In the matter of Abacus Global Approved Managed Pension Trust - Emanuel Gresh v RBC Trust Company (Guernsey) Limited and The Commissioners for Her Majesty's Revenue and Customs
Royal Court
26th February 2016

JUDGMENT 6/2016

Application for leave to set aside the distribution of funds on the grounds of a mistake

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF

THE ABACUS GLOBAL APPROVED MANAGED PENSION TRUST

Between: **EMANUEL GRESH** **("the Applicant")**

and

RBC TRUST COMPANY (GUERNSEY) LIMITED **("the Respondent")**

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **("Intervener")**

Judgment handed down: **26 February 2016**

Before: **Sir Richard Collas, Bailiff**

Advocate for the Applicant: **Advocate S Davies**

Advocate for the Respondent: **Advocate K Le Cras**

Advocate for the Intervener: **Advocate I Swan**

Cases, legislation and references referred to:

HM Revenue and Customs v Gresh and RBC Trust Company (Guernsey) Limited 2009-10 GLR 239
Futter v HMRC
Pitt v Holt [2013] UKSC 26
Wright v National Westminster Bank Plc [2014] EWHC 3158 (Ch);
Kennedy v Kennedy [2014] EWHC (Ch);
Freedman v Freedman [2015] EWHC 1457(Ch);
In the Matter of the Strathmullen Trust [2014 (I) JLR 309]
Ogilvie v Littleboy (1897) 13 TLR 399, 400
Gibbon v Mitchell [1990] 1 WLR 1304
Gibbon v Mitchell [1990] 1 WLR 1304, 1310
In Re S (A Child) [2005] 1 AC 593, para 17

JUDGMENT

1. The Applicant was the recipient of a lump sum distribution ("the distribution") paid to him, at his request, by the trustee of his pension fund ("the Trustee"). He had been advised that the distribution would be tax-free provided that the distribution was not remitted to the UK and on that understanding he requested that the distribution be made to him. It later transpired that the advice he received was wrong and the distribution has been assessed in the UK to a tax liability of 40%. In this Application, the Applicant seeks to have the distribution set aside on the grounds of mistake.
2. The Trustee, the Respondent to the Application, has adopted a neutral stance but in effect supports the Applicant. The Application is opposed by the Commissioners for Her Majesty's Revenue and Customs, the Intervener ("the Revenue").

3. The Application was originally before the Court in the form of an application to set aside the distribution based on *Hastings-Bass* grounds. The Revenue was not initially a party to the Application but it applied to be joined as a party and was in due course joined as such, following a decision of the Court of Appeal reported as *HM Revenue and Customs v Gresh and RBC Trust Company (Guernsey) Limited 2009-10 GLR 239*.

4. The Application was later amended and in its amended form, the Applicant is no longer relying upon the *Hastings-Bass* principles. Instead he is seeking to invoke the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake and he relies upon the decision of the Supreme Court in *Futter v HMRC; Pitt v Holt [2013] UKSC 26.*

5. At the request of the parties, I agreed to hear the Application without Jurats pursuant to section 13 of the Royal Court (Reform) (Guernsey) Law 2007.

6. There has been no oral evidence, instead the evidence was tabled in a number of affidavits: two affidavits sworn by Lisa Hélène Barnett (formerly Crawford), a director of the Trustee, dated respectively 15 August 2008 and 12 March 2015; an affidavit by Simon Hart of the Revenue sworn on 12 December 2008; an affidavit by the Applicant sworn on 12 February 2015 and an affidavit by Nicola Claire McGall, an authorised signatory of the Trustee. It was not necessary for me to consider all of the contents of the affidavits as I was asked by counsel to have regard to a statement of agreed facts:

"AGREED FACTS

- *The Applicant was at all material times a member of the Bankers Trust Company International Pension Plan (the Plan). The Plan is a Sub-Scheme of the Abacus Global Approved Managed Pension Trust (the Trust).*
- *The Respondent was the sole trustee of the Trust.*
- *When the Applicant was 50, he sought a distribution from the Plan.*
- *The Applicant sought advice from his tax advisers, Frank Hirth Plc (FH), and was told that a distribution of a lump sum from the Plan to him would be tax-free, provided it was not remitted to the UK and the Applicant believed that advice and acted on it (the "Advice").*
- *The facts relevant to that advice are as follows:*
- *A letter was sent from the Intervener to FH outlining the tax position, dated 10 October 2006.*
- *Following an email from James Murray of FH, dated 12 October 2006, (which stated that a payment made from the Plan would only be taxable if it was remitted to the UK), the Applicant emailed the Respondent on 20 October 2006 and asked that such a distribution be made.*
- *Siobhan Barrett of the Respondent replied to the Applicant's email on 23 October 2006 giving him 3 options and stating, if he wished to adopt option 3, he must take tax advice:*

  (i) A pension at retirement age 50;
  (ii) A lump sum commutation of the Applicant's pension at retirement age; or

(iii) A transfer payment to another plan (as defined under the relevant UK legislation).

- *The Applicant replied to the Respondent on 23 October 2006 stating he had already taken tax advice.*
- *The Respondent, in an email dated 25 October 2006, requested from the Applicant a copy of the letter setting out the tax advice he had received and outlined a number of queries. The Applicant replied the same day forwarding the email from FH which attached the letter of the Intervener and responding to the queries in turn.*
- *A further e-mail from FH to the Applicant dated 27 October 2006 asserted that the Intervener had stated they would only tax a lump sum payment from the Plan on a remittance basis, and that as long as the Applicant did not remit the funds to the UK, such a payment should not be taxable.*
- *The Respondent also believed the Advice to be correct and acted in reliance on it.*
- *On 17 and 20 November 2006, in reliance on the Advice, the Respondent decided that a lump sum payment should be made from the Plan to the Applicant and gave instructions for the transfers to be made to the Applicant, and the transaction statement shows the distributions being made to the Applicant on 30 November 2006, 1 January 2007 and 30 January 2007 (the Distribution).*
- *The total amount distributed to the Applicant was £1,462,280.51.*
- *The Advice was incorrect, in that only a pension (i.e. periodic payments rather than a lump sum) would be tax-free, even if any capital sum so paid were to be retained outside (and therefore not remitted to) the UK.*
- *The cash was paid into the account the Applicant shared with his ex-wife at UBS AG Jersey (the UBS Account).*
- *The Respondent completed a file review in 2007 during which it was identified that there was a possibility that as the Distribution did not involve periodical payments made over time, it may not have constituted a pension payment for UK tax purposes, being treated instead by the Intervener as a lump sum payment, in which case it would be subject to 40% income tax in the UK.*
- *Had the Respondent appreciated that the Advice was incorrect and that the Distribution would be subject to income tax, the Distribution would not have been made by way of a lump sum payment.*
- *Under United Kingdom law, HMRC considers that if the Distribution is valid it is pension income and taxable whether or not remitted to the UK."*

7. The parties also agreed that the issues relevant to the Application are:

"AGREED ISSUES

- *Under the law of Guernsey, there is jurisdiction to set aside a voluntary transaction (such as the Distribution) where it has been made as a result of a mistake.*
- *The principles established by the English Supreme Court in Pitt v Holt [2013] UKSC 26 will be highly persuasive in Guernsey.*
- *In making the Distribution in reliance on the Advice, which was incorrect, the Respondent was mistaken as to the tax consequences of it.*
- *The Respondent's mistake was causative.*
- *A voluntary disposition made as a result of a mistake is not void, but may be set aside by the Court in the exercise of its discretion."*

8. Furthermore, they advised at the outset of the hearing that they had agreed the disputed issues which were:

"DISPUTED ISSUES

1. *Whether the correct test as set out in Pitt v Holt requires:*

   (a) *a causative mistake which it would be unconscionable in all the circumstances to be left uncorrected (as the Applicant contends)*

   (b) *a causative mistake which is of a sufficiently serious character as to render it unconscionable for the donee to retain the property given to him (as the Intervener contends).*

2. *Whichever test applies whether it is satisfied in this case.*

3. *Whether it is open to the Applicant to bring the claim herein, or whether the claim gives rise to an equity that he is unable to assert as against himself."*

9. As the hearing progressed, it became apparent that their attempt at summarising the disagreement between them as to the correct test at point 1 above was not a fair or accurate summary of how the parties' respective contentions. I should perhaps add that there was no disagreement over the statement of agreed issues and hence it has not been necessary for me to reopen any of those factual matters.

10. In Advocate Davies' oral submissions on behalf of the Applicant, he summarised the differences between the parties, and hence the issue I had to decide as being limited to a choice between whether the agreed mistake was of sufficient gravity to justify it being set aside on the ground that it would be unconscionable or unjust to leave the mistake uncorrected or, that it would be unconscionable or unjust for the Applicant to retain the benefit of the transaction (as he alleged the Revenue contended). The former he referred to as a *"wider"* test and the latter as a *"narrower"* test.

11. For his part, Advocate Swan on behalf of the Revenue referred to paragraphs (a) and (b) of the disputed issues set out point 1 above and said that the contention of the Revenue was neither (a) nor (b) but *"(a) in the sense of (b)".* In other words, he submitted that the correct legal test in *Pitt v Holt* requires a causative mistake which it would be unconscionable in all the circumstances to be left uncorrected in the sense that it is a causative mistake which is of a sufficiently serious character as to render it unconscionable for the donee to retain the property given to him.

12. Counsel focussed their submissions on the judgment of the Supreme Court in *Pitt v Holt* in which the decision of the seven judges was delivered by Lord Walker of Gestingthorpe. In summary, Advocate Swan contended that the test was as set out in paragraph 126 of the judgment while Advocate Davies relied upon paragraph 128, notwithstanding that in the concluding paragraph, 142, Lord Walker said *"in my opinion the test for setting aside a voluntary disposition on the ground of mistake is that set out in para 126 above".* The reference to that paragraph number was, Advocate Davies submitted, a typographical error.

13. Advocate Davies relied in particular on the second half of paragraph 128:

> *"". . . the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round." In my opinion the same is true of the equitable doctrine of mistake. 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."

14. He submitted that the Applicant's formulation of the relevant principle is consistent with the general test put forward by Lord Walker in paragraph 123 of the Judgment where he referred to *"the general disinclination of equity to insist on rigid classifications expressed in abstract terms"* being, he submitted, the reason why in paragraph 92 the Court had declined to answer the *"would not"* or *"might not"* question and in paragraphs 93 and 94 the Court had declined to set out the principles as to whether gifts made under a mistake should be considered void or voidable.

15. Relying on paragraph 128, he submitted that all the circumstances must be considered in the round. In paragraph 126, where the Court said *"the gravity of the mistake must be assessed by a close examination of the facts … including the circumstances of the mistake and its consequences for the person who made the vitiated decision",* it was important to note the word *"including"* which, he submitted, the Revenue were interpreting as being to the exclusion of all else. The correct test required that all the circumstances be taken into account in order to do justice.

16. In order to illustrate the application of the test to specific circumstances, he referred me to four first instance decisions in which ***Pitt*** has been considered and applied: ***Wright v National Westminster Bank Plc*** [2014] EWHC 3158 (Ch); ***Kennedy v Kennedy*** [2014] EWHC (Ch); ***Freedman v Freedman*** [2015] EWHC 1457(Ch); and a decision of the Jersey Royal Court, ***In the Matter of the Strathmullen Trust*** [2014 (I) JLR 309]. I discuss each of those cases later in this judgment. The general principles were summarised by the Chancellor of the High Court in ***Kennedy***:

> *"(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.*
>
> *(2) A mistake may still be a relevant mistake even it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.*
>
> *(3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.*
>
> *(4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."*

17. In all four of those cases, the court was satisfied that it was appropriate to set aside the mistaken disposition. Each case turned on its own particular facts but nevertheless I have found the discussion in each of the judgments to be helpful, as I discuss later in this judgment. The principal point that Advocate Davies sought to draw out of those decisions was that they illustrate the importance of taking account of all the circumstances of the vitiated disposition.

18. Advocate Le Cras, on behalf of the Trustee, stated that the Trustee was broadly neutral in relation to the Application but nevertheless, she adopted Advocate Davies' submissions and made some further submissions in support thereof.

19. Advocate Swan, for the Revenue, submitted that the case was solely concerned with the correct application of the equitable doctrine of mistake, as explained by the Supreme Court in ***Pitt***. He disagreed with Advocate Davies' interpretation of the equitable test. In short, he submitted that there was no basis for equity to intervene. Whilst the Revenue accepted that there had been an operative mistake made by the Trustee in relation to the distribution to the Applicant, there was nothing unconscionable as between the Applicant and the Trustee if the Applicant were to retain the proceeds of the distribution.

Discussion

20. Counsel are agreed that the leading decision is that of ***Pitt*** which, I also agree, is highly persuasive in this jurisdiction and I know of no reason why, under Guernsey law, we should not apply the principles set out in the judgment of Lord Walker of Gestingthorpe.

21. In ***Pitt***, the first claimant's husband had suffered serious injuries in an accident in respect of which substantial damages were recovered on his behalf under a structured settlement in order to provide for his care. The damages which were in the form of a lump sum and monthly payments (referred to as an "annuity" for the sake of convenience, by Lloyd LJ delivering the leading judgment of the Court of Appeal reported at [2012] Ch 132) were paid or payable to the first claimant as the receiver of her husband, under the jurisdiction of the Court of Protection. In that capacity and with the authority of the Court of Protection, she paid the monies and assigned the annuity to a discretionary trust of which the two claimants and the first defendant were trustees. Tax advice was taken on the creation of the settlement but the advisers overlooked the question of liability for inheritance tax on the transfer of the assets into a discretionary trust and its subsequent operations. In particular, they failed to consider the special provisions that may apply to discretionary trusts created for disabled persons. If the discretionary trust had complied with the requirements of section 89 of the Inheritance Act, 1984, no inheritance tax liability would have been incurred.

22. In order to comply with section 89, one additional provision would have been required in the trust instrument, namely that at least one half of the trust fund applied during Mr Pitt's lifetime be applied for his benefit. Absent that provision, the trust became liable to Inheritance Tax in the same way as any ordinary discretionary trust. Thus there was a charge to IHT on the whole of the value of the sum paid into the trust at the outset. Furthermore, there would have been a charge to IHT on any capital paid out of the trust, and there would have been a charge to IHT on the value of the trust on every tenth anniversary of its creation. The value of the assets transferred at inception was around £800,000 and the initial charge to IHT would have been of the order of £100,000. At the time of the death of Mr Pitt there remained only £6,000 in the trust and the annuity came to an end in any event. Lloyd LJ summarised the factual position at paragraph 214E on page 200 of the report:

> *"The assets which can be assumed to have been adequate, but no more than that, to provide for Mr Pitt's needs for the rest of his life, and which, apart from his home, were the only assets of any substance that were available for that purpose, thereby immediately became significantly less than adequate for that purpose. It could be foreseen that they would become even more inadequate when further charges to IHT arose."*

23. During Mr Pitt's lifetime, proceedings were commenced against the financial advisers on the basis of whose advice the discretionary trust was set up. That claim was resisted and then stayed pending the outcome of proceedings to set aside the transfer of the assets into the trust. The claim against the advisers was brought by the personal representatives of Mr Pitt and by Mrs Pitt personally, the other trustee was joined as the first defendant. The Revenue were joined as second defendant with the agreement of the Revenue. The claim was for a declaration that the transfer of assets was void or voidable and ought to be set aside, on two bases: on the *Hastings-Bass* rule; and, in the alternative, on the ground of mistake.

24. The matter was heard first by Robert Englehart QC sitting as a deputy judge of the Chancery Division. In his judgment he held that the settlement and the assignment were to be set aside under the *Hastings-Bass* rule though he held that he would not have come to the same conclusion on the ground of mistake. He did not have to decide whether they were void or voidable but he said that if they were voidable there was no reason not to avoid them.

25. The Revenue appealed and the matter came before the Court of Appeal together with an appeal in the matter of *Futter v Futter*, a case where the Revenue had appealed the decision of Norris J setting aside under the *Hastings-Bass* rule the exercise of powers of advancement under two discretionary trusts, the details of which are not material to my present judgment as the Applicant in the instant proceedings has withdrawn his original claim for relief under the *Hastings-Bass* rule.

26. In relation to the equitable jurisdiction to set aside a voluntary disposition for mistake and after reviewing a number of decisions, Lloyd LJ held (at para 210) *"there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction."* In the next paragraph, he defined the test that would have to be satisfied by the claimants and the first defendant in *Pitt* as: *"first, that there was a mistake, secondly that it was a relevant type of mistake, and thirdly that it was sufficiently serious to satisfy the Ogilvie v Littleboy test."* The latter test he had set out in paragraph 167 by quoting from Lindley LJ, giving the judgment of the Court of Appeal in *Ogilvie v Littleboy* (1897) 13 TLR 399, 400:

> *"Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor…. 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."*

27. He declined to allow the appeal on the respondents' notice because of the distinction that had been drawn between mistakes as to the "consequence" of a disposition and those which go to the "legal effect**"** of the disposition. He held, at paragraph 210 that:

> *"The fact that the transaction gives rise to unforeseen fiscal liabilities is a consequence, not an effect, for this purpose, and is not sufficient to bring the jurisdiction into play."*

28. The distinction between "consequence" and "effect" was one that had been drawn by Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304.

29. In the Supreme Court, Lord Walker largely approved Lloyd LJ's definition of the legal test. In doing so, he reviewed carefully the judgments in *Ogilvie v Littleboy*, in *Gibbon v Mitchell* and a number of subsequent cases before holding that the *Gibbon v Mitchell* test should not be followed. He said (at para 122);

> *"But I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. If the Gibbon v Mitchell test is further widened in that way it is questionable whether it adds anything*

> *significant to the Ogilvie v Littleboy test. 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 only when there is a mistake as to the legal character or nature of a transaction, or as to some matter or fact of law which is basic to the transaction.*
>
> ***123*** *To confirm the Gibbon v Mitchell test as formulated by Millett J would in my view leave the law in an uncertain state, as the first-instance decisions mentioned in para 119 above tend to demonstrate. It would also be contrary to the general disinclination of equity to insist on rigid classifications expressed in abstract terms."*

Lord Walker went on to consider what he referred to as *"The conscience test"*

> *"**124** Lindley LJ's test in Ogilvie v Littleboy, quoted at para 101 above, requires the gravity of the causative mistake to be assessed in terms of injustice-or, to use equity's cumbersome but familiar term, unconscionableness. Similarly Millett J said in Gibbon v Mitchell [1990] 1 WLR 1304, 1310:*
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> > *"Equity acts on the conscience. The parties [in] whose interest it would be to oppose the setting aside of the deed are the unborn future children of Mr Gibbon and the objects of discretionary trusts to arise on forfeiture, that is to say his grandchildren, nephews and nieces. They are all volunteers. In my judgment they could not conscionably insist upon their legal rights under the deed once they had become aware of the circumstances in which they had acquired them."*
>
> ***125*** *The evaluation of what is or would be unconscionable must be objective……*
>
> ***126*** *The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion. Justice Paul Finn wrote in a paper, "Equitable Doctrines and Discretions in Remedies" published in Restitution: Past, Present and Future (eds W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo) (1998), at p 260:*
>
> > *"the courts quite consciously now are propounding what are acceptable standards of conduct to be exhibited in our relationships and dealings with others…… A clear consequence of this emphasis on standards (and not on the rules) is a far more instance-specific evaluation of conduct."*
>
> *The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus (in Lord Steyn's well-known phrase in In re S (A Child) [2005] 1 AC 593, para 17) on the facts of the particular case."*

Lord Walker concluded his passage on *"the conscience test"* in para 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."*

30. I regard it to be clear that "unconscionable" is to be interpreted as being synonymous in this context with "unjust or unfair". It is not necessary to look for a specific conscience that would be affected if the vitiated transaction were not set aside. I return to this issue later in this judgment.

31. The decision of the Supreme Court was summarised by Lord Walker in the final paragraph of the judgment, para 142:

> *"In my opinion the test for setting aside a voluntary disposition on the ground of mistake is that set out in para 126 above, and it is satisfied in Pitt v Holt. There would have been nothing artificial or abusive about Mrs Pitt establishing the SNT so as to obtain protection under section 89 of the Inheritance Act 1984. There was*

considerable delay in the commencement of the proceedings, but the Revenue do not rely on the delay. They do rely on rescission being pointless and therefore inappropriate, but I would reject that submission for the reasons set out above. The deputy judge found [2010] 1 WLR 1199, para 15 that the setting aside of the settlement would have no effect on any third party (plainly he was not here treating the Revenue as a third party). I would discharge the orders below and set aside the SNT on the ground of mistake."

32. The reference in that passage to paragraph 126 was described by Advocate Davies as a typographical error and should, he submitted, have read paragraph 128. I cannot accept that submission. Having carefully read the passages concerned, I have no doubt that Lord Walker intended to say that the test for setting aside a voluntary disposition was that set out in paragraph 126. In paragraph 128, Lord Walker was comparing equitable mistake with the elements of proprietary estoppel. What he was explaining was that in relation to both, the court must look at the matter in the round and not in accordance with a set of rules. He was not attempting to restate or redefine the test which he had set out in the earlier paragraph.

33. It is my understanding that having looked at the facts of ***Pitt*** in the round, a significant element in the Supreme Court's objective analysis was that if the mistake had not been corrected, there would have been insufficient funds in the settlement to pay the inheritance tax which would have been or become due and, of greater significance, that there would not then have been funds available to provide for Mr Pitt. Thus the whole purpose of the structured settlement for the payment of damages to him would have been frustrated and defeated. For those reasons it would have been unconscionable (or unjust or unfair) on the part of the trustees to insist on upholding the terms of the vitiated trust.

34. The general principles in ***Pitt*** were summarised by the Chancellor of the High Court in the later decision of ***Kennedy***:

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

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

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

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

35. The Chancellor's summary of the principles is clearly taken very closely from the wording of the judgment of Lord Walker. Applying those principles to the facts of the present case, there was a distinct mistake namely that the Applicant believed, and relied upon, the tax advice he had received and which turned out to be incorrect. His mistake was distinguishable from mere ignorance, inadvertence or misprediction of some future event. The mistake is what caused the Applicant to make the request upon which the Trustee acted in making the the distribution to him. The contentious issue is the fourth principle namely the injustice (or unfairness or unconscionableness) of leaving the disposition uncorrected.

36. At the conclusion of the oral hearing, I invited the parties to make further submissions to provide assistance on the meaning of the term unconscionable (or unjust or unfair). I received further written submissions from Advocates Davies and Swan. Advocate Le Cras indicated that she agreed with Advocate Davies.

37. Advocate Davies submitted that the meaning depends entirely upon the context in which the term is used. In the context of cases where the court had to decide whether a recipient could, in good conscience, retain the benefit of property received by him, he submitted it will involve an enquiry into the mind of the recipient. Whereas in ***Pitt***, he submitted that Lord Walker chose to formulate the test more widely and more flexibly referring to *"the injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected".* In other words, it is not necessary to identify a specific conscience that was affected in order for equity to intervene. He said that the test requires consideration of all the circumstances to decide whether the Court would be acting in a way that would be unfair, unjust or unconscionable if it declined to correct the mistake.

38. Advocate Swan strongly disagreed with any contention that the Supreme Court had altered the test for equitable mistake. In his submission, the decision in ***Pitt*** did not alter what equity regards as unconscionable conduct, as originally expounded in ***Ogilvie*** at page 400:

> *"In the absence 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."*

39. He emphasised the passage at paragraph 126 of Lord Walker's judgment, quoted above, in which Lord Walker referred to the *"consequences for the person who made the vitiated disposition"* and quoted with approval from Justice Paul Finn speaking of equity's concern to correct conduct which is unconscionable.

40. I accept Advocate Swan's submission that the test for equitable mistake was not altered by the Supreme Court and that what is required is to look at all the relevant circumstances or, as Lord Walker said *"to look at the matter in the round"*, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition in order to evaluate objectively *"the injustice (or unfairness or unconscionableness) of leaving the disposition uncorrected"* (quoting from paragraph 126 of ***Pitt***).

41. Advocate Davies sought to add support to his case by citing later decisions in which the court had set aside dispositions applying the test in ***Pitt***. Each case is very fact-specific but I agree that the cases can be illuminating in helping to understand how the principles are to be applied to individual situations, without altering the legal principles. The facts of each of the cases to which I was referred were different from the present case.

42. Incorrect tax advice is a common feature of a number of the decisions. Lord Walker considered tax avoidance schemes in paragraph 135 of his judgment in ***Pitt***:

> *"Had mistake been raised in Futter v 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….. 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."*

43. In *Kennedy*, the Chancellor observed (at paragraph 39) that:

> *"The October 2008 Appointment was not an artificial tax avoidance arrangement or part of one. It was executed as a perfectly legitimate way of conferring benefit on Mr and Mrs Kennedy's children and grandchildren in a tax efficient manner that was contemplated by express provision in FA 2006."*

44. Those passages were considered by Mrs Justice Proudman in *Freedman*. She concluded at paragraph 27:

> *"It is clear from Pitt v Holt at [129]-[132] that a mistake as to the tax consequences of a transaction may, in an appropriate case, be sufficiently serious to warrant recission and Mr Slater [for the Revenue] did not seek to argue to the contrary. There is no justification for a different approach to mistakes about tax and other types of mistake."*

45. In the present Application, there is no suggestion that the Applicant was seeking to contrive an artificial tax avoidance scheme. He was simply misled as to the tax consequences of what he proposed to the Trustee and thus a causative mistake was made. There are no public policy reasons or other grounds for holding that because it involved an error over tax liability, the court should not allow the discretionary relief sought. It was a mistake of the kind that Lord Walker described.

46. When considering the issue of unconscionability (or unfairness or injustice) it is necessary to look at the consequences of setting aside, or not setting aside, the disposition. The only person affected is the Applicant who will have a tax liability if the mistake is not corrected (and the Revenue who will not be able to levy the tax if the disposition is set aside).

47. By contrast, in other cases where the court has been persuaded to set aside dispositions, there have been other parties whose interests were affected. In *Pitt*, the husband of the first claimant, if he had not died, would have been deprived of the funds needed to provide for his needs for the rest of his life, which was the sole purpose for which the settlement was established.

48. In *Wright*, the mistake had serious consequences not only for Mr Wright but also for his wife who would not have been able to receive any income from the trust fund either during her husband's lifetime or after his death whereas his wish, expressed in a letter of wishes, was that income and capital could be applied by the trustees for the benefit of his wife to meet her general needs if required by her.

49. The effect of the mistake in *Kennedy* was described by the Chancellor as being *"very serious"* (paragraph 38). He added that:

> *"The effect of the inclusion of clause 2.1(c) was to deprive the other beneficiaries of the Settlement, namely (subject to any future appointment) Mr and Mrs Kennedy's children, of the relevant assets and to diminish the value of the remaining assets in the Settlement by the amount of the substantial charge to CGT payable by the trustees of the Settlement."*

50. The consequences of the mistake that was corrected by Proudman J in *Freedman* were summarised by her in the penultimate paragraph of her judgment:

> *"The position is that Melanie has made a distinct and serious mistake. The settlement was not created for the beneficiaries but to protect Melanie. She now has a large tax liability which affects her ability to repay the loan which she took on the basis that it would be repaid. Taking the matter in the round, it would be unconscionable for the donees to profit from that mistake and insist on their rights under the settlement."*

51. Finally, in the Jersey Royal Court decision *In re Strathmullen Trust*, a settlor had been unaware of deemed domicile provisions with the result that a trust he had established would not avoid Inheritance Tax, as he had intended, but instead IHT would still be payable by his

estate on his death and there would be additional IHT charges. The headnote summarised the court's decision on pages 310-311 of the Report:

> *"Thirdly, the mistake was so serious as to render it unjust on the part of the trustee to retain the trust property. The trust had been intended to benefit the representor and his immediate family, who wished it to be set aside. It would be seriously unjust for the representor otherwise to be required to accept the substantial tax loss or to seek to bring proceedings against his former tax advisers the outcome of which might be uncertain."*

52. On that last issue of bringing proceedings against the former tax advisers, the Royal Court said, at paragraph 27:

> *"If the court were approaching this case upon the basis that the loss should lie where equitably appears to be appropriate, one could take the view that the tax advisers should bear the loss, and that the trust should remain undisturbed. However, that would require the present trustee, who had no contractual relationship with the tax advisers in question, to take the necessary litigation steps. Indeed, it is not obvious that the trust itself will have sustained an enforceable loss. The enforceable loss has been sustained by the representor and by his estate. In those circumstances, the focus of the Royal Court is on protecting the settlor/beneficiary because to do otherwise would require him to pursue litigation against his former advisers. We accept that the representor was not at fault, and may have already incurred some losses. In that context, it would therefore be seriously unjust to require him to bring litigation against his former professional advisers, the outcome of which, whether on limitation or other grounds, might be uncertain."*

53. That position is distinguishable from the facts of the present Application where there was a contractual relationship between the Applicant and the tax advisers, the incorrect tax advice was given to the Applicant by his tax advisers and it is the Applicant who will have to pay the tax assessed by the Revenue on the distribution to him if it is not to be set aside. At paragraph 17 of the judgment in ***Wright***, Norris J quoted Lord Walker:

> *"As Lord Walker (when Sir Robert Walker) said (at p. 235) in an article in Private Client Business (2002) 4 PCB 226-40 called The Limits of the Principle in Hastings-Bass [1975] Ch, 25:*
>
> > *"One's instinctive reaction….is to ask why the Chancery Division, rather than the parties' professional indemnity insurers, should have to pick up the pieces.""*

54. That quotation by Norris J was in the context of considering any tax-avoidance scheme which had gone wrong but it seems to me that the view expressed by Lord Walker is not necessarily limited to such a situation. When considering whether to set aside a disposition on the ground of equitable mistake, the court is not in a position to form a definitive view as to the merits of any action that might be brought against a professional adviser who might have given incorrect or negligent advice. However it is a reminder that not every mistake will be corrected by the courts. All the circumstances of the case have to be considered when deciding whether it would be unconscionable, unfair or unjust to leave the mistake uncorrected. It is not every serious error that will be corrected by the courts. Where the court decides it is not appropriate to correct the error, there may be another or other remedies available to remedy the loss suffered by the person concerned. I have not been told whether that is the case here.

Decision

55. The legal test to be applied is that laid down by the Supreme Court in the judgment delivered by Lord Walker in ***Pitt*** and summarised by the Chancellor in ***Kennedy***. On the agreed facts, the Trustee acceded to a request for the Applicant to distribute to him a lump-sum from the pension trust it held on his behalf. In requesting the distribution, both the Trustee and the Applicant believed the tax advice he had received to be correct in that he would not pay tax provided that the lump sum was not remitted to the UK. In fact, the distribution was incorrect because it is only a pension i.e. periodic payments as opposed to a lump sum that would be tax-free even if the lump sum were not remitted to the UK. Had the Trustee and

the Applicant correctly understood the tax position, the Trustee would not have made the distribution. The incorrect tax advice was the central factor in the transaction; it was basic to it. The Applicant is now faced with a tax liability of 40% of the lump sum, it being taxable to income tax at the highest rate. He was not seeking to pursue an aggressive tax-avoidance scheme which the court would not want to support for reasons of public policy.

56. The only person affected if the distribution were not to be set aside would be the Applicant. Unlike the other cases referred to by Advocate Davies that have been decided since ***Pitt***, there are no other family members involved and no other third party (apart from the Revenue). The unconscionableness (or injustice or unfairness) of leaving the mistake uncorrected has to be viewed objectively.

57. In all the circumstances and having regard to the principles I have set out in this judgment, my decision is that it would not be an appropriate exercise of the Court's jurisdiction to set aside the distribution. It is perhaps unfortunate for the Applicant if he will have to pay the tax to which he has been assessed (particularly if he is unable to pursue any remedies against his tax adviser) but it is not unconscionable, unfair or unjust in the sense described in ***Pitt*** and the other cases reviewed if he should have to do so. It is not unconscionable (unjust or unfair) that he should have to retain the proceeds of the distribution made by the Trustee to him.

58. I therefore dismiss the Application.

59. I sincerely apologise to the parties, and to their counsel, for the length of time it has taken me to prepare and issue this judgment which is entirely due to factors beyond my control and which could not have been anticipated when I agreed to hear the case.

Sir Richard Collas
Bailiff