkable. Unworkability in this context arises from the fact that the trustees have not been provided with a sufficiently clear principle or reference point to guide them in surveying the class of beneficiaries, and they cannot simply select such a principle or reference point themselves: see *Thomas on Powers* (n 23) paras 10.133 and 10.41 citing (1974) 38 Conv (NS) 269, 274 (L McKay).

43. *Re Manisty’s Settlement* (n 22) 27.

44. See *Re the H Trust* [2007] JLR 569 para 43, *A Trustees Ltd v W, X, Y and Z* [2008] JRC 097, *Representation of N and the Matter of the Y Trust* [2011] JRC 135, *Re the Representation of A and B and Re the C Trust, A and B v Verite Trust Company Limited* [2012] JRC 086B, *Re Jasmine Trustees Limited, the Piedmont Trust and the Riviera Trust* [2015] JRC 196.

45. *Trustees of the Saffil Pension Scheme v Curzon* [2005] EWHC 293 (Ch) para [46]: moreover in relation to a perverse decision the Court is not precluded from intervening by a provision in the rules which states that the trustees’ decision is final: *ibid* para [24]. If the trustees come to a conclusion which no reasonable person could have come to, there must have been either a failure to exercise the power in good faith, or a failure to exercise the power upon a real and genuine consideration, or a failure to exercise the power in accordance with the purposes for which it was conferred: *Sayseng v Kellogg Superannuation Pty Ltd* [2003] NSWSC 945 para [63], affirmed *sub nom. Hannover Life Re of Australasia Ltd v Sayseng* [2005] NSWCA 214.

46. *Lewin on Trusts* (n 10) para 29–140.

47. But that does not necessarily mean that it will bless a proposed transaction founded on the decision: see *Re the AAA Children’s Trust* Royal Court of Guernsey Judgment 29/2014, [2015] WTLR 683.

48. See *Re Jasmine Trustees Limited* (n 44).

49. *Crociani v Crociani* [2015] 17 IT ELR 624 per Lord Neuberger [36] and *S v L* [2005] JRC 109, *Re The Circle Trust* [2006] CILR 323.

In this case,⁵⁰ the Royal Court struck down as irrational (in the necessary sense) the appointment of a new trustee of two substantial Jersey discretionary trusts, in circumstances in which (*inter alia*) the appointor of a New Zealand trust company as the new trustee had purported to approve it without giving any consideration to the company's expertise, experience, or financial standing and by reference to certain supposed requirements of the tax authorities in Italy, although none of the beneficiaries was resident there. The Court also struck down the appointment of new joint protectors of the trusts: the appointees were two brothers who were beneficiaries of the trusts and were already involved in hostile litigation with their sister who was the complainant and a fellow beneficiary; they had moreover in relation to other family trusts already shown themselves to be willing to conform to the wishes of the settlor without regard to their proper fiduciary responsibilities. In the circumstances, the Court was satisfied that the appointments in question fell outside the band within which reasonable disagreement was possible: they were categorized as irrational, and so were declared to be invalid.

For their part, beneficiaries may often consider that their trustees' decision-making processes have been vitiated by a failure to solicit the views of the beneficiaries themselves, or to invite beneficiaries to make submissions to the trustees, or make reasoned requests for distributions to be effected in their favour. A well-advised trustee will no doubt invite at least the primary categories of beneficiaries to keep him informed of their personal circumstances, as might give them a deserving claim upon the settlor's bounty; but the mere fact that the trustee has not done so is not a basis for a challenge to his eventual decisions. As Templeman J said in *Re Manisty's Settlement*:⁵¹

The court cannot insist on any particular consideration being given by the trustees to the exercise of the power. If a settlor creates a power exercisable in favour of his issue,

his relations and the employees of his company, the trustees may in practice for many years hold regular meetings, study the terms of the power and the other provisions of the settlement, examine the accounts and either decide not to exercise the power or to exercise it only in favour, for example, of the children of the settlor. During that period the existence of the power may not be disclosed to any relation or employee and the trustees may not seek or receive any information concerning the circumstances of any relation or employee. In my judgment it cannot be said that the trustees in those circumstances have committed a breach of trust and that they ought to have advertised the power or looked beyond the persons who are most likely to be the objects of the bounty of the settlor. The trustees are, of course, at liberty to make further inquiries, but cannot be compelled to do so at the behest of any beneficiary. The court cannot judge the adequacy of the consideration given by the trustees to the exercise of the power, and it cannot insist on the trustees applying a particular principle or any principle in reaching a decision.

The situation may, however, be different where a beneficiary who is within the ambit of the relevant power is aware of its existence, and specifically requires the trustees to consider exercising the power and, in particular, to consider a request on his part for the power to be exercised in his favour.⁵² In these circumstances, the trustees must consider the beneficiary's request, and if they refuse to do so or can be proved to have omitted to do so, then the aggrieved beneficiary may apply to the Court, which may oblige the trustees to comply with their duty of consideration, or ultimately, may remove the trustees and appoint others in their place. Since a beneficiary's application to the Court for an order requiring the trustee to consider an exercise of his power may be something of an empty threat, for practical purposes the appropriate remedy will usually be the removal of the trustee;⁵³ but if there is no reason to doubt that

50. *Re Jasmine Trustees Limited* (n 44).

51. [1974] Ch 17, 25; and cf *Re Gestetner Settlement* (n 3) 688.

52. *ibid.*

53. *ibid* and see *Thomas on Powers* (n 23) para 10.44 citing also *Tempest v Lord Camoys* (1882) 21 Ch D 571, 578, 579, 580;

the trustees will properly comply with their duty of consideration if they are ordered to do so (eg because their failure is the result of some misapprehension) then the Court may give a direction accordingly.⁵⁴

It is possible that the Court also has other options available to it, eg the appointment of a substitute to consider the exercise of a power, or the making of an order actually exercising the power itself after it has considered what should be done.⁵⁵ The learned editors of *Lewin on Trusts*⁵⁶ nevertheless caution that the Court would be very reluctant, in the absence of exceptional circumstances, to exercise a power which had not been considered properly by the trustees, particularly where the duty of consideration was a continuing one, so that the procedure would be costly and cumbersome.⁵⁷

A question which has been raised more recently is whether, notwithstanding these general propositions, there may be particular circumstances in which a beneficiary may be considered to have a *legitimate expectation* of being consulted, so that the trustee's failure to do so may provide a ground for attacking his ultimate decision. In the *Baldwin* case,⁵⁸ Mrs Baldwin was the occupier of a charitable almshouse; she sought judicial review of a decision of the Charity Commissioners which had declined to set aside the decision of the charity's trustees to remove her from

the property on the grounds of her antisocial behaviour. The Queen's Bench Division held that the rules of natural justice in the traditional sense did not apply,⁵⁹ and that the beneficiary of a trust had no general right to a hearing from the trustees, not even when the exercise of the power depended on a judgment as to an existing state of facts.⁶⁰

Although the principle that a decision by trustees may be overturned if it is made in bad faith, or is irrational, or perverse to any sensible expectation of the settlor, may be regarded as equivalent to *Wednesbury* unreasonableness in the realm of public law, the law of trusts is only concerned with trustees having adequately informed themselves before making a decision:⁶¹ it is not in principle concerned (as is public law) with the right of an individual to be heard before the decision is made.

There may be particular circumstances in which the Court could consider that trustees would be acting unreasonably if they failed to give a beneficiary an opportunity to persuade them against a particular course of action. In the *National Trust* case,⁶² Robert Walker J had to consider whether the remedy of judicial review was available in relation to the National Trust's decision not to renew hunting licences on certain parts of its estates in the West Country. His actual decision was that the plaintiffs'

Gartside v IRC [1968] AC 553, 606, *McPhail v Doulton, Re Baden's Deed Trusts (No 1)* [1971] AC 424, 457.

54. See *Lewin on Trusts* (n 10) para 29–128 fn 433 citing *Cowan v Scargill* [1985] Ch 270, 296–97, where some of the trustees had misapprehended their duty when considering a power of investment and the Court merely declared what their duty was: Megarry V-C expressed himself ready to assume that the trustees would duly comply with the law once the Court had made its declaration.

55. There are older authorities in which the Court has intervened in the exercise of mere powers (see *Lewin on Trusts* (n 10) paras 30–033ff) to which attention has more recently been drawn: see *Lewin on Trusts* (n 10) para 29–128, fn 440 citing *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587, 1617–18 (referring *inter alia* to *Re Hodges* (1878) 7 Ch D 754 and *Klug v Klug* (n 6) Ch 67) and approved in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 paras [42] and [51]; and cf also *Freeman v Ansbacher Trustees (Jersey) Ltd* [2009] JRC003 [43](ii) (where Birt DB noted that Lord Walker's language in *Schmidt* concerning the Court's jurisdiction to supervise and if appropriate intervene in the administration of trusts is in general terms. Accordingly the position may not necessarily be so restrictive as was suggested by Templeman J in *Re Manisty's Settlement* [1973] Ch 17, 27–28, where he said that 'in relation to a power exercisable by the trustees at their absolute discretion, the only "control" exercisable by the court is the removal of the trustees, and the only "due administration" which can be "directed" is an order requiring the trustees to consider the exercise of the power, and in particular a request from a person within the ambit of the power').

56. (n 10) paras 29–128.

57. At paras 29–179 they state more emphatically that 'nowadays' it is unlikely that a court would itself direct an exercise of the relevant power and 'If the trustees are unfit to act, the remedy is the appointment of new trustees'.

58. *R v The Charity Commissioners for England and Wales ex parte Baldwin* (2001) 33 HLR 48, [2001] WTLR137.

59. Specifically of course the *audi alteram partem* rule.

60. (2001) 33 HLR 48 paras [48]–[49], [2001] WTLR 137, 148–49; and cf *Karger v Paul* [1984] VR 161, 166.

61. The principles of public law which are applicable to decisions by public bodies (as instanced by *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223) may well be comparable to those that govern decision-making by trustees, but there is not a complete equivalence: see *Edge v Pensions Ombudsman* [2000] Ch 602, 627–30 and cf *Pitt* in the Court of Appeal (n 27) per Lloyd LJ para [77] ('I would wish to discourage reference to such public law principles in relation to trust law, since trust law has plenty of satisfactory means of dealing with the issues that arise under trusts, and those issues are inherently different from those arising in public law') and Mummery LJ at para [235] ('it is dangerous to develop the private law of fiduciaries by analogy with public law on curbing abuse of power').

62. *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705.

challenge to the National Trust's decision should more appropriately be pursued through the medium of charity proceedings, for which Parliament had made special provision; however, he did make a general point which is relevant to the analysis of trustees' decision-making processes. He said:⁶³

In reaching decisions as to the exercise of their fiduciary powers, trustees have to try to weigh up competing factors, ones which are often incommensurable in character. In that sense they have to be fair. But they are not a court or an administrative tribunal. They are not under any general duty to give a hearing to both sides (indeed in many situations 'both sides' is a meaningless expression) . . . Nevertheless, if (for instance) trustees (whether of a charity, or a pension fund, or a private family trust) have for the last ten years paid £1,000 per quarter to an elderly, impoverished beneficiary of the trust it seems at least arguable that no reasonable body of trustees would discontinue the payment, without any warning, and without giving the beneficiary the opportunity of trying to persuade the trustees to continue the payment, at least temporarily. The beneficiary has no legal or equitable right to continued payment, but he or she has an expectation. So I am inclined to think that legitimate expectation may have some part to play in trust law as well as in judicial review cases.

legitimate expectation may have some part to play in trust law

In Jersey,⁶⁴ the Royal Court has recently considered the claim of a disaffected beneficiary who contended that a trustee's decision regarding distribution was contrary to an alleged legitimate expectation, which the trustee had created over a period of years, that he and his half-brother would each receive 50 per cent

of the trust fund, that this represented a complete change of position from a proper and reasoned decision which the trustee had previously arrived at, and that, in all the circumstances of the case, it was a decision which no reasonable trustee could have made. In its judgment the Court adverted to both the *Baldwin* and *National Trust* decisions in England, but concluded on the evidence before it that nothing had been said to the disaffected beneficiary which was contractual in nature, nor was the case one in which the trustee had applied actual benefits to the beneficiary in such a way as might arguably have imposed upon it a duty to give him the opportunity of persuading it against a distribution to his half-brother's children.⁶⁵ Although by not consulting the beneficiary beforehand, the trustee took the serious risk that, had he been consulted, he might have provided the trustee with information that would or might have led it to act otherwise than it did, the evidence was clear that the trustee's assessment of the beneficiary's needs and lifestyle was correct. In the circumstances, although the Court thought it was regrettable that the trustee had proceeded to deal with the trust fund in a way which differed from its earlier thinking without informing the beneficiary and his advisers of its intention to do so,⁶⁶ it was obliged to exercise its judgement according to the circumstances as they existed at the relevant time and could not fetter the future exercise of its discretions. The 50/50 division previously canvassed was 'notional' only, and in any event there was no authority for the importation into trust law of a right to be heard or consulted, which would potentially render trusts unworkable.

In any event, of course, trustees are not bound by the expressed wishes of beneficiaries any more than they are by those of the settlor. They are not obliged to succumb to the wishes of a beneficiary notwithstanding that she has an 'an overwhelmingly

63. [1998] 2 All ER 705, 718.

64. In *Representation of N and the Matter of the Y Trust* (n 44).

65. See *Trump Holdings Limited v Planning and Environment Committee* [2004] JLR 232, where the Jersey Court of Appeal held that there were four requirements for a substantive legitimate expectation to be established, namely '(a) that a clear and unequivocal representation has been made; (b) that the expectation is confined to one person or a few people, giving the representation the character of a contract; (c) that it is reasonable for those who have the expectation to rely upon it and that they do so to their detriment; and (d) that there is no overriding public interest that entitles the representor to frustrate that expectation'.

66. In principle trustees ought to take into account any previous indications that they have given to the beneficiaries as to the manner in which they might exercise their powers in the future: *Lewin on Trusts* (n 10) paras 29–170 citing *Cameron v M & W Mack (Esop) Trustee Ltd* [2002] WTLR 647 (dispute as to the interpretation of references to the 'ear-marking' of shares under an employee benefit scheme).

preponderant interest' in the trust property,⁶⁷ and even all the beneficiaries collectively cannot direct the trustees in the exercise of their powers.⁶⁸

The canvassing of different proposals may well be a part of the trustees' decision-making process, but not all of such proposals necessarily result in a concluded resolution or disposition.⁶⁹ If a proposed resolution is of special significance to the trust and its beneficiaries, the trustees may invoke the Court's jurisdiction to bless their '*momentous decisions*'. This is the jurisdiction that enables trustees (without any surrender of their own discretion to the Court) to apply for the Court's confirmation that any opinion which the trustees have formed, or any decision which they propose to make in the administration of their trusts, is within the scope of their powers, has been arrived at in good faith, is one which a reasonable trustee could reach, and is not vitiated by any actual or potential conflict of interest.⁷⁰ The jurisdiction is one which (according to the circumstances) may be exercised either prospectively⁷¹ or even retrospectively.⁷² However, whether trustees are seeking the Court's blessing for a decision at which they have already arrived, or one which (subject to the Court's authorization) they wish to make thereafter, there has to be a formulated resolution which the Court can properly consider: it may be that a careless attitude to due process on the part of the trustees means that there is actually no coherent proposal which the Court can properly consider at all.

In the *AAA Children's Trust* case decided in Guernsey (albeit concerned with a Jersey trust),⁷³ the trustees made an application for the Court's blessing of what was considered by them to be a momentous decision involving the sale of a significant property comprised in the trust. A lengthy memorandum of wishes

compiled by the settlor during his lifetime stated *inter alia* that he wished no sale of any part of the property to take place before his children turned 40, unless there were extraordinary changes in its surroundings: he thought the property to be '*the finest jewel in [his] jewel box*' which should not be sold save in exceptional circumstances, and even then only at such an extraordinary price as the news of it would '*reach him even in heaven*'. Given this emphatic expression of the settlor's wishes, one might have expected that the trustees would have assembled a compelling body of evidence in support of their application to Court to bless a proposed sale of the property. In the event, however, the Court found on the evidence that it could not pinpoint any meeting of the trustees at which the decision which it was being asked to bless had actually been taken. What emerged was a species of '*rolling decision*' taken over a long period of time, discussed in telephone conversations between two only of the three trustees, of which no file notes had been created or, if they had been recorded, were not disclosed in evidence. The proposal had also been considered in a multitude of e-mails exchanged between the parties which again had not been produced. The trustee minutes which were produced made no reference to any discussion as to the value of the property, or the level of price that would have to be offered before the trustees could support the sale in accordance with the settlor's wishes; instead, the minutes suggested that the decision was taken as if they were discussing a simple investment: there was concern about capital erosion, but no discussion and no consideration of the other steps that could be taken to preserve capital, such as the sale of other assets, the disposal of other properties, reducing distributions, or any other matters. Property experts retained by the parties met to prepare a joint

67. *Lewin on Trusts* (n 10) paras 29–169 citing *Re Steed's Will Trusts* [1960] Ch 407, 417–18.

68. *Re Brockbank* [1948] Ch 206.

69. An '*evolving strategy*' on the part of trustees is not itself evidence of irrationality: *The Representation of Investec Co-Trustees (Jersey) Limited and Re the A Trust* [2012] JRC 066.

70. See *Public Trustee v Cooper* [2001] WTLR 901, 923, *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312, [2015] WTLR 39 per Vos LJ paras 12–17 and cf *A Trustees Ltd v W, X, Y and Z* [2008] JRC097 (citing *Re the S Settlement* [2001] JLR N 37, [2001] JRC 154), *Representation of N and the Matter of the Y Trust* (n 44), *The Representation of Investec Co-Trustees (Jersey) Limited and Re the A Trust* [2012] JRC 066, *Re the AAA Children's Trust* Guernsey Judgment 29/2014, [2015] WTLR 683.

71. *Marley v Mutual Security Merchant Bank* [1991] 3 All ER 198.

72. *Representation of N and the Matter of the Y Trust* (n 44) and cf *Mills v Mills* [2015] EWHC 1522 (Ch), [2015] WTLR 1631.

73. *Re the AAA Children's Trust* Guernsey (n 70).

report but failed to agree a value: the difference between them was very significant, especially when addressing the question of whether the proposed price was so exceptional that the settlor would have wished it to be considered.

In the circumstances, even though the Court could not conclude that the decision was one which no reasonable trustee could properly have taken, it was unable to bless the trustees' proposal, as it could not be satisfied that they had approached their decision-making process in a proper manner: it was impossible to discern what the trustees had in their minds at the relevant times, and there was no evidence that they had taken any (or, if so, what) account of the wishes of the settlor's children, their mother or their aunt (who was one of the protectors), let alone of the settlor's own emphatic memorandum of wishes. In effect, the Court was being asked to bless a decision of the trustees which remained inchoate.

This last-mentioned case is an object lesson for trustees in the responsibilities which attach to their duty to give proper consideration to the exercise of their fiduciary powers. In some cases, of course, an application for the Court's blessing may reveal that the trustees' decision-making processes have been so dysfunctional or vitiated by conflicts of interest that the Court feels obliged to remove them from office.⁷⁴ It will not be often that trustees mount an application for the Court's blessing of one of their proposals in circumstances in which their own decision-making processes actually warrant their removal; however, they should bear in mind that removal from office may be justified

not only where they have made deliberate defaults, but also where they do not (or cannot) give proper consideration to the exercise of their fiduciary powers, and so may be deemed unfit for office.⁷⁵ A case of 'inadequate deliberation' or failure of due consideration may therefore actually highlight an inadequacy of the trustees themselves. In Australia the concept of 'inadequate deliberation' continues to be referred to as an 'abuse of power',⁷⁶ which (in English terms at least) probably carries rather too pejorative a ring. Nevertheless, the duty of proper consideration requires trustees to ask themselves, and to consider, the right questions, and their accompanying duties to inquire and to ascertain require them to furnish themselves with the right information to enable them to do so. If they fail to ask the right questions, or fail to procure the right information, in a respect which is fundamental to the issue that is before them, the failure will be a breach of trust and justiciable by the beneficiaries. Although trustees are not obliged to guarantee to their beneficiaries that they will always 'get it right',⁷⁷ the requirement that they 'do their best' in accordance with the standard of the prudent man means that, in exercising their fiduciary powers, they must comply with the duty of proper consideration: that is the touchstone of adequate deliberation.

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74. *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch), LTL 27/10/2008 (where Briggs J found that there had been a 'total abdication of their duties' by the trustees, both individually and collectively, save only in relation to a beneficial sale of family companies).

75. *Jones* *ibid*, per Briggs J paras 281, 282.

76. See Ford and Lee, *Principles of the Law of Trusts* Thomson Reuters (Professional) Australia Limited paras 12.14550, 12.14610.

77. See fn 29, and cf *Thomas on Powers* (n 23) para 10.121.