Tax Mistakes Post-*Pitt v Holt*

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The Supreme Court's decision in *Pitt v Holt*[1] is the leading authority on the equitable jurisdiction to correct mistakes in trust law. The case is tightly bound up with the issue of tax planning errors, as the immediate effect of the decision was to restrict the so-called "rule" in *Re Hastings-Bass*.[2] This rule had allowed trustees to escape poor tax planning decisions merely by showing that they failed to consider relevant information. By almost common consensus, the requirements for this doctrine had become too lax, and it was all too easy to avoid an unforeseen tax charge. By curtailing this rule, *Pitt v Holt* seemed to strike a blow for the Revenue, and make it harder for litigants to rely upon the equitable jurisdiction to correct tax planning errors. However, the decision has had precisely the opposite effect. By closing down one escape route, litigants have been forced to structure their claims in different ways, particularly under the doctrines of rescission for equitable mistake and rectification. The recent case law on these remedies suggests an even more liberal approach to tax planning mistakes than prevailed before the Supreme Court's intervention.

I TAX MISTAKES PRE-2013

Prior to the decision in *Pitt v Holt*, the law's approach to tax mistakes in trust law focussed upon two doctrines, the "rule" in *Re Hastings-Bass*, and rescission for equitable mistake. A third doctrine, rectification, played a peripheral role in such cases. *Pitt v Holt* has had a dramatic effect on each of these doctrines. We begin with a brief overview of the law pre-*Pitt v Holt*.

A. Re Hastings-Bass

The "rule" in *Re Hastings-Bass* was said to apply in cases where a trustee, in exercising a discretion, failed to take into account some relevant matter, such as the tax implications of the decision, or did take into account something that was irrelevant, such as erroneous tax

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[1] [2013] UKSC 26; [2013] 2 A.C. 108.

[2] The "rule" takes its name from the decision in *Re Hastings-Bass* [1975] Ch. 25.

advice. This understanding of the "rule" in *Re Hastings-Bass* prior to *Pitt v Holt* was perhaps formulated most clearly by Lloyd LJ, sitting at first instance, in *Sieff v Fox*:[3]

> "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 have taken into account."

Such a rule meant that, if the trustees failed to take into account the tax consequences of a disposition which ought properly to have been considered, then the disposition might be unwound.[4]

The "rule" in *Re Hastings-Bass* attracted criticism from many quarters. Its doctrinal basis was never secure, with lingering doubts over whether the eponymous case was actually authority for the rule described by Lloyd L.J. in the last paragraph.[5] More importantly, it was seen as being overly generous to trustees, beneficiaries and their professional advisors. Put in its strongest terms, the "rule" meant that no decision made by a trustee was ever final unless the trustee had been in possession of all relevant information at the time the decision was made. Given that no decision-maker ever has perfect information, the "rule" made it relatively easy to set aside a trustee's decision when the parties did not like its consequences (especially as regards tax).

B. Rescission for equitable mistake

Rescission for equitable mistake is a much wider remedy. It applies not just to decisions made by trustees and other fiduciaries (as in the "rule" in *Re Hastings-Bass*), but also to decisions made by settlors when declaring a trust or making a disposition to an existing trust. The types of mistake that fall under this doctrine will be discussed in detail below.[6] For present purposes it is sufficient to say that, prior to *Pitt v Holt*, claims were frequently brought, with varying degrees of success, in cases where a party held a false belief that trusts declared by him would mitigate tax liability.[7] Where the doctrine applied, it resulted in the declaration being set aside.

Although different tests for the availability of this remedy have been proposed, before *Pitt v Holt* the dominant approach was that set out in the judgment of Millett J. in *Gibbon v*

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[3] [2005] EWHC 1312 (Ch); [2005] 1 W.L.R. 3811, at [119].

[4] *Eg Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch); [2003] Ch. 409; *Sieff v Fox* [2005] EWHC 1312 (Ch); [2005] 1 W.L.R. 3811; *Smithson v Hamilton* [2007] EWHC 2900 (Ch); [2008] 1 W.L.R. 1453.

[5] See *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108, at [9]-[46].

[6] See section III.B below.

[7] e.g. *In re Griffiths* [2008] EWHC 118 (Ch); [2009] Ch. 162 and *Sieff v Fox* [2005] EWHC 1312.

Mitchell.[8] This test, which could make it difficult to have tax planning errors set aside, drew a distinction between the "effects" and the "consequences" of a declaration of trust:[9]

> "In my judgment, these cases show that, wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."

Some judges found this test difficult to apply in practice, as it is not clear what difference there is between an "effect" and a "consequence" of a transaction, these terms often being used as synonyms for each other.[10] However, the test often proved difficult to satisfy in the context of tax errors, as unforeseen tax charges were commonly characterised as the "consequence" of a declaration of trust, not its "effect".[11]

C. Rectification

Rectification, played a minor role in the context of tax mistakes before *Pitt v Holt*. The remedy is said to be available in cases where the terms of a document do not reflect the intention of the party (or parties) that executed it. In the context of trusts, the test for rectification was stated by Baring J. in the recent case of *Giles v The Royal National Institute for the Blind*.[12] The principal requirements are:[13]

> '[T]here must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended … [and]'
>
> '[T]he specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did *not* intend what was recorded; they also have to show what they did intend, with some degree of precision …'

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[8] [1990] 1 W.L.R. 1304.
[9] Ibid., 1309.
[10] The test was therefore criticized: see e.g. *Wolff v Wolff* [2004] EWHC 2110 (Ch); [2004] S.T.C. 1633 at [25] (Mann J.); *Anker-Petersen v Christensen* [2002] W.T.L.R. 313 at [38] (Davis J.). Nevertheless, it had also received support since the thrust of what was intended was thought by some judges to be tolerably clear: "If anything, it is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them." *AMP (UK) Ltd v Barker* [2000] EWHC 42 (Ch); [2001] P.L.R. 77 at [70] (Lawrence Collins J.).
[11] e.g. *AMP (UK) Ltd v Barker* [2001] P.L.R. 77 and *Anker-Petersen v Christensen* [2002] WTLR 313.
[12] [2014] EWHC 1373 (Ch). Baring J. was here summarising Peter Gibson L.J.'s judgment in *Racal Group Services Ltd v Ashmore* [1995] S.T.C. 1151. It is Baring J's formulation of the test that is adopted in *Lewin on Trusts*. See J. Mowbray et al (eds), *Lewin on Trusts* (19th ed, London: Sweet & Maxwell, 2014) [4-69].
[13] Ibid., [25].

Rectification requires some disparity between the terms contained in a trust deed and the intention of the party that executed it. The clearest examples are those cases where there has been a drafting error in the preparation of the final trust deed, such that it does not reflect earlier drafts.[14] In such cases the mistake relates to the terms of the trust deed, as the document does not say what the settlor intended. This function of rectification meant that it was an inappropriate remedy for tax planning errors. As we will see, in most cases involving tax mistakes, the terms of the trust say and mean precisely what the settlor intended. The settlor's mistake usually relates to his *reasons* for adopting those terms, i.e. a false belief that those terms will achieve his fiscal motives. As such, claims to rectify trust deeds for tax planning errors tended to fail.[15] Before *Pitt v Holt*, most tax errors were pleaded, with varying degrees of success, under the rule in *Re Hastings-Bass* or rescission for equitable mistake.

II THE DECISION IN *PITT V HOLT*

Mr Pitt was seriously injured in a road accident, for which he received significant compensation. His wife, who was his appointed receiver, obtained professional advice and consequently put the compensation into a discretionary trust for the benefit of her husband, herself and their children. Mr Pitt later died, and his estate was liable to inheritance tax of the sum held on trust. This liability could have been readily avoided had the trust contained a provision that at least half of the settled property applied during Mr Pitt's lifetime be used for his benefit,[16] but both the advisers and the Court of Protection, which had approved the trust, apparently overlooked the relevant tax liability.[17] Given the substantial tax liability that arose, Mr Pitt's personal representatives sought rescission of the disposition to the trust, both on the ground of equitable mistake and under the rule in *Re Hastings-Bass.* Whilst the latter claim failed, the Supreme Court did grant rescission on the basis of mistake.

In rejecting the claim under the rule in *Re Hastings-Bass*, the Supreme Court sought to curtail the scope of the rule. The Court was of the view that a series of uncontested first-instance decisions had allowed the doctrine to spiral away from its origins in *Re Hastings-Bass* itself, and it had become too easy to set aside a disposition on this basis. The Court decided that if the trustees make a disposition which has unforeseen consequences, then affected parties should not automatically be able to set aside that disposition simply because if the trustees had realised what the tax consequences would be they would have done something different. Lord Walker in *Pitt v Holt* was clear that for the doctrine of *Re Hastings-Bass* to be engaged, the trustees must have committed a breach of duty:[18]

> "Breach of duty is essential (in the full sense of that word) because it is only a breach of duty on the part of the trustees that entitles the court to intervene (apart from the

[14] e.g. *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272.

[15] e.g. *Racal Group Services Ltd v Ashmore* [1995] S.T.C. 1151.

[16] Inheritance Act 1984, s. 89. In fact, the actual distribution of the trust fund was consistent with such a provision.

[17] [2013] UKSC 26; [2013] 2 W.L.R. 1200, at [90].

[18] Ibid., [73]. Lord Walker, with whom with whom Lord Neuberger, Lady Hale, Lord Mance, Lord Clarke, Lord Sumption and Lord Carnwath agreed, gave the only judgment in the Supreme Court.

special case of powers of maintenance of minor beneficiaries, where the court was in the past more interventionist …). It is not enough to show that the trustees' deliberations have fallen short of the highest possible standards, or that the court would, on a surrender of discretion by the trustees, have acted in a different way. Apart from exceptional circumstances (such as an impasse reached by honest and reasonable trustees) only breach of fiduciary duty justifies judicial intervention."

Such a breach of duty may arise where the trustees fail to take expert advice, for example.[19] But if the trustees have taken advice and reasonably relied upon it, then the trustees should not, generally,[20] be thought to have committed a breach of duty. Instead, the focus should switch to the advisors who gave poor advice to the trustees. Claims in breach of contract and tort may well be available against professionals who have been negligent. In *Pitt v Holt,* both the Court of Appeal[21] and Supreme Court[22] seem to have been influenced by a desire to ensure that those responsible for the bad advice should, as a matter of general principle, have to pay for their mistakes. The advisors made the original mistake; trustees who reasonably follow that advice should not bear responsibility for that mistake.

Although the claim under *Re Hastings-Bass* was rejected, the court allowed the claim to have the settlement set aside under the doctrine of equitable mistake. In so doing, Lord Walker overturned the careful judgment of the Court of Appeal. Lloyd LJ, who gave the leading judgment in the Court of Appeal, may have been prepared to accept that the mistake was serious given the sums at issue;[23] but he refused to grant relief because, echoing the test of Millett J. in *Gibbon v Mitchell*, he held that the mistake did not relate "either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction".[24] Lloyd L.J. favoured a strict view of mistake, which would appear to make it very difficult to set aside a disposition simply because of unforeseen tax consequences. For better or worse, Lloyd L.J. would have preferred recovery to be available through claims against the insured negligent advisors, rather than the revenue.

Lord Walker, by contrast, was moved to allow the appeal on the ground of mistake.[25] It is difficult not to have sympathy for Mrs Pitt and such a result given the tragic facts of the case. Moreover, the judges may well have felt some embarrassment about the Court of Protection failing to spot the mistake and importance of the key provisions of the Inheritance Act 1984; as Lord Walker observed, "[t]hat court's apparent lack of awareness of the importance of section 89 of the Inheritance Tax Act 1984 is one of the most remarkable features of the whole sorry story".[26] But hard cases can make difficult law. By opening up the valve of rescission for mistake, it became possible to relieve the pressure placed upon parties by the Supreme Court's restrictive interpretation of the rule in *Re Hastings-Bass*, and simply to achieve the same aim by a different route. It may be thought that there is something of a

[19] Truste Act 2000, s. 5.
[20] Cf *Power Adhesives Ltd v Sweeney* [2017] EWHC 676 (Ch), discussed in Section III.A. below.
[21] [2011] EWCA Civ 197; [2012] Ch. 132.
[22] [2013] UKSC 26; [2013] 2 A.C. 108.
[23] Around £200,000 to £300,000 according the the first instance judge: see [2010] EWHC 45 (Ch); [2010] 1 W.L.R. 1199 [2] (Robert Engelhart Q.C.).
[24] [2011] EWCA Civ 197; [2012] Ch. 132, at [210].
[25] See Section III.B below.
[26] [2013] UKSC 26; [2013] 2 A.C. 108, at [90].

"whack-a-mole" problem in this area: where one avenue is shut down (*Hastings-Bass*), that just leads to other avenues opening up (such as rescission and, possibly, rectification). This brings the risk of doctrinal incoherence and inconsistency, and these risks must now be considered.

III TAX MISTAKES POST-PITT V HOLT

The full implications of the decision in *Pitt v Holt* are still to be worked out. We have had only a few years of case law dealing with the new approach signalled by the Supreme Court. However, the early signs are that the equitable jurisdiction to correct mistakes has undergone a profound change. It is important to consider the impact of *Pitt v Holt* upon each remedy in turn.

A. The rule in Re Hastings-Bass

Our starting point is the rule in *Re Hastings-Bass* itself. What effect did the decision in *Pitt v Holt* have upon this doctrine? The Supreme Court clearly sought to restrict relief under *Re Hastings-Bass*. One consequence of *Pitt v Holt* is that it is now up to beneficiaries to decide whether or not to bring a claim for relief; previously, most claims had been brought by trustees relying upon their own inadequate deliberation. But as Lord Walker said, "in general it would be inappropriate for trustees to take the initiative in commencing proceedings of this nature".[27]

Given that beneficiaries need to show that their trustees have committed a breach of duty, this avenue may well be unattractive. Where the trustee has reasonably sought and followed professional advice, it will generally be very difficult to establish any breach of duty. Indeed, it may be that taking professional advice will come to be recognised as an important defence to claims for breach of trust in its own right.[28] This is very different from the situation before *Pitt v Holt*, when trustees were often happy to admit to improper deliberation in order to set aside a disposition. Now that the rule in *Re Hastings-Bass* is of much narrower scope, it is difficult for trustees to take the same liberal attitude, since admitting to breach of duty may have serious repercussions.

It is therefore understandable why there has not been a wealth of cases dealing with the rule in *Re Hastings-Bass* following the narrowing of that doctrine in *Pitt v Holt.* But the few cases that there have been suggest that already the tight shackles imposed by the Supreme Court may be somewhat loosened by the lower courts. For example, in *Top Brands*

[27] [2013] UKSC 26; [2013] 2 A.C. 108, at [69], agreeing with Lloyd L.J. in the Court of Appeal: [2011] EWCA Civ 197; [2012] Ch. 132, at [130].

[28] For further discussion, see M. Ashdown, "Professional Advice" in P. Davies, S. Douglas and J. Goudkamp (eds) *Defences in Equity* (Oxford: Hart Publishing, 2018).

Ltd v Sharma,[29] the court insisted that simply pointing to the presence of advice would not in itself be enough. This is unsurprising: in *Pitt v Holt*, Lord Walker held that the professional advice must be obtained "conscientiously", "apparently competent" and reasonably followed.[30] This was developed in *Top Brands* by H.H.J. Simon Barker Q.C., when considering the liability of a liquidator:[31]

> "a liquidator will not have taken proper advice where the instructions to the adviser were flawed (partial or incorrect) by reason of a failure on the part of the liquidator to identify relevant considerations, or a failure to use all proper care and diligence in obtaining information relevant to the instructions given, or a failure to use all proper care and diligence in obtaining information relevant to the advice obtained."

This appears to put the onus on the liquidator, or trustee, to identify the relevant considerations. This may place weighty demands upon a trustee who seeks advice exactly because he or she is not well-equipped to determine what the relevant considerations are. That would be inappropriate. Perhaps the better reading of this passage in *Top Brands* is simply that trustees cannot be protected where their advisors do not provide advice precisely because they have not been asked to do so.[32] But where the request for advice is framed in reasonably wide and general terms, then it should be very hard for a beneficiary to be able to establish that the trustee committed a breach of duty in failing to ask about particular considerations.

A more difficult case to explain, perhaps, is the recent decision of Chief Master Marsh in *Power Adhesives Ltd v Sweeney*.[33] The claimant company was concerned that it owed a debt of £490,000 to a terminally ill director, Mr Sweeney. The directors ultimately decided to pass resolutions to swap the debt for shares, and allotted 490,000 £1 shares to Sweeney. Rather obviously, this had the effect of transferring a very significant proportion of the claimant's substantial value to Sweeney, and greatly diluted the value of the interests of the other shareholders. Remarkably, this does not appear to have been appreciated either by the professional advisors to the company, or by the directors themselves. Moreover, the transaction had created an unforeseen potential for tax charges to Sweeney's estate both as to inheritance tax and capital gains tax.

The directors sought relief under the rule in *Re Hastings-Bass*.[34] Chief Master Marsh accepted that the directors did not understand the effect of the transaction they approved, and would not have passed the resolution if they had fully understood the consequences of doing so. The purpose was solely to accommodate the perceived (but perhaps imaginary) problem that Sweeney's loan would become immediately payable on his death. However, the directors needed to establish a breach of duty for the rule in *Re Hastings-Bass* to apply. By

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[29] [2014] EWHC 2753 (Ch); [2015] 2 All E.R. 581 (HHJ Simon Barker QC): not considered on appeal: [2015] EWCA Civ 1140; [2017] 1 All ER 854.

[30] [2013] UKSC 26; [2013] 2 A.C. 108, at [80].

[31] [2014] EWHC 2753 (Ch); [2015] 2 All E.R. 581, at [33].

[32] See too M. Ashdown, 'Professional Advice' in P. Davies, S. Douglas and J. Goudkamp (eds) *Defences in Equity* (Oxford: Hart, 2018).

[33] [2017] EWHC 676 (Ch).

[34] This rule clearly applies to directors: see eg *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch) [165]-[179] (John Randall Q.C.).

seeking professional advice, it would appear that the directors fulfilled their duties rather than breached them. Chief Master Marsh was conscious of this argument,[35] but nevertheless rejected it since he was unconvinced that the directors did enough to fulfil their fiduciary duties by instructing and following their professional advisors. The judge observed that "the Claimant is a substantial trading concern and the board of directors possessed a considerable degree of experience and sophistication",[36] and ultimately concluded that[37]

> "… it is not the mere involvement of professional advisors that is sufficient to prevent reliance upon the *Hastings-Bass* principle. In this case, even if, which is not alleged in the evidence, the directors were entitled to advice from [the firm of advisors] as to the way in which the transaction was to operate, in a real sense the decision to issue the B shares was that of the directors. The seeking of professional advice by the directors, which was mainly focused on the overall family tax planning, does not lead to similar consequences to those in *Futter* and *Pitt*. Some attempt to obtain advice was made but to my mind it cannot be said the directors used all proper care and diligence in the manner in which [the firm of advisors] was involved.
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> It is not entirely obvious where the boundary will lie where professional advisers are involved but (arguably) fail to spot a point arising from the structure of the transaction. I am satisfied, however, on the facts of this case that there was a breach of their fiduciary duties by the directors who did not intend the transaction to dilute the value of other shares and transfer a significant proportion of the value the Claimant to Peter Sweeney. The directors did not fulfil their fiduciary duties because, principally, they failed to take into account relevant considerations such as the massive dilution of the value of the ordinary shares and the potentially very serious tax consequences for the shareholders that would flow from the transaction. These were matters within their remit and they could reasonably have been expected to have spotted the obvious mismatch between the value of the existing share capital and the new shares."

This is a very generous approach, reminiscent of the "get-out-gaol-free card"[38] provided by the rule in *Hastings-Bass* prior to *Pitt v Holt*. Chief Master Marsh is no doubt right to note that it is difficult to know exactly where the line should be drawn, and of course it is true that it is 'for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts'.[39] Nevertheless, the directors sought apparently competent advice and acted upon it. This is reminiscent of *Futter v Futter* and *Pitt v Holt*. The advisors in *Power Adhesives* must have breathed a huge sigh of relief in being let off the hook by the decision of the Chief Master.

Perhaps in *Power Adhesives* the mistake was so obvious that no reasonable director could have followed that advice without seeking a second opinion or following up on the

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[35] [2017] EWHC 676, at [24].
[36] Ibid., at [26].
[37] Ibid., at [27]-[28].
[38] Lord Neuberger, "Aspects of the law of mistake: *Re Hastings-Bass*" (2009) 15(4) T.&T. 189, 192
[39] *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All E.R. 705 (Ch D), at 717 (Robert Walker J.).

particular issue raised. If so, it is a rare and unusual case and should be narrowly confined. It is to be hoped that *Power Adhesives* does not mark the immediate expansion of *Re Hastings-Bass*. After all, in *Futter v Futter* one of the trustees was a solicitor in the firm who provided the negligent tax advice, and yet was still entitled to rely upon the advice of a junior solicitor under his supervision. That seems appropriate, and trustees who follow apparently competent advice should not generally be found to be in breach of trust. As Lord Walker pointed out, "it would be contrary to principle and authority to impose a form of strict liability on trustees who conscientiously obtain and follow, in making a decision which is within the scope of their powers, apparently competent professional advice which turns out to be wrong".[40]

It may be that a desire to relax the requirements of the *Hastings-Bass* doctrine can be explained by the need to compete with other jurisdictions which are more generous when granting relief under *Re Hastings-Bass*.[41] For example, following *Pitt v Holt*, Jersey soon introduced new articles 47B-47J of the Trusts (Jersey) Law 1984 which make it clear that a "lack of care or other fault" on the part of the fiduciary is not a pre-requisite to relief.[42] Nevertheless, the principled approach taken by Lord Walker in *Pitt v Holt* should be supported.[43] If greater protection needs to be provided to beneficiaries (and trustees) then this may more appropriately be achieved through other avenues, such as rescission and rectification, which must now be considered.

B. Rescission for equitable mistake

The power to set aside a transaction on the ground of mistake is a long-standing feature of the equitable jurisdiction. In the old authority of *Ogilvie v Littleboy*, Lindley L.J. held that this jurisdiction was engaged when there was a 'serious' mistake:[44]

> "In the absence of all circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him".

This was endorsed by Lord Walker in *Pitt v Holt*, who framed the "unjust" aspect of the test in terms of "unconscionableness", which was to be objectively assessed on the basis of all the facts of the case. His Lordship said:[45]

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[40] [2013] UKSC 26; [2013] 2 A.C. 108, at [80].

[41] See eg S Kempster, "Who said you can't legislate for mistakes? - International aspects of "the rule in Hastings-Bass"" [2016] P.C.B. 248.

[42] See too s47A of Trustee Act 1975 (Bermuda)

[43] Indeed, trust beneficiaries already receive more favourable treatment than an absolutely entitled legal owner of property, even under the narrower approach of *Pitt v Holt*, and this may itself by considered to be controversial since other taxpayers are not so fortunate: M. Bhandari, "Undoing Transactions for Tax Purposes: The *Hastings-Bass* Principle" in S. Elliott, B. Häcker and C. Mitchell (eds) *Restitution of Overpaid Tax* (Oxford: Hart, 2013).

[44] (1897) 13 T.L.R. 399; this decision was not departed from by the House of Lords: (1899) 15 T.L.R. 294.

[45] [2013] UKSC 26; [2013] 2 A.C. 108, at [128]

> "The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), 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. The court may and must form a judgment about the justice of the case."

Significantly, Lord Walker departed from the notorious decision in *Gibbon v Mitchell* that the mistake had to be "as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it".[46] As noted earlier, the *Gibbon v Mitchell* test had been the favoured approach to rescission claims in the two decades preceding *Pitt v H*olt. The need to show that the mistake related to the "effects" of a declaration had made it difficult to have tax planning errors set aside. Indeed, when Lord Millett's effects/consequences distinction was applied by the Court of Appeal in *Pitt v Holt*, the claim failed: the Court took the view that the mistake related to the financial consequences, rather than the effect of the transaction.

By breaking free of the shackles of the effect/consequence distinction, and moving to an approach that focussed upon the 'seriousness' of the mistake, it was possible for the Supreme Court to grant equitable relief for a mistake relating to the fiscal consequences of a disposition. The test for mistake therefore appears to be, in at least some respects, wider than it was previously understood to be. This has also raised the difficult question of whether the test for mistake should be the same as that used generally in the common law of unjust enrichment. Space precludes a full examination of the relationship with the common law of unjust enrichment, but it is worth noting that although a simple test of "causative mistake" appears to have been largely accepted in unjust enrichment[47] – without any further restrictions of "seriousness" or "unconscionableness" – some powerful dissent has been voiced, particularly in the area of gifts.[48]

In any event, it is important to determine the scope of the equitable jurisdiction following *Pitt v Holt*. The decision of the Supreme Court could perhaps suggest that the effect/consequence distinction may continue to have some evidential value. As Lord Walker said:[49]

> "I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied

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[46] [1990] 1 W.L.R. 1304, 1309.

[47] At least in so far as how the test has been articulated; none of the major cases have had to deal with anything other than a serious mistake. For further discussion see C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* 9th ed. (London: Sweet & Maxwell, 2016) [9-128]-[9-151].

[48] See e.g. *Deutsche Morgan Grenfell v Inland Revenue* [2006] UKHL 49 , [2007] 1 A.C. 558, at [87], cited in *Pitt* at [200]. See further Tang Hang Wu, "Restitution for mistaken gifts" (2004) 20 J.C.L. 1; A. Tettenborn, *The Law of Restitution in England and Ireland,* 3rd edn (London: Cavendish, 2002) ch. 3; S. Hedley, *A Critical Introduction to Restitution* (Oxford: OUP, 2001), p.111.

[49] [2013] UKSC 26; [2013] 2 A.C. 108, at [122]

> 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."

This clearly opens the door to mistakes relating to tax being sufficient for relief if "basic to the transaction". In *Pitt v Holt* the mistake appears to have been considered to be sufficiently basic and serious for rescission to be granted.

It is not clear whether rescission on the basis of mistake would also have been available in *Futter v Futter.* In that case, trustees of discretionary trusts exercised powers of advancement on the understanding that, although this would result in a liability to capital gains tax,[50] those gains could be absorbed by allowable losses. This was in accordance with professional advice, but overlooked the effect of a statutory provision which provided that such gains could not be absorbed.[51] A significant capital gains tax liability therefore arose both for Mr Futter, who had set up the trust, and his children, as beneficiaries of the exercise of the power of advancement. The trustees sought relief under the rule in *Hastings-Bass*, but not mistake – presumably because the mistake was considered to be one of "consequences" rather than "effect" and therefore not a relevant mistake under the test of *Gibbon v Mitchell*. The Supreme Court declined to permit the trustees to raise mistake when it had not been pleaded in the courts below.[52] Nevertheless, Lord Walker did say:[53]

> "Had mistake been raised in *Futter* there would have been an issue of some importance as to whether the Court should assist in extricating claimants from a tax-avoidance scheme which had gone wrong. The scheme adopted by Mr Futter was by no means at the extreme of artificiality (compare for instance, that in *Abacus Trust Co (Isle of Man) v NSPCC* [2001] STC 1344) but it was hardly an exercise in good citizenship. 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. Since the seminal decision of the House of Lords in *WT Ramsay Ltd v IRC* [1982] AC 300 there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures. But it is unnecessary to consider that further on these appeals."

This is an intriguing passage. It raises the prospect that a claim based on mistake in *Futter v Futter* would not have succeeded. But this is not easy to explain. The idea that tax avoidance is a social evil has been described as "startling" by the editors of *Lewin*.[54] Indeed, courts have regularly approved arrangements under the Variation of Trusts Act 1958 designed to avoid tax;[55] this has clearly not been viewed as a "social evil" that must be prevented. This

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[50] Taxation of Chargeable Gains Act 1992, s 87.
[51] Ibid., s 2(4).
[52] [2013] UKSC 26; [2013] 2 A.C. 108, at [135]
[53] Ibid., [135].
[54] J. Mowbray et al (eds), *Lewin on Trusts* (19th ed, Sweet & Maxwell, London 2014) [4-079].
[55] See eg *Re Weston's Settlements* [1969] 1 Ch. 223, at 246 (Harman L.J.): "this court is not the watch-dog of the Inland Revenue, and it is well known that much and perhaps the main use which has been made of the Act has

analogy was pressed in argument in the Supreme Court, but Lord Walker wondered in the course of questioning whether the time had come to depart from those cases.[56] Robert Ham QC, counsel for the appellants in *Futter*, agreed that that might be right, but has later confessed to regretting that admission.[57] After all, distinguishing between artificial tax avoidance and sensible tax mitigation can be highly problematic. Lord Walker said that the scheme in *Futter v Futter* was not "at the extreme", but it is difficult to be at all confident about how any particular scheme will be viewed by any individual judge.

That the law is difficult at the boundaries is not unique to this area of law, and some commentators have thought that artificial tax avoidance versus legitimate tax mitigation could be a workable distinction.[58] However, this seems somewhat optimistic. Parliament has recently legislated to create a general anti-abuse rule,[59] which can be used to tackle unacceptable tax avoidance, and it is not entirely satisfactory for the courts to interfere further after Parliament has decided where to draw the line. It is suggested that courts are likely to shrink away from preventing rescission on the nebulous ground of public policy identified by Lord Walker in *Pitt v Holt*. If such an approach is to be enforced, further elucidation from the appellate courts should be required. In *van der Merwe v Goldman*,[60] the revenue asked to leapfrog the Court of Appeal to appeal directly to the Supreme Court on this issue. Morgan J. said that he could "well understand why HMRC wish to have clarification of the types of case in which this possible approach might operate".[61] Nevertheless, he refused the application, mainly because the facts of that case were not considered suitable for such an appeal, but the judge also thought full consideration of the Court of Appeal would be helpful. This sensible approach should be endorsed, and even at the appellate level it is suggested that the courts should shy away from imposing a vague public policy bar that depends upon the degree of artificiality of a scheme designed to reduce tax liabilities.

Post-*Pitt v Holt,* the better view would appear to be encapsulated in the observation of Proudman J. that "[t]here is no justification for a different approach to mistakes about tax and other types of mistake".[62] Nevertheless, the mistake does need to be serious, such that it would be unconscionable for rescission not to be ordered. The meaning and effect of "unconscionableness" is unclear. Wherever the mistake is sufficiently serious, it would appear that rescission is generally available, and it is perhaps only in extreme cases that "unconscionability" will act as a brake and prevent rescission. It should be noted that Lord Walker used the language of "unconscionableness" interchangeably with that of "justice" and "unfairness",[63] so the test of gravity appears to turn simply upon an assessment of fairness determined through the exercise of judicial discretion. Lord Walker rejected the suggestion

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been to produce schemes of variation of English trusts which will have the effect of reducing liabilities either on the capital of the trusts or the income of the beneficiaries."

[56] R. Ham. "The rule in Hastings-Bass after *Pitt v Holt* and *Futter v Futter*" (2016) 22 T&T 971, 979.

[57] Ibid., at 981.

[58] M. Yip, 'Further Reflections on the *Hastings-Bass* Rule, Rescission for Mistake and Rectification' (2014) 8 Journal of Equity 46.

[59] Finance Act 2013, Part 5 and Schedule 43.

[60] [2016] EWHC 926 (Ch).

[61] Ibid., at [9].

[62] *Lobler v HMRC* [2015] UKUT 152 (TCC); [2015] S.T.C. 1893, at [68].

[63] Eg [2013] UKSC 26; [2013] 2 A.C. 108, at [126].

that this creates a borderline which is "susceptible to judicial manipulation",[64] on the ground that the court ought to form a view about the merits of the claim:[65]

> "[The court] must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), 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. The court may and must form a judgment about the justice of the case."

It is not likely that courts will enthusiastically refuse relief on the basis of such uncertain criteria. Yet perhaps where the mistake was serious but of an unpalatable nature,[66] "unconscionableness" could be invoked to refuse equitable relief. Similarly, the relationship between risk-taking and mistake remains unclear following *Pitt v Holt*; although it is clear that negligence does not negate a claim in mistake,[67] where the fiduciary can be taken to have deliberately run the risk of being wrong relief may be refused, and perhaps in equity this can be justified by reference to unconscionability.[68]

The major restriction on relief following *Pitt v Holt* appeared initially to reside within the concept of "seriousness". In principle, it is not unreasonable to impose some qualification upon relief awarded on the basis of a causative mistake. Yet Langlois and Cloherty have suggested that "if the disponor can show that, but for the mistake he *would* not have entered into the disposition in question, it is difficult to see on what basis his mistake could ever reasonably be regarded as insufficiently "serious" to justify an order for rescission".[69] This is similar to the causative mistake approach generally adopted in the common law of unjust enrichment, which appears to be based on the premise that if the donor has made a disposition under a causative mistake, then his donative intention is vitiated, and therefore the recipient's enrichment is unjust. But this is unduly claimant-friendly: it is not clear that *any* causative mistake really leads to a vitiation of intention,[70] nor that it is unjust for the recipient to retain the gift when that recipient was unaware of any "vitiation"; the law should strive to uphold completed transactions and protect the important principle of security of receipt. For example, if a person donates money to a charity, but contends that he would not have done so had he known that the charity pays fundraisers rather than rely upon

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[64] This suggestion was made in C Mitchell, P Mitchell and S Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment*, 8th ed (2011), [9.41], as regards the difficulties of distinguishing between tacit assumption and ignorance.

[65] [2013] UKSC 26; [2013] 2 A.C. 108, [128].

[66] For example, a mistake laced with racist or homophobic undertones, such as mistakenly making a gift believing the recipient not to be gay.

[67] *Kelly v Solari* (1841) 9 M&W 45.

[68] Risk-taking appears to bar restitution in unjust enrichment: see eg *Deutsche Morgan Grenfell Plc v IRC* [2007] 1 A.C. 558, [24-30]; P. Davies, "Risk in Unjust Enrichment" [2012] RLR 57. Compare F. Wilmot-Smith, "Replacing Risk-Taking Reasoning" (2011) 127 LQR 60. For further discussion of risk-taking in the equitable context, see *van der Merwe v Goldman* [2016] EWHC 790 (Ch); [2016] 4 W.L.R. 71 [47].

[69] *Langlois and Cloherty*, ''Playing the 'Get Out of Jail Free' Card: Mistake in the Law of Trusts'' [2010] J.G.L.R 10 [46]. See too *Clarkson v Barclays Private Bank & Trust (Isle of Man) Ltd* [2007] W.T.L.R. 1703 at [41] (Deemster Kerruish).

[70] Tang Hang Wu, "Restitution for mistaken gifts" (2004) 20 JCL 1 points out that donors give away property for a variety of reasons.

volunteers, the "mistake" in question is causative, but it is suggested that it should be considered to be insufficiently serious to justify relief for the mistake. Similarly, it is surely unsatisfactory for mistakes concerning racist factors to ground a claim for recovery, even if "but for" such a mistake a disposition would not have been made.

Nevertheless, "seriousness" does not seem to have proved much of a bar to equitable relief on the ground of mistake post-*Pitt v Holt*. Indeed, it would appear that rescission for mistake has now encompassed all the cases that were previously decided under the rule in *Re Hastings-Bass* prior to *Pitt v Holt*.[71] A string of cases suggest that a mistake can be sufficiently serious simply because it leads to a large and avoidable tax bill;[72] these were the cases that readily fell within the realm of the rule in *Re Hastings-Bass* before its curtailment in the Supreme Court. In *Lobler v HMRC* Proudman J. cited with approval the observation of Jacob L.J. in *HMRC v Proctor & Gamble UK*[73] that "you do not have to know where the precise line is to decide whether something is one side or the other".[74] The courts appear to have great leeway in deciding whether a mistake is sufficiently serious for rescission to be granted, and tend to find that the mistake is serious when a large tax bill is at issue. These are naturally the cases that are presented to the court: small tax bills are not worth the application for equitable relief.

The breadth of rescission for mistake has drawn some of the venom from the decision of the Supreme Court in *Pitt v Holt*. Being able to invoke mistake to unwind dispositions has spared advisors from a spate of professional negligence claims that would otherwise have been attractive given the restrictive approach taken to the rule in *Re Hastings-Bass*. Indeed, the ability to set aside the transaction under a liberal doctrine of rescission is now viewed as the normal means by which affected parties should mitigate their losses.[75] This further shields professional advisors from liability, as affected parties will be accused of failing to mitigate their losses should they proceed directly with an action for professional negligence without first attempting to have the transaction set aside. Yet this means that the revenue still loses out. It is unclear whether this is satisfactory. After all, it is very easy for a claim in mistake to get off the ground, yet difficult for the revenue (or other defendant) to establish a defence or bar to rescission. As a result, the revenue is not often inclined to oppose equitable relief, given the risk of having to bear the costs. The liberalisation of rescission clearly reduces the impact that the restriction on the rule in *Re Hastings-Bass* might otherwise have had. Indeed, a more liberal approach also appears now to be taken to rectification, such that trustees who make mistakes may even be better protected by the law after *Pitt v Holt* than they were before – an outcome which did not seem likely in the immediate aftermath of the Supreme Court's decision.

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[71] Cf *Freedman v Freedman* [2015] EWHC 1457 (Ch); [2015] W.T.L.R. 1187, at [20].

[72] *Van Der Merwe v Goldman* [2016] EWHC 790 (Ch); [2016] 4 W.L.R. 71; *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch); [2016] W.T.L.R. 943; *Freedman v Freedman* [2015] EWHC 1457 (Ch); [2015] W.T.L.R. 1187; *Kennedy v Kennedy* [2014] EWHC 4129 (Ch); [2015] B.T.C. 2.

[73] [2009] EWCA Civ 407; [2009] S.T.C. 1990, at [32]

[74] *Lobler v HMRC* [2015] UKUT 152 (TCC); [2015] S.T.C. 1893, at [43].

[75] *Horsfall v Haywards* [2000] WTLR 29.

C. Rectification

Perhaps the most interesting development in the few years since *Pitt v Holt* has been the use of rectification in cases involving tax planning errors. This might be thought surprising, given that rectification was not pleaded in *Pitt v Holt*. Indeed, Lord Walker indicated that rectification was a very different remedy to rescission and perhaps implied that rectification would have failed on the facts of the case.[76] Yet by curtailing the rule in *Re Hastings-Bass*, the decision of the Supreme Court may well have pushed a series of tax mistake claims down the rectification route.

The remedy of rectification has traditionally been available in cases where a party, when executing a trust deed, has made some mistake in the recording of its terms such that it does not say or mean what was intended. As Lord Walker said in *Pitt v Holt*: "Rectification is a closely guarded remedy, strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it."[77] A common example is what might be called a "content error", where a word, phrase or entire clause is accidentally included in, or omitted from, the final trust deed. Take the example of *Lawie v Lawie*[78] where a settlor had instructed solicitors to draft a trust deed that made both the settlor and his grandchildren beneficiaries. The solicitor failed to follow these instructions and the deed named only the grandchildren as beneficiaries. The settlor, when executing the deed, failed to spot this change. This led to a mistake as to the terms: the settlor executed the trust deed in the false belief that it contained particular terms (i.e. a term naming himself and his grandchildren beneficiaries), when in fact it contained different terms (i.e. the grandchildren were the sole beneficiaries).

Mistakes as to terms cannot readily be cured by construction.[79] This is true even under an extreme version of the "contextual approach" to interpretation favoured by Lord Hoffmann, which permits a court to conclude that the parties have "used the wrong words" in their trust deed.[80] The settlor in *Lawie v Lawie*, by executing the final deed, intended that document to supersede all other earlier drafts and statements, and become the sole source of the terms of the trust. It would be contrary to this aspect of the settlor's intention to introduce parol evidence, found in his instructions to the solicitor, as evidence of the "true" terms of the trust. This explains one of the functions of rectification. By showing that the settlor had a false belief about the terms contained in the final trust deed, his intention that

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[76] *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108, at [131].

[77] ibid.

[78] [2012] EWHC 2940. See also *Re Farepak Food and Gifts Ltd* [2006] EWHC 3272, *Industrial Acoustics Co Ltd v Crowhurst* [2012] Pens. L.R. 371 and *A v D* [2017] EWHC 2222.

[79] Cf. A. Burrows, "Construction and Rectification" in E. Peel & A. Burrows (eds), *Contract Terms* (Oxford: OUP, 2007). For further discussion in the contractual context see P. Davies, "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75 C.L.J. 62. See recently *Murray Holdings Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch) (Mann J).

[80] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 913. Recent cases suggest a departure from Lord Hoffmann's broad approach to interpretation, favouring a more literal approach which places greater emphasis upon the clear language chosen by the parties: *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619; Lord Sumption, "A Question of Taste: The Supreme Court and the Interpretation of Contracts" (Harris Society Annual Lecture, 8 May 2017) https://www.supremecourt.uk/docs/speech-170508.pdf.

that deed be the sole source of terms of the trust can be set aside.[81] This then opens the door to the admission of parol statements, such as earlier drafts of the trust deed and instructions to the solicitor, in order to show "precisely the form to which the deed ought to be brought."[82]

Tax errors are of a different kind to those typically corrected by rectification. Take the facts of *Pitt v Holt* itself. Mrs Pitt had received poor professional advice when declaring a discretionary trust for her husband and her children. Had the trust been structured in a particular way, which allocated half of the settled property for Mr Pitt's benefit during his lifetime, it would have avoided the substantial inheritance tax charge that became payable. Whilst there was a mistake in the case, it was not a mistake as to the terms of the trust. No words or clauses were accidentally included in, or omitted from, the final draft of Mrs Pitt's trust deed. There was no disparity between the trust Mrs Pitt had been advised to declare, and the terms found in the trust that was actually declared. The terms of the trust said and meant precisely what Mrs Pitt intended. Her mistake related to her reasons for adopting those terms: she adopted them in the false belief that they would result in a tax saving. This is sometimes called a "motivational error", in the sense that the terms are deliberately adopted, but the party's motives for adopting them are flawed. This is far removed the traditional rectification claim.

Attempts to correct such tax errors by rectification failed in a number of decisions pre-*Pitt v Holt*. The leading case is *Racal Group Services v Ashmore Ltd,*[83] where the claimant had covenanted to make periodic payments to a charity. It was hoped that these payments would qualify for tax credit relief. Under the relevant statute, for such payments to benefit from the tax credit scheme they needed to be "payable over a period which may exceed three years".[84] However, when the deed had been drafted, the dates upon which the payments fell due all occurred within a three year period. The claim to rectify the deed by adding new dates for payment failed. Crucially, there was no was no accidental inclusion or omission of a term in the final deed, as the evidence showed that the original dates had been selected after some deliberation. The claimant's mistake was a motivational one, as it executed the deed in the false belief that the terms would qualify under the under the statutory scheme. Peter Gibson L.J. said:[85]

> "the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective. The specific intention of the grantor as to how the objective was to be achieved must be shown if the court is to order rectification."

Racal Group Services Ltd v Ashmore was followed in the case of *Allnutt v Wilding,*[86] where a settlor, who had received negligent advice from a solicitor, deliberately established a discretionary trust in the false belief that it would lead to a reduction in tax liability. Mummery

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[81] R. Stevens, "Objectivity, Mistake and the Parol Evidence Rule" in E. Peel & A. Burrows (eds), *Contract Terms* (Oxford: OUP, 2007).
[82] *Fowler v Fowler* (1859) 4 De G & J. 250, 265; 45 ER 97, at 103.
[83] [1995] S.T.C. 1151.
[84] Income and Corporation Taxes Act 1988, s.660(3).
[85] [1995] S.T.C. 1151, at 1158.
[86] [2007] EWCA Civ 412; [2007] B.T.C. 8003.

L.J. rejected the claim for rectification, since he was "unable to see any mistake by the settlor in the recording of his intentions in the settlement".[87]

The claimants in *Racal* and *Allnutt* were not asking the court to give effect to the intended terms of the trust, but to write, with the benefit of hindsight, a new trust for them on terms that would achieve their fiscal objectives. This is a function that has always been denied to rectification, as Park J. made clear in *Tankel v Tankel*:[88]

> "It is not enough for me to consider, as I do, that it would have been better if the settlor had executed a document which was from the outset in the form to which I am now requested to change it. Nor is it enough for me to conclude that if the settlor's intention had been drawn to the actual terms of the document which was executed, and he had been asked whether he would rather have them changed, he would have said that he would."

This reflects Lopes L.J.'s statement, in the older case of *Tucker v Bennett*, that the Court '… must look at the intention of the parties at the time when the deed was executed, and not what would have been their intent if … the result of what they did had been present in their minds.'[89]

Notwithstanding these clear statements of principle, there has been an increase in rectification claims being brought for tax errors in the past few years. We suggest that this is attributable, in part, to the decision in *Pitt v Holt*. An example is the recent case of *Prowting 1968 Trustee Ltd v Amos-Yeo*[90] where trustees, who held company shares on a discretionary trust, made an appointment of 115,000 shares to a beneficiary. The purpose of the transaction was entrepreneurs' tax relief, which was available if the shares represented at least 5% of the total value of a company. However, the advisors, in reaching the conclusion that 115,000 shares represented 5% of the company's value, had overlooked the fact that different classes of shares had different values. As such, the amount of shares appointed only represented 4.97% of the company's value and the beneficiary was denied the intended tax relief. Prior to 2013 such facts would have disclosed a straightforward claim under the rule in *Re Hastings-Bass*: by overlooking the different values of the share classes, the trustees failed to take into account relevant information, which resulted in a tax charge. However, with this route now effectively blocked, it is not surprising that the claimants structured their claim differently. The claim was for rectification. The claimants argued, successfully, that there was a mistake in the deed of appointment as the trustees really intended to appoint 150,000 shares (which was enough to satisfy the 5% threshold). Master Clark concluded:[91]

> "In my judgment the evidence sufficiently establishes that the parties' intention was that the defendants should receive from the 1968 settlement enough shares (when

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[87] Ibid, at [19]. See also *Racal Group Services Ltd v Ashmore* [1995] S.T.C. 1151, *Kennedy v Kennedy* [2014] EWHC 4129 and *W G Mitchell (Gleneagles) Ltd v Jemstock One Ltd* [2006] EWHC 3644.
[88] [1999] 1 FLR 676, at 678.
[89] (1887) 38 Ch. D 1, at 16.
[90] [2015] EWHC 2480; [2015] B.T.C. 33. See also *Juliar v Canada (Attorney General)* (2000) 50 OR (3d) 728, although cf. *Canada (Attorney General) v Fairmont Hotels Inc* [2016] SCC 56.
[91] [2015] EWHC 2480; [2015] B.T.C. 33, at [36].

combined with the shares they received from the 1987 settlement) to satisfy the [entrepreneur's relief] requirements."

With respect to Master Clark, this misrepresents the facts in the case. There was no evidence that the trustees really intended the figure of "150,000 shares" to be included in the deed of appointment; nor was there any evidence that the figure actually contained in the final deed, "115,000 shares", was included accidentally. Indeed, the figure of "115,000" was adopted after much deliberation by the trustees. It would be more accurate to say that their mistake related to their motives for adopting that figure, as they held a false belief that it would satisfy the 5% threshold. This is far removed from the classic rectification claim.

A similar case is *RBC Trustees v Stubbs*.[92] A family settlement conferred beneficial interests on the settlor's children and their spouses. The trust stipulated that the children enjoyed interests in possession, which meant that they benefited from an exemption from inheritance tax.[93] Owing to a number of divorces, the trustees exercised a power to resettle the entire fund on the settlor's family. They adopted the same type of trust structure, with the new beneficiaries also enjoying interests in possession. However, the trustees' solicitors had overlooked statutory changes[94] which had abolished the exemption under the Inheritance Tax Act, which meant that the trust became liable to a substantial tax charge. Had the professional advisors been aware of this, they would have advised a different kind of resettlement which would have avoided the tax charge. Again, these facts would have disclosed a clear *Re Hastings-Bass* claim prior to 2013, as the trustees had failed to take into account relevant information (namely, important statutory changes to inheritance tax). Instead, they brought their claim as one of rectification. As in *Prowting 1968*, the claim succeeded, notwithstanding the fact that the relevant terms had been deliberately included in the deed.

The closing down of the *Re Hastings-Bass* escape route might explain why tax mistakes are now being pleaded as rectification claims. This does not, however, explain why they are succeeding. In both *Prowting 1968* and *RBC Trustees*, there was no mistake as to the terms of the deeds of appointment; in each case the deeds said and meant precisely what the trustees had intended. By rectifying the trust deed in each case, the court was re-writing, with the benefit of hindsight, a better settlement for the parties, which achieved their fiscal motives. As McInnes recently noted, whatever this doctrine is, it is not rectification.[95] It would be more accurate to describe the remedy in these cases as a form of variation, where the parties to the trust ask the court to change the terms of the trust, with retrospective effect, so that the fiscal motives of the parties are achieved.

The attraction of this form of rectification is obvious. Although rescission and, to a limited extent, the rule in *Re Hastings-Bass*, offer relief against tax planning errors, they do so by setting aside the trust. This may be an effective remedy in cases where the mistake is discovered quickly, and the parties can start again. In other cases the ability to have the trust

[92] [2017] EWHC 180 (Ch)
[93] Under the Inheritance Tax Act 1984, s. 18.
[94] Specifically, the extention of the 'relevant property' regime under the Finance Act 2006.
[95] M. McInnes, 'Rectification, unjust enrichment, and taxes in the Supreme Court of Canada' (2017) 133 L.Q.R. 363, 365.

set aside will be of little use. If the mistake is discovered several years after the declaration of trust, then the settlor may be unable to achieve the intended tax saving simply by declaring a new trust.[96] If the settlor has died (as will be the case where the trust is declared by will), then the setting aside of the trust will cause the trust property to fall into the settlor's residue, which is unlikely to benefit the intended beneficiary or achieve the intended tax saving. In these cases the setting aside of the trust is unlikely to assist the parties. A better remedy is one that retrospectively varies the trust, where the court re-writes its terms so that they achieve the desired tax saving.

Whilst one can see the attraction, from a settlor's perspective, of applying for variation by rectification, what is less clear is why courts have been willing to grant it. By varying the terms of the document in cases such as *Prowting 1968* and *RBC Trustees v Stubbs*, the courts have strayed far from the doctrinal basis of rectification. This is not necessarily an unwelcome development. The power to retrospectively vary exists in some jurisdictions,[97] and if a potential settlor knows that something similar might be achieved under an extremely liberal doctrine of rectification, that does make England an attractive jurisdiction in which to settle property. However, this development does raise a number of potential difficulties. For one, courts must consider the relationship between rectification and the statutory power to vary a trust.[98] Statutory variation, unlike rectification, does not operate retrospectively. Further, statutory variation is available on a different basis, as it requires beneficiaries who are of full age and capacity to consent to any proposed variation of the trust.[99] Rectification, by contrast, focuses on the intention of the party executing the document, whether that be a settlor or a trustee exercising a power. At some point the courts must ask whether an expansion of the jurisdiction to vary a trust is better left to Parliament.

A further difficulty raised by recent developments in rectification is the thorny issue of tax avoidance. As we saw in the above discussion of rescission, the scope of Lord Walker's public policy rule, that in "some cases of artificial tax avoidance the court might think it right to refuse relief",[100] is difficult to determine. Rectification is not well placed to tackle this problem. In the traditional rectification claim, where a party can show a literal disparity between, for instance, a draft trust deed and the final trust deed, the court's discretionary function is quite limited: so long as the party can show that the disparity is due to a mistake, not a deliberate choice, then absent any specific bar to rectification[101], the claim ought to succeed. Courts have not been in the habit of evaluating the seriousness of the mistake, and it makes little difference whether the claim relates to a misplaced comma, or an entire series

[96] In *RBC Trustees v Stubbs* [2017] EWHC 180 (Ch) a change in the law, introduced by the Finance Act 2006, meant that the settlor was not able to declare a new 'interest in possession' trust that was exempt from Inheritance Tax. As a result, setting aside the old declaration, and asking the settlor to try again, would have been of little use to him.

[97] Section 416 of the Uniform Trust Code, enacted by the majority of US states, provides a power to retrospectively vary the terms of the trust in order "to achieve the settlor's tax objectives".

[98] Under the Variation of Trusts Act 1958.

[99] The jurisdiction to vary interests for underage beneficiaries, or those without capacity, is based upon the proposed variation being for the "benefit" of the beneficiary. See Variation of Trusts Act 1958, s. 1(1)(a)-(c).

[100] [2013] UKSC 26; [2013] 2 A.C. 108, [135].

[101] Such as detriment to a third party: see D Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake*, 2nd ed. (London: Sweet and Maxwell, 2015) ch 6.

of misplaced clauses.[102] The only relevant question is whether, in correcting the mistake, the court is giving effect to the intention of the party who executed the document. By contrast, in tax mistake cases, where courts are being asked to vary the terms of the trust, courts do need to evaluate the seriousness of the mistake. There is a difference between, on the one hand, a catastrophic and easily avoidable tax planning error, and, on the other hand, the party who discovers, with the benefit of hindsight, that he might have structured his or her trust in a slightly more tax efficient way. As discussed above, rescission for equitable mistake might be able to distinguish between these cases, as the jurisdiction is based explicitly upon the existence of a mistake that is 'sufficiently serious'. There is no obvious parallel in the case of rectification.

As rectification claims become more frequent, it is hoped that these problems will be worked out by the courts. However, if recent cases are a guide of things to come, then there is little reason for optimism. Claims to rectify trusts are frequently unopposed,[103] and the temptation to defer to the wishes of a gratuitous settlor is reinforced, or at least not challenged, when there is no defendant to provide a robust response.[104] Further, litigants appear to be taking advantage of the conceptual uncertainty surrounding this remedy. Whilst this paper has suggested a clear basis for the remedy, one need not look very far for vague dicta that obfuscate the matter. A number of cases unhelpfully suggest that there has been some degree of elision between the remedies of rectification and rescission.[105] In *Lobler v HMRC*, Proudman J., in finding that a document could be rectified due to an unforeseen tax charge, said: '… a mistake as to the tax consequences may, in an appropriate case, be sufficiently serious to warrant rescission *and thus rectification*.'[106] In our view, it is not correct to state that if rescission is available then so must be rectification. Rectification lies for a particular type of mistake, a 'mistake as to terms', whereas rescission is typically applied to 'motivational mistakes'. By suggesting some degree of merging, these dicta create space for litigants to argue that tax planning errors can also be corrected by rectification.[107]

IV CONCLUSION

Pitt v Holt might have signaled the outbreak of a rash of claims against professional advisors who give negligent advice. But that has not happened. This may be due to the

[102] As happened in the wills case of *Marley v Rawlings* [2014] UKSC 51; [2015] A.C. 157.

[103] The Commissioners typically decline the opportunity to be represented, so long as certain authorities are drawn to the court's attention. See *Bullard v Bullard* [2017] EWHC 3, [36].

[104] The position is not unlike that which prevailed in relation to the 'rule in *Re Hastings-Bass*', where unopposed claims were being granted too readily.

[105] In *Lady Hood of Avalon v Mackinnon* Eve J. was reluctant to draw a sharp distinction between the remedies, saying "whether it is rescission or whether it is rectification is only a question of degree" [1909] 1 Ch. 476, 481. To similar effect, in *Gibbon v Mitchell* Lord Millett described the remedies as forming part of a general "equitable jurisdiction to relieve parties from the consequences of their mistakes" [1990] 1 W.L.R. 1304, 1307.

[106] [2015] UKUT 152, at [68] (emphasis added). See also *Anker-Petersen v Christensen* [2002] WTLR 313, at [39]; *Day v Day* [2013] EWCA Civ 280, [2014] Ch. 114, at [41]; Mowbray et al (eds), *Lewin on Trusts* (19th ed, Sweet & Maxwell, London 2014) [29-260].

[107] For criticism of this assimilation of the remedies, see B Häcker, "Mistakes in the Execution of Documents: Recent cases on Rectification and Related Doctrines" (2008) 19 K.L.J. 293, 324.

potential difficulties in establishing the breach of a duty of care and the uncertainties of litigation, but is more likely a result of a variety of exclusion and limitation clauses which benefit the negligent advisor, and in particular because negligent advisors are prepared to fund the costs of applying for equitable relief – whether under the narrowed rule in *Hastings-Bass*, rescission or rectification. If such an application is successful, then the losses of the trust fund and individual beneficiaries is likely to be wiped out, thereby absolving the advisors of the need to pay damages.

Claims for equitable relief clearly merit careful consideration. The current tendency to favour claimants who incur large tax liabilities is at odds with the general tenor of Lord Walker's judgment in *Pitt v Holt*. This is, perhaps, unsurprising: tax law is notoriously complicated, and mistakes are bound to be made. It is natural to have sympathy for beneficiaries who find themselves in dire straits as a result of mistakes made by their trustees and advisors. But that should not distort legal doctrine, nor undermine the leading decision of the Supreme Court. The jurisdiction to grant relief under the rule in *Hastings-Bass* should remain narrow, and nascent attempts to expand that jurisdiction should be defeated. Rescission is now best-suited to respond to 'motivational mistakes'; one effect of *Pitt v Holt* should be to push cases out of the *Hastings-Bass* jurisdiction towards rescission. However, those cases do not easily fit within the realm of rectification, which should only correct 'content errors' rather than 'motivational errors'. Yet recent cases show a drift towards a more liberal approach to rectification, which sits uncomfortably with Lord Walker's observation in *Pitt v Holt* that rectification is a "closely guarded remedy".[108] The approach towards the rectification of trusts should itself be rectified, such that it "is strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it".[109]

[108] [2013] UKSC 26; [2013] 2 A.C. 108, at [131].
[109] Ibid.