WHEN WILL THE COURT GRANT RELIEF FOR TRUSTEES' MISTAKES? *PITT v HOLT* AND *FUTTER v FUTTER*

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Not many cases about family trusts come to court in England these days, and very few reach the Supreme Court. The courts are more often concerned with commercial trusts such as trust deeds forming part of the documentation for an issue of loan notes or derivatives, or the trust deeds of occupational pension schemes which provide retirement benefits for employees. So the recent cases of *Pitt v Holt* and *Futter v Futter*, which were heard together both in the Court of Appeal[1] and in the Supreme Court[2], are of particular interest to those concerned with private client work.

Pitt v Holt was concerned with two issues which are distinct in theory, but have tended to overtap in practice. The first issue has become known as the rule in *Re Hastings-Bass*[3], although (as I said in the very first paragraph of my judgment) that is a misnomer. The rule, so far as it deserves to be called a rule at all, should be called after the case of *Mettoy Pension Trustees Ltd v Evans*[4], decided by Warner J in 1989. The second issue in *Pitt v Holt* was the scope of the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake; in particular, whether it is limited, as Millett J held in

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[1] [2012] Ch 132
[2] [2013] 2 AC 108
[3] [1975] Ch 25
[4] [1990] WLR 1587

Gibbon v Mitchell[5], to a mistake "as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained."

Only the first of these issues was raised in *Futter v Futter* at first instance and in the Court of Appeal, and the Supreme Court declined to allow mistake to be raised as a fresh issue in the Supreme Court. In order to avoid repetition of the Hastings-Bass misnomer, I shall refer to the first issue as the "proper deliberation" issue. It is about the duty of trustees to give proper deliberation to the exercise of their powers, and the possible consequences of their failing in this duty. In *Pitt v Holt* I quoted from a judgment[6] which I had given 15 years before in a case in which charity trustees had to make a controversial decision about banning deer-hunting on their land:

> "Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever. It is, however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts. This sometimes creates real difficulties, especially when lay trustees have to digest and assess expert advice on a highly technical matter (to take merely one instance, the disposal of actuarial surplus in a superannuation fund)."

The best starting-point, on the proper deliberation issue, is *Mettoy*. I was counsel for the trustees in that case, and after nearly 25 years I still remember the exemplary patience with which Warner J heard the case, at a penitentially long hearing of 40 days, and the exemplary speed with which he gave judgment a fortnight later. *Mettoy* was about the pension scheme of a relatively small manufacturing company that had been successful in the market

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[5] [1990] 1 WLR 1304

[6] *Scott v National Trust for Places of Historic Interest or Natural Beauty* [1998] 2 All ER 705, 717.

for small toy cars and lorries. It had a healthy surplus in its pension scheme. But then the market for toy vehicles became more difficult, and the company made a disastrous attempt to diversify into personal computers. If a corporate employer is wound up, its pension scheme almost always has to be wound up as well, as there can be no more employer's contributions. But at a time when the Mettoy company was threatened with winding up, the trustees of its pension scheme were invited to adopt a new trust deed and rules which changed the power to distribute surplus on the winding up of the pension scheme. Most regrettably this important change was not explained to the trustees, or even drawn to their attention, by their professional advisers.

That was the situation in which Warner J held that the court has jurisdiction to declare void either the whole or some part of the purported exercise of discretion by trustees, as appropriate in the particular circumstances[7]. On the facts of *Mettoy* itself a possible conclusion would have been to approve the new trust deed and rules, but omitting the transfer from the trustees to the employer of the discretion over surplus, although in the event no such order was made.

It is now clear that in reaching this conclusion the judge made an error in confusing two categories: on the one hand, exercises of discretion which are wholly or partially invalid because they are not authorised by the relevant power, or infringe some general rule such as the rule against perpetuities; and on the other hand, exercises of discretion which are within the scope of the relevant power, but are not the fruit of proper deliberation on the part of the trustees. The judge fell into this error despite a clear submission by counsel for the employer, Mr Edward Nugee QC, pointing out that *Re Hastings-Bass* and its

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7 *Mettoy* at pp 1624H-1625A

antecedent authorities[8] were concerned with purported exercises of discretion that infringed the general law.

This error in categories had some important practical implications. First, it led to the supposition that an exercise of discretion which came within the new rule was void (in whole or in part) and not merely voidable. This made an application under the new rule more attractive to practitioners and the trustees whom they were advising as it seemed to exclude the possibility of relief being withheld as a matter of equitable discretion. Second, it focused on a narrow subjective question: what would trustees have done if they had considered some material consideration which they failed to take into account? Rather than the wider question: what is the appropriate order for the court to make in a situation in which trustees have failed in their duty to give the matter proper consideration? Third (following on from the second point) an application under the new rule came to be seen (despite Warner J's references[9] to trustees being under a duty, and failing in their duty) as a course that trustees could take without being particularly apologetic or penitential about it, and without feeling at risk as to costs. All these points have now been put right by the admirable judgment of Lloyd LJ in the Court of Appeal[10], very largely adopted and confirmed (on the proper deliberation rule, but not on the issue of mistake) by the Supreme Court. Lloyd LJ was building on a foundation laid by

[8] *Re Vestey* [1951] Ch 209 and *Re Abrahams* [1969] Ch 463. The submissions of Mr Edward Nugee QC are recorded in the judgment at pp 1622G-1623D. It is pleasant to record that his son, Mr Christopher Nugee QC, appeared for the appellants in *Pitt v Holt*, and that more recently Nugee pere, while still in (occasional) practice, welcomed Nugee fils on his taking his seat on the Chancery bench, a rare and perhaps unique event

[9] *Mettoy* at p 1625B

[10] [2012] Ch 132

Lightman J in 2003 in his admirable judgment in a case called *Abacus Trust Co (Isle of Man) v Barr*[11].

The matter of trustees being at risk as to their costs calls for closer examination. Trustees, whether of pension trusts or of family trusts, have to take decisions in an environment of ever-increasing complexity. Trust law has indeed become a bit easier to cope with as a result of the reform of the rule against perpetuities, but tax law never gets any easier. Nor does the regulatory regime affecting pension trusts. The range of investment opportunities open to trustees is much wider, and correspondingly more perilous, than in earlier times. For all these reasons trustees need skilled professional advice from lawyers, accountants, investment advisers, estate agents, and so on. And sometimes, unfortunately but inevitably, professional advisers fail in the performance of their duties of care. The outcome may be that the advisers' professional indemnity insurers are facing a claim for damages. In that situation an application to the court under the so-called rule in *Hastings-Bass*, undertaken at the expense of the insurer, was often seen as an attractive option in cases where the damages might be very large. The Supreme Court was told that *Pitt v Holt* was such a case, and *Futter* may have been as well. Near the beginning of my judgment in the Supreme Court I quoted the blunt opening words of Norris J in his first-instance judgment in *Futter*[12] :

> "This is another application by trustees who wish to assert that they have acted in an un-trustee-like fashion and so have failed properly to exercise a power vested in them. The trustees wish to take advantage of this failure to perform their duties in order to enable the beneficiaries to avoid paying the tax liability consequent upon the trustees' decision. Put like that (and I am conscious that that is not the only way in which the situation may be described) the possibility is raised that the development of the rule may have been diverted from its true course."

[11] [2003] Ch 409
[12] [2010] STC 982, para 2

Other judges expressed similar doubts. Park J said in one case[13] that he heard in 2001:

> "There must surely be some limits. It cannot be right that whenever trustees do something which they later regret and think that they ought not to have done, they can say that they never did it in the first place."

The fact is that proceedings tended to be, I will not say collusive, but non-contentious. Matters might have been different had HM Revenue and Customs intervened and opposed the granting of relief. But until *Pitt v Holt* and *Futter* the Revenue consistently declined to participate, even when invited to do so.

It would take too long to give a detailed account of the facts of the two appeals. Some of you will be familiar with them already. In brief summary, in *Pitt v Holt* Mrs Pitt was the receiver appointed under the Mental Health Act 1983 to look after the affairs of her husband, who had suffered serious brain damage in a road traffic accident. His claim for damages resulted in a structured settlement in the sum of £1.2m, which Mrs Pitt was advised to settle, with the approval of the Court of Protection, in a discretionary settlement for his benefit. As receiver Mrs Pitt was acting in a trustee-like capacity, but she was not a professional person. When she made the settlement in 1994 she relied on the advice of her solicitor and a firm which claimed to have specialist experience of structured settlements. This firm's advice was lamentably incompetent. It covered some relatively trivial points on income tax, capital gains tax and social security, but made no reference whatsoever to inheritance tax. In particular, it did not refer to section 89 of the Inheritance Tax Act 1984, which grants reliefs to a trust for a disabled person, so long as the trust complies with some simple conditions. The trust could easily have compiled with the

[13] *Breadner v Granville-Grossman* [2001] Ch 523, para 61

conditions, but through the advisers' ignorance it did not do so. Almost unbelievably, the relevant official in the Court of Protection (whose sole function is to protect the interests of mentally incompetent people) also seems to have been ignorant or forgetful of section 89. This was, as I said in my judgment[14], "one of the most remarkable features of the whole sorry story". The result was that by the time of Mr Pitt's death in 2007 his estate, and the trustees of the settlement, were facing inheritance tax liabilities in a total sum of between £200,000 and £300,000.

The facts of *Futter v Futter*, in brief summary, were that Mr Futter, a prosperous businessman, had in 1985 made two settlements with trustees resident in Jersey, an island which is not part of the United Kingdom for tax purposes. In the 1970s and 1980s many such settlements were made by United Kingdom residents in order to avoid or at least defer capital gains tax. Later anti-avoidance legislation made Jersey settlements less attractive, and in 2004 Mr Futter himself and his solicitor, both United Kingdom residents, were appointed as new trustees. In 2008 they adopted a plan to avoid capital gains tax on "stockpiled" trust gains by distributions to Mr Futter and his three children, in the expectation that gains attributed to them would be absorbed by Mr Futter's allowable losses and the children's annual exemptions. The trustees were advised on this by Mr Cutbill, but the advice was wrong, since it failed to take account of a statutory amendment made in 1998. The result was a large capital gains tax liability for the Futter family.

Were the trustees in breach of duty in following incorrect advice for which one of them was responsible? The Court of Appeal held that it would be artificial to distinguish between the two trustees, and treated Mr Cutbill's

[14] Para 90

role as one of a team of advisers as separate from his role as one of the trustees' team. The Supreme Court agreed[15], especially as it appears that the incorrect advice was actually given by an assistant solicitor in Mr Cutbill's firm. So both claims failed because neither Mrs Pitt in her fiduciary position as receiver, nor the trustees of the Futter settlements, were in breach of their duty of proper deliberation. In each case they took what was believed to be competent professional advice, but the advice was defective.

Each case was concerned with tax advice. That had became a feature of those cases, and I might almost say a notorious feature, as the so-called *Hastings-Bass* rule was coming to be seen as a sort of "Get out of jail free" card for failed tax-avoidance schemes. The Court of Appeal was in no doubt that tax considerations are something that trustees may and should take into account in deliberating how to exercise their discretions. The Supreme Court agreed. But tax considerations should not drive out everything else. If I may quote from my judgment[16] :

> "In the private client world trusts are mostly established by and for wealthy families for whom taxes (whether on capital, capital gains or income) are a constant preoccupation. It might be said, especially by those who still regard family trusts as potentially beneficial to society as a whole, that the greater danger is not of trustees thinking too little about tax, but of tax and tax avoidance driving out consideration of other relevant matters.
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> That is particular true of offshore trusts. They are usually run by corporate trustees whose officers and staff (especially if they change with any frequency) may know relatively little about the settlor, and even less about the settlor's family. The settlor's wishes are always a material consideration in the exercise of fiduciary discretions. But if they were to displace all independent judgment on the part of the trustees themselves (or in the case of a corporate trustee, by its responsible officers and staff) the decision-making process would be open to serious question. The *Barr* case [2003] Ch 409 illustrates the potential difficulties of unquestioning acceptance of the settlor's supposed wishes."

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[15] Para 96

[16] Paras 65-66

The *Barr* case[17] mentioned in that quotation is the decision of Lightman J to which I have already referred as laying the foundation of the need for a breach of duty by the trustees before the court's jurisdiction to intervene arises. It is also of interest as illustrating how this jurisdiction can overlap with the mistake jurisdiction, and as illustrating the complexities of trustees receiving in-house advice. Mr Barr took part in a successful management buy-out of a company that was later floated on the London stock exchange. By then his shares were held in an off-shore trust based in the Isle of Man. There was a corporate trustee, Abacus, linked to the international accountants, Coopers & Lybrand. Mr Barr's contact with Abacus was through a London-based partner in Coopers & Lybrand, Mr Ward-Thompson. Mr Barr told Mr Ward-Thompson that he would like 40 percent of the trust fund to be appointed to his children, reserving 60 percent for himself, but through a failure of communication these percentages were reversed in the appointment made by Abacus. Lightman J expressed surprise that the proceedings brought by Abacus did not rely, at least in the alternative, on mistake or rectification. Whether Abacus was in breach of duty was an issue of some difficulty. Lightman J concluded that it was in breach, since it had to accept responsibility for Mr Ward-Thompson who (in the judge's words) "has declined to give evidence and answer the case made or suggest a different scenario".

Various issues were touched on in my judgment but did not need to be decided, including the possible significance of a clause exonerating trustees from liability for non-fraudulent breaches of trust, and the possibility of the Court, in the exercise of its discretionary jurisdiction, declining to lend its aid to assisting artificial tax avoidance[18]. The last point I would like to mention on

[17] Footnote 11 above
[18] Para 89 and 135

this part of the case is whether the duty of proper deliberation is, as I assumed, a fiduciary obligation.

I recently attended a conference on equity held at Cambridge at which *Pitt v Holt* and *Futter v Futter* arose in the course of discussion, and soon afterwards I attended a seminar at Oxford devoted entirely to those cases. Many participants were sceptical about the duty of proper deliberation being truly fiduciary, since the core element of fiduciary obligation is that of loyalty, as Millett LJ put it in *Bristol and West Building Society v Mothew*[19], building on the seminal work of Justice Paul Finn of the Federal Court of Australia[20]. In response to that I contended that the obligation of proper deliberation is certainly an equitable obligation, not a common law duty of care, and that it is so much part and parcel of the exercise of fiduciary powers that it would be perverse not to regard this subsidiary obligation as being fiduciary also. I have to say that my argument was not greeted with enthusiasm by distinguished participants from Australia, Canada and England, but it was readily accepted by Professor John Langbein of Yale University. Fiduciary obligations are seen in the United States as having a wider range. I shall persist in what seems in other jurisdictions to be a minority view (though I found one firm supporter in Oxford).

I now move on to the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake. It may be helpful, by way of introduction, to identify the principal points of similarity, and then the principal points of difference, between the proper deliberation rule on the one hand, and the mistake jurisdiction on the other. The principal similarities are, first, that in each case the decision or disposition in question is not void but voidable; the

[19] [1998] Ch 1, pp 16-18 ("…not every breach of duty by a fiduciary is a breach of fiduciary duty")
[20] Fiduciary Obligations (1977) was written before his appointment to the Federal Bench

court is exercising an equitable jurisdiction of a discretionary nature, and there may be some bar (such as laches or acquiescence) to the granting of equitable relief. Second, in each case the principal relief to be granted will be the setting aside of the decision or disposition, either unconditionally or on terms (although in the event of an extreme failure in the duty of proper deliberation the court might consider further relief such as the appointment of new trustees). Third, there will be some factual situations in which relief may be available under either jurisdiction, as in the *Barr* case.

The principal points of difference are, first, that the proper deliberation jurisdiction is exercisable only over trustees and some other fiduciaries, whereas the mistake jurisdiction is exercisable to relieve anyone who has made a voluntary disposition. Second, fault amounting to a breach of duty on the part of trustees or other fiduciaries is needed for the proper deliberation jurisdiction, but not for mistake (unless the evidence shows that the person making the relevant disposition must be taken to have run the risk of his being wrong). Third, the proper deliberation jurisdiction may be satisfied where (as in *Mettoy*) trustees are simply unaware that there is any problem at all, whereas the mistake jurisdiction requires an operative mistake, and furthermore a mistake of sufficient seriousness as to make it unjust for the disposition to stand: as Lindley LJ put it in *Ogilvie v Littleboy*[21]:

> "…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".

[21] (1897) 13 TLR 399, 400, upheld and approved by the House of Lords as Ogilvie v Allen (1899) 15 TLR 294

On the first point above I referred cautiously to "some other fiduciaries". I sounded this note of caution because company directors are for some purposes fiduciaries, but in *Wood v Holden*[22] Chadwick LJ observed:

> "…a management decision does not cease to be a management decision because it might have been taken on fuller information; or even, as it seems to me, because it was taken in circumstances which might put the director at risk of an allegation of breach of duty. Ill-informed or ill-advised decisions taken in the management of a company remain management decisions."

What is a mistake in the eyes of the law? For this purpose it must be distinguished from a misprediction, on the one hand, and a mere absence of thought, on the other hand. Both of these concepts call for some explanation. A misprediction relates to events that lie in the future, whereas a true mistake relates to past or present matters of fact (but including, since *Kleinwort Benson Ltd v Lincoln City Council*[23], matters of law). But a statement which appears to be about the future may be grounded in present fact. If I tell you that this year Christmas Day will be on a Tuesday I am making a mistake, because the calendar is current fact. A more debateable instance is the statement that a diagnosis of some serious illness has reduced some person's life expectancy to, say, three years. Epidemiological evidence produces statistical averages, not reliable information about any individual. The case of *Re Griffiths*[24], which is discussed at some length in *Pitt v Holt*[25], illustrates the difficulties.

An operative mistake must also be distinguished, in this context, from mere absence of thought. But here too there are borderline cases. In *Lady Hood of Avalon v Mackinnon*[26] Lady Hood had a power of appointment among

[22] [2006] 1 WLR 1393, Para 43
[23] [1999] 2 AC 349
[24] [2009] Ch 162
[25] At paras 109-113
[26] [1909] 1 Ch 476

her children and remoter issue, subject to the life interest of her husband (who died before the second round of appointments mentioned below) and her own life interest. She had two daughters. In 1888 half the trust fund was appointed to the elder daughter on her marriage. In 1902 and 1904 she appointed £8,600 to her younger daughter and then, entirely forgetting the 1888 appointment, she appointed a further £8,600 to her elder daughter. She did not make a mistake about the 1888 appointment; her mind was oblivious to it. Her mistake, for which the court granted relief, was in her belief that the final appointment of £8,600 to her elder daughter would achieve equality, whereas in fact, unless rescinded, it would inevitably produce inequality.

The current edition of Goff & Jones, The Law of Unjust Enrichment[27], considers mistake at some length, and distinguishes between incorrect conscious beliefs, incorrect tacit assumptions, and true cases of mere causative ignorance ("causative" in the sense that but for his ignorance someone would not have acted as he did). Lady Hood had an incorrect conscious belief that she was achieving equality between her daughters. The trustees of the Mettoy pension scheme were in a state of mere ignorance, because no one told them that the lengthy and technical deed and rules placed before them for approval changed the power to distribute surplus assets on a winding up of the scheme, although that was a matter of high importance to their members. The intermediate position, that of incorrect tacit assumption, is a rather shadowy one, especially as it will often depend, in practice, on the evidence of a single individual with a strong personal interest in the outcome.

Pitt v Holt illustrates this. Mrs Pitt was not a professional person; she devoted herself, with the help of a paid carer, to the care of her severely

[27] 8th ed (2011) para 9-32 to 9-42

disabled husband. At first instance the deputy judge held that there was no mistake as to inheritance tax: "She never thought about it at all"[28] (nor, as I have already mentioned, did the so-called specialist advisers on structured settlements, or even the relevant official of the Court of Protection). In the Court of Appeal (which was in as good a position as the deputy judge to make findings of fact, as the case was heard on written evidence, with no cross-examination) Lloyd LJ held[29]:

> "…Mrs Pitt was advised that there were no adverse tax implications of what was proposed. In itself, a belief or assumption in general terms which is false in one material respect, even if not in others, seems to me to suffice as a mistake for these purposes. I would hold that there was a belief, not especially as to IHT but generally as to adverse tax effects, which was mistaken as regards IHT, and that on that basis Mrs Pitt was under a mistaken belief at the time of the transaction."

But the Court of Appeal dismissed the mistake claim. There was a mistake, but in the opinion of the Court of Appeal it was not a mistake of the right sort. It held[30] that the mistake on the part of the disponer must be "either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction" and (in either case) it must be of sufficient gravity to satisfy the *Ogilvie v Littleboy* test.

I will take these two limbs in turn. The first limb is an effect the test laid down in 1990 by Millett J (as he then was) in *Gibbon v Mitchell*[31], adapted to take account of cases like *Lady Hood of Avalon v Mackinnon*, which would not easily fit within Millett J's requirement that:

> "the mistake is as to the effect of the transaction and not merely as to its consequences or the advantages to be gained by entering into it."

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[28] [2010] 1 WLR 1199, para 50
[29] [2012] Ch 132, para 216
[30] Para 210
[31] [1990] 1 WLR 1304, 1309

The decision in *Gibbon v Mitchell* was plainly right. A prosperous farmer aged 68 surrendered his life interest in a trust fund in order (as he and his advisers thought) to accelerate his adult children's interests in capital and achieve a legimate saving of inheritance tax if he survived for the statutory period. Unfortunately his advisers overlooked the imposition of protective trusts on his life interest, so that the surrender brought into existence a discretionary trust of income for the rest of his life, and made the saving of inheritance tax much more difficult. So there was in that case clearly a mistake as to legal effect as well as to tax consequences. But, as the Supreme Court held, the test formulated in *Gibbon v Mitchell* was too narrow[32]:

> "Millett J's judgment has been very influential. It is a mark of the high respect in which he is held that an extempore first instance judgment, not (so far as appears from the judgment) based on much adversarial argument, is cited as one of the key authorities in most of the standard works, including [titles and defences omitted] Snell, Underhill & Hayton, Lewin and Thomas & Hudson. But the source from which Millett J's statement of principle is derived is far from clear and it has been subject of some criticism, both from legal scholars and in more recent decisions of the court."

In the Court of Appeal Lloyd LJ described *Ogilvie v Littleboy*[33] as having "disappeared from view for over a century, so far as decisions of the courts are concerned", with the sole exception of one citation in 1937. It was not cited in *Gibbon v Mitchell*. It was however referred to in Professor Peter Birks' Introduction to the Law of Restitution, published in 1985.

Mrs Ogilvie was a very rich widow who in 1887 settled large funds for charitable purposes. It appears that she came to regret her generosity when she discovered that she could not control the management and application of the trust funds in the way that she wished, and that the charity was subject to the jurisdiction of the Charity Commissioners. In 1894 she began proceedings to

[32] *Pitt v Holt* [2013] 2 AC 108, para 118

[33] (1897) 13 TLR 399, affirmed by the House of Lords as *Ogilvie v Allen* (1899) 15 TLR 294

have the trust set aside, complaining she had not been fully and properly advised, and that she did not sufficiently understand the nature and effect of the deeds which she had executed.

Her grievances were explored in the course of a nine-day trial and were almost entirely rejected. Byrne J dismissed the claim, stating:

> "The case is entirely wanting in any of those elements of fraud, undue influence, concealments of facts from the donor, want of separate and independent advice, surprise or pressure, which, or some of which, are commonly to be met with in cases of attempts to set aside or rectify voluntary instruments."

At worst, Mrs Ogilvie's advisers had not wanted to bother her with "every trouble and difficulty of detail". Undeterred, Mrs Ogilvie appealed, relying on grounds more closely focused on mistake. Her appeal failed. Lindley LJ gave the reason in what is now a much-quoted passage, though it seems to have gone almost entirely unquoted throughout the 20th century:

> "Gifts cannot be revoked, nor can deeds of gift be set aside, simply because the donors wish that they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relation between donor and donee, no mistake induced by those whose derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor…In the absence of all circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him."

Still undeterred, Mrs Ogilvie made a further appeal to the House of Lords. Lord Halsbury LC said that he entirely agreed with the judgment of Lindley LJ, and the other Law Lords agreed.

The test of "some mistake of so serious a character as to render it unjust" for the gift to stand has provoked criticism from some legal scholars.

There are, it seems, two main objections. The more far-reaching objection is that there should be no requirement of seriousness at all: any operative mistake, it is contended, should be enough even if the mistake, judged objectively, might appear to be trivial or even perverse. A good example is the scenario put forward by Professor Andrew Burrows QC in his Restatement of the English Laws of Unjust Enrichment (2012) p 66: a man gives money to the Red Cross because he mistakenly believes that the mayor and the vicar have done so too. It does not shock my conscience if a gift to charity, apparently motivated by unworthy considerations of social standing, should be left in place. There should be some good reason, judged objectively and not subjectively, for equity granting relief for what is a wholly unilateral mistake. Otherwise even Mrs Ogilvie might have obtained rescission on the strength of her tacit assumption that her charity would not be subject to the jurisdiction of Charity Commissioners.

The second objection is that the requirement of a mistake so serious as to make it unjust (or unconscionable) for the disposition to stand is an imprecise test which very much depends on judicial evaluation. Indeed the editors of the current edition of Goff & Jones[34] refer to "judicial manipulation" referring to:

> "…a boundary line which may be difficult to draw in practice, and which is susceptible to judicial manipulation, according to whether it is felt that relief should be afforded – with the court's finding or declining to find incorrect conscious beliefs or tacit assumptions according to the court's perception of the merits of the claim."

[34] The Law of Unjust Enrichment 8th ed (2012) para 9-41

I gave my answer to that in the section of my judgment headed "The conscience test", and I will conclude with that, right or wrong[35]:

> "More generally, the apparent suggestion that the court ought not to form a view about the merits of a claim seems to me to go wide of the mark. In a passage in *Gillett v Holt* [2001] Chi 210, 225, since approved by the House of Lords (see especially the speech of Lord Neuberger of Abbotsbury, with which the rest of the House agreed, in *Fisher v Brooker* [2009] I WLR 1764, para 63) I said in discussing proprietary estoppels that although its elements (assurance, reliance and detriment) may have to be considered separately they cannot be treated as watertight compartments:
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> > 'the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.'
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> In my opinion the same is true of the equitable doctrine of mistake. The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case."

[35] *Pitt v Holt* para 128