

An alternative (and possibly preferable) suggestion is for Parliament to repeal Part 2 of SCA 2007 and start all over again.

FINDLAY STARK

REVERSING MISTAKEN VOLUNTARY DISPOSITIONS

IN the cases subject to the joined appeals in *Futter; Pitt v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKSC 26, [2013] 2 W.L.R. 1200, fiduciaries had exercised dispositive powers on the basis of incorrect professional advice, and in a manner that resulted in substantial, unanticipated tax liabilities. Could these transactions be unwound, and the unwanted tax consequences avoided, because of the error that infected the fiduciaries' decision-making processes? Two legal routes to this conclusion were contested: (i) the "rule in *Hastings-Bass*", under which the exercise of the power might be undone because of the decision-maker's failure to take into account relevant considerations that should have been taken into account; and (ii) the equitable jurisdiction to rescind a voluntary transaction for mistake. The Supreme Court had an exceptional opportunity to examine and re-state the principles governing each: only the latter rule had previously been subject to appellate scrutiny, and not since the late 19th century (*Ogilvie v Littleboy* (1897) 13 T.L.R. 399 (CA), *Ogilvie v Allen* (1899) 15 T.L.R. 294 (HL)).

In relation to the first ground for relief – the "rule in *Hastings-Bass*" – the Supreme Court essentially agreed with Lloyd L.J.'s analysis in the of Court Appeal of the rule's genesis, the "wrong-turning" taken by lower courts in developing it, and its appropriate re-formulation. First, the "rule" was a "misnomer": *Re Hastings-Bass (deceased)* [1975] Ch. 25 (CA) was not authority for it. The "rule" instead emanated from *Mettoy Pension Trustees Ltd. v Evans* [1990] 1 W.L.R. 1587 (Warner J.), and ensuing first instance decisions. Secondly, there was an important distinction, in relation to legal controls on fiduciary powers, which earlier decisions had overlooked. An exercise of a power beyond its scope – "excessive execution" – would be void. However, the flaw targeted by the "rule in *Hastings-Bass*" – a failure to take into account relevant considerations – was different. An exercise of a power within its scope was at most voidable for "inadequate deliberation", and only if the decision-making process revealed such a substantial flaw as amounted to a breach of duty by the fiduciary decision-maker (see *Abacus Trust Co. (Isle of Man) Ltd. v Barr* [2003] EWHC 114 (Ch), [2003] Ch. 409 (Lightman J.)). Thirdly, many earlier *Hastings-Bass* cases had therefore erred in assuming that the exercise of a

fiduciary power might be vitiated wherever a relevant consideration, which would have resulted in a different decision, was misappreciated or ignored. Indeed, in general, the fiduciary's conduct could not be challenged, because no breach of duty is ordinarily committed by a fiduciary who, in good faith, obtains and acts on information and advice from apparently competent professional advisers, which proves incorrect. The claim to relief based on the "rule in *Hastings-Bass*" failed in both appeals for this reason.

The second ground for relief – equity's jurisdiction to rescind a voluntary transaction for mistake – was only in issue in the *Pitt* appeal. As Lord Walker recognised, this equitable jurisdiction is generous, in enabling voluntary transactions to be avoided for mistake more readily than contracts: it extends to a merely unilateral mistake of the donor, even though not induced by any misrepresentation by the party benefiting under the transaction, or even known to him. Nevertheless, this generosity is not boundless. A voluntary transaction will not be rescinded unless the mistake is not merely causative, but also of "sufficient gravity" as to make it "unconscionable" to deny relief.

In so holding, Lord Walker substantially endorsed the general standard adopted in the *Ogilvie* litigation, subject to certain refinements of his own. First, the concept of a "mistake" is narrow. It involves an incorrect conscious belief or tacit assumption about some past or present state of affairs, factual or legal. Neither mispredictions of the future, nor mere forgetfulness, inadvertence, or ignorance qualify. Secondly, it is inappropriate rigidly to restrict the mistakes that can be relieved to limited abstractly-defined categories. The Court of Appeal was wrong to hold, building on a distinction drawn in *Gibbon v Mitchell* [1990] 1 W.L.R. 1304 (Millett J.), that the donor's mistake must relate either to (i) the legal effect of the transaction (rather than its consequences), or (ii) a matter of fact (or by extension, law) basic to it. The requirement was for a causative mistake of "sufficient gravity", without further gloss. Thirdly, court intervention depends on explicit consideration of the "just" outcome, given each case's particular facts. The court should consider "in the round" the existence of a mistake, its centrality to the transaction, and the seriousness of the consequences, and make an "evaluative judgment" as to whether it would be unconscionable, or unjust, to leave the mistake uncorrected.

Much could be said in commentary on this decision. However, by far the biggest loose ends remain in relation to equity's jurisdiction to set aside a voluntary transaction for mistake. What, in particular, is the relationship between this jurisdiction and common law claims in unjust enrichment, grounded on mistake? The Supreme Court did not address this issue, or the problems raised by it.

The central dilemma is easily stated. Spearheaded by *Barclays Bank Ltd. v W.J. Simms Son & Cooke (Southern) Ltd.* [1980] Q.B. 677 (Robert Goff J.), the courts have expanded the ambit of restitution-grounding mistakes so far that it is widely assumed that any causative mistake, of fact or law, whether spontaneous or induced, prima facie triggers a common law personal restitutionary claim for benefits conferred. This liberalising trend at first sight opens the door for donors to seek a common law restitutionary remedy against donees for any spontaneous causative mistake. How can this be reconciled with the equitable jurisdiction to grant rescission of a voluntary transaction for mistake, which – as *Pitt* confirms – is more restricted?

Future courts, confronted with common law personal claims in unjust enrichment by mistaken donors, will not have a clean slate. They will need to take the equitable jurisdiction as given, and seek to state and develop common law principles compatibly with it. This will, unavoidably, require close examination of the nature and extent of the equitable jurisdiction itself.

To what types of gift transaction, then, does the equitable jurisdiction apply, and with what consequences? Gifts can vary enormously in form (they may be effected formally or informally) and in subject-matter. The paradigm involves a disposal of rights to an asset, either outright to a donee, or via a trust or settlement. However, a merely personal right to some benefit may be gifted by a deed (e.g. an annuity). And other, non-asset-based gifts are also conceivable (e.g. a parent who pays his son's debts, or paints his house). There are also two different ways in which the law might "reverse" a gift: (i) by rescission, involving *in specie* reversal or unwinding of the transaction, cancelling personal and proprietary rights conferred by it and bringing consequential relief; or (ii) by monetary reversal only, achieved via a personal restitutionary remedy against the donee.

It remains unclear whether the equitable mistake jurisdiction encompasses all these configurations. In *Pitt* and many earlier cases, it was relied upon to achieve *in specie* rescission of formal, asset-based voluntary transactions. Unfortunately, the Supreme Court has failed to clarify whether these are jurisdictional limits. Important questions are therefore left unanswered. Does the jurisdiction extend more widely to encompass informal as well as formal gifts? And to gifts of any subject-matter? And does it allow a merely monetary reversal of a gift, via a personal restitutionary remedy?

This continuing uncertainty is unfortunate: it makes it difficult to identify how far a liberal common law restitutionary jurisdiction might undermine equity's jurisdiction and its underlying policy commitments. There is manifestly some desire to restrict the reversal of mistaken gifts. However, is the underlying concern (A) that the reversal of all gift

transactions should be more tightly controlled, (B) that only formal gifts merit special treatment, or (C) only that the remedial mechanism of *in specie* rescission should be confined?

Interpretation (A) seems most plausible. It also has the widest ramifications. To avoid unjustified subversion of equity's assumed position, future courts would need to rein in common law restitutionary claims for mistaken gifts. Available techniques, within our orthodox unjust enrichment framework, include: (i) preserving the liberal causative mistake test for restitution-grounding mistakes reflected in *Simms*, but articulating a new bar – perhaps in the form of a new 'justifying ground' – to restitution for valid gifts (cf. *Goff and Jones – The Law of Unjust Enrichment* 8th ed., Part 2); (ii) adopting a narrower definition of restitution-grounding mistakes for gifts, most likely by replicating the *Pitt* equitable definition (cf. Lord Scott in *Deutsche Morgan Grenfell Group plc v I.R.C.* [2006] UKHL 49, [2007] 1 A.C. 558, at [87]; Wu (2004) 20 J.C.L. 1); or (iii) finding that gift transactions can only be reversed via the equitable jurisdiction, expanded to allow *in specie* rescission and personal restitutionary remedies where appropriate.

Interpretations (B) and (C) both reject the idea that the reversal of all mistaken gift transactions requires special controls. The common law's liberal approach to restitution-grounding mistakes might therefore continue, subject to fine-tuning to avoid conflict with equity's assumed position. For example, if interpretation (B) holds good, then a court might be expected to refuse the normal common law restitutionary remedy for a formal gift unless the higher equitable threshold is satisfied.

All this is highly speculative. However, what is beyond doubt is that *Pitt* leaves English courts and commentators with more work to do, to integrate more completely the common law and equitable perspectives, and secure a more "joined-up", coherent approach to the reversal of gift transactions for mistake.

STEPHEN WATTERSON

"MENS REA", BREACH OF CONFIDENCE AND THE IMPLICATIONS
FOR ENGLAND'S PRIVACY "TORT"

ALTHOUGH the equitable cause of action for breach of confidence is ancient in origin, the Supreme Court's decision in *Vestergaard Frandsen v Bestnet Europe Ltd.* [2013] UKSC 31 marks only the fourth time England's apex court has discussed its requisite elements. The decision potentially marks an important shift in what might be called