PLAYING THE "GET OUT OF JAIL FREE" CARD: MISTAKE IN THE LAW OF TRUSTS

by

Nicole Langlois &
Adam Cloherty

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PLAYING THE "GET OUT OF JAIL FREE" CARD: MISTAKE IN THE LAW OF TRUSTS[1]

Nicole Langlois and Adam Cloherty

The doctrines of rescission and rectification for mistake in relation to unilateral transactions have recently enjoyed a case-law renaissance in various jurisdictions, especially Jersey. This article considers those doctrines with especial reference to that case law, before going to consider the implications of it for disponors and others as well as how the doctrines might develop. On rescission, the demise of the effects/consequences distinction is applauded and the revived test of "serious mistake coupled with injustice" is explored while the apparent "but for" causation requirement is questioned. The limitations of the void/voidable distinction in that doctrine are also exposed. In relation to rectification, it is suggested that, following a flirtation with concentrating on the "effect" of instruments, the courts have (sensibly) returned to putting "meaning" centre-stage.

"When I use a trust, it means exactly what I choose it to mean ..."[2]

Introduction

1 Mistake is back in fashion. As with the rule in *Hastings-Bass* previously, in the last couple of years the scope of the courts' equitable jurisdiction to relieve parties from the consequences of their mistakes by setting aside or rectifying voluntary deeds or dispositions has come to exercise courts, practitioners and commentators alike in a range of jurisdictions around the world.

2 This paper considers the equitable remedies of rescission and rectification with reference to recent case law, and seeks to draw out areas of controversy or difficulty as well as offering some thoughts on how current debate as to the scope of these remedies might play out in the future.

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[1]This article is based upon a paper delivered by Nicole Langlois and Adam Cloherty at XXIV Old Buildings' International Trust Litigation Conference held in Geneva on 16 September 2009

[2]With apologies to Lewis Carroll.

3 The first part of this paper will deal with the jurisdiction to grant orders for rescission. We will begin by outlining the history of the courts' jurisdiction to grant such orders and then go on to analyse the recent authorities in this area. The second part of the paper will deal with the jurisdiction to grant orders for rectification.

Rescission for mistake

4 The jurisdiction to set aside voluntary deeds and dispositions on the grounds of mistake has a long pedigree, although it is given surprisingly little attention in the standard English works on trusts.[3] Although some commentators[4] suggest that the sorts of mistake which ground an order for rescission are broadly the same as those which ground an order for rectification, we would respectfully disagree. It is clear that the two remedies, although sometimes capable of being invoked in the same or similar circumstances, have different foundations—at least in the modern law.

Rescission: some history

5 The starting point for a consideration of the scope of the courts' jurisdiction in this area is the case of *Ogilvie v Littleboy*.[5] The plaintiff in that case, a widow, had executed deeds founding two charities and devoting to them a considerable part of the fortune she had inherited from her husband. She later brought proceedings to set the deeds aside, asserting that she had not been fully and properly advised and had not fairly understood the nature and effect of the documents. In particular, she claimed that she had not appreciated that the deeds failed to secure to her during her lifetime full control of the capital and income of the trust.

6 The action was dismissed by Byrne J and appeals were dismissed by the Court of Appeal and the House of Lords. In the Court of Appeal, Lindley LJ held as follows—

> "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

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[3]See *e.g.* the one paragraph in Mowbray et al, *Lewin on Trusts* (18th ed) at §4–64 and the few lines in Thomas & Hudson, *The Law of Trusts* at §11.56. Underhill & Hayton, *Law of Trusts & Trustees* (16th ed) fares better—see the discussion at §15.28–15.34.

[4]*E.g. Lewin on Trusts* at §4–58 and §4–64.

[5]*Sub nom Ogilvie v Allen* in the House of Lords, (1899) 15 TLR 294.

> and donee, no mistake induced by those who derive any benefit by it, a gift ... is binding on the donor ... In the absence of all such 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.*" (Emphasis added)

7 The Court of Appeal's judgment was upheld by the House of Lords, with their Lordships agreeing entirely with Lindley LJ's judgment. *Ogilvie*, then, set out a broad principle of "injustice" for the setting aside of voluntary dispositions.

Lady Hood of Avalon and Ellis v Ellis

8 *Ogilvie* was followed in a decision of Eve J in *Lady Hood of Avalon v Mackinnon.*[6] The plaintiff, again a widow, had a power of appointment in favour of her two daughters. She exercised that power in favour of her younger daughter on her getting married. She wanted to ensure equality between the two daughters. She therefore exercised the power to the same extent in favour of her elder daughter. She had, however, entirely forgotten that, some years before, she and her husband had already exercised the power in favour of the elder daughter. The result of the three exercises of the power was therefore to produce inequality between the children—a result she had not intended.

9 Eve J held that the last appointment had been made under a serious mistake as to the facts and that it ought therefore to be set aside.[7]

10 Shortly after it was decided, *Lady Hood of Avalon* was followed by Warrington J in *Ellis v Ellis.*[8] In that case, a husband made a substantial gift to his wife in the mistaken belief that it would be an outright gift. In fact, because of an after-acquired property covenant in her marriage settlement, the gift was automatically caught by a trust. Warrington J set the gift aside—

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[6][1909] 1 Ch 476.

[7]See pp. 483–484. Although the judge did not refer expressly to the formula used by Lindley LJ in *Ogilvie*, in the recent case of *Sieff v Fox* ([2005] 1 WLR 3811) Lloyd LJ commented (at 3843) that the decision was nonetheless consistent with *Ogilvie* because there was no doubt that the judge "would not have had any difficulty in finding that the circumstances were such that it would be unjust for the donee to retain the benefit of the appointment."

[8](1909) 26 TLR 166.

> "... the court had jurisdiction to set the gift aside, if satisfied that it was made under a 'mistake of fact'[9] ... Here there was a mistake of fact in this, that when the husband thought that he was giving the securities to his wife the gift was in reality hit by a document which the donor had at the moment forgotten ..."

There matters rested quite happily until 1990 and the case of *Gibbon v Mitchell*,[10] to which we must now turn.

Gibbon v Mitchell: introducing the effects/consequences distinction

11 *Gibbon v Mitchell* has been described by Collins J (as he then was) in *AMP v Barker*[11] as "the most notable modern authority"[12] on the exercise of the courts' jurisdiction to set aside documents or dispositions for mistake. The facts were these. A man entitled to a protected life interest under a trust executed a deed by which he was expressed to surrender his life interest in favour of his children, with a view to accelerating their entitlement to capital. Because his life interest was protected, not absolute, the deed of surrender did not have the intended effect, but resulted instead in a forfeiture which brought discretionary trusts into place.

12 Millett J held that the deed should be set aside for mistake. However, rather than adopting the test of a "sufficiently serious mistake" leading to "injustice" laid down in the *Ogilvie* and *Lady Hood* cases, he instead concluded that the authorities showed 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*

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[9]Note though that in *Gibbon v Mitchell*, Millett J held (at 1309) that the proposition that equity would never relieve against mistakes of law had been too widely stated, citing *Stone v Godfrey* ((1854) 5 De G.M.& G 76) and *Whiteside v Whiteside* ([1950] Ch. 65) in support. In *AMP v Barker* ([2001] WTLR 1237), Lawrence Collins J also commented that "the cases certainly establish that relief may be available if there is a mistake as to law" but without identifying the specific authorities he had in mind. By contrast, until the landmark decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln CC* ([1999] 2 AC 349), a mistake in law could not ground a claim for restitution under the common law.

[10][1990] 1 WLR 1304.

[11][2001] WTLR 1237.

[12]See p. 1263F.

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." (Emphasis added)

13 Neither *Ogilvie* nor *Lady Hood of Avalon* was referred to in Millett J's judgment, although the latter appears to have been cited in argument and his Lordship did cite *Ellis v Ellis*. The explanation for this may lie in the fact that, in contrast with the approach adopted by Warrington J in *Ellis,* Millett J clearly felt unable to classify Mr Gibbon's mistake as a mistake of fact,[13] finding instead that it constituted a "mistake of law as to the legal consequences of [executing the deed of surrender]".

14 It is far from certain whether the "serious mistake" test as formulated in *Ogilvie* is wide enough to encompass mistakes of law or whether it is limited to mistakes of fact. Millett J's finding that Mr Gibbon had made a mistake of law might therefore have caused him to doubt whether Mr Gibbon's mistake satisfied the requirements laid down in *Ogilvie*. However, by adopting an effects/consequences distinction as the test for mistake (and thus a test which encompassed mistakes of fact and mistakes of law), Millett J was able to side-step this issue altogether.

15 Millett J did not, however, cite any authority justifying his reliance on an effects/consequences distinction in lieu of the test laid down in *Ogilvie*. As we shall go on to discuss at paras 35–42 below, rather than being derived from earlier case law, the test formulated by Millett J is, in our opinion, of doubtful authority and, in any event, completely unworkable.

16 Nevertheless, following the decision in *Gibbon v Mitchell*, the distinction between "effects" and "consequences" was seized upon and developed in the cases which followed.

17 In *Anker-Petersen v Christensen*,[14] the beneficiaries of certain trusts consented (as part of a restructuring for tax reasons) to the assignment of their interests to new trusts, but were misled as to the terms of those trusts. Despite confessing that the effects/consequences distinction was "*difficult to draw*", Davis J set the deeds of assignments aside on the basis of a mistake as to the effect of the

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[13]He presumably felt it would be too much of a stretch on the facts to conclude that Mr Gibbon must simply have "forgotten" that his life interest was subject to a protective trust, which was the approach adopted by Warrington J in *Ellis v Ellis.*

[14][2002] WTLR 313.

assignments: "[the claimants'] ignorance of these new provision means that they were ignorant of the true effect of the assignments."[15]

18 Subsequently, in *Wolff v Wolff*,[16] again despite noting that the distinction between effects and consequences "is not always easy to grasp",[17] Mann J attempted to apply it. *Wolff* concerned a scheme to mitigate inheritance tax, as part of which Mr and Mrs Wolff executed a deferred reversionary lease over their home in favour of their daughters. However, the Wolffs did not appreciate (*inter alia*) that the effect of the lease would be to deprive them of the right to reside in their home from the moment of its commencement. Initially, Mann J said that he—

> "thought that the mistake of the Wolffs ... was more as to the consequences of their transaction that as to its effect ... They intended a lease to their daughters and they knew that that would give their daughters an interest. The fact that the lease deprived them of their right of possession seemed to me to be more of a 'consequence', in the words of Millett J."

However, his Lordship was—

> "persuaded that my initial reaction was wrong. The Wolffs intended to give away an interest to their daughters, but there were limits to that gift. It was to take effect in the future, but even then it was not to deprive them of the rights of occupation free of charge that they had enjoyed hitherto. In fact and in law the lease deprives them of that right from June 2017. That seems to me to be an effect of the transaction—they have given away more than they intended."

19 The test laid down by Millett J in *Gibbon v Mitchell* did not, however, go unchallenged for long. In *Sieff v Fox*,[18] Lloyd LJ cast doubt on it and contrasted it with the "serious mistake" test laid down in *Ogilvie*. He noted that the distinction between "effects" and "consequences" "may be difficult to apply".[19] He went on to say this[20]—

> "According to Gibbon v Mitchell, the mistake must be as to the effect of the disposition, and a mistake as to its consequences is

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[15]At [44].
[16][2004] WTLR 134.
[17]At [25].
[18][2005] 1 WLR 3811.
[19]At p. 3842C.
[20]At p. 3845.

not sufficient. *If that is the correct test*, Davis J's comment that the fiscal consequences of the transaction are not relevant is probably right[21] and a misunderstanding as to those would not justify setting the disposition aside. According to *Ogilvie v Littleboy* ... the test is more general, namely whether the donor or settlor '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'. That formula might allow fiscal consequences to be taken into account, if they were sufficiently serious." (Emphasis added)[22]

20 With the stage thus set, it is perhaps unsurprising that Millett J's analysis in *Gibbon v Mitchell* did not escape the next and most recent cases on rescission for mistake unscathed.

Ogden and Clarkson: a reversion to principle?

21 In *Ogden v Griffiths Trustees*,[23] the executors of the late Mr Griffiths sought to set aside various transfers into trust. Mr Griffiths had owned substantial assets in his own name, and wished to mitigate the effect of inheritance tax on his death. Having taken advice from tax consultants, he made various "potentially exempt transfers" of the assets into certain trusts. However, unbeknownst to him at the time he made the transfers, he was suffering from terminal lung cancer and died shortly afterwards.

22 The executors sought to set aside the transfers on the grounds that they had been made under a mistake.[24] This was said to be that, at the time Mr Griffiths made the transfers, he believed there was a real chance that he would survive for seven years whereas in fact (because of the unknown cancer) there was no such chance.

23 Lewison J considered the *dicta* of Millett J in *Gibbon v Mitchell* and said this—

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[21]As we shall go on to consider at paras 34 to 36 below, it is difficult to know though on what basis Davis J felt able to classify fiscal matters as a consequence rather than an effect not least since, as a matter of pure logic, there seems no reason why something which has been classified as a "fiscal consequence" could not equally well be classified as a "fiscal effect".

[22]See now *Ogden*, in which Lewison J left open the question whether mistakes as to the fiscal consequences of a transaction were sufficient to bring the courts' equitable jurisdiction into play.

[23][2008] EWHC 118; [2009] Ch 162.

[24]If the transfers were set aside, the property would fall into the residue of Mr Griffith's estate and pass to his wife under his will.

"His Lordship's distinction between the effect of the transaction and its consequences or advantages has proved a difficult one to grasp. Davis J in *Anker-Petersen v Christenson* ... Lloyd LJ in *Sieff v Fox* ... and Mann J in *Wolff v Wolff* ... have all expressed that difficulty. The principal debate has been whether a mistake by an individual (as opposed to a trustee) about the fiscal consequences of entering into a transaction counts as mistake about the effect of the transaction or a mistake about its consequences or advantages. I do not need to resolve this debate."

24 Having left open the question whether a mistake about the fiscal consequences of entering into a transaction was enough to bring the *Gibbon v Mitchell* principle into play, Lewison J then deftly side-stepped the debate altogether by saying that he did not read the formulation by Millett J as limiting the scope of the equitable jurisdiction to relieve against the consequences of a mistake. Instead, Lewison J held as follows—

"[Millett J] said that a voluntary 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. He did not say that a voluntary deed will *only* be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. The formulation of the principle by Lindley LJ[25] and approved by the House of Lords is not so limited." (Emphasis added)

25 Lewison J then went on to hold that, in his view, it was "plain" that a mistake of fact was capable of bringing the equitable jurisdiction into play. All that was required was a mistake of a "sufficiently serious" nature, and a mistake about an existing or pre-existing fact was, if sufficiently serious, enough to ground an order for rescission.[26]

26 On the facts of the case, Lewison J found that Mr Griffiths had made a "sufficiently serious" mistake about his health, and that it would be unjust for the donees to retain the property assigned to them

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[25] In *Ogilvie v Littleboy*.

[26] *Ogden* has since been followed, again at first instance (interestingly, also in the Birmingham District Registry), in *Fender v NatWest Bank* ([2008] EWHC 2242 (Ch); 48 (2008) EG 102), where HHJ Purle held that a bank which had executed a deed of release in the mistaken belief that debtor's indebtedness had been discharged could rescind the deed. See also *Bhatt v Bhatt* discussed at para 77 below.

in circumstances which would impose on Mr Griffiths' estate an unintended liability to inheritance tax. He therefore concluded that the conditions allowing the equitable jurisdiction to be exercised had been established.

27 In fact, however, Lewison J's approach of side-stepping the complexities thrown up by *Gibbon v Mitchell* had already been employed by the High Court of the Isle of Man in *Clarkson v Barclays Private Bank & Trust (Isle of Man) Ltd.*[27]

28 In that case the claimant husband and wife, who had become domiciled in Spain in 1983, sought to rescind 1987 transfers into an Isle of Man trust which they had failed to appreciate would be chargeable to tax by virtue of the deeming provisions in s 267 IHTA 84. They succeeded. Deemster Kerruish had this to say, at para [41]—

> "I accept that there is no rational basis for restricting recovery to where there has been a mistake as to the operative effect of a transaction. Ogilvie v Littleboy is authority for a wider test based upon the mistake being so serious as to render it unjust for the donee to retain the property, irrespective of the precise nature of the mistake. Both [AMP] and what Lloyd LJ said in *Sieff v Fox* lend support to a test based on the seriousness of the mistake."

Ogden and Clarkson analysed

29 At first blush, the *Ogden* and *Clarkson* line of authority appears to be a return to the test for mistake laid down in *Ogilvie* and *Lady Hood of Avalon*. However, in our view, the implications of both decisions are more far-reaching than might at first appear.

30 In the next part of this paper, we will analyse the recent authorities under the following headings—

(a) Have *Ogden* and *Clarkson* sounded the death knell for the effects/consequences distinction?

(b) To what extent have *Ogden and Clarkson* brought about a divergence from *Ogilvie* by introducing an "operating cause" test for mistake in lieu of (or even in addition to) the "serious mistake" test?

(c) The void/voidable debate.

(d) Pushing the boundaries of what constitutes a "mistake".

(e) Where are mistakes as to tax consequences left?

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[27][2007] WTLR 1703.

Have Ogden and Clarkson sounded the death knell for the effects/consequences distinction?

31 Although neither Lewison J in *Ogden* nor Deemster Kerruish in *Clarkson* expressly rejected the effects/consequences distinction as a test for mistake, the fact that neither of them applied it obviously begs the question as to what is its status now. In a recent decision of the Royal Court of Jersey in *Re Mr and Mrs P Capital Asset Protection Plan Trust*[28] the Jersey court seemed to take it as read that the test laid down in *Gibbon v Michell* could not co-exist with the test adopted in *Ogden* and *Clarkson,* although on the facts of that particular case it was not necessary for the court to decide which one to choose.

32 In our opinion though, even if it were possible for the effects/consequences distinction and the *Ogilvie/Clarkson* test to co-exist, it would still be preferable for the former to be consigned to legal history, since as a test for mistake it is both unworkable and of doubtful authority.

Unworkable

33 At first blush, a distinction between "effects" and "consequences" seems clear enough. However, on closer analysis, the line between the two begins to blur. The difficulty stems from the fact that "effects" and "consequences" are not entirely discrete concepts. Indeed, a dictionary definition of "effect" is "consequence intended".[29] Thus, on any set of facts, the "effect" of a particular transaction can always be defined so as to encompass any specific consequence which a party to the transaction had anticipated would flow from it. By way of example, as a matter of pure logic there is no obvious reason why a person who makes a disposition in the mistaken belief that it will attract favourable tax treatment should not be regarded as having made a mistake about the "effect" of that disposition (*i.e.* its supposed tax saving characteristics) although he could equally well regarded as having made a mistake as its "consequences" (*i.e.* that it would save him tax).

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[28][2008] JRC 159. Incidentally, this was the first occasion on which the issue of setting aside unilateral transactions on the grounds of mistake had fallen to be decided by the laws of Jersey.

[29]And indeed Davis J in the *Anker-Petersen* case noted that "in the Shorter Oxford English Dictionary one of the definitions of 'effect' is given as 'consequence'."

34 In our opinion, attempting to draw a clear distinction between the "effect" of a particular disposition and its "consequences" is therefore a hopeless exercise.

Doubtful authority

35 None of the cases cited by Millett J in *Gibbon v Mitchell* in fact constitute authority for the test which he adopted in lieu of the test laid down in *Ogilvie*.[30] So what then is the source of the effects/consequences distinction?

36 In *AMP v Barker*, Lawrence Collins J observed that the effects/consequences distinction appeared to have been derived from the following passage from the 6th edition of *Kerr on Fraud and Mistake* (1929), which was cited in *Whiteside v Whiteside*[31]:

> "Though the Court will rectify an instrument which fails through some mistake of the draftsman in point of law to carry out the real agreement between the parties, it is not sufficient in order to create an equity for rectification that there has been a mistake as to the legal construction or the legal consequences of an instrument."

37 In *Whiteside* itself, Evershed MR (who delivered the leading judgment) construed that passage in the following way—

> "I do not read that passage as meaning that if the mistake made is in using language to perfect an agreement which in law has some result different from the common intention, that is not a case in which there can be rectification[32]. I do not read the passage as so stating, and I think, as present advised, that if it did it would be too wide. *I think it may well be that if the mistake has arisen from the legal effect of the language used that may provide a*

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[30]Interestingly, in light of what we go on to say below, the authorities referred to by Millett J in *Gibbon v Mitchell* may in fact be early instances of the courts applying an "operative cause" test for mistake in place of the "serious mistake" test laid down by *Ogilvie*. If so, then these cases may also be authority for the proposition that a mistake of law can ground an order for rescission, provided of course that the mistake was causative of the disposition which is to be set aside.

[31]At 74, *per* Evershed MR.

[32]This is followed in *Re Butlin's Settlement*, where Brightman J confirms that rectification is available where "the words or the document are purposely used but it is considered that they bore a different meaning as a matter of true construction."

ground for the exercise of the court's reforming power. Subject however to that qualification, I think the passage cited is correct." [Emphasis added.]

38 The above passage from *Kerr* was clearly intended to define the limits of the courts' jurisdiction to grant an order for *rectification*. Further, when the words highlighted above are read in their proper context, it is clear that the reference to a mistake which has arisen from the "legal effect of the language used" was only intended to cover a situation where words are purposely used in a document, but a party to the document is mistaken as to their *meaning*. It is clear from the judgment of the court in *Whiteside* that the reason Evershed MR felt it necessary to highlight this point was to make clear that he did not agree with the assertion in *Kerr* that a mistake "*as to the legal construction ... of an instrument*" (*i.e.* its meaning) could never give rise to a claim for rectification.

39 When it is understood that the roots of the effect/consequences distinction lies in the rectification case law, where one is only concerned with the "effect" of language (*i.e.* its meaning), one can readily see how problems will follow if that distinction is transplanted into the rescission context and applied to the "effect" of an entire transaction.

40 The effect of Millett J's decision in *Gibbon v Mitchell* was therefore to confer upon the effects/consequences distinction a function it should never have had[33] and which it is incapable of performing.

41 To the extent therefore that *Ogden* and *Clarkson* have sounded the death knell for the effects/consequences distinction as a test for mistake, in our view this is a welcome development.

The introduction of an "operative cause" test for mistake

42 Although both Lewison J in *Ogden* and Deemster Kerruish in *Clarkson* appeared to be taking the equitable jurisdiction back to its *Ogilvie* roots, in fact the effect of those decisions has been to bring about a significant divergence from the earlier case law, by introducing what restitution scholars would call an "operative cause" test for mistake. This test is satisfied whenever it can be shown that the claimant's mistake caused him to enter into the disposition in question.

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[33]Namely determining the nature of the operative mistake which will bring the equitable jurisdiction into play.

43 Although both *Ogden* and *Clarkson* have brought about the introduction of an "operating cause" test for mistake, they have gone about it in different ways.

44 In *Clarkson*, Deemster Kerruish used the "operative cause" test to define what constituted a "sufficiently serious" mistake"[34]—

> "By way of analogy with the approach of the courts to a common law claim in restitution, the best measure as to whether the mistake was so serious as to render it unjust for the volunteer donee to retain the monies is if the payment would not have been made "but for" the mistake. In other words, the mistake was the cause of the payment."

45 In *Ogden,* having left entirely open the question of what types of mistake would satisfy the "sufficiently serious" test Lewison J then went on to hold that the claimants also had to demonstrate that, had Mr Griffiths been aware of the true facts he "*would* not have acted as he did" (emphasis added). It is important to note that Lewison J made clear that in answering this question it was *not* "necessary for the claimants to show what Mr Griffiths would have done if he had not made the mistake".

46 This has had the effect of introducing an "operating cause" test of mistake by the back door. Although it seems that Lewison J envisaged that the claimants would have to satisfy *both* the "sufficiently serious" test and the "operating cause" test, in the absence of any objective element to the former[35] it is difficult to see what it adds to the "operating cause" test. Thus, 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.

Is the introduction of an "operating cause" test a welcome development?

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[34]A simple causation test also appears to have been taken up in New Zealand: see for example *University of Canterbury v Att-Gen* ([1995] 1 NZLR 78).

[35]In the common law jurisdiction, Professor Tettenborn has argued in favour of an objective test formulated as follows: "If a person, knowing the facts behind the rendering of the benefit but not the individual characteristics of the parties, would have regarded the mistake as immaterial then restitution is not available: otherwise, it ought to be" (see *Law of Restitution in England and Ireland* (2002), at 76.).

47 On one view, the introduction of an "operating cause" test of mistake is a welcome development, since it may bring about greater certainty to this area of the law than there has been hitherto.

48 Moreover, adopting an "operating cause" test of mistake brings the equitable jurisdiction into line with its common law cousin, where causation is probably now the touchstone of the liability to make restitution. Indeed, it was by virtue of drawing an analogy with the common law claim that Deemster Kerruish adopted the "but for" causation test to decide whether a mistake satisfied the "sufficiently serious" requirement.[36]

49 The adoption of an "operating cause" test for mistake also brings about symmetry between this aspect of the courts' jurisdiction to relieve the consequences of mistake and the *Hastings-Bass* doctrine as it has been applied in circumstances where a trustee is seeking to set aside the exercise of a power he was not obliged to exercise. In such a case, it now seems well settled that the trustee has to show that, but for the mistake,[37] he *would* not have entered into the disposition in question.

Is the "operating cause" test of mistake suitable for all mistaken payment cases?

50 However, in the context of common law claims for restitution, Professor Tang Hang Wu[38] has argued that whilst the "operating cause" test may be a suitable test to apply to mistaken payments in the commercial world, it is a wholly inadequate test where gifts are concerned.[39] In summary, Tang's argument is as follows—

(a) First, he contends that there is a serious conceptual problem in using the "but for" theory in analysing complex human actions like gift giving, because human actions are indeterminate. Even with a great deal of information about people's characters and background, their reactions are not totally predictable.[40] Tang

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[36]See *Clarkson supra* at 1715, para [42].

[37]The *Hastings-Bass* doctrine also encompasses both mistakes of fact and mistakes of law. This is a further reason why we think it is more likely than not that the "operating cause" test as formulated in *Ogden* and *Clarkson* will be regarded as extending not only to mistakes of fact but also to mistakes of law.

[38]Assistant Professor, National University of Singapore.

[39](2004) 20 *Journal of Contract Law* 1.

[40]Tang also cites Honoré, who in the context of the "but for" test in tort law said: "an indeterminate world ... presents a difficulty for the but for theory,

gives the example of an uncle making a gift to his niece in ignorance of the fact that she married a man he detests: "who is to say but for his ignorance he would not have made the gift? It may very well be that after a period of reflection, he would still have the gift in spite of the niece's husband. At the very most, we can only come to a conclusion that he might have not made the gift. But we will never really know the answer since human actions are indeterminate".

(b) Secondly, when a gift is motivated by two or more reasons (which is usually the case) it is extremely difficult to apply the "but for" theory. This has also been recognised in misrepresentation cases, and Tang refers to the *dicta* of Lord Cransworth in *Reynell v Sprye*: "It is impossible to analyse the operations of the human mind so as to be able to say how far any particular representation may have led to the formation of any particular resolution, or the adoption of any particular line of conduct. No one can do this with certainty, even as to himself, still less as another".

(c) Thirdly, Professor Tang argues that gifts are an "important social practice meant to generate trust" and must therefore be protected[41] from the "overzealous application of the law of restitution".[42]

51 Professor Tang's proposed solution to the perceived difficulties of the "but for" test in gift cases is to adopt a combination of what he terms a "failure of basis" test and a "serious mistake" test. Essentially, two questions must be asked. First, did the donor make the basis of the gift clear to the donee from the outset? If so, and the basis fails to materialise, then according the donor should be entitled to restitution. However, if the basis of the gift was not articulated,[43] it is necessary to ask the second question: was the donor in making the gift labouring under a serious mistake which goes to the root of the gift?

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since in an indeterminate world we cannot calculate what *would* have happened in the absence of a particular ... act" ("Necessary and Sufficient Conditions in Tort Law" in Owen (ed) *Philosophical Foundations of Tort Law* (1995) p. 363, emphasis added).

[41]In the same way that contracts are.

[42]*Ibid* at 24.

[43]Tang accepts that usually this will only be the case in highly structured voluntary settlements where the donor has been quite single minded about the basis of the gift.

52 Tang argues that only mistakes as to the "nature and character" of the act or the identity of the donee should qualify as sufficiently serious to justify rescission of a gift. Mistakes relating to the character, attributes, social position and even the legal status of the donee should not be considered as a serious mistake of identity.[44]

Implications of Professor Tang's arguments in the context of the courts' equitable jurisdiction

53 Although the hybrid test which Tang proposes is intended by him to be applied in common law claims for restitution, in the absence of compelling reasons for retaining a distinction between the common law and equitable principles some commentators[45] have expressed the view that any differences between the two should be wiped away.

54 Tang's arguments demonstrate that the search for a single test—what he refers to as a "golden thread"—which could be applied to any unilateral mistake case is probably a futile one. The facts to which the test has to be applied are simply too diverse. They range from cases in which a disponor's decision to enter into a particular deed has been driven by purely financial considerations (the cases of *In re Walton's Settlement*[46] and *Meadows v Meadows*,[47] both of which were cited in *Gibbon v Mitchell*, fall into this category) through to cases in which the disponor was motivated purely by non-financial considerations. Cases such as *Gibbon v Mitchell* and *Ogden* would seem to fall in the middle of this spectrum, since the dispositions in those cases seem to have been motivated in part by altruism and in part by financial/tax considerations.

55 It may well be therefore that, although the "operative cause" test for mistake as formulated in *Ogden* and *Clarkson* is the appropriate test for cases in which the disponor has been motivated either wholly or in part by financial considerations, in circumstances where the disponor has simply been motivated by a desire to confer a bounty

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[44]Tang accepts, however, that it would be rash to assert that the categories of serious mistakes are closed. The test which he proposes is not perhaps as certain as it might first appear.

[45]Most notably Goff and Jones (see *e.g. The Law of Restitution* (7th ed) at §4–022). On wiping away the distinctions generally see Burrows "We do this at common law but that in equity" (2002) 22 OJLS 1.

[46][1922] 2 Ch 509.

[47](1853) 16 Beav 401.

upon another the test proposed by Professor Tang (or at least a variant of it[48]) would be a more appropriate one.

56 It should be observed that if a "failure of basis" plus "serious mistake" test were to be adopted by the courts when exercising their equitable jurisdiction, this would not necessarily bring about a conflict between the equitable jurisdiction and the common law jurisdiction since (at least so far as we are aware) the existing common law authorities all concern mistaken payments in the commercial world, and none of them concern gifts.[49]

Resolving the void/voidable debate?

57 Another matter of controversy decided by Lewison J in *Ogden* was whether, as a result of a finding of operative mistake, a unilateral transaction was thereby rendered void, or merely voidable. This was essential to the decision in *Ogden* because tax had been paid by the executors on a provisional basis.[50] Lewison J followed the approach of Lightman J in *Abacus Trust Co v Barr*[51] in the related field of *Hastings-Bass* applications and held that the transaction was "voidable". He did so on the basis that this was an inevitable corollary of the jurisdiction being a "discretionary" one, as it had been described by Kay LJ in *Barrow v Isaacs & Son*,[52] a case concerning a contract entered into by mistake.

58 Although the effect of mistake on unilateral transactions merits a far more extensive review than is possible within the scope of this article, we have sought to highlight the key issues below.

59 Up until now, the debate about the effect of mistake on a unilateral transaction has focused on whether the mistake renders the transaction "void" or "voidable". The terms "void" and "voidable"

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[48]It may be thought that Professor Tang's definition of a "serious mistake" is too narrow; indeed, it would not have been satisfied on the facts of *Ogden* itself. However, as yet, no satisfactory alternative has been proposed.

[49]We have been unable to find any English cases at least where the common law claim has been brought in relation to a gift.

[50]If the transaction were "void", the executors would have been entitled to interest on the overpaid tax from the date of payment (see s 235 IHTA 1984), whereas if it were merely "voidable", interest would only accrue from the date the claim was made (s. 236(3) IHTA 1984).

[51][2003] Ch 409. Lightman J's conclusion was of course doubted by Lloyd LJ in *Sieff v Fox* (*supra*)—although even Lloyd LJ observed the attractiveness of such a conclusion in giving the courts suitable flexibility.

[52][1891] 1 QB 417.

are, however, terms which English lawyers use to classify *contracts* according to their effect.[53] Thus, a "void" contract is a contract which produces no effect whatsoever.[54] By contrast, a "voidable" contract is one where one or more of its parties have the power, by manifestation of an election to do so, to avoid the legal relations created by the contract or, by affirmation of the contract, to extinguish the power of avoidance.[55]

60 If a party elects to avoid the legal relations created by the voidable contract, he does so by "rescinding" the contract. Rescission is therefore the act of the parties, not of the court; the function of the court being simply to say whether or not the party in question was entitled to rescind.

61 In *TSB Bank Plc v Camfield*,[56] a case which concerned the rescission of a contract of guarantee on the grounds of misrepresentation, the Court of Appeal held that court intervention in the rescission process was neither necessary nor warranted. Roch LJ commented that the court was only being asked—

> "to decide whether the representee[57] has lawfully rescinded the transaction or is entitled to rescind it. The court is not being asked to grant equitable relief; nor is it, in my view, granting equitable relief to which terms may be attached."

Power to set aside on terms: a third category of contract?

62 The decision of the Court of Appeal in *Camfield* makes it clear that the rescission of a voidable contract does not amount to the grant of equitable relief: on the contrary, the court's role is limited to determining whether the rescission was lawful. And yet, there is no doubt that the English courts have long exercised an equitable jurisdiction to relieve from the consequences of mistake.[58] So, if this

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[53]Interestingly though, in the Canadian case of *Re Horvath* (2002) 32 ETR 3d 81, the British Columbia Supreme Court held that the effect of mistake on a unilateral transaction was to render it void.

[54]See however para 1-081 of Chitty, *The Law of Contracts* for the exceptions to this principle.

[55]See paragraph 1-082 of *Chitty on Contracts.*

[56][1995] 1 WLR 430 (CA).

[57]In a case where rescission is sought on the grounds of misrepresentation.

[58]See page 403, line F of the judgment of Lewison J in *Ogden:* "This equitable jurisdiction has always been described as a jurisdiction to relieve against the consequence of a mistake or as a jurisdiction to set aside unilateral transactions entered into under a mistake."

equitable jurisdiction is entirely separate from the right vested in a party to rescind a "voidable" contract, what implications does this have for the classification of contracts and unilateral transactions?

63 The answer seems to lie in the fact that "void" and "voidable" contracts are not the only categories of invalid contracts to be recognised by English law: there is also another category, namely contracts which are liable to be set aside by the court on terms.[59] This category of contract is described at paragraph 1-083 of *Chitty on Contracts*[60] in the following terms:

> "**Power to set aside on terms.**
>
> In the case of contracts said to be voidable for common mistake in equity, this description refers not to a power in one or other of the parties to avoid the contract, but to a power in the court to set aside the contract on terms: see *Solle v Butcher* [1950] 1 K.B. 671."

64 Although the passage cited above obviously refers only to an equitable jurisdiction to set aside *contracts* on the grounds of mistake, in our view this jurisdiction clearly forms part of a much wider general equitable jurisdiction to set aside both contracts *and* unilateral transactions on "equitable grounds".[61] This is certainly the position in Australia, where the scope of such a general equitable jurisdiction was described in *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184

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[59]There is also a further category of "unenforceable" contracts, which are contracts which are valid in all respects except that one or both parties cannot be sued on the contract.

[60]Thirtieth Edition

[61]Indeed, as Lewison J recognised in *Ogden*, the courts have long exercised an equitable jurisdiction to set aside unilateral transactions entered into under a mistake. Also, in the recent case of *Sutton v Sutton* [2009] EWHC 2576 (Ch), Christopher Nugee QC sitting as a Deputy Judge had no hesitation in holding that the Court had jurisdiction to set aside a unilateral transaction on the grounds of the transferor's incapacity. It is more questionable though whether the Court was right to assume (as it seems to have done) that a particular transaction could be both liable to be set aside pursuant to the Court's general equitable jurisdiction *and* either "void" or "voidable". Since this would give rise to a potential conflict between the common law and equity, it must surely follow from the decision in *The Great Peace* that it is only where a particular transaction is neither "void" nor "voidable" (at least at common law) that the equitable jurisdiction to set aside is capable of being invoked.

C.L.R. 102, a decision of the [High Court of Australia], in the following terms[62]—

> "... the appellant seeks to be relieved completely and unconditionally from all liability under the guarantee ... If such complete and unconditional relief is to be granted, it must be upon some basis other than mere entitlement to a practical restoration of the status quo upon rescission ... induced by fraud. *The only such basis that comes to mind is equity's general jurisdiction in setting aside contracts and other dealing*[63] *on equitable grounds, to ensure the observance of the requirements of good conscience and practical justice.*"

65 Thus, although following the decision of the Court of Appeal in *The Great Peace*[64] there is no longer a separate jurisdiction in equity to set aside a contract on the ground of mistake, the reason for rejecting this aspect of the courts' general equitable jurisdiction was that it was irreconcilable with developments which had taken place in the common law. However, in the context of unilateral transactions, there is (at least as yet) no provision of the common law which is irreconcilable with the equitable jurisdiction to grant relief on the grounds of mistake.[65] Thus, the equitable jurisdiction will remain exercisable unless and until it is ousted by the common law.

66 The existence of a category of contracts which are "liable to be set aside" is also supported by authority. In the case of *Cooper v Phibbs*,[66] which concerned the equitable jurisdiction to relieve from the consequences of mistake, Lord Westbury suggested that such

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[62] *Vadasz* raised the issue of whether the Australian courts had jurisdiction to grant partial rescission. Note that in *TSB Bank Plc v Camfield* [1995] 1 WLR 430 the English Court of Appeal held that this was not possible as a matter of English law.

[63] We assume that the term "other dealing" would cover unilateral transactions.

[64] *The Great Peace* [2002] EWCA Civ 1407.

[65] Interestingly, as noted above it seems that the Canadian courts have indeed gone down the road of holding that mistake renders a unilateral transaction void: see *Re Horvath* (2002) 32 ETR 3d 81. In our view, however, whilst such an approach has the advantage of bringing about a measure of symmetry between the rules governing the validity of contracts and the rules governing the validity of unilateral transactions, the exercise of a discretionary equitable jurisdiction offers far greater opportunities for the courts to do practical justice.

[66] (1867) L.R. 2 H.L. 149.

contracts were merely "liable to be set aside as proceeding upon a common mistake"[67]. In the later case of *Bell v Lever Bros Ltd*[68] Lord Atkin expressed a contrary view, stating that "the agreement [in *Cooper v Phibbs*] would appear to be void rather than voidable". However, *Bell* concerned a mistake at common law. Lord Atkin was therefore simply making the point that, so far as the common law was concerned, a common mistake rendered a contract void, not voidable. The fact that Lord Atkin felt it necessary to highlight this point illustrates very clearly why it was that the equitable jurisdiction could not continue to co-exist alongside the common law: the two were irreconcilable. He cannot however be taken as having expressed the view[69] that contracts (or unilateral transactions) which remain liable to be set aside in equity must be classified as "void", or that the terms "voidable" and "liable to be set aside" are synonymous.

67 Arguably therefore, the answer to the question whether operative mistake renders a unilateral transaction "void" or "voidable" is that it has neither of these effects. Instead, the mistake simply renders the transaction "liable to be set aside on terms", pursuant to the courts' general equitable jurisdiction.

Implications of this analysis

68 What then are the implications of classifying a unilateral transaction vitiated by mistake as a transaction which is "liable to be set aside"?

69 Such a classification clearly begs the question whether or not the exercise of a power to set aside operates retrospectively. The answer to this question will no doubt be of particular interest to HMRC.[70] As we have already noted, a "void" contract produces no legal effects whatsoever. By contrast, voidable contracts are valid until they are rescinded. However, if they are rescinded, then the rescission takes effect retrospectively. Thus, if a third party to the transaction has acquired an interest in the subject matter of the transaction, this will

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[67]See also *Earl of Beauchamp v Winn* (1873) L.R. 6 H.L 223.

[68][1932] AC 161.

[69]Which would have been *obiter* in any event.

[70]It will also be necessary to decide whether the term "voidable" used in ss 150 and 236(3) of the Inheritance Tax Act 1984 (see *Ogden*, at 403, line F) should be construed so as to include transactions which are "liable to be set aside".

constitute a bar to a claim for rescission,[71] provided that the third party has acted in good faith and has given consideration.

70 But what of the exercise of a discretionary power to set aside a transaction pursuant to the court's general equitable jurisdiction? Does that also operate retrospectively? And if so, how, if at all, will the interests of third parties be protected?

71 In *Sutton v Sutton*[72] Christopher Nugee QC, sitting as a Deputy Judge, held that just as in the case of rescission for misrepresentation, the setting aside of a unilateral transaction in the exercise of the court's general equitable jurisdiction dated back to the original impugned transaction.

72 If that is right[73] then it presumably follows that, just as rescission has restitutionary consequences, so too does the exercise of a power to set aside.

73 Thus, once a transaction has been set aside by the court, the transferor will be entitled to assert both proprietary and personal claims against any person who has received property as a result of the impugned transaction. Further, although such a person might be able to avail himself of restitutionary defences such as change of position, estoppel, or good consideration, it is far from clear whether the change of position/estoppel defences operate to defeat proprietary claims, or whether they are only capable of being invoked against personal claims.

74 A recent decision of the Royal Court of Jersey in *In re R Remuneration Trust*[74] has, however, provided some insight into how the courts will be likely to exercise their equitable jurisdiction to set aside unilateral transactions on the grounds of mistake, and in particular, how the rights of the transferor are likely to be balanced against the rights of other parties who have received property which is the subject of the transaction. In *R Remuneration Trust*, the facts were that the settlor of a trust sought to have it set aside on the grounds of mistake. The trust was governed by English law, and so in considering the scope of its jurisdiction to set it aside, the Royal Court applied English law.

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[71] *White v Garden* (1851), 10 CB 919.
[72] [2009] EWHC 2576 (Ch).
[73] Although no authority was cited in support of this conclusion.
[74] [2009] JRC 164A.

75 The Royal Court began by noting that the power to set aside a transaction was a discretionary one.[75] It then went on to hold that there were two factors which it would take into account in deciding whether to exercise the discretion to set aside a settlement on the grounds of mistake. These were, first, whether it would be unjust on the beneficiaries for the settlement to be set aside, and secondly, whether the position of third parties would be prejudiced if the settlement were to be set aside.[76]

76 Insofar as concerned the first factor, the Court noted that, given the terms of this particular settlement, the beneficiaries were unlikely to derive any future benefit from it in any event. The Court also cited with approval the statement of Millett J in *Gibbon v Mitchell*[77] that it would be unconscionable for volunteers to insist on their rights under a deed once they became aware of the mistake.

77 As to the position of third parties, the Royal Court expressed the view that if the deed were set aside, the transferor would have what it described as a "theoretical" claim to recover property distributed to beneficiaries under the trust,[78] although it was said that any such claims would be subject to a defence of change of position.[79]

78 However, the court then went on to note that the transferor had confirmed that he would not seek restitution of these amounts, and that he had also confirmed that the trustees of the settlement would be permitted to retain trustee fees and disbursements which had been

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[75]Significantly, given the arguments advanced above, there is no reference anywhere in the Royal Court's judgment to the issue of whether the mistake rendered the settlement "void" or "voidable". Instead, the Court simply referred to the settlement being "set aside".

[76]Since the Court seems to have assumed that the setting aside of the transaction was capable of affecting the rights of third parties, the Court must have taken the view it would take effect retrospectively. It does not appear, however, that the Court heard any submissions on this point.

[77][1990] 1 WLR 1304.

[78]In fact, the Royal Court said that the transferor would have a "theoretical claim" against the *trustee*, and that the trustee might then have a claim against the beneficiaries. In our view though, it is difficult to see on what basis a claim could be made against the trustee, since there is no suggestion that it acted in any way unconscionably. However, assuming that the setting aside operated retrospectively, then the settlor would clearly have had restitutionary claims against any beneficiary to whom property had been distributed.

[79]As noted above, it is however far from clear whether the defence of change of position operates to defeat proprietary restitutionary claims.

charged. The court stated that both of these aspects would be recorded in its order.

79 Reading between the lines, it seems reasonable to infer that had the settlor not been willing to make these concessions, the Royal Court might well have declined to exercise its equitable jurisdiction in his favour.

80 Given the Royal Court's approach in this case, it seems likely that, although prejudice to a third party will not operate as an automatic bar to an order setting aside a transaction, the English courts will take the interests of such parties into account in exercising their discretion to grant equitable relief.[80]. Further, since a trustee of an impugned settlement will almost certainly be able to raise a "good consideration" defence to a restitutionary claim to recover fees, it seems reasonable to assume that parties seeking to set aside a voluntary settlement on the grounds of mistake will be likely to make similar concessions to those made by the settlor in *Nautilus*.

81 It remains to be seen however whether, in balancing the interests of the transferor against the interests of other parties, the English courts will go quite so far as the Royal Court seems to have done in *R Remuneration Trust* in protecting the interests of "volunteers",[81] regardless of whether or not it would have been open to such parties to claim the benefit of any restitutionary defence.

82 Another matter of controversy decided by Lewison J in *Ogden* was whether, as a result of a finding of operative mistake, a transaction was thereby rendered void or merely voidable. This was essential to the decision in *Ogden* because tax had been paid by the executors on a provisional basis.[82] Lewison J followed the approach of Lightman J in *Abacus Trust Co v Barr*[83] in the related field of *Hastings-Bass* applications and held that the transaction was voidable.

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[80]Further, since the jurisdiction is to set aside on terms, there would seem to be no reason in principle why the Court should not be entitled to grant an order setting a transaction aside on condition that the interests of third parties remain unaffected.

[81]Such as beneficiaries to whom property has been distributed.

[82]If the transaction were void, the executors would have been entitled to interest on the overpaid tax from the date of payment (see s 235 IHTA 1984), whereas if it were merely voidable, interest would only accrue from the date the claim was made (s. 236(3) IHTA 1984).

[83][2003] Ch 409. Lightman J's conclusion was of course doubted by Lloyd LJ in *Sieff v Fox* (*supra*)—although even Lloyd LJ observed the attractiveness of such a conclusion in giving the courts suitable flexibility.

He did so on the basis that this was an inevitable corollary of the jurisdiction being a "discretionary" one, as it had been described by Kay LJ in the mistake context in *Barrow v Issacs & Son*,[84] a case in which relief was refused.

83 Although this conclusion means that the equitable jurisdiction is out of step with contractual (common) mistake, where the parties' mistake goes to the formation of the contract and vitiates their consensus *ab initio*,[85] Lewison J sought to justify this difference on the grounds that the test for mistake in contract cases was more stringent than the test for unilateral mistake in equity. However, this distinction is not entirely convincing. Since the rationale for the doctrine of mistake is that "consent" (which is an essential ingredient of both bilateral and unilateral transactions) has been vitiated, it is difficult to see why the seriousness of the vitiation should make any difference.

84 It is also interesting to note that the Canadian courts appear to have taken a different view, regarding a transaction vitiated by unilateral mistake as being void rather than voidable (see for example the case of *Re Horvath*[86]). Further, prior to the abolition of a separate equitable doctrine of mistake in contract,[87] Lord Atkin in *Bell v Lever Bros Ltd*[88] had taken the view that the effect of setting aside a contract in equity on the ground of mistake was to render it void rather than voidable.[89]

85 It may be therefore that the void/voidable debate is not over yet.

Pushing the boundaries of what constitutes a "mistake"

86 As far back as the *Lady Hood of Avalon* case, the courts have bemoaned the fact that "there is no satisfactory definition of what mistake is".[90] Some 100 years on, we are little further advanced.

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[84][1891] 1 QB 417.

[85]See generally *Chitty on Contracts* (30th ed) §5–009 and 5–062 and *Great Peace Shipping* (*infra*).

[86](2002) 32 ETR 3d 81 (British Columbia Supreme Court) *per* Boyle J especially at para [32].

[87]Following the Court of Appeal decision in *Great Peace Shipping* (*supra*).

[88][1932] AC 161.

[89]He disagreed with Lord Westbury's judgment in *Cooper v Phibbs* ((1867) LR 2 HL) on this point and he clearly attached no significance to the fact that relief in equity was discretionary.

[90]*Lady of Avalon* (*supra*) at 482.

However *Ogden* arguably pushes the boundaries of what has hitherto found to be capable of constituting a relevant "mistake".

What is a "mistake"?

87 Dr Duncan Sheehan defines a mistake as "a belief in something that can, at the time it is acted upon, be proved not to be the case."[91] Although this would seem to fit with the definition now used in the contractual (*i.e.* common) mistake sphere,[92] it is not in our view adequate for the purposes of equitable unilateral mistake. It does not, for example, cover the "forgetting" cases (such as *Lady Hood of Avalon*, discussed below) suggesting, as it does, positive or conscious thought on the part of the disponor.

88 Professor Virgo however (in *The Principles of the Law of Restitution*) prefers the definition of an American academic, Professor Farnsworth, which focuses on the notion of "flawed perception".[93] In our view, this approach is preferable, not least because Professor Farnsworth's theory encompasses so-called "passive mistakes" which he sees arising where "I did not have the supposed fact in mind at the time, but I could have called it to mind".[94]

"Passive" mistakes

89 *Lady Hood of Avalon* was an interesting case because it held that a "passive" mistake was capable of constituting a "mistake" for the purposes of the equitable jurisdiction. As Eve J recognised "at that moment of time (*i.e.* at the moment of exercising the power of appointment) Lady Hood had not the slightest recollection ... of the appointment to the elder daughter which had been made some six years previously ..." At the time of executing the deed Lady Hood did not therefore (positively) believe something which later transpired to be false: she did not turn her mind to the question of previous exercise of the power at all.

90 In other words, Lady Hood's mistake was of a "passive" rather than an "active" nature. However, so far as Eve J was concerned, this made no difference: it was a mistake nonetheless:

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[91] See "What is a mistake?" (2000) 20 LS 538, especially at 540.
[92] See *Great Peace Shipping v Tsavliris* ([2003] QB 679) where, at para 28, Lord Phillips defines a mistake as "an erroneous belief".
[93] See Farnsworth, *Alleviating Mistakes: Reversal and Forgiveness for Flawed Perceptions* (2004).
[94] *Ibid* at 26.

> "It seems to me that when a person has forgotten the existence of a pre-existing fact, and assumes that such fact did not pre-exist, he is labouring under a mistake, and he acts on the footing that the fact really did not pre-exist … I should have thought that a man makes a mistake in forgetting an existing fact quite as much as he does in assuming a state of things to exist which does not in fact exist … I cannot myself see that it is material whether that mistake arose from her being misinformed as to the true state of things, or from her state of mind being such that she had not, at that moment, knowledge of the true state of things."[95]

Ogden

91 In *Ogden*, Lewison J held that there was no "mistake" as such about the tax consequences of the various transfers. As his Lordship put it "what was unexpected was Mr Griffiths's subsequent death just over a year later." He went on—

> "The operative mistake must, in my judgment, be a mistake which existed at the time when the transaction was entered into. The mere falsification of expectations entertained at the date of the transaction is not, in my judgment, enough."

92 It should be observed though that Mr Griffiths' "mistake" was clearly different from the type of "passive" mistake made in *Lady Hood of Avalon*. Adopting the definition employed by Professor Farnsworth, at the time of the transfers not only was Mr Griffiths not consciously aware that he was dying, but this was not a fact he could have called to mind either. He had not forgotten he was terminally ill; he was ignorant of this fact.

93 Professor Tang has considered how widely mistakes should be interpreted in the law of restitution.[96] According to him, in order for a person to be mistaken, he or she must possess a belief or knowledge about something which can be shown to be false: "ignorance or lack of belief is not a mistake".[97] However, according to this thesis, such a belief may be either explicit or tacit.[98] An explicit belief is a belief or

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[95] At 482–484.

[96] In our opinion there is no compelling reason why the definition of mistake in the equitable jurisdiction should differ from the definition adopted by the common law.

[97] *Supra* n. 35 at 5. See also pp. 8–9.

[98] This distinction between explicit and tacit beliefs appears to have been developed at least in part so as to "re-explain" cases such as *Kleinwort*

knowledge which is consciously adverted to; by contrast, a tacit belief is a belief which influences someone's actions without conscious contemplation.

94 Thus, whilst some restitution scholars[99] have sought to argue that ignorance or lack of belief *is* capable of constituting a mistake (at least for the purposes of the law of restitution), Tang's view is that ignorance/lack of belief in making a gift does not give a donor a right to restitution, unless it may properly be characterised as a mistaken tacit belief.

95 However, this distinction between tacit and explicit beliefs may at first blush be a difficult one to draw in practice: as Tang himself observes "almost every situation involving ignorance/lack of belief could potentially be twisted into a mistake by recasting the issue as a [tacit belief]."[100]

96 That is why, in Tang's definition, the key to differentiating a mistaken tacit belief from ignorance is said to be that the former is capable of *influencing* or *inducing* a claimant's actions, whereas the latter is not. Tang gives the example of an uncle who makes a gift to his niece in ignorance of the fact that she is married to a man he detests. Whilst the uncle's error might be cast as a tacit belief as to her marital status (it is true that the uncle might not have made the gift had he known to whom his niece was married) that is not the same as saying that his ignorance/lack of belief was the actual *inducement* of the gift. This is presumably because his tacit belief that his niece was married to someone pleasant played no part in his decision to make a gift to her.[101]

97 In our view, Mr Griffiths' ignorance of his terminal illness can properly be characterised as a mistaken tacit belief, because his tacit belief that he was in good health was clearly capable of inducing him to make the dispositions in question. Thus, although *Ogden* has

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Benson (*infra*), which suggest that ignorance or lack of belief are sufficient grounds to vitiate a transfer for the purposes of the law of restitution.

[99]Principally Burrows and Krebs (see, respectively, *The Law of Restitution* (2nd ed) at *e.g.* 144–145 and *Restitution at Crossroads: A Comparative Study* (2001) at 78–79).

[100]It is also difficult to see how a tacit belief is different from an assumption. Professor Waters has described setting aside trusts on the basis of mistaken assumptions as "a treacherous path for the courts to tread" (see *The Law of Trusts in Canada* (3rd ed) at 358–359).

[101]It is thus interesting to note that, at least so far as tacit beliefs are concerned, Professor Tang envisages a role for causation in any event.

pushed the boundary of what constitutes a mistake beyond the "forgetting" cases, it is not authority for the wider proposition that the definition of mistake now encompasses ignorance and lack of belief generally.

Where are mistakes as to tax consequences left?

98 Prior to *Ogden*, much of the case law and the commentary focused on the debate about whether a mistake by an individual about the fiscal outcome (to use a neutral word) of entering into a transaction counts as a mistake about the "effect" of the transaction or a mistake about its "consequences".

99 If *Ogden* and *Clarkson* have indeed sounded the death knell for this distinction,[102] then the only inquiry which will need to be made in future is whether it can be said that, "but for" the mistake, the disponor *would* not have entered into the transaction in question. As noted previously, this brings mistakes made by individuals about tax matters into line with the same kinds of mistakes made by trustees.[103]

100 Indeed, in the very recent case of *Bhatt v Bhatt*,[104] Martin Mann QC sitting as a Deputy Judge of the English Chancery Division held that, adopting the test laid down in *Ogden*, a mistake as to whether a particular transaction would result in a saving of inheritance tax was sufficient to ground an order for rescission.

101 As a footnote, it is interesting to note that not all "onshore" common law jurisdictions have shown themselves to be as reluctant as the English courts to save taxpayers from mistakes which impact upon their tax planning. In particular, the American courts seem to adopt a much more relaxed attitude to assisting parties in relieving themselves from infelicitous tax planning by use of the mistake doctrine,[105] even going so far as to assist parties to "reform" trusts so as to achieve their anticipated tax objective.[106]

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[102]Which we sincerely hope they do.

[103]There remains the issue though of whether the *Ogden/Clarkson* line of authority encompasses mistakes of law. For the reasons given previously, we consider that the better view is that it does.

[104][2009] EWHC 734; [2009] STC 1540.

[105]See generally, American Law Institute, *Restatement of the Law of Trusts* (3rd), at §12 (especially comment (c)) and 62.

[106]See *e.g.* Uniform Trust Code §415 and §416, which provides: "To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect."

Rectification for unilateral mistake

102 We turn now to the courts' jurisdiction to rectify unilateral transactions, which likewise has a long pedigree.[107]

103 One of the leading modern authorities in this area is the case of *Re Butlin's Settlement*.[108] The settlor in that case, Sir Billy Butlin, executed a voluntary settlement which was intended to give a majority of five trustees power to exercise the power given to them by the settlement over capital and income. As a result of a drafting error, the settlement did not give effect to this intention.

104 It was held that the court had power to rectify the settlement, notwithstanding that only one of the original trustees knew of the intention. With regard to the court's jurisdiction to order rectification, Brightman J held as follows—

> "There is, in my judgment, no doubt that the court has power to rectify a settlement notwithstanding that it is a voluntary settlement and not the result of a bargain, such as an ante-nuptial marriage settlement: *Lackersteen v Lackersteen* [1860] 30 LJ Ch 5, a decision of Page-Wood VC and *Behrens v Heilbut* (1956) 222 LJ Jo 290, a decision of Harman J, are cases in which voluntary settlements were actually rectified. There are also *obiter dicta* to the like effect in cases where rectification was in fact refused: see *Bonhote v Henderson* [1895] 1 Ch 642."

The nature of an order for rectification

105 As the Court of Appeal explained in *Allnutt v Wilding*,[109] rectification is about "putting the record straight". In the case of a voluntary settlement, the purpose of an order for rectification is to bring the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. For equity to intervene, it must therefore be proved that the settlement fails to express the real intention of the settlor.

The evidence needed for rectification

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[107] *Lackersteen v Lackersteen* ([1860] 30 LJ Ch 5); *Walker v Armstrong* ([1856] 8 De GM & G 531).
[108] [1976] Ch 251.
[109] [2007] EWCA Civ 412; [2007] WTLR 941.

106 A settlor who seeks rectification must establish his case by "*convincing proof*"[110]: *Joscelyne v Nissen.*[111] In *AMP (UK) Plc v Barker*[112] Lawrence Collins J (as he then was) noted that the requirement for "cogent evidence" of a settlor's intentions was, essentially, a policy requirement, since—

> "certainty and ready enforceability of transactions would otherwise be hindered by consistent attempts to cloud the issue".

107 The onus is of course on the claimant to put forward evidence as to the specific intentions on the part of the settlor which, because of a mistake in the recording of his intentions and/or in the drafting of the settlement, were either not recorded in the trust deed or were mis-recorded.

108 In *AMP*, Lawrence Collins J also noted that in earlier cases on voluntary settlements, rectification had sometimes been ordered on the uncontradicted affidavit evidence of the settlor even if there was no objective manifestation of the settlor's intention.[113] The judge left open in that case the question whether the need for objective manifestation in the case of a unilateral transaction was simply an element of the need for convincing proof of the mistake, or whether it constituted a separate requirement.

109 There is no doubt, however, that a court will be more easily satisfied as to the requisite intention if the application is supported by other evidence, such as the settlor's contemporaneous written instructions.

What types of mistake will justify rectification?

110 In *Re Butlin's Settlement*, the court also considered the circumstances in which a claim for rectification will be available. Brightman J held[114] that—

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[110]Earlier authorities have famously referred to the need for "strong irrefragable evidence": a formulation deriving from *Countess of Shelbourne v Earl of Inchiquin* ((1784) 1 Bro CC 338).

[111][1970] 2 QB 86.

[112][2001] WTLR 1237; [2001] PLR 77.

[113]By contrast, a claimant seeking an order for rectification of a bilateral transaction (such as a contract) must demonstrate some *outward* expression of accord, or evidence of a continuing common intention, *outwardly* manifested: *Joscelyne v Nissen.*

[114]At 261–262.

> "... rectification is available not only in cases where particular words have been added, omitted or wrongly written as a result of careless copying or the like. It is also available where the words of the document are purposely used but it was mistakenly considered that they bore a different meaning as a matter of true construction. In such a case ... the court will rectify the wording so that it expresses the true intention ..."

111 In *AMP*, Lawrence Collins J cited the above passage with approval, and went on to say[115] that—

> "Consequently, rectification may be available if the document contains the very wording that it was intended to contain, but it has in law or as a matter of construction *an effect or meaning* different from that which was intended: *Whiteside v Whiteside* [1950] Ch 65, 74 ..." (Emphasis added)

112 He also noted[116] that it was "sometimes said" that equitable relief against mistake was not available "if the mistake related only to the consequences of the transaction or the advantages to be gained by entering into it" and cited the authorities of *Whiteside v Whiteside* and *Gibbon v Mitchell* as examples.

113 Interestingly, however, he did not appear to attach much weight to this distinction, merely saying that—

> "If [the effects/consequences distinction means] 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 commercial effects of their transactions or have second thoughts about them."

114 However, although Lawrence Collins J did not appear to have attached great significance to the effects/consequences distinction in the context of rectification claims, subsequent decisions have, unfortunately, placed that distinction centre stage.

115 In *Allnutt v Wilding*, for example, the Court of Appeal described the passage from the judgment of Millett J in *Gibbon v Mitchell* distinguishing between "effects" and "consequences" as "a valuable illustration of the limits of the remedy of rectification".

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[115] At para [70].
[116] *Ibid.*

116 Likewise, in *Re the A Trust Company Ltd*,[117] a decision of the Royal Court of Jersey which concerned an application for rectification of a trust governed by English law, the Royal Court outlined the relevant principles and held, at 29, that it was—

> "*crucial* to distinguish between a mistake as to the consequences of a document—for example that the tax implications were different from that anticipated as for example in the recent Court of Appeal case *Allnutt v Wilding* ...—and its effect." (Emphasis added)

Difficulties with the effects/consequences distinction in the area of rectification

117 However, the fact that, in *Gibbon v Mitchell*, Millett J appears to have elided mistakes as to the effect of words used in a document with mistakes as to the effect of the document itself, has caused exactly the same difficulties in the area of rectification as it has done in the area of rescission (see paras 40–42 above).

118 These difficulties are well illustrated by the facts of *Allnut v Wilding*. The settlor in that case intended to make a potentially exempt transfer (PET) of funds to the trustees of a settlement which had been established for the benefit of his three children. The purpose of the transfer was to reduce the amount of inheritance tax payable on death. Following the death of the settlor more than seven years later, it was discovered that the transfer did not, in fact, constitute a PET. This was because the settlement contained discretionary trusts for the children rather than creating interests in possession for them.

119 The trustees then brought a claim seeking the rectification of the settlement. In essence, the claim made by the trustees involved substituting a wholly different settlement, an interest in possession settlement, in the place of the discretionary settlement.

120 At first instance, Rimer J said that the function of the equitable remedy of rectification was "to enable the parties to correct the way in which their transaction has been recorded". He also noted that the present case was "far removed" from the usual type of case in which rectification was available, since it was not a matter of correcting a mistake made in recording a settlor's intentions by inserting words, or deleting words, or putting in different words because the words that are there have the wrong meaning. The trustees' claim in this case involved the substitution of a wholly different settlement,

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[117][2007] JRC 184.

incorporating a raft of new trust powers and provisions which the settlor had never even contemplated.

121 On appeal, Counsel for the trustees submitted that the judge at first instance had taken too narrow a view of the remedy of rectification "by confining it to a case in which there was a mistake about the meaning of the document". He went on to say that, on a proper understanding of the doctrine, "it applied to a case ... where the settlor was under a mistake about the effect of the document that he signed". He contended that this *was* such a case, because the settlor had mistakenly believed that the settlement which he executed would have the legal effect of enabling him to reduce liability to inheritance tax by making a PET to the trustees, whereas it did not, in fact, have that effect.

122 The Court of Appeal rejected this argument. Mummery LJ, giving the leading judgment, held as follows—

> "I am unable to accept the trustees' submission on the availability of rectification in this case. The position is that the settlor intended to execute the settlement which he in fact executed, conferring benefits on his three children. The settlement correctly records his intention to benefit them through the medium of a trust rather than the alternative of making direct gifts in their favour. I am unable to see any mistake by the settlor in the recording of his intentions in the settlement. The mistake of the settlor and his advisers was in believing that the nature of the trusts declared in the settlement for the three children created a situation in which the subsequent transfer of funds by him to the trustees would qualify as a PET."

123 In our view, however, the Court of Appeal's conclusion that the settlor was not mistaken about the *effect* of the settlement he created is difficult to sustain, since the "effect" of the settlement could quite properly have been defined so as to encompass the consequences which the settlor intended to flow from it, namely that it would qualify the transfer of the funds as a PET.

Towards a resurgent role for "meaning"?

124 In our view, however, it is clear from the judgments of Rimer J and of the Court of Appeal in *Allnut v Wilding* that, despite paying lip service to the distinction between "effects" and "consequences", what was actually done in that case was to apply the principles laid down by Brightman J in *Re Butlin's Settlements.* In other words, under the guise of applying the effects/consequences distinction, both Rimer J and the Court of Appeal appear simply to have asked themselves

whether the settlement had a different *meaning* from that which the settlor had intended.

125 It is important to note in this context that "meaning" is not synonymous with "effect".[118] As the facts of *Alnutt* demonstrate, it is possible for a party to a document to be mistaken about its effect without also being mistaken as to its meaning.

126 It seems therefore that Counsel for the trustees was right when he said that the Rimer J had taken a "narrow" view of the availability of the remedy. In our view, however, the approach adopted in *Allnutt* was the right one.[119] As was acknowledged in *AMP* and *Alnutt*, the decision of Brightman J in *Re Butlin's Settlement* constitutes the leading modern authority as to the scope of the courts' jurisdiction to grant rectification. It is significant therefore that nowhere in Brightman J's judgment does he make any reference to rectification being available where a document has a different *effect* from that which the settlor intended. On the contrary, he simply refers to the document having a different "meaning" from that which was intended.

127 Furthermore, Brightman J's test is consistent with the passage from *Kerr* as construed by Evershed MR in *Whiteside.* As previously noted,[120] when read in context it is clear that the reference by Evershed MR to a mistake which has arisen from "the legal effect of the language used" was only intended to cover the situation where words are purposely used in a document, but it is mistakenly considered that they have a different meaning.

128 Thus, *Whiteside* and *Re Butlin's Settlements* are authority for the proposition that rectification will only be granted where words have been added, omitted, or wrongly written or where the words have a different *meaning* from that which the parties intended. It is true that

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[118]In the *Butlin* case, Brightman J said nothing at all about the document having a different "effect" from what was intended. Note, as discussed at para 105 below, whilst in the *AMP* case Lawrence Collins J did refer to the document having an "effect or meaning" different from that which was intended, he appeared to regard this as a summing up of the approach laid down by Brightman J in the *Butlin* case rather the introduction of a different test. Also, the *AMP* case was, in fact, a case where the document as executed had a different meaning from that which the parties to it had intended.

[119]It is unfortunate however that the Court of Appeal did not acknowledge the real basis on which it got there.

[120]At paras 38–42 above.

in *AMP*, Lawrence Collins J referred[121] to rectification being available "if the document contains the very wording that it was intended to contain, but it has in law or as a matter of true construction *an effect or meaning* different from that which was intended" (emphasis added). However, when this passage is read in context it is clear that this was simply intended as a summing up of the decisions in *Whiteside* and *Re Butlin's Settlements.* There is nothing in the judgment which indicates that Lawrence Collins J had any intention of widening the scope of the courts' jurisdiction to order rectification. Also, the *AMP* case was, in fact, a case where the document as executed had a different meaning from that which the parties had intended.

129 Thus, if, as we consider to be the case, the proper test for rectification is not whether a claimant was mistaken about the "effect" of a document but whether he was mistaken about its meaning, the claim for rectification in *Alnutt* was obviously bound to fail. The settlor had made no mistake about the meaning of the settlement; on the contrary, it meant exactly what he thought it did.

130 However, for the reasons given above it is much more doubtful whether the settlement could properly be said to have had the "effect" that the settlor intended, since he believed that it would qualify the transfers as PETs whereas in fact it did not.

131 In these circumstances it is perhaps unfortunate that rather than addressing this head on, the Court of Appeal simply purported to apply the effects/consequences distinction without offering any clear or convincing reasons why it had concluded that the particular facts of this case fell on the side of the line that they did.

Conclusions

132 Since the decision in *Gibbon v Mitchell,* the scope of the courts' jurisdiction to grant orders for both rectification and rescission has turned on a distinction between "effects" and "consequences" which is largely unworkable and which some distinguished commentators have gone so far as to call "spurious".[122] Indeed, as matters stand, it still remains unclear (despite several decisions on the point) whether, on the basis of this test, a mistake about the fiscal consequences of entering into a particular transaction is enough to bring the courts'

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[121]At para [70].
[122]Thomas & Hudson, *The Law of Trusts* (2002) §11.56.

jurisdiction into play.[123] Given the importance of this issue to settlors, trustees and beneficiaries, this lack of clarity is regrettable.

133 In the context of applications for rescission, the adoption of an "effective cause" for mistake in *Ogden* and *Clarkson* is therefore a welcome development, not least because it has probably sounded the death knell for the effects/consequences distinction. However, the new approach still leaves some important questions unanswered, such as whether the "serious mistake" test now has any meaningful role to play, and whether a single test for mistake is intended to apply to all kinds of mistaken payments, including the mistaken gift cases.

134 In the context of applications for rectification, the approach taken by the Court of Appeal in *Alnutt* has been to narrow the scope of the courts' jurisdiction to order rectification, by returning to the principle laid down in *Re Butlin's Settlement.* In our view, that is the correct approach and is certainly consistent with the pre-*Gibbon v Mitchell* authorities. It will also bring greater certainty to this area of the law.

135 Finally, some reflections on where things may go from here. A very senior English judge[124] has recently mounted a withering extra-judicial attack on the increasing width of the equitable doctrines of mistake in English law, vividly describing the *Hastings-Bass* doctrine as "doctor equity administering a magical morning-after pill to trustees feeling post-transaction remorse".[125] In England and Wales at least, litigants should be alive to the desire of the higher courts to impose some limits on a jurisdiction which has been increasingly noted for its lack of boundaries.

136 Perhaps more worryingly for "onshore" clients is the potential for domestic revenue authorities—who will often have a significant interest in the outcome, or at least in the tax consequences of the outcome—to get involved in such applications. For some time now, the courts in offshore jurisdictions have resisted HMRC's attempts to

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[123]Note also that, following the decision in *Sieff v Fox*, even if fiscal consequences are irrelevant as regards cases of mistakes by individual donors, they are nonetheless relevant to the application of the *Hastings-Bass* principle.

[124]Lord Neuberger of Abbotsbury.

[125]"Aspects of the Law of Mistake" a lecture to the Chancery Bar Association conference, January 2009. A revised version of Lord Neuberger's paper is available in (2009) 15 *Trusts & Trustees* 189.

intervene in such cases.[126] However, in the recent case of *Gresh v RBC Trust Company (Guernsey) Ltd*[127] the Guernsey Court of Appeal granted an application by HMRC to be joined as a party to an application made by the beneficiary of a pension scheme for an order setting aside a distribution which had given rise to adverse tax consequences. This decision has caused much consternation in the Channel Islands, and it remains to be seen whether it will yet be overturned on an appeal to the Privy Council.

137 Certainly as regards UK clients, HMRC has indicated a willingness to be heard on significant *Hastings-Bass* applications[128] and there seems no reason why they should not adopt a similar policy in equitable mistake cases.[129] The involvement of a party with a real interest in arguing against the granting of equitable relief (hitherto very rarely a feature of rescission, rectification or *Hastings-Bass* applications) should prove most interesting.[130]

Nicole Langlois is a Jersey Advocate and a barrister at XXIV Old Buildings in London. Adam Cloherty is a barrister at XXIV Old Buildings.

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[126]For example, in Jersey see *Re Ellastone* ([2008] JRC 091); *Re Seaton Trustees* ([2009] JRC 050); and *Williams (Trustee in Bankruptcy of Collett)* ([2009] JRC 054).

[127][*check citation*]

[128]See Tax Bulletin 83.

[129]Remember, the tax save in *Ogden* was in the region of £1m.

[130]Note that in *Ogden* itself Lewison J suggested that he might not made some of the findings of fact that he did had they been challenged by another party.