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ROLE OF EQUITY IN MISTAKEN TRANSACTIONS

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1. This address is not about “the rule in *Hastings Bass*” as Lord Walker reluctantly continued to call it in *Futter v Futter* and *Pitt v Holt*¹. That rule is concerned with trustees who make decisions without having given proper consideration to relevant matters which they ought to have taken into consideration or having taken into account considerations which they ought not to have taken into account².
2. This address is concerned with causes of action where an essential ingredient is that the claimant has made a mistake. It is essentially concerned with spontaneous mistakes, that is to say mistakes which have not been caused by the culpable conduct of the defendant or others, for example misrepresentation, non-disclosure

¹ [2013] UKSC 26; [2013] 2 WLR 1200. Lord Walker said at [1] that it would be more aptly called the rule in *Mettoy*

² [2013] UKSC 26 at [2]

(where there is a duty to disclose), undue influence, duress, or breach of a fiduciary duty.

3. Before descending into detail, it is helpful to survey the broad categories of case concerning spontaneous mistakes with which this address is concerned. These are (1) transactions which are void for mistake; (2) transactions where the Court can set aside the transaction because it was entered into under a mistake; (3) transactions where the court can alter the written terms of a contract or other document giving effect to the transaction because it mistakenly does not give effect to the intention of one or more of the parties; and (4) transactions where the claimant is entitled to a personal remedy or (possibly and more controversially) a proprietary remedy for mistakenly conferring a benefit on the defendant.
4. I am not concerned here to address the rectification of the terms of a will to correct a mistake. That turns on statutory provisions³. Nor am I concerned with the doctrine of *non est factum* – where a party who has executed a document under a fundamental misapprehension as to its nature can plead that it was not his or her deed.
5. The way the law has developed in the areas of mistake with which this address is concerned shows that there are broad distinctions between contractual transactions and non-contractual or unilateral transactions and also between the application of common law principles and principles of equity.

³ Administration of Justice Act 1982 ss. 20, 73(6) and 76(11)

6. The thesis of this address is that, although there are different tests for causes of action based on spontaneous mistake according to the different categories which I have mentioned, there is, as there should be, an overall coherence between the degrees of severity of the requirements to found the cause of action according to the category in question. In particular, there is justification for the more stringent requirements in equity for rescission on the ground of mistake, as endorsed by Lord Walker in *Pitt v Holt*, when compared with the simple “but for” causation principle which has been widely applied in claims for personal restitution for unjust enrichment arising from the claimant’s spontaneous mistake. That does not turn on treating gifts as a separate category, as several commentators have suggested, but rather as reflecting that (as the law currently stands⁴) rescission inevitably gives rise to or has the potential for proprietary consequences.
7. In order to place the principles of equity in this field in their place, it is appropriate to start with a short summary of certain common law principles.
8. Let us take, first, the case of a contract – a bilateral or multi-lateral agreement. In this context a mistake can only give rise to a remedy at common law if the contract never came into existence or it was void or voidable.
9. Sometimes a mistake in the communications between the parties negotiating a contract means that there is no binding contract because, for example, there is no correspondence between offer and acceptance or the agreement is not sufficiently certain. I am not concerned in this address with such a situation.

⁴ Cf. W.Swadling, “*Rescission, Property and the Common Law*” (2004) 121 LQR 123 and other articles and texts by him

10. A common mistake will render a contract void if, and only if, subject to certain other conditions, the mistake is so fundamental that it makes the contractual adventure impossible or makes it essentially different to what the parties anticipated.⁵ It is relevant to note that, even if that requirement is fulfilled, the contract will not be void if one party should have known the truth.⁶ The stringency of the conditions for a contract to be void reflect the social policy that contractual obligations should be performed in the interests of certainty and commerce⁷.
11. It is often said that some unilateral mistakes, if fundamental and the other party is aware of them, render a contract void at common law. Those situations, however, may be better analysed in some other way, including failure to satisfy the basic requirements for a contract⁸. Where, for example, a mistake by one party as to the terms of the contract was known by the other party⁹, the better analysis may be that the “apparent” contract does not exist but the mistaken party can enforce the contract on the terms intended by the mistaken party – assuming the equitable remedy of rectification is available.¹⁰
12. Let us turn then to the position at common law where there is no contract. In general terms, in the absence of any governing contract, a claimant is entitled at common law to a personal claim in restitution where the defendant has been enriched at the claimant’s expense as a result of an operative spontaneous mistake.

⁵ Chitty on Contracts (31st ed) at 5-018; *Bell v Lever Bros.* [1932] AC 161; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679

⁶ Chitty op cit. 5-040; cf. rectification and rescission in equity.

⁷ Usually expressed in the latin tag *pacta sunt servanda*; and see, eg., *Bell v Lever Bros Ltd* [1932] AC 161, 224 (Lord Atkin), *Associated Japanese Bank Ltd v Credit du Nord SA* [1989] 1 WLR 255, 269 (Steyn J)

⁸ *Statoil ASA v Louis Dreyfus Energy Services LP (The Hariette N)* [2008] EWHC 2257 (Comm), [2008] 2 LI Rep 685 at [87] (Aikens J)

⁹ *Hartog v Colin and Shields* [1939] 3 All ER 566

¹⁰ Chitty op cit. paras. 5-081-5-083.

A claimant will not be denied relief merely because he or she was negligent.¹¹ There will be a personal claim in unjust enrichment for spontaneous mistake if the transaction would not have taken place “but for” the mistake.¹² It is apparent from the decision of Robert Goff J in *Barclays Bank v Simms Ltd*¹³, in which he rejected a “supposed liability” test and approved a causation test, that he was implicitly adopting a “but for” test. That test has been accepted expressly or by implication in subsequent cases and various judicial statements, although never formally endorsed by a decision of the House of Lords or the Supreme Court¹⁴. The claim will, of course, be subject to all the usual defences, such as change of position. It is, nevertheless, on the face of it, a very benign legal regime for claimants.

13. The grounds on which a restitutionary remedy may lie for a payment made by mistake outside the contractual context are, therefore, considerably wider than those on which a contract may be void for mistake. This is consistent with a policy holding people to their bargains; or, putting it another way, giving greater security to those who have given good consideration for a properly made and binding contract than to those who have had benefits conferred on them otherwise than pursuant to a contractual obligation.
14. What then is the position in equity? In accordance with ordinary principles, one would expect equity generally to follow the common law, but to relax and amplify the common law where it would otherwise lead to a result which is unjust or

¹¹ *Kelly v Solari* (1841) 9M&W54; *Dextra Bank and Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50.

¹² Goff & Jones op cit para. 9-50; Burrows, the Law of Restitution 3rd ed. pp. 207-209.

¹³ [1980] QB 677

¹⁴ See the cases cited in ftne 247 to para. 9-98 of Goff & Jones op cit, and the citations in the text and footnotes in Burrows op cit pp. 207-209; Virgo, The Principles of the Law of Restitution 2nd ed pp. 154-157

unconscionable. One would also expect, in such a situation, that the context for the operation of equitable principles would be clearly defined.

15. Let us start, again, with the position in equity for contracts. Subject to what I shall say about rectification, there is no discord between equity and common law. In the case of a spontaneous mistake, that is to say in the absence of wrongdoing, such as fraud, misrepresentation, non-disclosure (where there is a duty to disclose), undue influence or breach of fiduciary duty, a contract is not voidable for mistake. There is no equitable jurisdiction to grant rescission for common mistake in circumstances falling short of the requirements at common law.¹⁵ The Court of Appeal in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*, declining to follow *Solle v Butcher*¹⁶, recognised the desirability of a jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract, so giving greater flexibility than the common law, but it considered that such a jurisdiction was a matter for Parliament. The court said:

“... the premise of equity’s intrusion into the effects of the common law is that the common law rule in question is seen in the particular case to work injustice, and for some reason the common law cannot cure itself. But it is difficult to see how that can apply here. Cases of fraud and misrepresentation, and undue influence, are all catered for under other existing and uncontentious equitable rules. We are *only* concerned with the question whether relief might be given for common mistake in circumstances wider than those stipulated in *Bell v Lever Brothers*. But that, surely, is a question as to where the common law should draw the line; not whether, given the common law rule, it needs to be mitigated by application of some other doctrine. The common law has drawn the line in *Bell v Lever Brothers*. The effect of *Solle v Butcher* is not to supplement or mitigate the

¹⁵ *Great Peace Shipping* supra

¹⁶ [1950] 1 KB 671

common law; it is to say that *Bell v Lever Brothers* was wrongly decided.”¹⁷

16. There is no separate equitable jurisdiction to set aside a contract for unilateral spontaneous mistake. In *Clarion Ltd v National Provident Institution*¹⁸ Rimer J said that there are “plenty of examples of equity permitting either rescission or rectification where one party has, to the knowledge of the other, made the contract under a mistake as to its subject matter or terms”¹⁹. Such a principle, however, now seems very doubtful in relation to rescission²⁰. I shall refer to this again in the context of rectification.
17. Although a contract is not voidable in equity for spontaneous mistake, it is arguable that common or unilateral mistake may be a ground for refusal of the equitable discretionary remedy of specific performance, even where the mistake was not induced by the words or conduct of the person seeking specific performance, if specific performance would cause the defendant “a hardship amounting to injustice”.²¹ Such a refusal would not, of course, undermine any claim for damages for breach of contract.
18. Moving away from rescission of a contract, equity may alleviate the consequences of spontaneous mistake by rectification of the contract. Here there is a policy alignment with the common law. In the first place, as is obvious, rectification in this context presupposes that the contract exists despite the mistake. Secondly, the purpose of rectification is, in the case of rectification for common mistake, to align

¹⁷ Ibid. at [156]

¹⁸ [2000] 2 All ER 265.

¹⁹ Ibid. at 276.

²⁰ *Statoil ASA v Louis Dreyfus Energy Services LP (The Hariette N)* [2008] EWHC 2257 (Comm), [2008] 2 Ll Rep 685 at [105] (Aikens J)

²¹ *Tamplin v James* (1880) 15 Ch D 215, 221.

the contract with the common intention of the parties. Thirdly, Lord Hoffman's "objective theory" of rectification described in *Chartbrook Ltd v Persimmon Homes Ltd*²², which was strictly *obiter* but carries the weight of having been approved by all the other members of the appellate committee of the House of Lords, achieves that end by mirroring the common law approach to contractual interpretation. According to that "objective theory", rectification requires a mistake about whether the final written instrument correctly reflects the prior consensus, not whether it accorded with what the party in question believed that consensus to have been; and, in accordance with the general approach of English law, the terms of the prior consensus are what a reasonable observer would have understood them to be and not what one or even both of the parties believed them to be.

19. It is to be noted that the objective approach to ascertaining the continuing common intention of the parties has been criticised²³. It is now very much an open question whether Lord Hoffmann's analysis, even though expressly agreed by the other members of the appellate committee and followed by the lower courts²⁴, would fully survive a further review in the Supreme Court.
20. Turning to equity's approach to rectification of a contract for unilateral mistake, the right to rectification depends on satisfaction of the following conditions at the time the contract was made: the defendant was aware that the final written instrument did not give effect to the claimant's actual subjective intention and that the claimant was mistaken that it did, and the defendant failed to draw the claimant's attention

²² [2009] 1 AC 1101

²³ *Daventry District Council v Daventry & District Housing Limited* [2011] EWCA Civ. 1152 at [157] and [173] to [177] (Toulson LJ); Patten LJ 2013 Chancery Bar Association Annual Lecture

²⁴ *Ibid.* My summary of the law, in the light of the objective theory, and how it would operate in four factual situations at [80] and [85]-[89] in *Daventry* was approved by Lord Neuberger MR.

to the mistake²⁵. In other words, the defendant must have been guilty of sharp practice²⁶.

21. A final point on rectification and contracts is that it seems reasonably clear that the practice in some 19th century cases concerning unilateral spontaneous mistake of ordering cancellation of the contract with the option to the defendant to accept rectification instead²⁷ cannot stand with modern case law. The authority of those older cases was seriously doubted in *Riverlate Properties v Paul*²⁸ and it is difficult to see how the existence of an equitable jurisdiction to set aside a contract for spontaneous mistake can survive the reasoning in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*²⁹.
22. So far as concerns rectification for mistake in a non-contractual transaction, there is jurisdiction to rectify a voluntary settlement where the settlement does not express the subjective intention of the settlor. In such a case, it is not necessary to prove that the settlement fails to express the intention of the trustees if they have not bargained. Nor is it necessary to prove an outward expression or objective communication of the settlor's intention equivalent to the need to show an outward expression of accord for rectification of a contract for mutual mistake. The court

²⁵ *Thomas Bates Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 515-516 (Buckley LJ)

²⁶ In *Daventry Toulson LJ* (at [184]) and Lord Neuberger MR (by implication, at [226]) expressed sympathy for a relaxation of the strict requirements for rectification for unilateral mistake so that the doctrine would apply to dishonourable and unreasonable conduct rather than sharp practice in the sense of dishonesty.

²⁷ Chitty on Contracts Vol. 1 (31st ed) 5-126; Snell's Equity (32nd ed) 16-20.

²⁸ [1975] Ch 133

²⁹ *Statoil ASA v Louis Dreyfus Energy Services LP (The Hariette N)* [2008] EWHC 2257 (Comm), [2008] 2 Ll Rep 685 at [105] (Aikens J)

naturally retains, however, a discretion on appropriate grounds to decline to rectify a settlement³⁰.

23. In the context of trusts there have, of course, been a number of important cases on rectification in the field of occupational pension schemes³¹. The right to rectification in that area raises particular difficulties because in many instances (most obviously, where the exercise of a power of amendment is in issue) the legal and factual context is not a bilateral contractual one but nor are the members of the scheme mere volunteers or donees. In *IBM United Kingdom Pensions Trust Limited v IBM United Kingdom Holdings Limited*³² Warren J applied Lord Hoffmann's objective approach³³, but in *Day v Day*³⁴ the Court of Appeal relied upon several pension cases as illustrations of the absence of any need, as regards rectification of a voluntary settlement, to prove an outward expression or objective communication of the settlor's intention³⁵.
24. It is against that background that I now turn finally to rescission in equity for spontaneous mistake where there is no contract, that is to say, unilateral transactions. This situation was the subject of masterly analysis in *Pitt v Holt* by Lloyd LJ in the Court of Appeal and Lord Walker in the Supreme Court, but with different outcomes. In that case, the claim was for a declaration that a settlement

³⁰ *Butlin's Settlement Trusts* [1976] Ch 251; *Day v Day* [2013] EWCA Civ 280

³¹ *Drake Insurance plc v MacDonald* [2005] EWHC 3287 (Ch) at [33]; *ZF Lemforder UK Ltd v Lemforder UK Pension Trustees Ltd* [2005] EWHC 2882 (Ch); *AMP v Barker* [2001] PLR 77; *Lemforder v Lemforder UK Pension Trustee* [2006] Pensions Law Reports 85; *Scania Ltd v Wager* [2007] EWHC 711 (Ch); *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch); *Colorcon Limited v Huckell* [2009] EWHC 979 (Ch); *Industrial Acoustics Company Limited v Crowhurst & Ors* [2012] Pens. L.R. 371; *Misys Ltd & Anr v Misys Retirement Benefits Transfers Ltd & Anr* [2012] EWHC 4250

³² [2012] Pens. L.R. 469

³³ Cf. *Pioneer GB Limited v Webb & Others* [2011] Pens. L.R. 425 at 23 referring to the uncertainty in the law as to whether a subjective or objective approach is correct.

³⁴ [2013] EWCA Civ 280

³⁵ [2013] EWCA Civ 280 at [22] (Etherton LJ) and [47] – [50] (Lewison LJ)

(called the Special Needs Trust) - created by Mrs Pitt (as Mr Pitt's Mental Health Act receiver) for the benefit of Mr Pitt, who had been badly injured in a road accident, and members of his family - and the assignment to the trustees of an annuity payable under a compromise of Mr Pitt's personal injury claim, were void or, alternatively, voidable and ought to be set aside because the Special Needs Trust gave rise to a present and future liability to inheritance tax which could have been easily avoided by creating a settlement with different provisions.

25. The Court was concerned with the application of equitable principles for the following reasons. There was no suggestion that the operative mistake was such as to make the assignment and the trust void at law. Nor was there a claim for restitution of unjust enrichment. The issue, therefore, was whether the assignment and the trust were voidable as a matter of equity and should be set aside.
26. Plainly, subject to any defences, a unilateral transaction can be set aside if it has been induced by, or has otherwise been caused by, fraud, misrepresentation, non-disclosure (where there is a duty to disclose), duress, undue influence or breach of fiduciary duty. *Pitt v Holt* was concerned with a situation in which none of those grounds applied and the only basis for the relief sought was Mrs Pitt's mistake.
27. In the Court of Appeal, Lloyd LJ concluded, after a meticulous analysis of the case law, that for the equitable jurisdiction to set aside a voluntary disposition there must be (1) a mistake, which is (2) of the type that qualifies under the test in *Gibbon v*

*Mitchell*³⁶ extended to cover a mistake as to an existing fact basic to the transaction and (3) sufficiently serious to satisfy the test in *Ogilvie v Littleboy*³⁷.

28. The test in *Gibbon* was as follows:

“... wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponent did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or a fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it.”³⁸

29. The test in *Ogilvie* was as follows:

“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.”³⁹

30. Lloyd LJ found that Mrs Pitt had established the Special Needs Trust and executed the assignment under a mistaken belief that they would have no adverse tax effects. He also found that her mistake satisfied the *Ogilvie* test of gravity bearing in mind that the tax liabilities would significantly deplete the assets available to meet Mr Pitt’s needs for the rest of his life. The Court of Appeal, nevertheless, rejected the claim to have the transaction set aside because Mrs Pitt’s mistake, being a mistake as to the tax treatment of the transaction, was as to the consequences of the transaction and not as to its legal effect. In other words, the *Gibbon* test was not satisfied.

³⁶ [1990] 1 WLR 1304

³⁷ (1897) 13 TLR 399

³⁸ [1990] 1 WLR 1304, at 1309

³⁹ (1897) 13 TLR 399 at 400 (Lindley LJ)

31. The Supreme Court allowed the appeal. On the first ingredient, “mistake”, Lord Walker referred to, and expressed no disagreement with, the tripartite characterisation in Goff & Jones⁴⁰ of incorrect conscious beliefs, incorrect tacit assumptions and mere causative ignorance (causative in the sense that, but for his or her ignorance, the person in question would not have acted as they did). Lord Walker disagreed with the view of authors of Goff & Jones⁴¹ that mere causative ignorance is sufficient. It seems to have been on that ground that he considered that Lewison J had reached the wrong result in *Re Griffiths, decd*⁴². That represents a tightening or restricting by Lord Walker of the scope for the intervention of equity.
32. On the other hand, on the issue of the type of mistake sufficient to justify the intervention of equity, Lord Walker took a more expansive position than the Court of Appeal. Lloyd LJ had stated there:
- “. . . that, for the equitable jurisdiction to set aside a voluntary disposition for mistake to be invoked, there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction.”⁴³
33. That was a limited extension of the *Gibbon* test, which Lord Walker considered too narrow. He could see no reason why a mistake of law basic to the transaction (even if not a mistake as to the transaction’s legal character or nature) should not also be included, and, if so, he thought that it was questionable whether the *Gibbon* test so

⁴⁰ Op cit 9-32 to 9-42.

⁴¹ 9-42, although it may be that the authors were there addressing restitutionary relief other than setting aside a voluntary transaction: see 9-39.

⁴² [2009] Ch 162; [2013] UKSC 26 at [113].

⁴³ [2011] EWCA Civ 197, [2012] Ch 132 at [210]

widened would add anything significant to the *Ogilvie* test.⁴⁴ He summarised his view as follows:

“I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake 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.”

34. Finally, Lord Walker addressed the requirement in *Ogilvie* of injustice or unconscionableness if the transaction was not set aside. He said that 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.⁴⁵ He elaborated as follows:

“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.”⁴⁶

35. Specifically in relation to mistakes about tax, he rejected the submission of counsel for the Revenue that such a mistake cannot in any circumstances be relieved.⁴⁷

36. On the other hand, Lord Walker also said that, in some cases of artificial tax avoidance, the court might think it right to refuse relief, either on the ground that the 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

⁴⁴ [2013] UKSC 26 at [122]

⁴⁵ *Ibid* at [126]

⁴⁶ *Ibid* at [128]

⁴⁷ *Ibid* at [132]

relief should be refused on grounds of public policy.⁴⁸ Although he did not elaborate, the public policy point would presumably be factored in either as a facet of the “injustice” or “unconscionableness” requirement or in the exercise of an overriding judicial discretion.

37. Lord Walker’s enlargement of the test as to the type of mistake was the vital difference from the approach of Lloyd LJ and led to the different outcome on appeal to the Supreme Court. In short, it was on the issue of “mistake as to effect or as to consequence” that Lloyd LJ felt obliged to withhold relief since he saw the tax liability as no more than a consequence.⁴⁹ On the principles, as formulated by Lord Walker, however, looking at the matter in the round, the causative mistake was sufficiently grave that, objectively evaluated, it would be unjust (or unfair or unconscionable) not to set aside the assignment and the trust and there was no policy reason for the court to refuse to do so.
38. On the face of it, this would appear to bring the law of England and Wales on mistake in the context of trusts broadly into line with Jersey, where the Royal Court has declined to follow Lloyd LJ’s approach in the Court of Appeal in *Pitt v Holt*.⁵⁰
39. Standing back from the detail, the analysis in *Pitt v Holt* of the equitable jurisdiction to set aside a non-contractual transaction appears on the face of it somewhat anomalous. It is a jurisdiction to set aside a transaction where there has been no improper conduct on the part of the defendant inducing the transaction. That, in

⁴⁸ Ibid at [134]

⁴⁹ [2012] Ch 132 at [217] and [218]

⁵⁰ *Re A Trust* [2009] JRC 447, [2011] WTLR 745; *Re S Trust* [2011] JRC 375; *In the Matter of the B Life Interest* [2012] JRC 229. See also Articles 47B and 47E of the Trusts (Amendment No. 6) (Jersey) Law 2013.. There may be a difference of approach, however, where the mistake concerns tax avoidance: see *Re R and the S Settlement* [2013] JRC 117 at 39.

itself, is not inconsistent with *Bell v Lever Bros* or *Great Peace Shipping* since the jurisdiction only arises in a non-contractual situation.

40. On the other hand, it permits the undoing of a transaction only if far more onerous conditions are satisfied than are required for the common law personal claim in unjust enrichment for causative spontaneous mistake. This runs contrary to the general historical role of equity, which I mentioned earlier, namely that equity follows the common law, save to relax and amplify it where it would otherwise lead to a result which is unjust or unconscionable. In the Court of Appeal in *Pitt v Holt*, Lloyd LJ said that “there is scope for an interesting discussion as to whether the principles relevant at common law and in equity are, or ought to be, more or less closely aligned”, but he declined to enter into “the debate as to the correct principles at common law and the comparison between the two bases of claim”⁵¹. In the Supreme Court, Lord Walker did not address the point. I propose to do so.
41. It seems unprincipled for there to be a difference between the common law and equity on the same area of liability unless there is a good policy reason for the difference. In the area of relief for spontaneous mistake some commentators object to any causation test other than the “but for” test. On the other hand, some commentators say that uniformity should be achieved by treating gifts as a separate category, as to which more onerous conditions for liability should apply. Some commentators have also complained that Lord Walker’s test of “sufficient gravity” and “injustice” is objectionable in principle as too vague. There is a yet further point as to whether the equitable doctrine as formulated in *Pitt v Holt* can logically and in

⁵¹ [2012] Ch 132 at [166].

principle be more or less extensive than the scope for proprietary relief for a common law claim in unjust enrichment as a result of the claimant's spontaneous mistake. There are a great many issues bound up in these points, some of which I propose to address and some I shall not.

42. As a starting point, it is not easy to see why, in principle, there should be any different policy as regards personal restitution claims in respect of mistaken gifts and other mistaken non-contractual transactions, for example a payment made pursuant to a perceived but mistaken obligation⁵². Consider also the following example: a person discovers a piece of antique jewellery on his land. It does not belong to him. He gives it to the person who he believes is, by descent, the true owner without any culpable conduct on the part of that person, such as fraud or misrepresentation or the like. He then discovers that the person to whom he gave it is not the true owner. Why should a different causative test apply in such a case than applies if a gift had been intended? In policy and, I would suggest, in jurisprudential terms the true principal distinction is between, on the one hand, upsetting contracts, which should be very difficult where there has been no culpable conduct on the part of the defendant, and upsetting other non-contractual transactions, whatever their character or subject matter⁵³.

⁵² Cf. Tang Hang Wu, who emphasises the need to respect the autonomy of the donee and his or her life choices and the importance of the transformative social effect of a gift, which promotes trust so as to form the source of future action. He argues for a hybrid failure of basis test and a serious mistake test: Tang, "*Restitution for Mistaken Gifts*", (2004) 20 JCL 1

⁵³ Burrows criticises the proposition that there should be a more restrictive approach to mistaken gifts but on the basis that the simple "but for" causation test should apply across the board to claims for both personal and proprietary restitutionary relief. See his criticism of Lord Browne-Wilkinson's gloss on Gouling J's reasoning in *Chase Manhattan Bank* at op cit pp. 235-237

43. Furthermore, historically, there is no case at common law which decides that gifts are a distinct category to which more stringent conditions apply. The authors of Goff & Jones point out⁵⁴ that historically the prevailing view that only liability mistakes of fact could ground a restitution claim precluded a personal restitution claim for a mistaken gift, leaving donors to look to equity for relief; but that, with the progressive widening of the scope of common law liability for mistaken payments, it has become possible to think of applying the “but for” causation test to mistaken gifts.
44. Furthermore, it is clear from the examples given in the seminal decision of Goff J in *Barclays Bank Ltd v WJ Simms*⁵⁵ that he thought that no different causative test applies to common law claims in respect of mistaken gifts than other mistaken transactions. Proponents of the global application of the “but for” causation test can forcibly argue that such a test, combined with the usual defences to a restitution claim in unjust enrichment, particularly change of position, are sufficient legal protection for a donee.
45. Those proponents are likely to be the same as those who have criticised the equitable doctrine, as formulated by Lord Walker, on the ground that, by making the test one of “sufficient gravity” to cause “injustice (or unfairness or unconscionableness)”⁵⁶ the test is too vague and makes the law too unpredictable. It can also be said that such expressions merely conceal the judge’s reasoning which should, on the contrary, be transparent and detailed. Those criticisms reflect a more

⁵⁴ Para. 9-110

⁵⁵ Page 697B

⁵⁶ [2013] UKSC 26 at paras. 122, 125 and 126

general modern debate about the appropriateness of defining causes of action or the right to particular remedies by reference to concepts such as injustice or unconscionableness. They underlie in part the widespread hostility in this jurisdiction to the notion of a remedial constructive trust.

46. A concrete example of such a cause of action is liability for knowing receipt, that is to say the receipt by the defendant of property transferred in breach of fiduciary duty with sufficient knowledge of those matters by the defendant to make it unconscionable of the defendant to retain the benefit to the receipt.⁵⁷ There are those, like Professor Andrew Burrows, who would prefer to see the law recognise a uniform strict liability claim in unjust enrichment both at common law (as is already the case) and in equity as regards misdirected trust funds⁵⁸.
47. While acknowledging the force of those concerns about the lack of precision in the requirements of the equitable doctrine as formulated in *Pitt v Holt*, I do not wish to enter that particular debate now for the following reasons. Firstly, whatever criticisms some commentators may make of it, the equitable test for setting aside a gift for mistake has actually been authoritatively stated in Lord Walker's judgment in *Pitt v Holt* and is binding on lower courts⁵⁹. Secondly, my overriding objective at this point in my address is to see whether there is a coherent policy rationale for reconciling the different causative tests for liability arising out of spontaneous mistake at common law, on the one hand, and under the equitable doctrine in *Pitt v Holt*, on the other hand. It is not to analyse whether criticisms of Lord Walker's

⁵⁷ *BCCI (Overseas) Ltd v Akindele* [2001] 1 C Ch. 437, 455E/F.

⁵⁸ Burrows, *A Restatement of the English Law of Unjust Enrichment* (2012) pp. 96-97.

⁵⁹ It is unclear why Lord Walker expressed his conclusion in [122] that "the true requirement is simply for there to be a causative mistake of sufficient gravity" as "provisional".

refining of the *Ogilvie* test are justified, a somewhat pointless practical exercise for a judge of inferior jurisdiction in relation to a recent decision of the Supreme Court. Thirdly, for what it is worth, *Ogilvie* (directly) and *BCCI (Overseas) Ltd v Akindele* (by analogy) provide an existing jurisprudential basis, whatever its weaknesses, for an equitable test which turns, in part, on unconscionableness. Fourthly, the practical way of best meeting the criticisms I have mentioned in respect of the test which has actually been endorsed by the Supreme Court is for judges to spell out clearly and precisely what underlies their conclusions on gravity and injustice (or unfairness or unconscionableness) on the particular facts. The reasoning in those cases, as well as Lord Walker's observation that the equitable test will normally be satisfied only when there is a mistake as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction, will build up a body of law which can inform those dealing with future cases.

48. I also do not see anything to be gained, at least in this address, from questioning whether the equitable doctrine as formulated in *Pitt v Holt* can logically and in principle be more or less extensive than proprietary relief for a common law claim in unjust enrichment as a result of the claimant's spontaneous mistake. There are two parts to that issue. The first is to identify what non-monetary restitutionary rights are available to a claimant who is entitled to succeed in a common law action for unjust enrichment arising from a spontaneous causative mistake⁶⁰. The most obvious relevant right in the present context is the right recognised by Gouling J in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*, namely a right to trace

⁶⁰ See Burrows, A Restatement of the English Law of Unjust Enrichment section 35

in equity pursuant to a trust⁶¹. Goulding J's reasoning was that, where money is paid under a mistake, the receipt of the money constitutes the recipient a trustee, on the ground that the payer "retains an equitable property in it and the conscience of [the recipient] is subjected to a fiduciary duty to respect his proprietary right".⁶²

49. In *Westdeutsche Landesbank Girozentrale v Islington LBC*⁶³ Lord Browne-Wilkinson disagreed with Goulding J's reasoning but said that the result in *Chase Manhattan Bank* may well have been correct on the footing that – although the mere receipt of the money in ignorance of the mistake does not give rise to a trust - the retention of the money after the recipient bank learned of the mistake may well have given rise to a constructive trust⁶⁴. Whether the principle is as formulated by Goulding J or as qualified by Lord Browne-Wilkinson⁶⁵, the underlying rationale is entirely conventional in permitting a claimant to trace in equity property held on trust for him or her.
50. This brings us to the second part of the issue, namely the relationship between the right to trace pursuant to a constructive trust arising on receipt of a payment made under a mistake and the *Pitt v Holt* equitable right to rescission. On the current generally accepted view, the equitable right to rescission enables property transferred under a voidable transaction to be recovered pursuant to a resulting⁶⁶ or

⁶¹ [1981] Ch 105; Burrows, A Restatement of the English Law of Unjust Enrichment section 35(1)(d) and p. 164.

⁶² Page 119E

⁶³ [1996] AC 669

⁶⁴ Page 715B/C.

⁶⁵ Burrows op cit at page. 164 doubting Lord Browne-Wilkinson's qualification.

⁶⁶ *El Ajou v Dollar Holdings plc* [1993] 3 All ER 717 at 734 (Millett J) reversed on other grounds [1994] 2 All ER 685.

a constructive trust⁶⁷ which arises immediately the claimant elects to rescind⁶⁸. Why, it may be asked, should equity confer, in addition to a conventional right to trace assets held beneficially for the claimant, a right to set aside the transaction itself in the absence of any fault or wrongful conduct on the part of the defendant and, moreover, to do so on the ground of some general notion of injustice or unconscionableness?

51. Well, I shall leave those questions also for others to debate. Faced with the reality of the decision in *Pitt v Holt*, I return to the task of seeing whether there is a principled and logical explanation for the different causative tests for, on the one hand, personal liability at common law for unjust enrichment caused by the claimant's spontaneous mistake and, on the other hand, the right of rescission under the equitable doctrine in *Pitt v Holt*. I consider that there is. It lies in the important distinction between, on the one hand, a personal monetary remedy for unjust enrichment and, on the other hand, a remedy which sets aside a transaction and so, on the current state of the law⁶⁹, inevitably gives rise to proprietary consequences or at least the potential for proprietary consequences.

52. In short, it is right that relief giving right to such proprietary consequences or potential consequences should be more difficult to obtain than an order for the payment of money by way of a personal restitutionary remedy⁷⁰. Like the policy

⁶⁷ Chitty on Contracts Vol 1 (31st ed) para. 6-119, 6-135; but note W. Swadling, "The Fiction of the Constructive Trust", (2011) 64 Current Legal Problems 399-433.

⁶⁸ Goff & Jones op cit 38-11, 38-36, , 40-02, 40-04, 40-16 ("We consider that the reversioning of title to assets following rescission should be seen as a proprietary remedy for unjust enrichment"). It may be later if a court order is needed

⁶⁹ For a different view of the effect of rescission, see the views of W. Swadling in the articles and texts mentioned in earlier footnotes

⁷⁰ See Virgo op cit at pp. 573-574.

underlying the strict requirements for holding a contract void for mistake and the principle that equity has no greater scope in that context than the common law, it is a policy by which society places particularly high obstacles in the way of obtaining a form of redress which has potentially particularly disruptive consequences. It may also be seen as a coherent part of a legal framework under which the kind of mistake that will ground a personal restitutionary remedy for unjust enrichment is far wider than the kind of mistake which vitiates an intention to transfer property⁷¹.

53. If that is correct, then, standing back from the detail of this entire area of the law, we can see a coherent policy imposing the following sliding scale of difficulty in interfering with transactions on the ground of spontaneous mistake: invalidating contracts *ab initio*; rescinding (unilateral?) transactions; rectifying contracts; rectifying voluntary settlements; advancing a personal claim. The common law, in this way, provides the outer limits of the range, and equity fine tunes it.⁷²
54. It follows from that this analysis that I am presently inclined to disagree with the view expressed by Lewison LJ in *Day v Day* that “rectification and rescission are to be treated in the same way”⁷³, although I acknowledge that rectification can in some instances have proprietary consequences⁷⁴.
55. Furthermore, consistently with that analysis, I am inclined to think that Lord Browne-Wilkinson was correct to express the view that the constructive trust in *Chase*

⁷¹ As Goff J observed in *Barclays Bank v W.J. Simms Ltd* at p. 689D

⁷² It follows from this analysis that, insofar as Lord Walker assumed in paragraph [126] of his judgment in *Pitt v Holt* that the constraints of the equitable doctrine apply to the examples on page 66 of Burrows, A Restatement of the Law of Unjust Enrichment, I do not agree with that view if and to the extent that the claim advanced in those examples is limited to a personal money claim.

⁷³ [2013] EWCA Civ 280 at [41]

⁷⁴ Goff & Jones *op cit.* 40-33ff.

Manhattan Bank could only have arisen, if at all, when the defendant became aware of the claimant's mistake, that is to say proprietary restitutionary relief was dependent on the defendant's conscience being affected by knowledge of the circumstances making the enrichment unjust. As in the case of rectification for unilateral mistake, that additional element of unconscionableness, over and above "but for" causation, is appropriate to distinguish the right to the proprietary restitutionary remedy in the form of a constructive trust from a right to a personal restitutionary remedy⁷⁵.

56. It also follows that I see no need, so far as concerns a personal restitutionary claim, to bring the common law "but for" causation test in line with the stricter requirements of the equitable doctrine.⁷⁶ It is true to say that there has been no decided case determining that the simple "but for" test applies to a common law claim in unjust enrichment in relation to gifts, and so, to that extent, the field is in theory clear for a court to hold that the more stringent conditions of the equitable doctrine in *Pitt v Holt* should apply to such gifts even at common law. It is also to be noted that in *Deutsche Morgan Grenfell Group plc Inland Revenue Commissioners*⁷⁷ Lord Scott expressed reservations about a common law claim for restitution of a gift on the basis of proof of a merely causative, spontaneous mistake, implying that a "serious" mistake is needed⁷⁸. In principle, however, a "but for" test combined with

⁷⁵ The authors of Goff & Jones disagree (37-22 and 37-34) that the defendant's state of mind is relevant, as does Burrows, *The Law of Restitution* p. 237. Virgo considers that, in any event, proprietary remedies are only available for unjust enrichment if they are a vindication of existing property rights and that the result in *Chase Manhattan Bank* is explicable on the footing that the claimant's mistake was so fundamental that the title to the money never passed: op cit. pp. 587-588; and see pp. 570 ff 609-610

⁷⁶ Cf. Paul S Davies, "Correcting mistakes: whither the rule in *Re Hastings-Bass*", *Conveyancer and Property Lawyer* (2011)

⁷⁷ [2006] UKHL 49; [2007] 1 AC 558.

⁷⁸ At [84]-[86]; Goff & Jones op cit. at para. 9-67.

a defence of change of position is a perfectly justifiable, coherent and sufficient constraint on a purely personal claim in unjust enrichment for spontaneous mistake in a non-contractual context.

57. There is one thing of which we can be absolutely certain – neither the magisterial judgments of Lloyd LJ and Lord Walker in *Pitt v Holt* nor this address will be the last word on liability for the defendant’s enrichment caused by the claimant’s spontaneous mistake.

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