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Trust Parties' Uniquely Easy Access to Rescission:  
Analysis, Critique and Reform

Adam Hofri-Winogradow and Gadi Weiss\*

Parties to trusts currently enjoy easier access to judicial avoidance of voluntary dispositions resulting from mistakes and inadequate decision-making than other persons. The principal doctrinal basis for this advantage has shifted from the rule in *Re Hastings-Bass* to rescission in equity. The article argues that this advantage is normatively unjustified, and recommends a uniform legal framework to govern the avoidance of voluntary dispositions resulting from mistakes or inadequate decision-making, whether or not a trust was involved. Under this framework, dispositions resulting from laypersons' mistakes and inadequate decision-making should be avoided, subject to appropriate defences, whenever that causative nexus is present, while dispositions resulting from professionals' mistakes and inadequate decision-making should only be avoided where the mistake or deliberative flaw was so serious as to render the transferee's retention of property transferred unjust.

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INTRODUCTION

As every law student knows, trust law is complex. So is tax law. As a result, not only students, but even well-paid professionals specialised in these very fields, make mistakes in understanding and applying the law. Such mistakes often lead to inadequate decision-making. Persons who commit mistakes outside the trusts context often have to bear the costs of their mistakes, which acts as a powerful prod to exercising prudence and care. In the trusts context, however, a complex knot of partly overlapping doctrines provides surprisingly easy relief<sup>1</sup> from the consequences of mistakes: actions resulting from mistakes

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\*Montesquieu Chair in Comparative Law, Hebrew University of Jerusalem Faculty of Law, and Associate, Pearl Cohen Zedek Latzer Baratz. We are grateful for comments by Ilan Benshalom, Hanoch Dagan, Paul Davies, Joshua Getzler, Birke Häcker, Raya Hofri-Winogradow, Charles Mitchell, Richard Nolan, Gideon Parchomovsky, Peter Turner, and other sage commentators, as well as from the two anonymous MLR reviewers. All remaining mistakes and instances of inadequate decision-making are ours.

1 In order not to confine our discussion to a specific remedy, we use the term 'relief' for all court orders holding dispositions void or voidable. Relief could be granted by way of rescission, the Rule in *Re Hastings-Bass* or other remedies, as available and as appropriate to each case.

or inadequate decision-making are held void or avoided, with the persons responsible for the mistakes and inadequate decision-making released from the prospect of a personal liability action. As many mistakes made in the trusts context relate to tax planning, the law's generous provision of relief comes at a cost to the public purse: the authors of failed tax planning schemes are allowed to have those schemes retroactively withdrawn and to put others in their place, with the courts helpfully pointing the way to more successful tax minimisation. As Jessica Palmer put it, 'it is not clear what makes a trust transaction more special than non-trust transactions that have also incurred unexpected fiscal consequences but which cannot be set aside'.<sup>2</sup>

In this article, we describe and criticise the law governing relief from the consequences of mistakes and inadequate decision-making in the trusts context. A large literature engages with different parts of the variety of doctrines facilitating relief from the consequences of mistake and inadequate decision-making.<sup>3</sup> Key contributions include, for example, Tang's analysis of restitution for mistaken gifts<sup>4</sup> and Häcker's more recent examination of mistaken gifts after *Pitt v Holt*.<sup>5</sup> Both authors provided sophisticated discussions of the law governing restitution and rescission for mistake. Neither addressed the special treatment given to mistakes in the trusts context, or the line of cases focused on inadequate trustee decision-making, developing and applying the so-called Rule in *Re Hastings-Bass*<sup>6</sup> (the Rule). The latter topic was the subject of a recent book by Ashdown.<sup>7</sup> Building on the existing literature, the present article innovates in directly addressing the underlying policy question: whether special treatment of mistakes and inadequate decision-making in the trusts context is justifiable.

We conclude that it is not. Three key policy considerations drive our conclusion. One is that the current ease of obtaining relief from the consequences of mistakes and inadequate decision-making in the trusts context permits professionals providing services in that context to have their mistakes and inadequate decision-making avoided at no cost to themselves. This situation may have a role in facilitating a standard of professional service that is not always as careful as it should be. Given that professional trust service providers are generously compensated for their services, the law should encourage them to offer a better service. The second policy consideration in point is that easy access to rescission is likely to impinge on beneficiaries' ability to rely on trust dispositions. The third animating consideration is that the law governing relief from the consequences of mistakes and inadequate decision-making should be coordinated and simplified.

Because the existing preferential treatment of mistakes and inadequate decision-making in the trusts context is unjustifiable, law reform is necessary. We propose a uniform legal framework to govern the avoidance of voluntary dispositions – including gifts, settlements on trust, appointments of trust property to beneficiaries and other unilateral transfers – resulting from mistakes or

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2 J. Palmer, 'Review: Equity and Trusts' (2015) *New Zealand Law Review* 141, 147.

3 Citing every contribution would be impossible. Many are cited in the footnotes following.

4 H. W. Tang, 'Restitution for Mistaken Gifts' (2002) 20 *Journal of Contract Law* 1.

5 B. Häcker, 'Mistaken Gifts after *Pitt v Holt*' (2014) 67 *Current Legal Problems* 333.

6 [1975] Ch 25.

7 M. J. Ashdown, *Trustee Decision Making: The Rule in Re Hastings-Bass* (Oxford: OUP, 2015).

inadequate decision-making, applicable whether or not trusts were involved and building on the recent reform of this part of the law in the combined cases of *Pitt v HMRC*, *Futter v HMRC*<sup>8</sup> (*Pitt*). Under this framework, dispositions resulting from laypersons' mistakes and inadequate decision-making should be avoided, subject to appropriate defences, whenever that causative nexus is present, while dispositions resulting from professionals' mistakes and inadequate decision-making should only be avoided where the mistake or deliberative flaw was so serious as to render the transferee's retention of property transferred unjust.

The article proceeds as follows. We first review the law governing relief from the consequences of mistakes and inadequate decision-making in the trusts context. We then normatively evaluate trust parties' uniquely easy access to rescission, draw conclusions from our normative analysis, and detail our proposed uniform legal framework governing the avoidance of voluntary dispositions resulting from mistakes or inadequate decision-making.

### THE LAW GOVERNING MISTAKES AND INADEQUATE DECISION-MAKING IN THE TRUSTS CONTEXT

The law offers a multitude of remedies to cure the results of actions resulting from mistakes. Rescission is available at law under some circumstances and in equity under other circumstances. Bilateral and multilateral transactions can be rescinded under some circumstances, unilateral dispositions under others. Some mistakes can be corrected by way of rectification. Relevant remedies are also available under the law of unjust enrichment, as well as under doctrinal tags such as *non est factum*. One pathway to relief – the Rule – is focused on inadequate decision-making rather than mistake, and is available to trust parties almost exclusively. The law holding so-called 'frauds on a power' void offers another route to relief from both mistakes and instances of inadequate decision-making. As we shall see in this section, the courts have displayed a strikingly accommodating approach in granting rescission of trust settlements and appointments flowing from mistakes originating with trustees, as well as with settlors' and trustees' advisors. This section describes the leniency of the law in allowing trust parties to retroactively avoid actions resulting from their and their advisors' mistakes and instances of inadequate decision-making.

As holders of rights to property on which trusts have been imposed, many trustees now have as complete a power to transact in the property they hold as any other property owner.<sup>9</sup> Attempts to have exercises of trustees' administrative

8 [2013] UKSC 26, [2013] 2 AC 108.

9 See for example, STEP, *STEP Standard Provisions* (London: STEP, 2<sup>nd</sup> ed, 2013) 1–2, 4; and see statutory provisions granting trustees administrative powers, less all-encompassing than those in the STEP Standard Provisions, in Trustee Act 1925, ss 12–19, 22, 24–25; Trusts of Land and Appointment of Trustees Act 1996, s 6(1); Trustee Act 2000, ss 3, 8. See, discussion in J. A. McGhee, *Snell's Equity* (London: Sweet & Maxwell, 33<sup>rd</sup> ed, 2015) 713–735; D. Hayton, P. Matthews and C. Mitchell, *Underhill & Hayton: Law of Trusts and Trustees* (London: Butterworths, 19<sup>th</sup> ed, 2016) 58–61; L. Tucker, N. Le Poidevin and J. Brightwell, *Levin on Trusts* (London: Sweet & Maxwell, 19<sup>th</sup> ed, 2015) 36–003.

powers resulting from mistakes declared void, avoided or otherwise corrected are subject to the general common law of mistake.<sup>10</sup> Contracts created by trustees' exercise of their administrative powers may be declared void based on the common law doctrines of common mistake and unilateral mistake, both of which are only available where stringent conditions apply: unilateral mistakes of fact, for example, can only serve as a basis for holding contracts void where the mistake pertains to the contractual terms, and the party not mistaken knows, or ought to know, of the mistake.<sup>11</sup> A pertinent remedy is also available under the law of unjust enrichment: where persons, including trustees exercising their administrative powers, pay money as a result of a mistake, but for which the payment would not have been made, an action lies to recover the money.<sup>12</sup> The fact that a mistaken party happens to be a trustee is of no import so far as these common law doctrines are concerned; the law's special leniency towards trust parties who want to have actions resulting from their and their advisors' mistakes and inadequate decision-making avoided only operates in circumstances which attract the operation of the equitable routes to rescission, to which we now turn.

Mistaken exercises of trustees' dispositive powers, such as their powers of appointment and advancement, are subject to the doctrine of equitable mistake.<sup>13</sup> Equitable mistake is not a doctrine unique to the law of trusts; it applies to the voluntary disposition of assets generally, as by way of gift.<sup>14</sup> Though the nature and boundaries of the doctrine of equitable mistake have long been disputed, the axiom remains that the tests for applying the doctrine of equitable mistake are not as strict as those governing common law mistake.<sup>15</sup> The tests generally accepted in England for setting aside an exercise of trustees' dispositive powers

10 On the common law of mistake see *Bell v Lever Brothers* [1932] AC 161; *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679 at [76]; J. Beatson, A. Burrows and J. Cartwright, *Anson's Law of Contract* (Oxford: OUP, 29<sup>th</sup> ed, 2010) 249–298; C. Mitchell, P. Mitchell and S. Watterson, *Goff & Jones: The Law of Unjust Enrichment* (London: Sweet & Maxwell, 9<sup>th</sup> ed, 2016) ch 9; M. Furmston, *Cheshire, Fifoot & Furmston's Law of Contract* (Oxford: OUP, 17<sup>th</sup> ed, 2017) 295–342; H. Beale (ed), *Chitty on Contracts* (London: Sweet & Maxwell, 32<sup>nd</sup> ed, 2012) 339–398, 605–641.

11 *Smith v Hughes* (1871) 6 QB 597; *Chitty on Contracts* *ibid*, 340–341, 350–358.

12 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; A. Burrows, *The Law of Restitution* (Oxford: OUP, 3<sup>rd</sup> ed, 2011) 203–209; G. Virgo, *Principles of the Law of Restitution* (Oxford: OUP, 3<sup>rd</sup> ed, 2015) 157–202; and see the brief discussion in *Lewin on Trusts* n 9 above, 42–005, 42–008. Virgo, *ibid*, 182, believes that because contracts and deeds connote a serious intention to carry out the relevant legal act, rescinding them for mistake should be harder than rescinding other mistaken payments. While in the latter case the mistake having caused the payment is, and should be, in his view, sufficient to obtain rescission, rescission of contracts and gifts made by deed should require, in addition, that the causative mistake was serious. He notes, however, that in *Pagel v Farman* [2013] EWHC 2210 (Comm) and *Spaul v Spaul* [2014] EWCA Civ 679 it was assumed without argument that the serious mistake requirement was applicable to gifts made other than by deed.

13 See discussion of the distinction between cases subject to the common law doctrine of mistake alone and those to which both that doctrine and the doctrine of equitable mistake apply, in *Der Merve v Goldman* [2016] EWHC 790 (Ch) (*Der Merve*) at [30]–[31] (holding, at [31], that the equitable doctrine is only available where one party gave no 'consideration . . . for the benefit conferred by the transaction').

14 See for example, the unsuccessful claim that a gift by one partner to the other was based on a mistake in *Pagel v Farman* n 12 above.

15 Ashdown, n 7 above, 183, 196.

on the ground of mistake<sup>16</sup> were, until recently, two: the test in *Ogilvie v Littleboy*, according to which ‘a donor can only obtain back property . . . 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’,<sup>17</sup> and the test in *Gibbon v Mitchell*, under which a voluntary disposition could only be set aside for mistake where the disponent was mistaken regarding ‘the effect of the transaction itself and not merely . . . its consequences’.<sup>18</sup> The present law of equitable mistake, as laid down in 2013 in the Supreme Court decision in *Pitt*, requires that in order for a disposition to be set aside due to mistake on the part of the disponent, there needs exist ‘a causative 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’, which mistake needs to be of sufficient gravity, that is, of so serious a character as to make it unconscionable on the part of the donee to retain the property.<sup>19</sup>

The law includes an additional route for eliminating trustees’ actions, beyond common law and equitable mistake, *non est factum*, restitution for unjust enrichment and ‘fraud on a power’. The Rule is an equitable doctrine first developed in 1990 in *Mettoy Pension Trustees Ltd v Evans*,<sup>20</sup> and increasingly applied at first instance since about 2000 until its transformation in the Court of Appeal<sup>21</sup> and Supreme Court decisions in *Pitt*.<sup>22</sup> According to the final formulation of the Rule prior to its transformation,

where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.<sup>23</sup>

The grounds for setting trustees’ dispositions aside under the Rule were thus, until *Pitt*, much broader than the relatively narrow grounds available for setting

16 Langlois and Cloherty argued that a transaction being liable to be set aside means it is neither void nor voidable, but a *tertium quid*: N. Langlois and A. Cloherty, ‘Playing the “Get Out of Jail Free” Card: Mistake in the Law of Trusts’ (2010) 14 *Jersey and Guernsey Law Review* 1, 21.

17 (1897) 13 TLR 399, 400.

18 [1990] 1 WLR 1304, 1309; and see Ashdown, n 7 above, 184–185. Writing extra-judicially, Lord Millett opined that to be set aside in equity, a mistake should satisfy both tests: P. Millett, ‘Second Thoughts on *Gibbon v Mitchell*’ (2013) 19 *Trusts and Trustees* 124, 128–129.

19 *Pitt* n 8 above, at [122]; see discussion in *Lewin on Trusts* n 9 above, 4-058–4-081, 29-255–29-259; *Underhill & Hayton* n 9 above, 15.29–15.36; *Goff & Jones* n 10 above, 9-128–9-151. While declaring that the Special Needs Trust in *Pitt* was created under a mistake of ‘sufficient gravity’ to be set aside (*Pitt* n 8 above at [142]), Lord Walker chose not to provide concrete criteria for identifying mistakes ‘of sufficient gravity’, believing such criteria not to be identifiable outside the context of particular cases. He thus created a pressing need for further clarification of the issue. See discussion in *Der Menwe* n 13 above at [26] and criticism in F. Ng, ‘*Pitt v Holt* and *Futter v Futter*: The Rule in *Hastings-Bass*, Mistake, and Tax Avoidance’ (2013) 4 *British Tax Review* 566, 575; Häcker, n 5 above, 345–51; Virgo, n 12 above, 200–202.

20 [1990] 1 WLR 1587.

21 *Pitt v Holt* [2011] EWCA Civ 197, [2012] Ch 132.

22 *Pitt* n 8 above.

23 *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 1 WLR 3811 (*Sieff*) at [119].

trustees' dispositions aside under the doctrine of equitable mistake, though not as broad as the grounds giving rise to a restitutionary action for money had and received. The Rule was founded on the sense that fiduciaries who fail to apply reasonable skill and care in their decision-making process do not act in their beneficiaries' best interests. The Rule applied whether or not the flaw in fiduciaries' decision-making process would have made the impugned disposition voidable under the doctrine of equitable mistake.<sup>24</sup> A successful application of the Rule was never made conditional on the existence of any mistake in the colloquial sense: in order for the court to interfere with a fiduciary's action, the latter was never required to hold any mistaken belief. A fiduciary's exercise of a dispositive power could be set aside under the Rule simply because a certain relevant consideration had never crossed his or her mind. Given, however, that fiduciaries are required, in exercising a discretion, to take into account all relevant considerations, and none that are irrelevant, a fiduciary's exercise of a discretion other than in conformity with this requirement could be seen, so long as not deliberate, as involving a mistake, either in identifying considerations to be taken into account or as to the requirement itself. One of the most well-known (and controversial<sup>25</sup>) contexts in which the Rule was successfully invoked was trustees' exercises of dispositive powers from which resulted tax liabilities the trustees failed to foresee or accurately assess.<sup>26</sup> Other successful invocations of the Rule allowed trustees to retrospectively have pension scheme amendments which came out far more generous than the employers intended held void.<sup>27</sup> In another case the court allowed trustees to have an appointment of 60 per cent of a fund, where 40 per cent were intended, held voidable years after its execution.<sup>28</sup> The Rule's distinctive capacity for turning back the clock on trustees' careless, hasty or mistake-based decision-making was captured in idioms such as 'get out of gaol free card' and 'morning after pill'.<sup>29</sup>

24 Mistake has been explicitly rejected as a possible doctrinal basis for the Rule in *Futter v Futter* [2010] EWHC 449 (Ch), [2010] Pens LR 145 at [21]–[22]. For an approach cleanly distinguishing the Rule from the other causes of action available for setting aside trustees' actions, see for example, H. W. Tang, 'Rationalising Re Hastings-Bass: A Duty to Act on Proper Bases' (2007) 21 *Trust Law International* 62.

25 See Lord Walker's remarks in *Pitt* n 8 above at [135].

26 See *Abacus Trust Co (Isle of Man) Ltd v NSPCC* [2001] STC 1344 (Ch) (the trustees in this case having ignored counsel's advice that exercising their power on the date they did so would create a large tax liability, it is perhaps more of a mistake case than a case where the Rule ought to have been applied – for which view, see, M. J. Ashdown, 'In Defence of the Rule in Re Hastings-Bass' (2010) 16 *Trusts and Trustees* 826, 842–843 — or even a case of breach of trustees' duty to exercise skill and care); *Green v Cobham* [2002] STC 820 (Ch); *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569; *Sieff* n 23 above; *Pitt v Holt* [2010] EWHC 45 (Ch), [2010] STC 982; *Futter* n 24 above.

27 *AMP (UK) plc v Barker* [2001] WTLR 1237; *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch), [2005] Pens LR 103. In both cases, mistake, rather than the Rule, was the primary ground for the court's conclusion, though both courts noted that had rectification for mistake not been available, they would have allowed the claim in each case based on the Rule.

28 *Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch), [2003] Ch 409.

29 Lord Neuberger, 'Aspects of the Law of Mistake: Re Hastings-Bass' (2009) 15 *Trusts and Trustees* 189, 192. See analysis of the cases where the Rule was applied, before *Pitt*, in Ashdown, n 7 above, 25–57.

The common law mistake doctrines, their equitable cousin, the action for restitution for unjust enrichment and the *non est factum* doctrine are as available, each within its sphere of application, for setting aside trustees' transactions or dispositions, as appropriate, as for setting aside transactions or dispositions undertaken with property held other than in a fiduciary capacity. The rule holding void exercises of powers where 'the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power'<sup>30</sup> as so-called frauds on a power applies both to trustees and to other appointors.<sup>31</sup> The opportunity the Rule gives trust parties to apply for the setting aside of a disposition merely because it followed a flawed decision-making process is not, on the other hand, generally available to parties to private law relationships outside the trusts context.<sup>32</sup>

The last few years have seen the Rule transformed in decisions rendered in *Pitt* by the Court of Appeal and then the Supreme Court. Under current law, a trustee's exercise of a discretionary dispositive power will be void *ab initio* where the disposition was ultra vires, outside the scope of the power the trustee purported to exercise. A flawed decision-making process leading to a disposition *within* the scope of trustees' powers may still render the disposition *voidable* under the Rule, should the court be satisfied that their ill-judged decision-making process amounted to a breach of one or more of their duties.<sup>33</sup>

30 *Vatcher v Paull* [1915] AC 372, 378.

31 *Topham v The Duke of Portland* (1864) 11 HL Cas 32, 11 ER 1242; *Cloutte v Storey* [1911] 1 Ch 18; *Vatcher ibid*; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862; *Klug v Klug* [1918] 2 Ch 67; and see discussion in *Lewin on Trusts* n 9 above, 29-289-29-316; *Ashdown*, n 7 above, 157-182.

32 Though never expressly limited to trustees, successful applications for orders under the Rule have, under English law, been largely concerned with trustees. On a single occasion, the Rule has been applied to dispositions undertaken by a receiver appointed by the Court of Protection: *Pitt* n 8 above at [2]. The rule has twice been applied to company directors: *Hunter v Senate Support Services Ltd* [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175 at [150]-[190]; *Power Adhesives Ltd v Sweeney et al* [2017] EWHC 676 (Ch) (*Sweeney*), though cf *Wood v Holden* [2006] EWCA Civ 26, [2006] 1 WLR 1393 at [43], quoted in R. Walker, 'When Will the Court Grant Relief for Trustees' Mistakes? *Pitt v Holt* and *Futter v Futter*' (2014) *Hong Kong Law Journal* 759, 767. For applications of the Rule to fiduciaries other than trustees, see *Lewin on Trusts* n 9 above, 29-288; *Ashdown*, n 7 above, 131-133.

33 *Pitt* n 8 above at [43], [73], [80]; *Pitt v Holt* n 21 above at [99]-[101]. At one point in Lord Walker's speech he seems to say that only breaches of trustees' *fiduciary* duties may lead to a voidable result: *Pitt* n 8 above at [73]. However given his more general reference, at other points in his speech, to trustees' breaches of (any) duty (*ibid*, [43], [73], [80]), including their 'failing to give proper consideration to the exercise of their discretionary powers' (*ibid*, [80]) as potentially leading to a voidable result, it appears *Pitt* should not be read as limiting the application of the Rule, outside cases of ultra vires, to breaches of trustees' no-conflict and no-profit duties, those of their duties seen as fiduciary duties, properly so called, in *Bristol and West Building Society v Mothew* [1998] Ch 1, 18. See analysis of the nature of the *Re Hastings-Bass* duty, showing it not to be a fiduciary duty, in *Ashdown*, *ibid*, 61-80. In the Court of Appeal in *Pitt v Holt*, Lloyd LJ referred to trustees' duty to take, when exercising their powers, relevant matters into account both as the foundation of the Rule and as a fiduciary duty: *Pitt v Holt ibid* at [127], and see similar analysis in *Snell's Equity* n 9 above, 10-033. See criticism of imprecise use of the term 'fiduciary duty' in *Underhill & Hayton* n 9 above, 27.2-27.4, and further analysis of the nature of fiduciary duties in M. Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Oxford: Hart Publishing, 2010); cf J. D. Heydon, 'Modern Fiduciary Liability: the Sick Man of Equity?' (2014) 20 *Trusts and Trustees* 1006; L. Smith, 'Prescriptive Fiduciary Duties' (2018) 37 *University of Queensland Law Journal* 261.

Neither the Court of Appeal nor the Supreme Court made it clear precisely which flaws in trustees' decision-making would amount to a breach of duty rendering the consequent disposition voidable. Both Courts preferred a case-by-case approach. However it is apparent from the Court of Appeal decision that the Court's vision for the future of the Rule involves narrowing its ambit of application, so that fewer types of flawed trustee decision-making will lead to a voidable result than in the past.<sup>34</sup> The Court of Appeal contributed to the accretion of precedent on the application of the Rule in specific contexts by ruling on what was a highly disputed issue, the possibility of applying the Rule where a trustee had, before coming to a decision regarding the exercise of its discretion, invited and received the advice of an apparently competent professional, such as, depending on the type of advice necessary, a solicitor, accountant or tax specialist. The Court held that receipt of such advice removed trustees' consequent actions from the Rule's ambit of application.<sup>35</sup>

The Supreme Court addressed another much-debated question: the precise causative nexus applicants must prove to obtain relief under the Rule. Must applicants convince the court that had the trustees considered all the relevant considerations and ignored all those which were irrelevant, they *would* not have exercised their discretion as they did, or is it sufficient to show that a better decision-making process *might* have led them to act otherwise? Until the Supreme Court decision in *Pitt*, the dominant approach on this point was that in order to set aside dispositions trustees were at liberty to refrain from carrying out, trustees had to show that given a proper decision-making process they *would* not have exercised their discretion as they did, while setting aside dispositions trustees were obliged to carry out merely required a showing that absent the processual flaw in trustees' decision-making, they *might* have exercised their discretion differently.<sup>36</sup> The Supreme Court rejected this dichotomous rule of thumb, holding that Courts must decide whether to apply the Rule according to the unique circumstances of each case.<sup>37</sup>

How much more restrictive has the Rule in fact become following *Pitt*, and does it still provide trustees with a valuable tool for avoiding the results of ill-judged exercises of discretion? The apparent retreat of the Rule from a void to

34 *Pitt v Holt* *ibid* at [129]; and see S. Kerry, 'Control of Trustee Discretion: The Rule in *Re Hastings-Bass*' (2012) 1 *UCL Journal of Law and Jurisprudence* 46, 63–68.

35 *Pitt* n 21 above at [125].

36 *Steff* n 23 above at [77]. For commentary on the would/might issue see for example, J. Hilliard, 'Limiting *Re Hastings-Bass*?' (2004) *Conveyancer and Property Lawyer* 208, 222–223; D. Hayton, 'Pension Trusts and Traditional Trusts: Drastically Different Species of Trusts' (2005) *Conveyancer and Property Lawyer* 229, 237–239; R. Nolan and M. Conaglen, 'Trustee (In)discretion' (2006) 65 *CLJ* 15, 17; C. Mitchell, 'Reining in the Rule in *Re Hastings-Bass*' (2006) 122 *LQR* 35, 39–40; L. Smith, 'Can I Change my Mind? Undoing Trustee Decisions' (2008) 27 *Estates, Trusts and Pensions Journal* 284, 299–300.

37 *Pitt* n 8 above at [92]. See criticism of Lord Walker's case-by-case approach to this issue in Ashdown, n 7 above, 87, arguing in favour of a 'might' rule. And see discussion of the Rule in its current form in *Lewin on Trusts* n 9 above, 29–253–29–254, 29–263–29–288; *Snell's Equity* n 9 above, 10–032–10–036; *Underhill & Hayton* n 9 above, 57.17–57.44. For an argument that Mrs Pitt was not a fiduciary, did not have discretion as to settling the trust, and that the capital of Mr Pitt's settlement was never vested in her, so that the Rule, in any form, was not an appropriate tool for correcting the tax mistake made in that case, see D. Rees, 'Whose Mistake is it Anyway?' (2014) *Private Client Business* 149, 149–154.

a voidable result may under some circumstances lack practical significance: an application of the Rule to an exercise of trustee discretion which produced an unexpected liability to inheritance tax would, under the Inheritance Tax Act 1984, still bring about a refund, despite the application of the Rule rendering the exercise, following *Pitt*, voidable rather than void.<sup>38</sup> Further, as pointed out in some critiques of the decisions in *Pitt*, there is at least one way to bypass the courts' attempts at reining in the Rule and render an exercise of power by trustees resulting from inadequate deliberation void rather than merely voidable. As a trustee's act *ultra vires* is seen as void, all that a trustee must do to enjoy the application of a full-scale, pre-*Pitt* version of the Rule is include a clause in the trust instrument to the effect that the trustee must consider all relevant considerations and ignore all irrelevant considerations before exercising one or more of its powers and discretions. A disposition consequent on a failure to do so would then arguably amount to an act *ultra vires*, rendering the exercise of power void.<sup>39</sup> In fact, such a drafted version of the Rule is likely to prove even stronger than the judicial Rule in its pre-*Pitt* form: as noted above, for an application for an order under the judicial Rule to succeed, pre-*Pitt*, its proponents had to show both a flaw in trustees' decision-making process and some causal connection between that flaw and the consequent disposition, be that connection of the 'would have' or the 'might have' variety. On the other hand, a trust instrument clause restricting the exercise of one or more of trustees' powers to exercises which follow a taking into account of all relevant considerations and none that are irrelevant would make *any* trustee disposition resulting from a decision-making process infringing that clause void, regardless of the causal connection, if any, between the flaw and the disposition.<sup>40</sup>

In practice, however, the Rule in its shrunken, post-*Pitt* form does not appear to provide trustees or beneficiaries with a practicable means for having the results of ill-judged exercises of trustees' discretions declared void or avoided. The courts have never, since *Pitt*, declared an exercise of a trustee's discretion void or avoided under the Rule as a matter of English law,<sup>41</sup> though they

38 Inheritance Tax Act 1984, s 150, providing that 'where on a claim made for the purpose it is shown that the whole or any part of a chargeable transfer ("the relevant transfer") has by virtue of any enactment or rule of law been set aside as voidable or otherwise defeasible— (a) tax paid or payable by the claimant (in respect of the relevant transfer or any other chargeable transfer made before the claim) that would not have been payable if the relevant transfer had been void *ab initio* shall be repaid to him by the Board, or as the case may be shall not be payable'. For further reasons why the practical import of the retreat from void to voidable should not be overstated, see R. Nolan, 'Controlling Fiduciary Power' (2009) 68 CLJ 293, 322; for one sense in which the void/voidable distinction makes an important difference, see Langlois and Cloherty, n 16 above, 17 (n 50).

39 Kerry, n 34 above, 76–78. Nolan mentioned a similar idea before *Pitt*: Nolan, *ibid*, 308.

40 See discussion of such a putative clause in *Underhill & Hayton* n 9 above, 57.39–57.40.

41 See the court's rejection of Hastings-Bass claims in *British Airways plc v Airways Pension Scheme Trustee Limited* [2017] EWHC 1191 (Ch) at [579]–[629], and the court's remark *obiter dictum* in *Wedgewood Pension Plan Trustee Limited v Salt* [2018] EWHC 79 (Ch) at [69]: 'it is clear since the decision in *Pitt v Holt* that the failure by trustees to take into account a relevant consideration will not render a decision void'. The Privy Council has recently upheld a decision of the Court of Appeal of the Eastern Caribbean holding an appointment by trustees voidable as a matter of British Virgin Islands law: *Gany Holdings (PTC) SA (Appellant) v Khan and others* [2018] UKPC 21.

have recently applied the Rule to avoid one decision by a company's board of directors.<sup>42</sup> The decline of the Rule does not mean, however, that the courts' generosity to trust parties looking to have dispositions avoided is at an end. Quite the contrary: recent cases show the courts being generous in their application of the doctrine of equitable mistake to cases where assets were settled on trust, or appointed out of trust. In many of these cases the dispositions rescinded were undertaken based on erroneous professional advice concerning the tax implications of the settlement or appointment. These cases show the doctrine of equitable mistake to have taken the place of the Rule as a short route to avoidance and rescission of voluntary dispositions in the trusts context.<sup>43</sup> It is not that rescission in equity for mistake under *Pitt v Holt* is in principle more easily available to parties to trusts than to other persons. It is rather that since the doctrine of equitable mistake is mostly applied to trust parties, it is mostly trust parties who enjoy its capacity for avoiding the results of mistakes.<sup>44</sup>

The first instance of the recent application of rescission in equity in trust cases may have been the Supreme Court decision in *Pitt* itself, where the Court set aside the Derek Pitt Special Needs Trust due to Mrs Pitt's advisors having failed to consider, and so to alert her to, the inheritance tax implications of the trust.<sup>45</sup> Other instances soon followed, and are multiplying. In *Kennedy v Kennedy*, an appointment of trust assets to Mr Kennedy, the settlor, productive of a large liability to capital gains tax which his advisors assumed would not occur, was set aside for equitable mistake, the court reasoning that '[t]he mistakes made by the three trustees were causative and very serious'.<sup>46</sup> In *Freedman v Freedman* the very settlement of a family trust was set aside for mistake. Melanie Freedman, the settlor, settled her two houses on trust based on advice from her father's solicitors, who failed to consider the large inheritance tax liability

42 *Sweeney* n 32 above.

43 The same point has recently been made by J. Lee: 'Tax, Equity and Artificiality' (2018) 31 *Trust Law International* 219, 219.

44 The *Pitt v Holt* test for rescission in equity for mistake has been applied 12 times since the Supreme Court decision in *Pitt* (counting cases heard by more than one judicial instance as one case). Nine of these 12 cases dealt with trust parties. Of the nine trust rescission cases, rescission was granted in seven, while of the three non-trust rescission cases, rescission was declared to be theoretically available in one, the mistake in point was corrected, without any disposition being avoided, in another, and rescission was refused in the third. The cases concerned are so few that no statistically significant conclusion can be drawn regarding rescission in equity being more forthcoming in trust cases than in others. The trust rescission cases are *Santander UK Plc v Fletcher* [2018] EWHC 2778 (Ch) (rescission refused); *South Downs Trustees Limited v GH, IJ, KL* [2018] EWHC 1064 (Ch) (rescission granted); *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch) (rescission granted); *Der Merwe* n 13 above (rescission granted); *Ong v Ping* [2015] EWHC 1742 (Ch) (rescission refused); *Freedman v Freedman* [2015] EWHC 1457 (Ch) (rescission granted); *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) (rescission granted); *Wright v National Westminster Bank Plc* [2014] EWHC 3158 (Ch) (rescission granted); *Roadchef (Employee Benefits Trustees) Ltd v Hill* [2014] EWHC 109 (Ch) (rescission granted). The non-trust cases are *Hymanson v Revenue and Customs Commissioners* [2018] UKFTT 667 (TC) (a rescission case by analogy only - the tribunal held that rescission would have been available had the taxpayer taken his case to the High Court); *NRAM Ltd v Evans* [2015] EWHC 1543 (Ch) (mistake corrected); and *Spaul v Spaul* n 12 above (rescission refused).

45 *Pitt* n 8 above at [142].

46 *Kennedy* n 44 above at [38].

consequent on the settlement's creation. While the settlement was created to prevent Melanie's various suitors from acquiring rights in her houses, it was also intended that one of the houses be sold, and the proceeds used to pay back a large part of a loan Melanie's father provided to enable her to purchase her other house. Given the tax liabilities consequent on the settlement's creation, however, Melanie was not going to have enough of the proceeds left to cover much of the loan, and was likely, on the evidence, to be forced to sell her other house, where she currently lived with her son. The Court saw the mistake by Melanie, her father and his solicitors concerning the tax consequences of the settlement as serious enough to justify setting it aside, noting that 'the fact that the tax charge means that the loan cannot be repaid makes all the difference'.<sup>47</sup> There have been at least another two recent cases where transfers on trust were rescinded as a result of the transferors having been mistaken as to the tax consequences of the transfer.<sup>48</sup>

The *Pitt*, *Kennedy* and *Freedman* courts, and the more recent courts following them, thus adopted a generous approach to the doctrine of rescission for mistake as applied in equity to voluntary dispositions, setting aside settlements and appointments due to their tax consequences, which under *Gibbon v Mitchell*, overruled in *Pitt*,<sup>49</sup> would not have been seen as entitling the donors or appointors to rescission. Thus for all the reformulation, in *Pitt*, of both the Rule and the doctrine of equitable mistake, the courts seem to have retained a tenderness for trust parties: the recent focus on the latter doctrine has made for an extension of that tenderness, formerly focused on dispositions by trustees, to those undertaken by settlors. The common law right to restitution of payments made by mistake, extended in *Kleinwort Benson* to include mistakes of law, was again extended in *Deutsche Morgan Grenfell* to 'the payment of taxes made to the revenue on the mistaken belief that they were due and payable'.<sup>50</sup> But *Pitt*, *Kennedy*, *Freedman* and the other recent cases of that ilk were not cases where a taxpayer paid tax in the mistaken belief that it was due. They were cases where persons became liable to pay tax as a result of having settled a trust or appointed assets out of trust, of which liability neither they nor their advisors were aware when planning and executing the settlement or appointment. Burrows opined, outside the trusts context, that 'where the tax regime was lawful and the claimant had simply mistakenly failed to operate it to its advantage, there should be no restitution'.<sup>51</sup> Yet in the trusts context the courts have been awarding restitution of taxes paid, and avoiding unpaid tax liabilities, where taxpayers have simply mistakenly failed to operate the law of trusts taxation to their advantage.

It therefore appears that as the law currently stands, trust parties enjoy, so far as voluntary dispositions are concerned, a remarkably lenient approach on the part

47 *Freedman* n 44 above at [41].

48 *Der Merve* n 13 above; *Bainbridge* n 44 above.

49 *Pitt* n 8 above at [123].

50 *Deutsche Morgan Grenfell Group plc v IRC* [2006] UKHL 49, [2007] 1 AC 558 at [56] *per* Lord Hope; see also at [18] *per* Lord Hoffmann. And see criticism in C. Mitchell, 'Recovery of Overpaid Tax under English Law' (2016) 10–11 at [papers.ssrn.com/abstract=2847060](http://papers.ssrn.com/abstract=2847060) (last accessed 4 August 2018).

51 Burrows, n 12 above, 233.

of the courts to relief from the results of their and their advisors' mistakes and instances of inadequate decision-making. While the courts' lenient approach does not extend to contracts for value, voluntary dispositions by trustees which have results adverse to beneficiaries' interests can be set aside, so long as they can be shown to have been ultra vires the trustee or a breach of trustees' duties. Trustees' powers can also be drafted as limited so as to facilitate a showing of ultra vires. While the extension of relief to cases of inadequate decision-making, presented as such, has become rare since the shrinking of the erstwhile Rule in *Pitt*, many cases of inadequate decision-making can be put, alternatively, as cases of mistake. A facility of rescinding actions which turn out to have disappointing consequences is thus one advantage of arranging one's economic affairs by way of a trust, an advantage not generally available to either individuals or companies.<sup>52</sup> As Ashdown wrote regarding the tax context, '[b]eneficiaries could . . . be seen as having obtained a preferential status in relation to taxation . . . one not open to other taxpayers'.<sup>53</sup> While he believed that following the shrinking of the Rule '[s]uch an approach has now been rendered impossible',<sup>54</sup> it has been revived by way of rescission in equity for mistake.

Fact-sensitive analysis makes clear who really won in *Pitt*, *Kennedy*, *Freedman* and similar recent cases. The mistakes in those cases originated with trustees' or settlors' professional advisors. Had the settlement or appointment in each case not been set aside, trustees' and settlors' principal recourse would have been against those advisors, who would in turn have been likely to file a claim with their insurers. The grant of rescission saved the advisors and/or their insurers from paying out to the advisors' clients to compensate them for the consequences of apparent negligence. The identity of the winners will play an important role in our normative analysis of mistakes and inadequate decision-making in a trusts context in the next section.

### **SHOULD TRUST PARTIES ENJOY AN ESPECIALLY EASY ACCESS TO RESCISSION FOR MISTAKE AND INADEQUATE DECISION-MAKING?**

In this section, we address the question whether trust parties should enjoy a more ready access to rescission of voluntary dispositions for mistake and inadequate decision-making than other people, as they presently do. We will first discuss the arguments for an especially lenient approach in the trust context, then the arguments for the opposite position.

<sup>52</sup> Though see the application of the Rule to a decision of a corporate board of directors in *Sweeney* n 32 above. A facility of having actions set aside as ultra vires used to be available to companies by way of the company law ultra vires doctrine. That doctrine was abolished, in respect of companies, in the Companies Act 2006, s 39(1), which provides that 'the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution'. See discussion in P. L. Davies and S. Worthington, *Gower & Davies: Principles of Modern Company Law* (London: Sweet & Maxwell, 9<sup>th</sup> ed, 2012) 7-4.

<sup>53</sup> Ashdown, n 7 above, 145.

<sup>54</sup> *ibid.*

One argument for an especially generous approach to relieving the consequences of mistake and inadequate decision-making in the trusts context is that unlike persons who manage their property themselves, trust beneficiaries depend on others for the management of trust property. Ordinarily, beneficiaries who are not also settlors do not choose the persons or organisations fulfilling the trustee function. In creating trusts, trust settlors create agency risks,<sup>55</sup> which they may believe to be more than counterbalanced by the advantages of asset management under trust. One such advantage – indeed, one reason people rely on experts generally – is that they believe the expert is likely to commit fewer mistakes and to make better decisions than themselves, or, in a trusts context, their beneficiaries. Professional fiduciaries are clearly hired for their apparent expertise, and even a lay trustee chosen for his acquaintance with a family can be seen as an expert on that family’s needs, perhaps able to assess the needs of each family member more objectively than the several members. Another perceived benefit of using experts is that where they commit mistakes or reach inadequate decisions they can be found liable for the resulting harm and compensation may be forthcoming, while loss occasioned by self-made decisions generally rests with the decisor. Trustees’ duties to their beneficiaries would seem to imply that they be liable for the results of their mistakes and inadequate decision-making more often than non-trustees. Yet this general expectation is often belied in the private trusts context by the prevalence of trustee exemption clauses releasing trustees from liability for losses resulting from their negligent, and even grossly negligent, behaviour, with most settlors neither demanding nor receiving any quid-pro-quo for the clauses’ inclusion.<sup>56</sup> Given the permissive state of the law governing exemption clauses under the general law of trusts,<sup>57</sup> a liberal approach to relief from trustee actions resulting from mistakes or inadequate deliberation can be seen as necessary to preserve the value of trustees’ services for their consumers. We doubt, however, that making trustees’ services attractive to their consumers despite the prevalence of exemption clauses is a sufficient reason for extending relief from the consequences of trustees’ mistakes and inadequate decision-making to circumstances where it is not extended outside the trusts context. The prevalence of exemption clauses is a deep structural flaw in the market for trustee services, imposing the loss flowing from trustees’ mistakes and negligence on beneficiaries and thus belying

55 See generally R. H. Sitkoff, ‘An Agency Costs Theory of Trust Law’ (2004) 89 *Cornell Law Review* 621.

56 For empirical data showing trustee exemption clauses to be extremely prevalent in private trusts, without quid-pro-quo flowing to trust service providers’ clients, see A. Hofri-Winogradow, ‘The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts’ (2017) 68 *Hastings Law Journal* 931, 984–985. The consequences of that prevalence for the importance of relief from mistake-based trustee actions have been noted by several commentators, including, for example, Hilliard, n 36 above, 212–213. The above argument for a generous approach to relief from the consequences of mistakes in the trusts context has less force in areas of trust practice where the use of exemption clauses is forbidden. Those areas include pension trustees’ exercise of their investment functions (Pensions Act 1995, s 33) and persons, natural or corporate, serving as trustees and/or managers of unit trust schemes (Financial Services and Markets Act 2000, s 253).

57 *Armitage v Nurse* [1998] Ch 241, 251–256, followed by the majority of the Privy Council panel to hear *Spread Trustee Co Ltd v Hutcheson* [2011] UKPC 13, [2012] 2 AC 194 at [57], [108].

likely consumer expectations that the package of services purchased includes absorption of trustee-created loss. Trust services should create value for their users; that trustees bear the loss resulting from their mistakes is a valuable part of the services they should offer. Despite the current equilibrium of the market in trustee services having coalesced around the use of exemption clauses, so that trustees may not currently be willing to serve without them, a market recalibration imposing the loss flowing from trustees' mistakes on trustees is possible. Such recalibration, conforming market reality to consumer expectations, is preferable to making today's exemption clause-based trust practice palatable to trust service consumers by extending relief for trustees' mistakes and inadequate decision-making to where it does not extend outside the trusts context. Where the mistake originated with an advisor on whose advice a trustee reasonably relied, trustees can and should pass the loss to that advisor or its insurers.<sup>58</sup> An imposition of such loss on trustees, relief not being available where it would not have been available outside the trusts context, would incentivise them to act so that their advisors or the latter's insurers bear the loss.<sup>59</sup>

Another argument for a permissive approach to relief in the trusts context is that relief releases beneficiaries from the uncomfortable experience of demanding that their trustees make them whole and, if necessary, litigating the issue. It similarly reduces contention, in and out of court, between trustees and their advisors, as well as between settlors and their advisors. Increased contentious litigation between, in each of those three cases, a service provider and its client is likely to increase the costs of service providers' professional liability insurance, which providers are likely to pass on to their clients to the extent the market will bear. An increased chance of contention, in and out of court, may make service providers increase their fees even independently of any insurance costs. This argument has won some recognition in the Jersey courts.<sup>60</sup> Given that trustee exemption clauses already render trustees largely immune from (successful) litigation so long as their mistake or inadequate decision-making was not made recklessly,<sup>61</sup> the argument may be more applicable to mistakes by trustees' or settlors' advisors than to trustees' own mistakes. As regards mistakes which do not relate to tax, the argument may carry some weight. In tax-related

58 Lord Walker noted extra-judicially that many court applications invoking the Rule were funded by advisors' insurers, likely defendants in a negligence action: Walker, n 32 above, 762.

59 Bhandari similarly argued that loss resulting from trustees' mistakes and those of their advisors should rest with the erring trustee or advisor rather than resting, given a tax-related error, with the public purse by way of an extended doctrine of relief from mistake: M. Bhandari, 'Pitt v Holt, Futter v Futter: At Last, Hastings-Bass Limited, but is it Enough?' (2011) *British Tax Review* 288, 293; M. Bhandari, 'Undoing Transactions for Tax Purposes: The Hastings-Bass Principle' in S. Elliott, B. Häcker and C. Mitchell (eds), *Restitution of Overpaid Tax* (Oxford: Hart Publishing, 2013) 149, 162. See also Tang, n 24 above, 68–70.

60 In *In the Matter of the Green GLG Trust* [2002] JLR 571, the earliest Jersey case where the Rule was applied, the court was 'not attracted' by a suggestion 'that, as a matter of policy, the Court might decide that [trustee actions consequent on wrong advice] should best be settled by way of litigation between the trustees, beneficiaries and any negligent advisers rather than be dealt with by finding the decision in question to be void' (at [30]). Atkins noted similarly that a liberal approach to relief 'avoids both the uncertainty and costs involved in suing professional advisers who have given incorrect advice': S. Atkins, 'Futter and Pitt: Trustees' Mistakes' (2014) 18 *Jersey and Guernsey Law Review* 121, 127.

61 *Armitage v Nurse* n 57 above.

mistake cases, however, we believe the public should not subsidise, by collecting less tax, sparing settlors, beneficiaries and trustees the discomfort of suing their advisors. Even should advisors successfully defend such a claim, leaving the mistake costs plus the resulting litigation costs imposed on settlors and/or beneficiaries rather than on any of the service providers involved, such a distributive outcome is preferable to the mistake costs resting with the public. The public should not fund the use of trusts for private purposes, such as succession to family property, any more generously than it funds the accomplishment of similar purposes without trusts.

A related argument for a permissive approach to relief in the trusts context is that regardless of exemption clauses, many trusts do not have beneficiaries who are realistically able and likely to demand that their trustees make them whole, whether in or out of court. Beneficiaries' identity may be undetermined, trustees not having yet chosen them. Even if fixed or determined, beneficiaries may be minors, may lack capacity, may be uninformed about or uninterested in their entitlements under trust and the management of that trust, or may even rationally decide to refrain from making demands or filing suit, given the costs of doing so and the size of their entitlements. In the absence of beneficiaries actively demanding that their trustees make good any loss resulting from those trustees' mistakes, such loss may well rest with beneficiaries unless trustees are provided with an easy route to relief at little or no cost to themselves. As with the last argument discussed, this argument may carry some weight where avoiding the results of practitioners' mistakes would come at no cost to the public purse. Where relief imposes a cost on the public purse, however, it should not be more broadly available in a trusts context than in other contexts: trust beneficiaries are hardly the only example of persons who may absorb the costs of others' mistakes without a realistic prospect of diverting those costs to the mistaken party. Further, an alternative way to correct the harm caused by trustees' mistakes even given beneficiaries' inaction is by appointing a trust protector or enforcer tasked with monitoring trustees' exercise of their powers and enforcing their compliance with their duties.<sup>62</sup> Unlike the application of a permissive approach to relief, appointing a protector or enforcer does not externalise the risk of trustee mistakes to third parties having nothing to do with the trust. The uncertain legal position of trust protectors and non-beneficiary enforcers under English law may have contributed to English law's development and retention of an exceedingly liberal approach to relief from the consequences of trustees' mistakes.<sup>63</sup>

62 A Protector is a common name for a trust officer to whom some of the powers traditionally associated with beneficiaries are allocated, namely the power to appoint and terminate trustees; information rights; veto rights with respect to trustees' exercise of their dispositive powers, etc. See, *inter alia*, Trustee (Amendment) Act 1993 (BVI) s 86; Trust (Guernsey) Law 2007, s 15; Trusts (Special Provisions) Amendment Act 2014, s 2A (Bermuda); Trusts Law (2017 Revision), s 14 (Cayman) (Cayman Trust Law). An Enforcer is a person to whom some of the enforcement powers traditionally associated with beneficiaries are allocated, usually in the context of a private trust for purposes lacking definite beneficiaries; see for example, the provisions regarding 'STAR Trusts' under the Cayman Trust Law, ss 95–109.

63 The main argument against the recognition of protectors and non-beneficiary enforcers in English Law is that the English trust, as a doctrinal structure, cannot admit the allocation of enforcement

A fourth argument for a liberal approach to relief in the private trusts context, applicable to non-trust gifts as much as to trusts, is that unlike beneficiaries of pension, investment and commercial trusts,<sup>64</sup> private trust beneficiaries who are not also settlors generally give no consideration; consequently, their reliance-based interest in retaining sums or assets appointed may be weaker than where consideration has been given. On reflection, however, while this argument may support rescission of mistaken non-trust donative payments resulting in sums paid being returned to their donors, extending it to support the rescission of mistaken trustee appointments ignores the unique characteristics of trusts, suggesting that inserting a fiduciary between donor and donee makes little difference. As one purpose of using professionally-managed trusts is enjoying professional asset managers' tendency to make fewer mistakes than less expert owners, with the costs of the remaining mistakes absorbed by the professional, that absorption should not be prevented even given the lesser respect beneficiaries' interest in retaining sums distributed may command, compared to persons who have given consideration for sums or assets received.

A fifth argument for a liberal approach to relief in the private trusts context is that neither trustees nor beneficiaries can recover from an advisor to the trustees for loss suffered personally by a beneficiary as a result of the advisor's mistake and/or breach of a duty the advisor owed the trustees, where that loss is not reflected in any loss to the trust estate. The injured beneficiary is usually not a party to any contract between the trustee and the advisor, and so has no cause of action in contract 'unless he can bring himself within the limited scope of the Contracts (Rights of Third Parties) Act 1999'.<sup>65</sup> Trustees' advisors do not owe beneficiaries a duty of care under either the tort of negligence or that of conversion.<sup>66</sup> In such cases, having the act carried out in reliance on the advice rescinded may be the only way to extinguish the beneficiary's loss. This argument gives rise, however, to two counter-arguments: first, that the fact of a class of loss-absorbing parties remaining without remedy for their losses is never in itself a justification for providing one. Since one's remedy is always another's loss, deciding which types of loss-absorbing parties will remain without remedy is the essence of the law's key task of distributing risks and costs between different parties. Second, an alternative means of protecting beneficiaries' interests under such circumstances is allowing trustees to claim damages from their advisors for loss suffered by beneficiaries, with any damages paid seen as subject to the relevant trust or passed directly to the beneficiaries.

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powers to persons who do not personally benefit from the trust. For elaboration see for example, T. H. Tey, 'Trust Enforcer' (2009) 23 *Trust Law International* 151; K. H. Lau, 'The Control of Trust Protectors' (2012) 26 *Trust Law International* 39.

64 But note the case of pension trustees' mistakes resulting in overpayment to retired employees. See for example, *AMP (UK) plc v Barker* n 27 above; *Gallaher Ltd v Gallaher Pensions Ltd* n 27 above; and see discussion in, for example, Hilliard, n 36 above, 222–223; Tang, n 24 above, 75–76 and sources cited.

65 Ashdown, n 7 above, 142; cf R. Nolan, 'Fiduciaries and their Flawed Decisions' (2013) 129 *LQR* 469, 471–472.

66 Ashdown, *ibid*, 142; cf *Yudt v Leonard Ross & Craig* [1998] 1 *International Trusts & Estates Law Reports* 531; *Shell UK Ltd v Total UK Ltd* [2010] *EWCA Civ* 180, [2011] *QB* 86, and see Ashdown's criticism of these two cases in Ashdown, *ibid*, 143–144.

While this solution has long given rise to doctrinal controversy, it has the advantage of imposing the costs of advisors' mistakes on advisors, rather than on blameless trust non-parties such as taxpayers.<sup>67</sup>

A sixth argument for a lenient approach to relief is that in the trusts context, beneficiaries themselves often consent to relief, since beneficiaries are likely to suffer from the ill results of the disposition from which relief is sought and are equally likely to benefit from the better results of the alternative disposition trustees or settlors will put in its place.<sup>68</sup> And furthermore, the parties usually active in pursuing relief in trust cases, be they settlors or trustees, are often themselves key beneficiaries of the trusts in question. This argument, however, reflects a lack of concern for some of the interests involved: as case law referred to above clearly demonstrates, that some beneficiaries and the trustees concur that a certain disposition should be set aside does not necessarily mean that rescission will not harm anyone. There are additional parties whose interests are often involved (and often represented in court), common examples being other beneficiaries who, having relied on the disposition, or for some other reason, are not interested in rescission, beneficiaries' spouses, beneficiaries' dependants and HMRC.

A final argument for a liberal approach to relief in the private trusts context applies, *prima facie*, to all dispositions, whether donative or not and whether trust-related or not. Tang noted that 'a donor's autonomous choice is compromised if he or she was mistaken as to some underlying assumption, which caused her or him to make the gift. Thus, restitution is essential to restore the donor's personal autonomy.'<sup>69</sup> While Davies warns that 'it is not clear that *any* causative mistake really leads to a vitiation of intention',<sup>70</sup> some mistakes do undermine the settlor or donor's intention in settling or gifting: take a trust settled in order to save taxes, which, unbeknownst to the settlor, results in an aggravated liability to tax. The same applies to a trustee appointment made in order to save taxes and later revealed to aggravate the appointee's or the trustee's tax liability. Mistake-based dispositions' undermining of donors' autonomy should not necessarily, however, be accorded great weight in determining when relief should be available, whether in the trusts context or elsewhere. The choices people make, in and out of the trusts context, often have, after all, results they did not intend or anticipate, which frustrate their intentions in making those choices and in that sense vitiate their autonomy. People's mistakes often have

67 See *Robertson v Wait* (1853) 8 Ex 299; *The Albazero* [1977] AC 774; *Colour Quest Ltd v Total Downstream UK Plc* [2010] EWCA Civ 180, [2010] 3 All ER 793. See also P. S. Davies, 'Correcting Mistakes: whether the Rule in *Re Hastings-Bass*' (2011) *Conveyancer and Property Lawyer* 406, 414, suggesting that such expansion of the trustee's *locus standi* is 'indeed likely' under English Law. But see C. H. Tham, 'The "Trustee Exception" in *Lloyd's v Harper*: Loss, Liability, and "Black Holes"' (2016) 132 LQR 148; P. G. Turner, 'Consequential Economic Loss and the Trust Beneficiary' (2010) 69 CLJ 445.

68 Beneficiary consent to relief can facilitate its award, as in the Jersey case of *Re the Strathmullan Trust* [2014] JRC 056 at [27]: 'in the circumstances that the only other beneficiaries of the Trust request that the Trust be set aside on the basis of the mistake made, it is much easier to reach the conclusion that it would be unjust on the part of the donee/trustee to retain the trust property causing this substantial tax loss to the Representor.'

69 Tang, n 4 above, 27–28.

70 Davies, n 67 above, 419.

such results, while inadequate decision-making not involving a mistake cannot be said to vitiate the decision-maker's autonomy. Unexpected, disappointing results are a consequence of personal autonomy being exercised and intentions being implemented in a social, economic, legal and physical context rather than in an abstract, individual bubble. In very many cases such results are not reversed, despite decisors' ensuing disappointment. That some actions undertaken in a trusts context turn out to have unexpected, disappointing results for those undertaking them is therefore not per se a reason for making relief more easily available in that context than it is in others, where disappointing, intention-vitiating outcomes are also frequent.

We conclude that the principal arguments for an especially liberal approach to relief in the trusts context largely fail to survive scrutiny. Some of the arguments surveyed above are logically flawed; other arguments, solid per se, suggest that a lenient rescission regime be applied even though more elegant, obvious, and/or doctrinally appropriate solutions are at hand. We examine next the arguments *against* easy relief from the consequences of mistake and inadequate decision-making in the trusts context.

One argument is that such easy relief may tend to make trust service providers less careful in carrying out their responsibilities. Even if any additional mistakes and inadequately deliberated decisions made as a result of relief being easily available are all corrected at the errant service provider's expense – as where the service provider files suit for relief from the consequences of its mistakes and/or inadequate decision-making, obtains the desired orders and covers the cost of the proceedings from its own funds rather than from the trust fund – that cost is, given professional, for-profit trust service providers, likely to be at least partly externalised to the provider's clients. While trust cases litigated to judgment represent only a tiny, and surely unrepresentative, fraction of all trusts, regarding many of which perfectly sound advice is given, no mistakes are made and decisions are arrived at in an appropriate manner, one is struck, on reading the cases discussed above, by the numerous mistakes made by employees of well-known firms. The law should clearly provide professional trustees, solicitors and other advisors with incentives for attaining a better professional standard than that apparent in those cases.<sup>71</sup> Further, assuming mistakes and inadequate decision-making result in otherwise avoidable costs, the professional trustees and/or advisors involved are often, using time-honoured Calabresian terminology, the cheapest cost avoiders; in mistake of law cases that is nearly always the case.<sup>72</sup> They could in most cases have discovered their mistake or improved their decision-making with a very small additional investment of time and effort. In order for these cheapest cost avoiders to bear the costs of avoiding mistakes and inadequate decision-making, dispositions resulting from such flaws should only rarely be avoided, and unreasonable exemption clauses protecting the professionals involved should be disappplied.

71 See discussion in K. Purkis, 'Reports of the Death of the Rule in Hastings-Bass are Exaggerated' (2013) 17 *Jersey and Guernsey Law Review* 345, 361–362.

72 For the concept of 'cheapest cost avoiders' see G. Calabresi, *The Costs of Accidents: a Legal and Economic Analysis* (New Haven, CT: Yale UP, 1970); G. Calabresi and J. Hirschoff, 'Toward a Test for Strict Liability in Tort' (1972) 81 *Yale Law Journal* 1055.

A second argument against easy relief is limited to the tax context. Granting relief from the tax-related consequences of trust service providers' mistakes and inadequate decision-making enriches trust settlors and beneficiaries, as well as, exemption clauses aside, trust service providers. By disentitling the government to the tax revenue which would have otherwise resulted from the avoided disposition, relief decreases the amount of tax revenue raised. Diminished tax revenue may well result, at least eventually, in cutbacks to government programs. While tax raised is not distributed directly to the beneficiaries of government action, those beneficiaries may be harmed by such cutbacks. Where the persons claiming relief from a disposition which they have found to have disappointing tax results are wealthier than the individual of median wealth among the beneficiaries of government action, relief would enrich relatively richer persons while reducing the funds with which the government supports persons who are relatively poorer. While tax planning is in many cases quite legal, it should not, given its consequences for the size of the government tax take, be encouraged by affording trust parties an especially easy access to relief.

This line of argument is not unique to the trusts context: it supports taking a restrictive approach to tax-planning schemes whether they involve trusts or not. Such an approach is embodied in the General Anti-Abuse Rule (GAAR),<sup>73</sup> applicable to tax arrangements of any kind. That a certain tax arrangement involves a trust does not in itself render it abusive. Some believe that even if trusts are a legal mechanism inherently prone to misuse for tax avoidance purposes, to an extent justifying stricter scrutiny of tax arrangements involving trusts than that applicable to other tax arrangements, this should be achieved by introducing special anti-avoidance rules applicable to tax arrangements involving trusts, rather than by reforming the law of mistake.<sup>74</sup> At least if we assume, however, that rescission cases not involving trusts are less likely to serve a tax saving purpose than rescission cases which do involve them, then given the consequences of a diminished tax take, trust parties should not enjoy an especially easy access to relief.

Recipient reliance makes a final argument against easy relief, one relevant to all transactions and dispositions. Declaring a trust or appointment void or voidable may mean beneficiaries have to repay any sums already distributed, retransfer any assets distributed, and forgo any rights or expectations to future distributions from the trust. The lower the threshold for relief, the less beneficiaries can rely on the finality of even completed distributions, not to mention rights to future distributions. While the risk of relief may be insurable, the cost of such insurance crystallises the cost of relief, and it is not clear that beneficiaries should bear that cost. Trustees and their advisors can surely in most cases, absent both easy relief and exemption clauses, obtain professional liability insurance more easily than beneficiaries could, given easy relief, obtain

73 Finance Act 2013, ss 206–215.

74 See discussion in R. Lee, 'Correcting Mistakes in Trust Planning: a Comparative Post-Pitt Analysis' (2018) *Conveyancer and Property Lawyer* 45, 57; P. S. Davies and S. Douglas, 'Tax Mistakes Post-*Pitt v Holt*' (2018) 32 *Trust Law International* 3, 12–13; N. Lee, '*Futter v HMRC*; *Pitt v HMRC*: The Rule in *Hastings-Bass* and of Mistake Reviewed' (2014) *Conveyancer and Property Lawyer* 175, 184; Häcker, n 5 above, 365.

insurance against distributions being rolled back. Even granting that trustees and their advisors are likely to throw as much of the cost of their professional liability insurance on the trust fund as the market will permit, such a situation is preferable to beneficiaries bearing the entire costs of the risk of relief.

Tang suggested, writing about restitution of mistaken gifts in terms equally applicable to equitable relief from settlements and appointments resulting from mistakes or instances of inadequate decision-making, that restitution of such transfers should be made difficult, since even mistake-based donative transfers can create a beneficial bond between donor and donee, as well as increase the donor's status. These positive consequences could result even from donative transfers where some of the matrix of factual assumptions against which the transfer was made was wrong.<sup>75</sup> It could, however, be argued in response that the moral economy of gifting, which Tang praises, is better protected by making relief easy rather than difficult to obtain: letting beneficiaries retain transfers resulting from mistakes or inadequate decision-making may render potential donors or settlors wary of gifting, driving the moral economy of gifting into decline. Further, as Tang was aware, the equitable jurisdiction to relieve from mistake-based dispositions is applicable, and frequently applied, to dispositions very different from the archetypical emotionally-driven gift: structured settlements, often created for tax planning purposes, some of which have the same parties on both sides of the 'gift'.<sup>76</sup> Such dispositions can have little to do with the moral economy of gifting.

## NORMATIVE CONCLUSIONS AND PROPOSAL

The balance of the foregoing arguments for and against giving trust parties an easier than usual access to relief from dispositions resulting from mistakes or inadequate decision-making appears negative: no such special leniency should obtain in the trusts context. Key reasons for this result are the first and third arguments against easy relief mentioned above: that easy access to rescission is likely to create a disincentive for trustees to exercise careful judgment, and that it is likely to impinge on beneficiaries' and third parties' ability to rely on trust dispositions. Making relief harder to obtain could potentially result in an improvement in trust service providers' professional standards, or, at least, in more of the costs of mistakes and inadequate decision-making being imposed on the cheapest cost avoiders. Thus relief should not, at least, be more easily available in the trusts context than in others.

A further reason for our conclusion that relief should not be more forthcoming in the trusts context than in others is that the law governing relief from the results of mistakes and inadequate decision-making should be coordinated and simplified. In principle, the test for relief should, as Häcker and Ng have suggested,<sup>77</sup> be as uniform as possible, reducing the complexity of

<sup>75</sup> Tang, n 4 above, 54–56, 59, 61–62, 66–73.

<sup>76</sup> Tang speaks of the 'highly structured voluntary settlement' as one of three types of gift: *ibid*, 7.

<sup>77</sup> Häcker suggested (n 5 above, 359–369) that the law governing recovery of mistaken gifts should be conformed to the common law of unjust enrichment: recovery should in both cases depend

this area of the law by conforming the law governing the avoidance in equity of mistake-based voluntary dispositions and voluntary dispositions consequent on inadequate decision-making to the law governing restitution at law. Even so, we believe that creating incentives for professional trust service providers to provide a quality service is worth some degree of complexity. Applying the causative but-for test currently accepted in unjust enrichment to relief in equity from the results of professionals' mistakes and instances of inadequate decision-making would tend to enhance professionals' ability to have the harmful results of their mistakes and inadequate decision-making corrected at little<sup>78</sup> or no cost to themselves. It may therefore be that the higher bar of 'a causative mistake of sufficient gravity',<sup>79</sup> that is, 'of so serious a character as to render it unjust on the part of the donee to retain the property given to him',<sup>80</sup> should not be applied, as at present, to rescission of voluntary dispositions in equity generally, but to avoidance of voluntary dispositions resulting from mistakes and/or inadequate decision-making, whether or not a trust was involved, where the person who made the mistake or deliberated inadequately was a professional, acting either as decision-maker, such as a trustee, or as advisor. This higher bar should also apply to joint decisions by co-trustees, whenever they include at least one professional: otherwise, professional trustees would be able to lower the bar governing access to relief by joining laypersons as co-trustees.

We therefore propose that the test governing avoidance of voluntary dispositions resulting from mistakes or inadequate decision-making be unified across three doctrinal tracks: restitution at law for mistaken payments, recovery in equity of mistake-based voluntary dispositions and the avoidance in equity of voluntary trustee dispositions consequent on inadequate decision-making. Across all three tracks, relief should be available, so long as the person mistaken or deliberating inadequately was not a professional, whenever the flaw caused the impugned disposition. Where the person mistaken or deliberating inadequately was a professional, or was advised by one, relief should be harder to obtain, and should only be available in the presence of 'a causative mistake of . . . so serious a character as to render it unjust on the part of the donee to retain the property given to him'.<sup>81</sup>

Varying the test for relief according to whether or not a professional was involved may seem startling to those accustomed to varying applicable rules of law exclusively according to doctrinal differences. We believe, however, that lay mistakes and professional mistakes are fundamentally different phenomena and demand a fundamentally different legal response. As suggested above, laypersons pay for professional services because, among other reasons, they expect professionals to make fewer mistakes than themselves, and to bear the costs of the mistakes they do make. The law, having for centuries

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on the presence of a causative mistake and nothing more. For a similar view see Ng, n 19 above, 573.

78 A caveat reflecting Lord Walker's comment that trustees should not in future 'confidently expect' in proceedings for relief based on the Rule 'to recover their costs out of the trust fund': *Pitt* n 8 above at [69].

79 *Pitt ibid* at [122].

80 *Ogilvie* n 17 above, 400.

81 Combining the formulas in *Pitt* n 8 above at [122] and *Ogilvie* n 17 above, 400.

supported a class of remunerated experts called 'lawyers', should support these laypersons' expectations by crafting rules that encourage professionals to make as few mistakes as possible and prevent professionals from shifting the costs of the mistakes they do make, other than to their insurers. We believe this important animating purpose justifies varying the test for relief from mistake-based or inadequately-deliberated dispositions, and their often costly consequences, according to whether the decision-making process involved professional input. We do not suggest that decisions involving professional input may never attract relief, but merely that they be subject to a higher bar regarding the gravity of error required to justify relief. Our proposed solution balances the imperative of incentivising professionals to take proper care with the necessity of making relief available where grave injustice would otherwise ensue.

To the extent current law does not provide sufficiently effective means for countering what Lord Walker called the 'social evil' of 'artificial tax avoidance',<sup>82</sup> it is, in principle, tax law, rather than the law of mistake, which should be changed so as to better counter that evil. Still, the presence of artificial tax avoidance could be a factor tending to render the retention of property given, as well as the tax charge resulting from the unrelieved disposition, sufficiently just to justify withholding relief.<sup>83</sup> We acknowledge that our unified test would make relief relatively easily available, even in cases of artificial tax avoidance, where the person mistaken or deliberating inadequately was not a professional and was not advised by a professional. The failure of a tax avoidance scheme, even given relief, to achieve its object of tax minimisation appears to us an acceptable result where no professional was involved, given that lay trustees may not always be the cheapest cost avoiders, and that many such trustees are likely to remain unaware of any hurdles built into the law in order to incentivise them to take care.

Our proposed solution blurs two doctrinal distinctions. One is between restitution of mistake-based payments at law, a personal remedy, and avoidance of mistake-based dispositions in equity, a proprietary remedy involving the re-vesting of equitable title to the property transferred in the disponent. While the award of a proprietary remedy based on the mere presence of a causative nexus may seem startling, such an award could be denied, where disponent or beneficiary reliance renders it unjust, by way of the estoppel and change of position defences, as well as the requirement that rescission will only be granted where *restitutio in integrum* remains possible.<sup>84</sup> Where, in the trusts context, third parties deal in good faith with trustees in reliance on dispositions that are later avoided, such dispositions can, as Nolan suggested, be avoided as between settlors, trustees and beneficiaries, while remaining in place as between trustees and third parties.<sup>85</sup> There is thus no need to incorporate the defences to unjust rescission into the very test governing rescission. It may be that due to the proprietary character of rescission, the afore-mentioned

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82 *Pitt ibid* at [135].

83 See discussion of Lord Walker's 'artificiality caveat' in Lee, n 43 above.

84 We thank Peter Turner for his advice on defences.

85 See discussion in Nolan, n 65 above, 471.

defences will be engaged more often in rescission cases than in cases involving personal orders to repay money paid by mistake.

The second distinction blurred by our proposed solution is that between equity's remedial response to mistake-based dispositions and its remedial response to inadequate decision-making. While under current law the former remedy reacts to the presence of a mistake and the injustice of leaving it uncorrected, while the latter reacts to a breach of one or more of trustees' duties, the two remedies are reacting to different aspects of the same phenomenon: professionals' mistakes are indeed themselves often seen as breaching duties they owe their clients. Remembering that the complexity of the law on the subject produced what Longmore LJ called a 'comparatively rare instance of the law taking a seriously wrong turn',<sup>86</sup> the virtues of simplification and uniformity trump the merits, if any, of leaving each of the two paths to rescission subject to a different test.

Finally, we should emphasise that our proposal of a lower bar for relief where professionals are not involved would not extend to cases where a disposition was made by lay trustees, relying on professional advice. The presence of professional advice renders such cases subject to our higher bar, requiring, for relief to be available, a serious mistake which makes the donee's retention of property transferred unjust.

## CONCLUSION

We showed that parties to trusts currently enjoy easier access to judicial avoidance of voluntary dispositions resulting from mistakes and instances of inadequate decision-making than other persons. The principal doctrinal basis for this advantage has shifted from the rule in *Re Hastings-Bass* to rescission in equity. We then showed this advantage to be normatively unjustified, and recommended a uniform legal framework to govern the avoidance of voluntary dispositions resulting from mistakes or inadequate decision-making, whether or not a trust was involved. Under this framework, dispositions resulting from laypersons' mistakes and inadequate decision-making should be avoided, subject to appropriate defences, whenever that causative nexus is present, while dispositions resulting from professionals' mistakes and inadequate decision-making, whether by trustees or advisors, should only be avoided where the mistake or deliberative flaw was so serious as to render the transferee's retention of property transferred unjust.

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<sup>86</sup> *Pitt* n 21 above at [227].