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A legal update from Dechert's Financial Services Group

Recent Trust Law Decisions in the Court of Appeal

A recent Court of Appeal ruling could mean higher legal costs for trustees and expose investment managers or advisers with trustees among their clients to increased liability.

Thousands of UK trustees, including those overseeing charities, schools and pension funds, may be forced to incur higher legal costs after a recent Court of Appeal ruling.

The decision, which overrules 35 years of case law and involves an unusual judicial U-turn, could have a far-reaching impact that will be expensive for trusts and their beneficiaries, and could trigger an increase in professional indemnity insurance rates for solicitors, barristers and other specialist trust advisers, which may mean higher fees for clients.

The Court of Appeal Judges said that years of decisions under a rule dating from 1975 and known as the rule in *Hastings Bass* were an "example of the law taking a serious wrong turn".[1]

In fact, Lord Justice Lloyd, the Court of Appeal Judge who gave the leading judgment in the case, found that the rule in *Hastings Bass* was not actually "the rule in *Hastings Bass*". Instead, Judges have, for at least two decades,[2] been mistaken as to the true precedent set by the case.[3]

The position, for now, is that:

1. If trustees are now found to have acted outside the scope of their powers under the terms of their trust instrument or under trust law, that action will be void.

2. If trustees have done something that is within their powers, it will be voidable <u>only</u> if they have acted in breach of a fiduciary duty. The judgment reverts to the former rubric of relevant considerations without explaining what these are or why trustees may be subject to a fiduciary duty to consider them. Thus, a breach of duty <u>may</u> be established if the trustees take into account a factor that is irrelevant, or ignore a relevant element, which may include the tax consequences of a particular action.

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1 Per Longmore LJ, *Pitt and another v Holt and another; Futter and another v Futter and others* [2011] EWCA Civ 197 ("Pitt and Futter") at 227. This case also clarified that where a donor seeks to set aside a voluntary disposition on the ground of mistake he must show: (a) that he was under a mistake at the time of the disposition; (b) that the mistake was either a mistake as to the legal effect of the transaction or as to an existing fact that is basic to the transaction; (c) that the mistake is of so serious a character as to render it unjust on the part of the donee to retain the property given to him. The learned judge's findings on the law of mistake are, however, beyond the scope of this OnPoint.

2 Starting, according to Lloyd LJ, with *Mettoy Pension Trustees Ltd v Evans and others* [1991] 2 All ER 513.

3 *Pitt and Futter at 65.*

3. However, if trustees have taken legal advice and their actions (on advice) have unintended negative consequences, they will not have breached their duty. This was the typical situation in which trustees used to apply for a Hastings Bass Order; but they will no longer, in such circumstances, be able to turn the clock back to a time before the trustees took their fateful decision.

4. The era of legal digests containing numerous reports of trustees obtaining Hastings Bass orders is over; it will rarely be appropriate for trustees to apply to Court for a declaration that an action was voidable; usually it will be for a beneficiary to make the application.

One strange consequence of the ruling is this: a conscientious trustee who has taken advice on a proposed course of action is barred from using the rule in *Hastings Bass* to undo the effects of that action, while the rule can still be used where a trustee has failed to take advice and simply embarked on a course of action without taking into account all relevant considerations. It remains to be seen how the courts will address this point in the future.

In this *DechertOnPoint*, we analyse these decisions and their practical implications for investment managers and advisers to trustees. The article delves into the history of the rule in *Hastings Bass*, and explores in some depth the joined appeal of *Pitt and Futter*. **Readers who would like to take the key points from the judgement, together with a few thoughts and practical tips, should go straight to paragraph 7.3.**

1. The position before *Pitt and Futter*: The Rule in *Hastings Bass*

1. What was the Rule?

The rule in *Hastings Bass* developed over the course of three main cases.

1.1. In *Re Hastings Bass*[4] itself, the Court of Appeal found that:

"Where a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action, notwithstanding that it does not have the full effect which he intended, unless:

(1) what he has achieved is unauthorised by the power conferred on him, or

(2) it is clear that he would not have acted as he did:

(a) had he not taken into account considerations which he should not have taken into account, or

(b) had he not failed to take into account considerations which he ought to have taken into account."

1.2. The first point—that actions which are taken but are unauthorised by the power conferred upon the trustee (or, *ultra vires*) are void—has long been a rule of equity. It was the second point—that the court may interfere with a trustee's actions if he has failed to take account of relevant considerations (whether legal, or factual)—which was the principle that was developed over the following decades.

This second point is based upon the fundamental nature of trusteeship. Beneficiaries of discretionary trusts have no right (as such) to the assets of the trust; they do however, have a right to "proper conduct on the part of the trustees".[5] Where trustees consider the exercise of a fiduciary power, it is their duty to take into account all relevant matters and to exclude from consideration all irrelevant matters. What is "relevant" or "irrelevant" is judged according to the "reasonable trustee". If the trustee breaches this duty, that amounts to a breach of trust, which will invalidate the exercise of the power.

From these principles flow the rule that that a trustee's actions might be vitiated if he had taken into account considerations which he should not have taken into account, or failed to take into account factors which he should have taken into account.

4 [1975] ch25.

5 M. Ashdown, *In defence of the rule in Re Hastings Bass*, Trusts & Trustees, Vol. 16, No. 10, November 2010, p. 827 (hereinafter "Ashdown").

1.3. Whereas the Court of Appeal had, in *Hastings Bass*, expressed the *Re Hastings Bass* rule in negative terms ("the court should not interfere with a trustee's actions unless..."), fifteen years later, Mr Justice Warner (sitting at first instance) expressed the "positive converse" of the rule:

"Where a trustee acts under a discretion given to him by the terms of the trust, the court will interfere with his action if it is clear that he would not have acted as he did had he not failed to take into account considerations which he ought to have taken into account." (Emphasis added).

Warner J has labelled this positive formulation "the Rule in Hastings-Bass" (hereinafter **the Rule**), though many commentators have noted that the positive formulation of the Rule does not follow from the negative formulation provided by *Hastings Bass* itself.

1.4. The Rule was approved by Mr Justice Lloyd (as he then was),[6] who expressed it in fuller terms:

"Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account." (Emphasis added).

2. When was the Rule used?

2.1. It appeared that where trustees took an action the effect of which was different to that which they envisaged, the Courts had discretion to grant an Order reversing this action. This was beneficial to trustees and beneficiaries in two main categories of case:

2.1.1. Pension trust cases:

2.1.1.1. *Mettoy Pension Trustees Ltd v Evans*[7] was the case in which the Rule, as it was (until recently) understood was first stated (see 1.3 above). The trustees of a pension scheme purported to exercise an express power within the scheme rules to amend the formalities for winding up the scheme. However, none of the trustees read the Deed of Amendment, relying instead on a summary prepared by the solicitor. Warner J found that the trustees should have considered the terms of the Deed, and had failed to do so. This failure would allow the Court to interfere in the trustees' exercise of their power.

2.1.1.2. In pensions cases, the authorities suggested that a slightly lower threshold might apply where a trustee sought to reverse its actions: "*a... distinction lies between cases involving voluntary family settlements by patriarchs providing the 'icing on the cake' for family members and cases involving pension trusts where the beneficiaries have earned significant benefits crucial to a decent retirement for themselves or their cohabitees*".[8] Under the Rule, it was sufficient to show that pension trustees "might" have taken a different course had they been aware of a material fact, rather than showing that they "would" have done so as required by trustees of private trusts. It should be noted that this analysis was by no means universally accepted and, happily, is now irrelevant to the reformulated Rule (see below).

2.1.2. Private trust cases:

2.1.2.1. The Rule also applied to private trusts,[9] where trustees were mistaken as to material considerations such as the settlor's wishes regarding the exercise of a fiduciary power,[10] a point of law,[11] or the tax consequences of a transaction.

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6 In *Sieff v. Fox [2005] 1 W.L.R. 3811 at paragraph 119*

7 [1990] 1 WLR 1587 (Ch.).

8 Underhill and Hayton, *Law of Trusts and* Trustees, 18th ed. 57.21.

9 As in *Green v Cobham [2002] STC 820.*

2.1.2.2. In some cases, the trustees had taken advice on the tax consequences, which they then discovered to be incorrect,[12] in some they had simply not considered the tax consequences[13] of an action; in some they had received correct tax advice which they then failed to put into effect.[14]

2.1.2.3. A recent (2010) example of the application of the Rule is *Jiggens v Low*.[15] The assets of an accumulation and maintenance settlement comprised two farms. The trustees executed an irrevocable deed in 2004 declaring that the income of the trust fund would from the date of the deed be paid to the primary beneficiaries. They were subsequently advised that this appointment constituted, for capital gains tax purposes, a deemed disposal of the entire trust fund, and the deed would also have the effect that any subsequent transfer of capital from the trust fund to the second of the primary beneficiaries would not qualify for holdover relief. Roth J held that:

(a) the trustees in deciding to execute the deed did not consider these adverse tax effects;

(b) had they not misunderstood the effect of the exercise of their power of appointment, they would have acted differently; and so

(c) the Rule was satisfied and the deed declared void.

2.1.3. The Rule has also been applied to fiduciaries other than trustees, such as directors[16] and receivers appointed under the Mental Health Act 1983.[17]

2.1.4. The Rule has also been applied in other jurisdictions such as Jersey and Cayman.[18] In these jurisdictions, the Rule has been applied even more widely: *"in England it is confined to the exercise of distributive (or dispositive) discretions <u>internal</u> to the trustee-beneficiary relationship, whereas offshore it has been applied to the exercise of administrative powers, including those <u>external</u> to the trust, such as decisions to enter into contracts with third parties."*[19]

3. Consternation

3.1. The extent of the Rule caused some consternation among legal practitioners, academics and Judges. Broadly, there were three concerns:

3.1.1. The Rule had developed, unchecked, too far: *"The so-called rule in Re Hastings-Bass continues to trouble lawyers—practitoners, Judges and academics alike—as the growing volume of the decided cases appears further to entrench into the law a principle with which many feel wholly uncomfortable and which some doubt should exist at all in anything like its current form"*.[20]

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10 *Abacus Trust Co (IOM) v Barr* [2003] Ch 409.

11 *Re Hastings Bass* [1975] Ch 25 – which concerned the application of the law of perpetuities.

12 *Jiggens and another v Low and another* [2010] EWHC 1566 (Ch).

13 *Pitt v Holt [2010] EWHC 45 (Ch).*

14 *Abacus Trust Co (IOM) Ltd v NSPCC* [2001] STC 1344.

15 *Jiggens and another v Low and another [2010] EWHC 1566 (Ch).*

16 *Hunter v Senate Support Services Limited and others* [2004] EWHC 1085 (Ch.).

17 *Pitt and another v Holt and another* [2010] EWHC 45 (Ch.).

18 In Jersey (see a string of case law from *Re the Green GLG Trust* (2002)); Cayman (see in particular *Barclays Private Trust Cayman Ltd* [2006]*; A et al v Rothschild Trust Cayman Limited* [2004-5]).

19 Underhill and Hayton, *Law of Trusts and* Trustees, 18th ed. at 57.18.

20 Ashdown, p.826.

3.1.2. The Rule gave trustees a "*get out of jail free*" card. There was concern that the Rule had become "*a morning after pill [for] trustees suffering post-transaction remorse*" whereby they could undo decisions which had unintended consequences. "*It cannot be right that whenever trustees do something which they later regret and think that they ought not to have done, then they can say that they never did it in the first place".*[21] *Where a trustee had taken advice and on that advice embarked on a course of action, "why ... should the trustee be entitled to have the transaction set aside in a way that would not be open to an individual taxpayer merely because the advice he obtained was incorrect or because he negligently failed to follow it correctly?"*[22]

3.1.3. The Rule let negligent advisers off the hook. There was concern that advisers such as lawyers or accountants who had given trustees incorrect advice (often tax advice) avoided liability because trustees would take the easier option of a Hastings Bass application instead of pursuing the advisers, leading Lord Walker to "*ask why the Chancery Division, rather than the party's professional indemnity insurers, should have to pick up the pieces*".

3.2. There were of course defenders of the Rule.

3.2.1. One argument for the Rule was that it offered significant protection to beneficiaries of (discretionary) trusts, who are often in a vulnerable position. In the Cayman case of *A v Rothschild Trust Cayman Limited,*[23] Chief Justice Smellie commented that: "*In my view, if it is appropriate for the Court to intervene in order to avoid or mitigate a fiscal consequence which would be injurious to the interest of innocent beneficiaries (for example where an unwarranted charge to tax would otherwise arise) the Court might well do so notwithstanding the fact that the beneficiaries may have other recourse available to them against the ill-advised or mistaken trustees or their advisors*".

3.2.2. A second argument was that it offered a "plank in a shipwreck" to trustees "victimised" by "recondite" tax legislation.[24]

3.3. Nonetheless, there was a sense that, with so many voices of concern, something had to change. Many within the profession came to ask whether the Rule had gone feral. "*When the Court of Appeal fashioned for the trustees of the 1947 settlement upon Captain Hastings-Bass a stout shield against an attack upon the validity of their decisions by the Inland Revenue, the members of the Court cannot have supposed that they were creating for such trustees a powerful weapon enabling them to attack their own decisions in the face of objections by the Inland Revenue.*"[25]

4. HMRC arrives on the scene

4.1. Despite concerns, however, *Hastings Bass* cases rarely made it further than first instance. Judges at first instance (such as Norris J, in *Futter*[26]) felt unable to challenge previous authorities, so simply tried to apply the often conflicting precedents as best as possible. This was because the Inland Revenue declined to participate, hence all *Hastings Bass* claims (before *Pitt and Futter*) were non-adversarial; the interests of the trustee and the beneficiaries aligned.

4.2. The Revenue will usually be the only party with an interest in ensuring that the *Hastings Bass* application (which will usually seek to avoid an unfortunate, unforeseen and unintended tax charge) does not succeed. For this reason, Lloyd LJ commented "*that the Court's task might be easier in some cases if the Inland Revenue did not always decline the invitation to take part in cases of this kind*".[27]

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21 *Per* Park J, in *Breadner v Granville-Grossman* [2001] Ch 523.

22 Tax Bulletin 1294.

23 At N.16.

24 T. Molloy QC, *What is the Rule in Hastings-Bass?* (Trusts & Trustees Vol. 15, No. 4, June 2009, at 200).

25 *Per* Norris J, *Futter* v *Futter* [2010] EWHC 449 (Ch)

26 *Futter v Futter op. cit.*

27 *Ibid* at 83.

4.3. In their Tax Bulletin of June 2006,[28] HMRC announced their intention to intervene in *Hastings Bass* applications where appropriate—especially where large amounts of tax were at issue, or where its involvement could contribute to the elucidation of the principle.

It was against this backdrop that the Court of Appeal heard the joined cases of *Pitt v Holt* and *Futter v Futter*.

5. *Pitt v Holt*

5.1. Mr Pitt, Mrs Pitt's husband, had been in a very bad road accident in 1990 and his personal injury claim was compromised four years later on the basis of a structured settlement. Mrs Pitt was the "receiver" (appointed by the Court of Protection). The Court of Protection gave Mrs Pitt permission to put the lump sum, and annuity, received by way of compensation on trust. The trust which was entered into created discretionary trusts of income and capital for the benefit of Mr and Mrs Pitt, their children and remoter issue during Mr Pitt's lifetime ("the Special Needs Trust"). Upon Mr Pitt's death the trust fund would be held by his personal representatives for the benefit of his estate.

5.2. It was realised in 2003 that this gave rise to a significant tax liability—around £100,000 of inheritance tax (IHT) payable by virtue of the creation of the discretionary trust, plus further IHT chargeable for every ten years that the trust remained in existence, and IHT when assets left the trust (e.g. when distributions were made to beneficiaries). This tax would represent a significant proportion of the value of the trust fund (c.£800,000). The Special Needs Trust could easily have been drafted in a way that none of these IHT charges arose.[29]

5.3. The trustees of the Special Needs Trust (including Mrs Pitt and one Mr Shores) sought a declaration that the deed by which the Special Needs Trust was created was void or voidable and ought to be set aside. The Judge at first instance[30] granted this order.

6. *Futter v Futter*

6.1. The facts of the case are in a sense classic Hastings Bass territory. "*Trustees of a settlement exercise a discretionary power intending to change the beneficial ownership of trust property, but the effect of what they do turns out to be different from what they intended*".[31]

6.2. Two offshore settlements contained significant "stockpiled gains"—that is, while the funds remained offshore, there would be no charge to UK capital gains tax (CGT) but once funds were distributed absolutely to UK resident beneficiaries, the gains would be triggered, resulting in a CGT charge.

6.3. The trustees received (incorrect) advice that the beneficiaries could set off their personal losses against the capital gains and utilise their annual exemptions to "wash out" the stockpiled gains. The trustees accordingly made dispositions to four of the beneficiaries. It was then discovered that the tax advice was incorrect.[32]

6.4. At first instance, Norris J held that the transaction was void under the Rule.

7. The Court of Appeal Judgement: Pitt and Futter

7.1. The Court of Appeal heard the appeal of both *Pitt and Futter* together. Lloyd LJ gave the leading judgement—having already contributed to the elucidation of the Rule in *Sieff v Fox* (see para. 1.4). Lloyd

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28 *Tax Bulletin 83*, 1291 at 1293.

29 One of the sorry aspects of the case is that, technically, the trust could qualify (under s. 89 of the Inheritance Tax Act) as a discretionary trust for disabled persons – but the crucial clause was not included in the trust deed.

30 *Pitt v Holt* [2010] EWHC 45 (Ch.)

31 *Pitt and Futter*, at 1.

32 S. 2(4) of the Taxation of Chargeable Gains Act 1992 provides that allowable losses cannot be set off against gains attributed to beneficiaries in these circumstances.

LJ was keen to stress that neither Judge at first instance was wrong; but that they had been constrained by a line of authorities they inherited.

7.2. Lloyd LJ went back to basics and examined the precedent (the *ratio dicedendi*) set by *Re Hastings Bass* because that case (as a Court of Appeal authority) is binding on all lower Courts, any major change to the Rule would require a consideration of the *ratio*. Lloyd LJ found that the *ratio of Re Hastings-Bass* was not the Rule which is set out at 1.1 but is in fact a far narrower Rule.

7.3. He then provided a new Rule to replace what was formerly known as the Rule in *Hastings Bass*:

7.3.1. Where a trustee purports to exercise a discretionary power but acts outside the terms of the power, that act is void. For example:

7.3.1.1. where there is a procedural defect in the trustee's action – for example, he has used the wrong document, or acted without a necessary prior consent;

7.3.1.2. where there is a substantive defect – for example, he has delegated in an unauthorised way or appointed someone who is not within the specified class of objects; or

7.3.1.3. where there is a defect under general law.

7.3.2. Where the trustees exercise a discretionary power, their act is voidable if they have breached their fiduciary duties.[33] Breach of fiduciary duty may, according to the Court of Appeal, include failing to take into account relevant factors, or taking into account irrelevant factors. Relevant factors may include fiscal considerations.[34]

7.3.3. Where trustees consider matters which are outside the scope of their expertise, they must take proper advice. They must then weigh that advice and follow it if sensible to do so. That is their duty. If the advice turns out to be incorrect, and this results in a tax charge that is the fault of the adviser. The trustee has carried out his job and has not breached his duty. Therefore, the action will not be voidable.

7.3.4. Where the act is voidable, a beneficiary can apply to have it set aside,[35] but it will not usually be for the trustee to bring such a claim. This means that one of the beneficiaries must "grasp the nettle of alleging and proving a breach of fiduciary duty on the part of the trustees".

7.4. Applying these principles to *Futter v Futter* and *Pitt v Holt*:

7.4.1. In *Futter v Futter*, the trustees took advice from solicitors. On that advice, they made distributions believing that would wash out stockpiled gains. Unfortunately the advice was wrong but that did not mean the HMRC's appeal, therefore, was allowed: the appointments were not void.

7.4.2. In *Pitt v Holt*, the solicitors had advised on tax—income tax and ad valorem stamp duty—but had not it seems, addressed IHT. Mrs Pitt, as trustee of the Special Needs Trust, fulfilled her duty to take appropriate advice and put it into effect. Unfortunately, the advice obtained was lacking. Therefore, HMRC's appeal would be successful; the Special Needs Trust would stand.

7.5. Lloyd LJ recognised that the retrenchment of the Rule may in some cases prejudice beneficiaries. Indeed, he said that "*Mrs Pitt is entitled to feel that she has been badly let down by the advice that she was given, and the failure of her advisers to address the question of IHT, especially as the liability could have been avoided so easily". However he continued, "it seems to me that her remedy for that (and likewise that of the Futter family for the corresponding errors in their case) lies not in the realms of equity but by way of a claim for*

33 Pitt and Futter Para. 99.

34 *Ibid* Para. 114ff.

35 Subject to equitable defences.

damages for professional negligence". Although there is an understandable demand for a remedy where a mistake has been made, that does not mean that the law should provide one.

7.6. There is no doubt that trustees have lost a very useful method of unwinding actions which have unintended or unfortunate tax results in particular. It will be difficult to show that trustees have acted in breach of trust simply because they have failed to take into consideration a tax consequence of an action; trustees have no fiduciary duty to minimise tax "*it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty... it would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty*".[36]

8. What are the consequences?

8.1. One strange consequence of the ruling is that a conscientious trustee who has taken advice on a proposed course of action is barred from using the Rule in *Hastings Bass* to undo the effects of that action, whilst the Rule can still be relied upon where a trustee has failed to take advice and simply embarked on a course of action without taking into account all relevant considerations. It remains to be seen how the Courts will address this point in the future. This is unlikely, however, to change trustee behaviour; trustees will continue to seek advice when considering a substantial exercise of a fiduciary power notwithstanding that this may well close off the *Hastings Bass* route to correcting mistakes.

8.2. *Hastings Bass* applications will be far less readily available in circumstances where trustees have taken advice and acted according to that advice, but the advice has been incorrect and a tax liability has been suffered. It seems likely that beneficiaries will still look to recover the lost value of the trust fund, but may find it difficult to sue trustees who will be able to show that they have discharged their duty by taking advice (and will, in any event, usually be protected by an exoneration clause which provides that they are not liable for any act except for fraud).

8.3. It is possible, therefore, that beneficiaries will look to the trustees' advisers to recover the lost value of the fund.[37] However, cases such as *Grimm v Newman*[38] demonstrate that this is easier said than done.

9. Conclusions

9.1. Lloyd LJ has certainly pruned the Rule back, but some questions still remain. The decision is being appealed to the Supreme Court—will they accept the Court of Appeal's reasoning? What is the effect on previous cases where Hastings Bass relief has been ordered? Will other jurisdictions continue to recognise the old "*Hastings Bass*" rule, or will they conduct a similar pruning exercise? And will Judges in future cases attempt to clarify the seeming anomaly that trustees who take advice are in a worse position than those who do not? Might we even see cases brought by disgruntled beneficiaries who claim that advisers should have warned them that advice was necessary, but failed to do so?

9.2 Whatever the answer to these questions, we imagine that one consequence of the Court of Appeal's decision will be an increase in claims brought against professional advisers. Advisers should be careful to consider taking steps to mitigate their exposure to being sued by trustees for incorrect advice; such mitigation may, for example, be in the form of a written disclaimer or duty defining clauses; though these merit a separate analysis in themselves.

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36 T. Molloy QC, "*The Court of Appeal Removes the Safety Net" in Trusts* & Trustees Vol. 17, No. 5, June 2011, at 422.

37 This may be via a "dog leg" claim brought by the trustee (which is the party that has the contractual relationship with the adviser).

38 [2002] EWCA Civ 1621.

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