



Neutral Citation Number: [2024] EWHC 3128 (Ch)

Case No: PT-2024-000272

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 December 2024

Before :

MASTER BRIGHTWELL

Between :

(1) JTC EMPLOYER SOLUTIONS TRUSTEE LIMITED (AS TRUSTEE OF THE HENDERSON FAMILY BENEFIT TRUST AND OF THE HENDERSON GROUP PLC EMPLOYER FINANCED RETIREMENT SCHEME)

(3) JANUS HENDERSON ADMINISTRATION LIMITED

(4) JANUS HENDERSON UK (HOLDINGS) LIMITED

(5) JANUS HENDERSON INVESTORS UK LIMITED

- and -

(1) MR WILLIAM GARNETT

(2) MR MANRAJ SEKHON

Claimants

Defendants

Richard Wilson KC and Oliver Jones (instructed by **Fieldfisher LLP**) for the **Claimants**
Thomas Fletcher (instructed by **DMH Stallard LLP**) for the **Defendants**

Hearing date: 5 September 2024

Approved Judgment

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Master Brightwell :

1. This rescission claim concerns various deeds of appointment executed pursuant to two employee benefit trusts created for the benefit of employees of Janus Henderson, the asset management group (formerly the Henderson Group), being:
 - i) The Henderson Family Benefit Trust (the “HFBT”), created by a deed declared by the fourth claimant and dated 15 June 2005 and, as recited, established with a view to such trust holding assets for the benefit of selected individuals and their families with an object of making distributions as determined to be appropriate.
 - ii) The Henderson Group plc Employer Financed Retirement Scheme (the “EFRBS”), created by a deed made between the first, third and fourth claimants and dated 22 March 2011 and, as recited, establishing a discretionary employer-financed retirements benefits scheme (within the meaning of s.393A of the Income Tax (Earnings and Pensions) Act 2003) for the provision of benefits to or in respect of employees and former employees.
2. JTC Employer Solutions Trustee Ltd is named in the claim form as both first and second claimants, i.e. separately in its capacity as trustee of both the HFBT and of the EFRBS. It was known as Abacus Corporate Trustee Ltd until 5 September 2007, when it changed its name to RBC cees Trustee Ltd, and it acquired its present name on 6 April 2021. Even though it sues in two separate capacities, I consider that it can be a claimant only once. In the heading of the judgment, I have left the numbering of the other claimants to match the numbering in the claim form.
3. The third claimant is a member of the Janus Henderson Group and a party to the EFRBS deed, having also settled funds into the HFBT in 2009 and 2010. The fourth claimant is also a member of the Janus Henderson Group, a settlor of the HFBT and a party to the EFRBS deed as Principal Company.
4. The fifth claimant, another group member, has been joined out of an abundance of caution as its name appears on the letterhead of some letters sent to the trustee recommending appointments from the HFBT onto sub-trusts. I do not consider that it needs to be a party, as it is not suggested that the fifth claimant either exercised any relevant power, or that it would be entitled to the return of any funds on rescission. However, no harm is caused by its joinder.
5. The defendants are beneficiaries of the trusts. The first defendant is a beneficiary of the HFBT and of certain sub-trust appointments under it. He was employed by Henderson as a fund manager from 1986 to 2016. The second defendant is a beneficiary of a Member’s Account Appointment made from the EFRBS, having been a beneficiary of the HFBT until 2011. He worked at Henderson from 2003 to 2011, latterly as Head of International Equities. He is the sole EFRBS beneficiary with a

Member's Account Appointment still in place, and with funds still remaining to be distributed.

6. Having been independently represented by solicitors and counsel, the defendants have indicated that they do not oppose the relief sought by the claimants. They have also said that they are willing to be appointed as representative beneficiaries should the court consider it appropriate to appoint them.

The trusts and appointments

7. The claimants seek the rescission of various deeds of appointment executed pursuant to the HFBT and to the EFRBS and creating sub-trusts for the benefit of individual beneficiaries and their families.
8. The beneficiaries of the discretionary trusts created by clause 4 of the HFBT are, by clause 1(a) of the trust instrument:

‘the employees and former employees from time to time of any Group Company [defined by reference to the fourth claimant] and the members of the Family of such employees and former employees but excluding any Jersey tax residents’.

9. Clause 14 contains the following powers:

‘(a) [...] the Trustee shall hold all sums contributed by a particular company... separate from all sums contributed by any other company and shall hold the same upon trust for those Beneficiaries who are employees or former employees of the contributing company or members of the Family or such employees or former employees to the exclusion of the other Beneficiaries.

(b) [...] the Trustee shall have power exercisable in its discretion at any time or times during the Trust Period... to declare in relation to the capital and income or the whole or any specified part or parts of the Trust Fund that the expression “Beneficiaries” should be limited to a specified person(s) or class of persons.’

10. A new sub-clause 14(c) was added by a deed of amendment dated 9 December 2009:

‘(c) The Trustee may at any time and from time to time merge any Sub-Fund [i.e. created pursuant to the clause 14(b) power] with any other Sub-Fund or Sub-Funds provided that the Beneficiary or Beneficiaries of all such Sub-Funds are the same person or people respectively by transferring all the income and capital and liabilities of the latter Sub-Fund or Sub-Funds to the former Sub-Fund and, following such merger, the Trustee shall hold the income and capital of the merged Sub-Fund upon such terms as the Trustee may appoint...’

11. I take the following summary of the sub-trust appointments from Mr Fletcher's skeleton argument.

12. By reference to the deed of appointment dated 15 April 2005 in favour of the first defendant and his family (with all deeds pursuant to the HFBT being in substantially similar form):
 - i) Clause 1 contains a revocable declaration pursuant to clause 14(b) of the HFBT trust instrument that “in relation to the parts of the Trust Fund specified in the Schedule to this Instrument (and the income thereof) that the expression “the Beneficiaries” shall henceforth be limited to such of the Beneficiaries as are mentioned in the Schedule opposite each such part (hereinafter called “the Restricted Beneficiaries”)”. The Restricted Beneficiaries are then listed in the accompanying Schedule.
 - ii) Clause 2 confers on the trustee a power of revocation in respect of the declaration at clause 1.
 - iii) Clause 3 confirms *inter alia* that the powers conferred on the trustee pursuant to the HFBT trust instrument remain exercisable in respect of the assets subject to the relevant Sub-Trust Appointment.
13. Following the 2009 amendment, the trustee executed a number of deeds of merger in circumstances where separate funds had been established pursuant to separate appointments in respect of the same member. This enabled the consolidation of those assets into a single fund via a separate appointment. By reference to the deed of merger dated 10 December 2009, again in relation to the first defendant:
 - i) Clause 1 contains a revocable appointment, the relevant parts of which provide that:
 - a) At clause 1(a), the “Appointed Trust Assets” (being the assets subject to previous sub-trust appointments) ‘shall be held by the Trustee in a single separate Sub-Fund distinct and separate from all other assets comprising the Trust Fund upon and subject to such trusts powers and provision for the benefit or in favour of the Restricted Beneficiary as the Trustee may by deed or deeds, revocable, or irrevocable executed during the Trust Period in its absolute discretion, appoint’.
 - b) At clause 1(b), ‘subject to any appointments by the Trustee the Appointed Trust Assets shall otherwise continue to be held upon and subject to the trusts powers and provisions of the Declaration of Trust, SAVE THAT the expression “the Beneficiaries” shall henceforth be limited to Restricted Beneficiary’. The reference to the “Restricted Beneficiary” is to the person(s) so defined in the previous sub-trust appointment.
14. The EFRBS was established in advance of pending legislative changes in 2011, to enable assets to be transferred from the HFBT. Beneficiaries of the HFBT were asked

whether they wished for “their” assets to be transferred, this being a reference to funds which had appointed for the benefit of them and their families by deeds of appointment. The second defendant, but not the first defendant, became a member of the EFRBS as a result of such a transfer.

15. The beneficiaries of the discretionary trusts created by clause 4.1 of the EFRBS trust instrument are defined by clause 2.2 as:

‘(A) all present officers and employees of any Group Company [again as defined] at the Commencement Date and all persons who become such officers and employees during the Trust Period including (in all cases) after they cease to be such officers and employees for any reason and all present officers and employees of any company which becomes an Employer at the date when it becomes an Employer and all persons who become such officers and employees while that company is an Employer (but not otherwise) including (in all cases) after they cease to be such officers and employees for any reason; (B) all spouses, co-habitees and civil partners from time to time and the children and remoter issue living from time to time of all persons described in (A) above...’

16. Clause 5.1 confers on the trustee a power of appointment exercisable in favour of the Beneficiaries on terms that ‘any Trust Assets so appointed for the benefit of a Beneficiary shall form a Member’s Account’. A “Member’s Account” is defined as ‘in relation to a Member, those of the Trust Assets which have been appointed for or allocated to the benefit of the Member (whether alone or jointly with other Beneficiaries) or the money and assets representing the same and any income derived therefrom and any accretions thereto less any expenses, taxes and other liabilities paid thereout’.

17. The appointments to Member’s Accounts were made on 22 March 2011. By reference to the deed of appointment of that date made in favour of the second defendant:

- i) At Recital (F), it is recited that the trustee had “agreed as a term of the deed of transfer of assets from the [HFB Trust]... to appoint certain assets to a number of Member’s Accounts for the Benefit of certain Beneficiaries and related family members”, and
- ii) By clause 2.1, the trustee revocably appoints that “the Trustees shall hold the Appointed Fund distinct from all other assets in the Trust Assets upon and with and subject to the provisions of the Trust Deed, in particular, Rules 5.1 and 8.1 and such trusts, powers and provisions... for the benefit of the Appointed Beneficiaries of all or any one or more of them exclusive of the other or others as the Trustees may... in their absolute discretion appoint”. The reference to the “Appointed Beneficiaries” is to the “Specified Beneficiary” (being the person listed in Part 1 of the Schedule, namely the second

defendant) and their spouses, co-habitees, dependents and certain other family members.

18. A list of all the relevant appointments, reflected in the evidence before the court, is contained within the draft order prepared by the claimants. This includes the deeds of appointment relating to the first and second defendants. Sub-trust appointments under the HFBT were made in favour of a total of 26 employees. There were also six Member's Account Appointments pursuant to the EFRBS. Orders are sought in relation to all such appointments (but not in relation to the deeds of merger, which will fall away if the prior appointments are set aside).

Section 86, Inheritance Tax Act 1984

19. A trust for the benefit of employees falls outside the relevant property regime for the purposes of Chapter III of the Inheritance Tax Act 1984 ("the 1984 Act") where it complies with s.86. Section 86(1) provides that:

‘(1) Where settled property is held on trusts which, either indefinitely or until the end of a period (whether defined by a date or in some other way) do not permit any of the settled property to be applied otherwise than for the benefit of—

(a) persons of a class defined by reference to employment in a particular trade or profession, or employment by, or office with, a body carrying on a trade, profession or undertaking, or

(b) persons of a class defined by reference to marriage [to or civil partnership with,] or relationship to, or dependence on, persons of a class defined as mentioned in paragraph (a) above,

then, subject to subsection (3) below, this section applies to that settled property or, as the case may be, applies to it during that period.’

20. The relevant part of subsection (3) is s.86(3)(a):

‘(3) Where any class mentioned in subsection (1) above is defined by reference to employment by or office with a particular body, this section applies to the settled property only if—

(a) the class comprises all or most of the persons employed by or holding office with the body concerned...’.

21. The published practice of HM Revenue and Customs, which they have indicated in correspondence should apply to the trusts under consideration, is set out in their Inheritance Tax Manual (at IHTM42970), and also in the response to a frequently asked question, published in 2012 as part of the HMRC guidance concerning the EBT Settlement Opportunity then in force:

‘If the sub-trust only benefits an individual and their family it is unlikely to satisfy s.86. The wording of s.86 is very clear in that for a trust to qualify the settled property must be held on trusts with the class comprising of ‘all or most’ of the employees. Where sub trusts are for the benefit of a named individual and their family, it cannot be said that the settled property (i.e., the assets in that sub trust) are being held for the benefit of all or most of the employees at that time, so s.86 will not apply.’

22. It is also HMRC’s position that it is irrelevant for these purposes whether or not the sub-trust is revocable or irrevocable; what matters are the current trusts that apply (see IHTM42972).
23. The effect of a trust not being within the relevant property regime is that it is not subject to periodic charges at ten-year anniversaries of the date on which the settlement commenced, on property ceasing to be subject to the settlement, or on otherwise ceasing to satisfy the conditions in s.86. The trusts in issue in this claim have been administered on the footing that they are not liable to these charges. Mr Sharp explains that, if these charges were to have applied, there would be some difficulty in calculating the tax that would be due, although he does not suggest that it would be impossible to do so. He estimates the likely total inheritance tax that would be due in respect of periodic and exit charges, to include that due on the upcoming ten-year anniversary in April 2025, may be approximately £3.8m to £4.3m (independent of any interest and penalties).
24. There are also potential income tax charges applicable to employee benefit trusts (and consequential effects on national insurance contributions), notably pursuant to the disguised remuneration provisions in Part 7A of the Income Tax (Earnings and Pensions) Act 2003, with effect from April 2011, the introduction of which no doubt informed the creation of the EFRBS in March 2011. Furthermore, in *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45, the Supreme Court held that loans made by the trustees of an employee benefit trust to beneficiaries before the 2011 amendments are taxable in the hands of the beneficiaries. Loans have been made to beneficiaries of the HFBT in the present case.
25. In 2015, HMRC and Henderson entered into a settlement agreement in relation to the income tax and national insurance consequences of the HFBT and the EFRBS. That settlement did not comprise any inheritance tax consequences, it being stated that, ‘The Employer does not wish to include any IHT that may be due or become due in connection with the EBT or the EFRBS as part of this settlement’.

The evidence

26. Given the time that has passed since the execution of the documents in issue, there has been some difficulty in obtaining a full set of contemporaneous documents, and in obtaining evidence from all of the individuals who were directly involved in the

creation of the trusts and in the making of the deeds of appointment. A full set of deeds is available, although not all of the copies in the hearing bundle are executed. It has not been possible to identify every human mind involved in the execution of each deed, a corporate trustee being involved, acting by authorised signatories who have not generally been identified.

27. The claimants' solicitor, Mr Matthew Sharp, explains in his first witness statement the process used to search for documents, and that all potentially relevant electronic and hard copy documents were obtained. He says that, 'None of the documents disclosed and reviewed by my team suggest that anyone involved with the creation or administration of the Trusts considered there was any risk that the exemption at section 86 Inheritance Tax Act 1984 would not apply to the assets within the Trusts, including their respective sub-trusts'.
28. There is, however, evidence before the court from a number of individuals who have worked for the Henderson Group at material times and who have knowledge of the trusts, as well as of the processes which were employed within the group. There is a witness statement from Mr Andrew Boorman, former HR director for the group, who took the idea for the HFBT to the Remuneration Committee. He says that Henderson were not aggressive tax planners and would not 'have done anything that was considered dodgy or risky'. He refers to a draft Members' Guide, which reflects the understanding of how the scheme should operate, including that no inheritance tax would be due. Mr Boorman also says that his understanding was that the HFBT would be used as a vehicle to receive discretionary bonuses of eligible employees, and that any such bonuses had to be non-contractual.
29. Mr Jeremy Mindell, former UK Group Employee Tax Manager for the group, indicates that he and other members of the tax and HR team did not consider s.86 of the 1984 Act to be a risky element of the planning. He says that, 'it was ingrained in our thinking that we were setting up an employee benefit trust and so we got the s.86 exemption', and that 'we did not think that appointing assets on sub-trust made any difference to the s.86 position'. He indicates that if the risk had been appreciated, then sub-trusts would probably not have been used. There is evidence to like effect from Mr Paul Markham, an associate director at JTC (Jersey) Ltd, who is involved in the administration of the trusts but was not involved in their creation. The defendants give evidence that they were unaware of any risk of inheritance tax charges applying to the trusts. That may not be relevant to an assessment of the mistake made, as they did not make the appointments, but it is relevant to an assessment of whether the remedy should be granted to alleviate the consequences of the mistake.
30. There is also available a certain amount of contemporaneous documentation concerning the creation of the HFBT and the EFRBS, and it should be noted that the witness statements give little direct evidence about the creation of the EFRBS in 2011. The main evidence on this is given by Mr Markham, by reference to contemporaneous documentation, but not to his own involvement at the time.

31. There are a number of indications in these documents that it was assumed either that s.86 of the 1984 Act would apply to the trusts as it was proposed that they would be administered, or that there would be inheritance tax benefits from them (which in practice amounts to the same thing). For the purposes of this judgment, I consider that it suffices to give four examples in relation to the HFBT:
- i) In a memorandum to the group Reward and Remuneration Committee dated 2 September 2004, Mr Mindell discussed a proposed employee benefit trust which would allow payments into family benefit trusts (i.e. not a precise description of what was ultimately achieved), and said that there would be ‘potentially significant tax advantages in terms of National Insurance, income tax and inheritance tax with regards to funds within the family benefit trust’.
 - ii) A memorandum from Mr Boorman dated 17 February 2005 indicated, without mentioning any inheritance tax risk, that ‘sub-funds are not separate settlements and, if the taxation advantages are to be maximised, must not be’. He also said that the appointments must be revocable, but that was for income tax and not inheritance tax purposes.
 - iii) The draft Members’ Guide referred to by Mr Boorman, of 1 April 2005, contained an Appendix which stated that there would be no inheritance tax liability.
 - iv) An April 2005 PowerPoint presentation for potential HFBT beneficiaries said that the funds within the trust would not form part of their estate and that there would be no inheritance tax due on the death of a participant (and did not mention any other inheritance tax charges that might be payable by the trustee).
32. As far as the EFRBS is concerned, the need to comply (and thus the assumption that it would comply) with the requirements of s.86 of the 1984 Act was expressly mentioned in the period leading up to its execution:
- i) An email dated 2 March 2011 from Henderson to the trustee said expressly that ‘we need to ensure that [the EFRBS documents] are covered by s86 IHTA’.
 - ii) KPMG provided advice to the group in relation to the EFRBS, dated 15 March 2011. This explained that the EFRBS should be a group plan based on a discretionary trust, as it would offer a preferential tax analysis in terms of inheritance tax. KPMG advised that the HFBT was a discretionary employee benefit trust which appeared to satisfy the requirements of s.86 of the 1984 Act and, in particular, that ‘the HFBT was drafted such that the class of beneficiaries would fall within section 86 IHTA’. They also advised that the EFRBS would be regarded as falling within s.86 and thus outside the relevant

property regime, and that there would be no inheritance tax charge on a transfer between the two settlements.

33. It is also relevant to note that the trust instruments themselves were drafted (and, it is thus to be assumed, executed) in the understanding that s.86 of the 1984 Act applied:
- i) Clause 4(a)(i) of the HFBT deed permits transfers to another trust, ‘provided that such other trust shall only be capable of benefiting the classes of persons referred to in section 86(1) Inheritance Tax Act 1984’.
 - ii) By clause 12(a) of the HFBT deed, the fourth claimant is given power to amend the provisions of the trust, provided that no such alteration or addition ‘may be made which would have the effect of prejudicing the status of this Trust as a trust satisfying the conditions set out in Section 86(1) of the Inheritance Tax Act 1984’.
 - iii) By rule 2.2 of the EFRBS rules, no person may be a beneficiary by reference to their relationship with a relevant employee ‘if this would or might result in the Plan failing to satisfy the requirements of s.86, Inheritance Taxes [*sic*] Act 1984 of the United Kingdom’.
 - iv) By rule 26.1, there is a similar prohibition on amendment which might result in a failure to satisfy the conditions in s.86 as in the HFBT deed.
34. I would also note (and confirming the point made by Mr Sharp) that none of the documents to which I was referred refer to any inheritance tax risks, nor do they advert to the possibility that the treatment provided by s.86 might not apply.
35. Mr Sharp confirms in his second witness statement that as at 20 August 2024 the value of the assets remaining in the trusts is approximately £5.3 million. He says,
- ‘...I assume that the total value of assets appointed from the Trusts is around £48 million, being the amount of £53,477,300 settled into the Trusts less the £5.3 million remaining in the Trusts at 20 August 2024 as set out above. It is possible that the true value is a higher sum given that the funds settled into the Trusts were invested for many years.’

The position of HM Revenue and Customs

36. As is required in claims seeking the rescission or rectification of an instrument where the order will or may lead to a reduction in tax payable by one or more taxpayers, and particularly where a mistake as to tax forms the basis of the claim before the claim, HMRC have been served with the claim form, and invited to indicate whether they wished to be joined.

37. HMRC indicated on 24 April 2024 that they intended to prepare a letter to be put before the court. They were informed of the hearing date (of 5 September 2024) on 31 May 2024. In the event, a five-page letter from HMRC's Solicitor's Office was sent on 30 August 2024, less than a week before the hearing and after the parties' skeleton arguments had been filed.
38. The HMRC letter begins by setting out a summary of the tax treatment of employment benefit trusts and, particularly, the effect of section 86 of the 1984 Act in relation to inheritance tax. After referring to the decision of the Supreme Court in *Pitt v Holt* [2013] 2 AC 108, it then sets out a number of potential objections under a series of headings.
39. First, the letter refers to the remarks of Lord Walker of Gestingthorpe in *Pitt v Holt* at [135], concerning the joined appeal in the case of *Futter v Futter* (which was argued and decided on the basis of the rule in *Re Hastings-Bass*):

‘135. Had mistake been raised in *Futter v Futter* there would have been an issue of some importance as to whether the court should assist in extricating claimants from a tax-avoidance scheme which had gone wrong. The scheme adopted by Mr Futter was by no means at the extreme of artificiality (compare for instance, that in *Abacus Trust Co (Isle of Man) v National Society for the Prevention of Cruelty to Children* [2001] STC 1344) but it was hardly an exercise in good citizenship. In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy. Since the seminal decision of the House of Lords in *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300 there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures. But it is unnecessary to consider that further on these appeals.’

40. HMRC suggests as follows:

‘Whilst HMRC agrees that the tax planning undertaken by Henderson was not as aggressive as some other schemes, such as the one used in the *Rangers* case, it is nevertheless the case that Henderson established a complex tax planning scheme that did not comply with the conditions for IHT relief created by Parliament, and is now seeking to turn to the Courts to alter the terms of that scheme to obtain that relief’.

41. The letter goes on to refer to the witness statement of Mr Markham and comments on the fact that it appears that there is no intention to seek repayment of any of the loans or distributions to beneficiaries, and it is said that if the loans (i.e. made from the sub-trusts of the HFBT) are waived or become unenforceable, there may be further

inheritance tax charges (presumably by virtue of s.72(2)(c) of the 1984 Act, although HMRC do not specify). Then, Mr Markham appears to say that each beneficiary would, after rescission, be considered to have their own “pot”, such that there does not appear to be an intention that the trustees’ discretion as to future distributions will be meaningfully exercised.

42. HMRC also suggest that HMRC themselves have been prejudiced by the delay by the claimants in the pursuit of this claim. The letter says:

‘18. HMRC opened its inquiry into the IHT position in January 2021 and has had to dedicate resources over the past 3 and a half years to this matter. The witness statement of Paul Markham states at paragraph 21 that he became aware of the IHT issues which have in turn resulted in this application in autumn 2021. No notification was given to HMRC prior to 2024 that an application for rescission was being considered.

19. We should explain here that HMRC chose to continue its compliance activity into this matter after being notified of the claim in 2024, as this is a long-running matter and HMRC was concerned that pausing its activities for many months at this stage might negatively impact on the effectiveness of its compliance activities. If the application had been made at an earlier date, HMRC may have chosen to pause its compliance activities pending the outcome of the application.’

43. Finally, the court is asked to consider whether the mistake is of such a serious nature that it would render it unconscionable or unjust for the order to be refused. After referring to *Pitt v Holt* at [26] at [132], it is said that:

‘22. The claim form sets out that over £53m was appointed to the sub-trusts, and as a result the tax due including interest is expected to be in the region of £7m. We should be clear that the tax is in line with what would be expected where an employer sets up a trust or sub-trust to benefit a particular employee, as was the case here. On HMRC’s understanding of the facts, the trust as originally established would have qualified for section 86 relief, and the appointment to the sub-trusts resulted in the conditions of section 86 no longer being satisfied. It is not clear to HMRC from the evidence provided why the decision was made to make the appointments to the sub-trusts. However, and in any event, the mere fact that there is a difference in tax treatment as a result of the appointments to the sub-trusts does not necessarily lead to the conclusion that it would necessarily be unconscionable for the Court to refuse the order.’

The availability of rescission

44. It is well established that the court has an equitable jurisdiction to set aside voluntary dispositions. It was not suggested to me by counsel (or by HMRC) that an EFRBS

does not constitute a voluntary disposition, unlike a registered pension trust, which is not and which therefore cannot be rescinded under this jurisdiction. This is so even though the trust may be created and administered as a way of an employer providing retirement benefits to its employees. Employees under the trusts such as the HFBT and the EFRBS in this case are objects of the discretionary powers of the trustees and do not have contractual rights as against the trustees by virtue of being beneficiaries (cf. *Baird v Baird* [1990] 2 AC 548 at 560). Members may not contribute to the EFRBS (rule 7.3).

45. The test for rescission was restated by the Supreme Court in *Pitt v Holt*. In *Kennedy v Kennedy* [2014] EWHC 4129 (Ch), Sir Terence Etherton C summarised the relevant principles as follows, at [36]:

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

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

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

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

46. In *Pitt v Holt*, Lord Walker rejected as far too wide and unsupported by principle the proposition that mistakes which relate exclusively to tax cannot in any circumstances be relieved: see at [132]. Relief was granted in relation to the claimant's mistake as to the tax effects of a settlement established for a disabled person. She had mistakenly believed that the settlement had no adverse tax effects; in fact the beneficial treatment afforded to trusts for disabled persons by section 89 of the 1984 Act was not available as its requirements were not satisfied. As Lord Walker said at [134], 'The SNT could have complied with section 89 without any artificiality or abuse of the statutory relief. It was precisely the sort of trust to which Parliament intended to grant relief by section 89.'
47. Furthermore, Lord Walker made plain at [132] that 'consequences (including tax consequences) are relevant to the gravity of a mistake, whether or not they are...basic to the transaction'. A mistake merely as to tax consequences may, accordingly, be sufficiently grave for it to be unconscionable or unjust to leave that mistake uncorrected.
48. The type of mistake made by the claimant in *Pitt v Holt* was an incorrect conscious belief, or an incorrect tacit assumption (see at [133]). An incorrect belief or a false assumption about the tax effects of a disposition is capable of founding the court's equitable jurisdiction. Mere ignorance is not enough. Nor can a claim be pursued where a claimant can be seen to have deliberately run the risk of that which has come to pass. At [114], Lord Walker said this:
- '114. Some uncontroversial points can be noted briefly. It does not matter if the mistake is due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong....Nor need the mistake be known to (still less induced by) the person or persons taking a benefit under the disposition. ...'
49. The conscience test derived from *Pitt v Holt* at [126] is summarised at point (4) of the Chancellor's summary of the applicable principles. The question of unconscionability is to be assessed by reference to those who are to be affected by the relief if it is granted. Where a settlement is set aside, that will generally be the beneficiaries or objects of the trustees' future discretions (see *Pitt v Holt* at [124]–[125], pointing out that Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304 identified precisely those who would be affected). I mention this to make the point that the assessment of unconscionability is not a question of public policy. There may as HMRC have suggested be public policy grounds in some cases for denying relief but I consider that, where they apply, the court denies relief even though it may be unjust *as between the parties* for the transaction to remain undisturbed.

Discussion: role of HMRC

50. I consider it appropriate first to address the role of HMRC in this litigation. HMRC referred in the introduction to their letter to the following comments of HHJ Hodge QC, in *Hartogs v Sequent (Schweiz) AG* [2019] EWHC 1915 (Ch) at [4], also a claim for the rescission of voluntary transactions:
- ‘4. ... I wish to make it clear that the court is always willing to consider anything that HMRC may wish to say about claims of this nature, even if it is only in the form of a written letter to be placed before the court by the claimant's own solicitors. In this case I have heard no representations from HMRC. That, however, does not mean that the court will not scrutinise a case of the present kind closely to ensure that the applicable legal principles have been properly addressed and considered.’
51. *Hartogs* was a case where HMRC did not put forward any submissions. It has for many years been the practice of HMRC in such cases to write a short letter to be placed before the court, asking for a small number of well-known authorities to be drawn to the attention of the court. For myself, I have long doubted the utility of such letters that do no more than this; judges of the Business and Property Courts are well familiar with the relevant authorities, and the parties to such claims are (as in this case) almost invariably represented by able solicitors and counsel who are aware of the need to ensure that the court is satisfied that the equitable jurisdiction of the court is engaged and that the court is aware of any arguments which may tend against the granting of relief. I would note that, whilst Mr Fletcher was not instructed to act as “devil’s advocate” and positively argue against the claim (a form of advocacy which can be particularly useful where there are obvious arguments which may be made against the claim), both sides recognised their duty to give the court all the help that it requires to reach the right decision: *Sutton v England* [2012] 1 WLR 326 at [9]. In that case, Mummery LJ also said, ‘It must be established to the satisfaction of the court (a) that it has jurisdiction to entertain the application and (b) that it can properly exercise its discretion to do what is being asked of it.’
52. To that end it is clearly appropriate for HMRC to write to the court, if they wish, referring to any relevant authorities that might be overlooked, and/or setting out any points that might be made as to why the evidence of the parties might be said not to support the claim for rescission and/or rectification and why the order ought therefore not to be made. To some extent, the letter from HMRC in the instant case does this. In my view, however, and in at least two respects, it goes well beyond the sort of points which may properly be made only in correspondence and without seeking to be joined to the proceedings. That is quite apart from the criticism of the lateness of HMRC’s engagement.
53. First, HMRC suggest that they, or possibly the UK taxpayer more generally, have been prejudiced by the conduct of the claimants in delaying in bringing the claim when HMRC’s inquiry into the inheritance tax position has been ongoing since January 2021. They say that:

‘We should explain here that HMRC chose to continue its compliance activity into this matter after being notified of the claim in 2024, as this is a long-running matter and HMRC was concerned that pausing its activities for many months at this stage might negatively impact on the effectiveness of its compliance activities. If the application had been made at an earlier date, HMRC may have chosen to pause its compliance activities pending the outcome of the application.’

54. I am afraid that I do not follow the logic of this assertion. It may be that with the provision of further information about ‘the effectiveness of [HMRC’s] compliance activities’, not included in the letter the logic would become clear. But, there is a more fundamental problem. HMRC appear to wish to rely on matters of fact other than those already in evidence in order to substantiate an argument that the court ought to refuse relief.

55. As an equitable remedy, rescission is subject to the doctrine of laches. HMRC refer to *Lewin on Trusts*, 20th edn at 5-089:

‘A claim to rescission or rectification is not within the Limitation Act 1980 but is subject to the equitable doctrine of laches. And so delay and acquiescence may bar a claim to rescission or rectification, certainly where relief is opposed on such grounds. It has been said that the doctrine of laches applies to a party seeking relief “where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material”. There must have been some form of detrimental reliance on the part of the person relying on the defence, or a relevant third party, in order for it to succeed.’

56. In *Pitt v Holt*, Lord Walker at [142] indicated that HMRC took no point on delay, despite the fact that there had been considerable delay before the claim was issued. The applicability of delay was therefore not considered. It is not self-evident to me that detrimental reliance by HMRC on delay is capable of leading to the refusal of relief on the grounds of laches, in circumstances where the delay does not affect the position as between the disponent and those who benefit or might in future benefit under the disposition. As I have noted above, I consider that the question of unconscionability is to be determined in relation to those affected in this way, separate from public policy considerations. If relief were to be refused because of prejudice to the body of taxpayers more generally, this would seem to be an argument squarely based on public policy.

57. That issue is, however, a matter for another case in which it is properly before the court. If HMRC wish to rely on prejudice to taxpayers generally as a ground for the refusal of relief, I consider that they must become a party to the claim, and file

evidence explaining their position and, of course, affording the other parties to the claim the opportunity to respond by filing evidence themselves. Writing a letter at the eleventh hour and making this sort of point in elliptical terms is not an appropriate way for it to be raised.

58. The second matter raised by HMRC in correspondence, which I consider not to be suitable to be raised in this way, is the reference to the public policy considerations mentioned by Lord Walker in *Pitt v Holt* at [135]. Again, the precise point sought to be made is somewhat obscure, not least because this reference is juxtaposed to the comments about Mr Markham's witness statement, about whether the order sought serves any useful purpose now, which I will consider further below.
59. It is not obvious to me whether HMRC is contending that any of the HFBT and EFRBS and/or the appointments made under them constitute 'artificial tax avoidance', being the expression used by Lord Walker. HMRC describe the arrangements as a 'complex tax planning scheme', before referring to what he said, perhaps implying that they do wish to make that contention. I would note that the word "complex" is not a synonym for "artificial". Again, the precise point sought to be made may be known to the writer of the HMRC letter but it is, unfortunately, not known to me and the letter was written too late for any further correspondence on it to take place. HMRC seem to accept that the 'complex tax planning scheme' would have had the benefit of s.86 of the 1984 Act if it were not for the sub-trust and Members' Account appointments, and do not directly suggest that the way in which it was administered (save for those appointments) would have caused that benefit to have been lost.
60. HMRC do not mention the rescission case of *Van der Merwe v Goldman* [2016] 4 WLR 71. Mr Wilson, who appeared in that case, was not aware of any later case in which HMRC had intervened and in which public policy issues had been considered. At [42], Morgan J said this:

'42. The parties' skeleton arguments in advance of the trial addressed the question whether this was a case of artificial tax avoidance where the court ought to withhold relief on the ground of public policy, a possibility which was mentioned by Lord Walker in *Pitt v Holt*, at para 135. The parties' arguments were of considerable interest but in the course of closing submissions, HMRC accepted that it was unrealistic for them to ask a judge at first instance to give effect to Lord Walker's suggested possibility on the facts of this case. HMRC accepted that at this level of decision, in the light of recent decisions of the Supreme Court on the principle of *ex turpi causa* and public policy, in particular, the decision in *Les Laboratoires Servier v Apotex Inc* [2014] UKSC 55; [2015] AC 430, the court could not be expected to withhold relief on this ground in this case. Having considered the arguments in the skeleton arguments, I can say that I do not think it appropriate for me to hold, on my own initiative, that it would be contrary to public policy to grant relief in this case.'

61. In light of these comments, it seems to me that question of whether relief should be refused on public policy grounds should await a case in which HMRC intervenes by being joined. HMRC cannot expect these points to be determined if their only involvement is by a form of shadow boxing through correspondence. I do not suggest that the points to which their letter in this claim adverted are not worthy of consideration in a suitable case and, on that note, I would refer to what Robin Vos has written (*Trusts: righting wrongs*, Private Client Business, 2021, 2, 52):

‘The good news for those who are adversely affected where things have gone wrong in relation to trusts is that the English courts are happy to help. What once appeared to be strict conditions have been relaxed. Perhaps this is why HMRC are no longer willing to participate in cases where the effect of relief being granted is to avoid a tax liability. Instead, they simply ask the court to bear in mind some of the older cases where claims have been unsuccessful.

It is however arguable that the pendulum has swung too far in favour of those wishing to correct their mistakes. Unsurprisingly, since most of the cases are uncontested, it is some time since the Court of Appeal has had to consider any of these issues. When they get a chance to do so, it will be interesting to see whether they are prepared to show as much flexibility as the judges in the High Court.’

62. For the reasons I have given above, however, I do not consider it appropriate to give further consideration to these arguments raised by HMRC.

Discussion: availability of relief

63. I now turn to the test for rescission, as summarised in *Kennedy*, as it applies to the evidence relied on by the claimants.
64. The first question is whether there has been a relevant and operative mistake. A point of principle arises because I am not asked to make a determination of whether HMRC are correct in their position that the effect of the execution of the deeds of appointment was to take the funds thereby appointed outside the protection of s.86. The mistake, accordingly, is said to be the fact that HMRC contends that the deeds had that effect. In the reported cases, it has been accepted that a mistake as to the tax effects of a transaction has been made. In this case, neither the claimants nor the defendants admit that the assets subject to the deeds of appointment do not benefit from the treatment of s.86. There is, therefore, no admission that any mistake has been made.
65. When this point was discussed during the course of submissions, Mr Wilson indicated that he may be in a position to make a concession that HMRC’s view of the inheritance tax effect of the deeds of appointment was correct, if that were necessary in order to obtain the relief sought by the claim. This does not seem to me to be an entirely satisfactory way of approaching the issue.

66. I have also considered other ways of addressing the issue. One would be to adjourn the claim so as to enable HMRC to complete their inquiries. If they determined that s.86 applied after all, the problem would no longer arise. In the absence of an assessment which can be challenged, this would leave the matter outstanding, and all parties unsure where they stand. HMRC themselves complained of delay (although they did not explain why their own inquiries have taken so long). As the correspondence suggests, there would also be a continuing financial burden on HMRC in having to continue their inquiries.
67. In my view, the court is entitled in all the circumstances to proceed for the purposes of the rescission claim on the footing that HMRC's position is correct. That position is that 'the sub-trusts in the present case do not attract relief as they are not for the benefit of a class of employees and are instead held for individual employees'. Making that assumption in favour of HMRC cannot be unfair to HMRC. Alternatively, one could approach the alleged mistake as being that HMRC would contend that s.86 would apply, whether or not that contention is in the event correct. I consider that it is sufficient that HMRC's position as to the correct position in tax law is cogent and properly arguable (which it plainly is). Another way of formulating the point would be to say that it is enough for there to be an operative mistake if there is an incorrect belief or assumption that there is no risk of a particular tax consequence, where in fact that real risk does exist. In those circumstances, any consideration of just how real or significant that risk was would go both to the question of whether there was an operative mistake and to an assessment of unconscionability, and of whether it would be unjust to leave the mistake uncorrected. It suffices here to say that there is clearly a very real risk that HMRC's position would be vindicated if the tax point were to be litigated.
68. For those reasons, I have not considered it necessary to seek a concession from the parties that HMRC's view on the applicability of s.86 to the appointed funds is correct.
69. On that basis, I consider that the deeds of appointment which are the subject matter of this claim were entered into on the basis of an operative mistake as to the fiscal effect of those deeds. That mistake was an incorrect conscious belief or an incorrect tacit assumption that the assets appointed under the deeds of appointment, relating to either the HFBT or the EFRBS as the case may be, would continue to benefit from the treatment in s.86 of the 1984 Act once sub-trust appointments were made. I find that such a mistake was made, despite the lack of clarity as to precisely which human minds were operating at each step, the deeds of appointment being executed by corporate directors of a corporate trustee.
70. There is ample evidence before the court that those administering the scheme consciously considered that s.86 applied. As the summary at paragraphs 31 and 32 above sets out, communication surrounding the creation of the trusts, including in advice, assumes either (consistent with s.86) that funds held within the trusts will not

be liable to inheritance tax, or that s.86 will positively apply. This assumption was carried over into the terms of the trust instruments themselves, which precluded the exercise of certain powers if the effect of such exercise would be to cause s.86 not to apply.

71. Likewise, this evidence shows that the point was considered, before the creation of the HFBT and of the EFRBS deed, and in relation to the administration of the trusts. This shows that those determining to make the deeds of appointment did not do so taking the risk that s.86 did or might not apply. The evidence also suggests that employee benefit trusts of this kind were not seen as an aggressive form of tax planning. It also suggests, in the form of the KPMG and Ernst & Young advice, that EBTs of this kind have (putting aside the question of sub-trusts) been seen as a mainstream form of tax planning. The tenor of HMRC's objection, in accepting that s.86 would apply but for the appointments, also tends to suggest the same. This adds credibility to the evidence that neither Henderson nor the trustee were seeking to do anything risky and that the trustee accordingly would not knowingly have taken the risk of losing the protection of s.86.
72. The analysis then turns to consideration of whether the causative mistake was sufficiently grave to make it unconscionable on the part of the donee to retain the property. If the mistake is left uncorrected, there will be a tax liability of around £7 million, to fall upon the claimant as trustee(s) and/or the beneficiaries. The claimant retains an insufficient sum with which to pay the potential tax liabilities. There will, in the absence of an order for rescission, therefore be an issue as to where the inheritance tax liability is to be borne (see s.201 of the 1984 Act).
73. Subject to the points discussed below, I consider that the mistake made was sufficiently serious as to render it unconscionable for the mistaken dispositions to be left uncorrected. That is essentially because of the significant amount of tax which is payable, and which would not have been payable had the HFBT and EFRBS been administered without the creation of sub-trusts. I consider that the assumed application of s.86 was basic to the transaction. The trusts could have been administered lawfully and without incurring these substantial inheritance tax liabilities without any real difference in the relevant transactions as far as the beneficiaries were concerned, and without any abuse or artificiality (see *Payne v Tyler* [2019] EWHC 2347 (Ch) at [31]). There is no reason why justice or fairness would require the superfluous appointments to remain in place, unless there was a general principle that the court should not intervene where the mistake has been as to tax effects. As I have set out above, there is no such general principle. Further, I do not consider that the fact that the HFBT sub-trust appointments are revocable with the consent of two adult beneficiaries is a bar to rescission. The benefit of an order for rescission is greater than the protection granted by that right, especially in circumstances where many of the appointed funds have already been exhausted.

74. Although not stated in terms in *Kennedy*, there must be an issue capable of being contested between the parties: *Pitt v Holt* at [139], citing and approving *Racal Group Services v Ashmore* [1995] STC 1151 at 1157. Peter Gibson LJ said in *Racal* that, ‘the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal benefit.’ HMRC appear to refer to this by saying in their letter that the claimants seek the rescission of the appointment to obtain inheritance tax relief, but without making meaningful changes to the arrangement.
75. In *Van der Merwe*, Morgan J suggested at [26] (point (11)) that it is not pointless, nor is it acting in vain, to set aside a transaction and to remove a liability to pay tax, even where that is the principal, or the only, effect of the setting aside, citing *Pitt v Holt* at [136]–[141]. I do not read those paragraphs in *Pitt v Holt* as going quite so far. Lord Walker appears to endorse the view that, if the rights of the parties are wholly unaffected by an order for rescission, save for the availability of a tax benefit, relief will usually be refused. This may preclude an order if, for instance, the parties have already rescinded the disposition voluntarily. There has been no such out of court rescission here, not least because it would not have operated retrospectively, and would thus not have obviated inheritance tax charges which had already arisen.
76. In *Pitt v Holt*, Lord Walker accepted that there was an issue between the parties beyond the right to a tax benefit, as there were potentially contestable issues between HMRC and any person who had received distributions from the trust in question. Mr Wilson submitted, and I accept, that a similar potential issues arises here. I have mentioned above s.201 of the 1984 Act, concerning those who may be liable for unpaid inheritance tax. In the absence of rescission, an issue might well arise as to how the tax should be borne, in circumstances where the trustee does not retain sufficient assets. There may be issues as to how the tax is to be borne if it cannot be recovered from some beneficiaries or from the trustee.
77. A related point arises in HMRC’s comments about the evidence of Mr Markham, suggesting that the arrangements would continue as they have been administered if an order for rescission is made. In his witness statement, he says this:
- ‘52. All of the distributions and loans made to beneficiaries from the sub-trusts of the Trusts could have been made from the Trusts directly and the Trustee does not intend to seek repayment of any historic payments if the Application is successful. Historic and current debtors (i.e. the beneficiaries) and creditors (i.e. the Trustee) will remain the same.
53. The software would be able to track the position of the assets recommended for each of the remaining beneficiaries in the Trusts going forward. I expect that nothing would change for the beneficiaries as the software will consider each

beneficiary to still have their own “pot”, that pot will just be held at the “head-trust” level if the sub-trusts are void.’

78. HMRC suggest that relief might be refused because the claimant does not intend to call in the loans which have been made, or to seek repayment of sums which have been distributed. Mr Wilson submitted that it is not necessary for such steps to be taken. The appointments, both from the HFBT and the EFRBS, did not create new settlements and the powers exercised by the trustee were those contained in the head trust, which remained fully applicable after each relevant appointment had been made. Indeed, the decision to proceed with the appointments would not have been taken had such new settlements resulted, because there would have been adverse capital gains tax consequences as the appointment would then be a chargeable disposal for the purposes of Taxation of Chargeable Gains Act 1992, s.71(1).
79. HMRC do not suggest in their letter that the appointments by the trustee to beneficiaries from the sub-trusts, or the loans made by the trustee to beneficiaries in respect of any individual sub-trust, will be directly affected by the rescission of the appointments onto sub-trusts. The power of the trustee to make the subsequent appointments and loans will not be rescinded and there is thus no necessity for those transactions to be unwound.
80. The question is whether the granting of the equitable remedy should be made contingent on their being unwound. HMRC ask the court to consider carefully whether it is appropriate to grant a remedy without all the subsequent transactions being unwound. They do not explain why rescission ought to be refused. The fourth requirement for rescission, as summarised in *Kennedy v Kennedy*, is that the order should not be granted in such a way or on such terms that would operate unjustly, unfairly or unconscionably. In *Pitt v Holt*, the claimant indicated in correspondence that she would not seek to make any claims against the recipients or distributions or other payments from the trustees (see at [138]). Lord Walker indicated at [141] that, in the absence of that letter, an undertaking to similar effect might have been required.
81. This point is also made in *Rogge v Rogge* [2019] EWHC 1949 (Ch) at [164.3], explaining at [165] that rescission may be ordered even where complete restitution is impossible. The court then went on to discuss whether the order would operate unfairly on third parties, and indicated that an order for rescission would be made only if the claimants provided suitable counter restitution. I do not consider that third parties are so affected in the present case so as to require the consideration of such conditions.
82. Another point raised by HMRC is the fact that, once the appointments are set aside, the trustee has indicated that each beneficiary will still have his or her own pot. As noted above it is thus suggested that, whereas the trustee would have discretion as to future appointment, it does not appear that this discretion would be meaningfully exercised.

83. HMRC are correct to point out that it is a requirement of s.86 of the 1984 Act that the funds held on trust are available to be distributed among the full class of discretionary objects. And, where s.86(3)(a) applies (as it does here), it provides that the class must comprise all or most of the persons employed by or holding office with the employer concerned. Trustees of a discretionary trust must, when they consider whether or not they should exercise their powers of appointment, consider the range of objects of the power and consider the appropriateness of individual appointments (see *Re Hay's Settlement Trusts* [1982] 1 WLR 202 at 210, Sir Robert Megarry V-C). Mr Wilson accepted that the trustee would have such a duty in relation to any funds held within the HFBT and the EFRBS after an order for rescission had been made.
84. This is the case with any employment benefit trust which relies on s.86(3)(a) of the 1984 Act. HMRC themselves accept in published guidance that the informal allocation of funds to individual beneficiaries may, but will not necessarily, lead to s.86 no longer being satisfied but it will depend on whether the trustees have as a matter of fact altered the trusts on which the funds are held. Accordingly, HMRC say that 'if, as a matter of fact, the funds continue to be available for the benefit of all or most employees, then something like simple book entries may not infringe the requirements of IHTA84/S86' (HMRC Inheritance Tax Manual at IHTM42978). It seems to me that what Mr Markham says about the notional allocation of funds is consistent with an approach which will not involve a failure to comply with s.86. HMRC's published guidance, read together with the evidence filed on behalf of the claimants, also suggests to me that this way of treating property within an employee benefit trust is well established and that the notional allocation of property to individual beneficiaries is not without more impermissible, absent a formal appointment onto sub-trusts.
85. Accordingly, I do not consider that this final objection raised by HMRC provides any reason for the denial of equitable relief.

Representation order

86. The claimants seek an order under CPR r 19.8 that the defendants represent the entire class of affected beneficiaries, i.e. that the first defendant represent the beneficiaries under the HFBT and that the second defendant represent the beneficiaries under the EFRBS, in both cases in whose favour an appointment has been made.
87. An order should be made only where the representative has the same interest as those to be represented, and where there is no conflict between them: *Google LLC v Lloyd* [2022] AC 1217 at [71]. It is a matter of discretion whether to make the order. It is clear that a representation order can be made at the conclusion of proceedings: *IBM United Kingdom Pensions Trusts Ltd v Metcalfe* [2012] 3 Costs LO 420 at [24] (Warren J). This may be particularly appropriate in a claim concerning trusts when the court has been addressed on the interests of the beneficiaries.

88. I am satisfied that the defendants have the same interests as the other beneficiaries under the respective trusts. In the absence of rescission, tax will due in respect of the appointments and an issue will arise how that tax is to be borne as between the beneficiaries. The amount for which each may be due will inevitably differ. I can see that, in the absence of rescission, a conflict between beneficiaries may arise in this respect, perhaps between those who had spent the sums appointed without being aware of the issue, and those who had not done so. That conflict does not arise at the stage of considering whether to grant rescission.
89. Mr Fletcher indicated that another option would be for the trustee to be appointed representative. I discern that his clients are willing to be appointed, rather than enthusiastic about being so. I consider that the defendants are the appropriate parties to appoint; they have with the benefit of solicitors and counsel considered the position in the round from the perspective of beneficiaries with the same interest as those who would be represented. It would be unsatisfactory for the trustee to be appointed. Not only is it a claimant but it is also the party whose mistake in executing the relevant deeds of appointment is relied on in support of rescission.
90. I will accordingly make a representation order as sought by the claimants.

Conclusion

91. For the reasons set out above, I am satisfied that the various deeds of appointment made under the HFBT and the EFRBS should be set aside. The claim is therefore allowed.