Neutral Citation Number: [2019] EWHC 1949 (Ch)

CLAIM No.BL-2018-000909

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

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

Date: **23rd July 2019**

Before: DEPUTY MASTER HENDERSON

BETWEEN:-

(1) Mr OLAF ROGGE
(2) Mrs KRISTINA ROGGE — Claimants

-and-

(1) Mrs SOPHIA KATERINA ROGGE
(2) Mr RALPH KEITH THEODORE ROGGE
(3) Mr STEFAN HENRY JULIUS ROGGE — Defendants

Oliver Conolly (instructed by Pitmans LLP, subsequently BDB Pitmans LLP), counsel for the Claimants, Edward Waldegrave (instructed by Pitmans LLP), counsel for the 1st and 2nd Defendants on 28th November 2018

Hearing dates: **28th November 2018, 15th January 2019**

JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

DEPUTY MASTER HENDERSON

Introduction

1. This is my judgment on a Part 8 Claim seeking an order setting aside all transfers by the Claimants prior to 27th November 2015 to the trust known as the Stefan Rogge Discretionary Trust ("the Trust") and a declaration that the sums transferred to the Trust after 27th November 2015 are held on resulting trust.

2. The First Claimant is a 72 year old retired businessman of German nationality, who has been resident in the UK since 1978. He had built up a substantial business, Rogge Global Partners PLC, specializing in fixed income investment, prior to the sale of his majority

interest in it in 1988. He continued to run the business after 1998 but reduced his commitment in 2016 to non-executive chairman, which role came to an end on 3 June, 2017.

3. The Second Claimant, who is 61 years old, is the wife of the First Claimant.

4. The First and Second Claimants have four children: Sophia, born on 7 September, 1982, who is the First Defendant; Ralph, born on 22 August, 1985, who is the Second Defendant; Stefan, born on 18 October, 1990, who has been joined as the Third Defendant; and Isabella, born on 28 May, 1992.

5. The First and Second Defendants are two of the four trustees of the Trust. The other two trustees are the First and Second Claimants. The Trust was created by a deed dated 31 March 2011 made between the First Claimant as settlor and the four trustees.

6. On 5 April, 2009 Stefan, who was then 18 years old, suffered a very serious brain injury (a traumatic external brain injury stage three) while playing polo. Stefan is unable to walk unaided as he has no balance and has problems with sight and speech as well as severe memory problems.

7. After 15 months' residential treatment in a variety of hospitals and clinics, Stefan and returned to his parents' home in London in July 2010. That property was not suitable to his needs. The First and Second Claimants sold it and purchased two contiguous flats in SW11 in September 2013. One for themselves and one for Stefan, as it was easier for Stefan to live in a flat owing to his need for a wheelchair. The First and Second Claimants moved into one of the flats in order to be available to Stefan whilst also providing him with a degree of independence.

8. In 2010 the First and Second Claimants were looking for a house to purchase in the countryside which would serve as both a retirement home for them, and a place for their children and possible future grandchildren to visit, with an area designed to meet the needs of Stefan.

9. In February 2011 the First and Second Claimants identified the property they wished to purchase: Medstead Grange, near Alton ("the Property").

10. On advice, the First Claimant created the Trust. The First Claimant settled £4.1 million into the Trust which the Trustees used to purchase the Property.

11. From the time of purchase of the Property down to 27th November 2015 the trustees spent £11,600,780 on construction and other works to the Property. From 27th November 2015 to 30th November 2016 a further £1,326,563 was spent. The funds for the expenditure down to 27th November 2015 were provided by or through the Second Claimant because the Claimants thought that by providing them in that way the payments would be more

likely to fall out of charge to Inheritance Tax ("IHT") than if they were provided by the First Claimant.

12. The claim to set aside the payments is made under the principle authoritatively expounded by the Supreme Court in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 under which the court may set aside a voluntary transaction for mistake where the transaction has been effected pursuant to a causative mistake of such gravity as to make it unconscionable for the donee to retain the property.

13. In paragraphs 14 to 16 of the Particulars of Claim the Claimants aver that the payments, at least down to some time in August to November 2015, were made on the basis of three mistakes:
    13.1. That the Gift with Reservation of Benefit Rules (the "GWROB" rules) would not apply despite the Claimants making use of the Property.
    13.2. That they did not realise that on Stefan's death an IHT charge at 40% would arise.
    13.3. That they did not realise that under the law as it stood in 2011, in the event of Stefan's death there would be an IHT charge on the value of the trust fund, but no corresponding "uplift" for Capital Gains Tax ("CGT") purposes. This effect was removed by legislation with effect from 5th December 2013. Stefan is still alive, so this mistake has had no causative effect.

14. In paragraph 19 of the Particulars of Claim the Claimants identify some additional mistakes which they aver they made in making the transfers. Those are:
    14.1. They were mistaken in failing to understand that they would only be able to occupy the property, as they intended, by entering into an arm's length rental agreement with the Trust for the remainder of their lives, such rental agreement having to cover the whole year.
    14.2. They were mistaken in failing to understand that such a rental agreement would give rise to an estimated total lifetime expenditure on their part of £3,164,650 (assuming the rent remains constant) giving rise to tax charges on the trustees (assuming that current rates remain at 45% over the first £1,000 and at 20% up to that figure), of £1,416,592.50.
    14.3. They were mistaken in failing to appreciate that payment of rent would swell even further the value of the Trust fund in favour of Stefan in a manner which is unfair to his siblings and exacerbates the IHT problem.
    14.4. They were mistaken in failing to appreciate that a method of attempting to mitigate the IHT charge (of which they were unaware) by the trustees appointing 50% of trust assets to Stefan's siblings would (a) have adverse consequences (potentially) for IHT should Stefan die within seven years of those transfers (as they would be deemed to be made by him), (b) would reduce the availability of CGT principal private residence relief on future disposals of the Property, (c) would fragment ownership of the Property, (d)

would not resolve the GWROB problem, and (e) would only partially mitigate the IHT problem.

15. In order to for them to be able to use the Property without the GWROB rules having an adverse impact, on 8th December 2016 the First and Second Defendants took a lease of the Property from the trustees with effect from 1st September 2015 at an annual rent of £102,000, subject to a 20% discount for the period down to 30th November 2016 and to future review. This rent is taxable at 45% in the hands of the trustees.

Procedure and Parties

16. The Claimants do not seek to set aside the Trust. They seek an order setting aside the transfers by them of sums into the Trust and a declaration that sums paid by the First Claimant to the trustees after 27th November 2015 are held on resulting trust for him. As their case developed, they also came to seek an order requiring the trustees to transfer the Property to them. Accordingly the claim comes within the scope of CPR 19.7A as a claim which "may be brought" "against trustees" "without adding as parties any persons who have a beneficial interest in the trust" ("the beneficiaries"). By CPR 19.7A(2) any judgment or order given or made in a claim within the rule is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings. CPR 19.7A(2) may be invoked by an interested beneficiary who can show that the trustees did not in fact represent him.

17. Initially the Part 8 Claim was supported by the following witness statements:
    17.1. A statement of the First Claimant dated 20th December 2017 with substantial exhibits.
    17.2. A statement of the Second Claimant dated 27th December 2017 with exhibits.
    17.3. A statement of Mr Anthony Broom dated 19th December 2017 with exhibits. Mr Broom is a chartered accountant and had provided accountancy advice and services to the First Claimant for many years.

18. In the bundles for the initial hearing there were also copies of:
    18.1. The property register for Flat 2, Parkgate House.
    18.2. A letter of claim to Taylor Wessing dated 23rd December 2016. Taylor Wessing was the firm which had acted for the First Claimant in relation to the creation of the Trust.
    18.3. Taylor Wessing's response dated 14th April 2017.
    18.4. Letters to HMRC dated 2nd and 14th November 2018. The 2nd November 2018 letter put HMRC on notice of the claim and asked them if they wished to be parties. The 14th November 2018 letter was a chaser.

19. Subsequently there were filed:

19.1. A statement by Ms Collings of the Claimants' solicitors dated 14th January 2019 dealing with Stefan's capacity, his joinder and the appointment of a litigation friend for him.

19.2. A Supplemental Statement of the First Claimant dated 9th January 2019.

20. At the hearing on 28th November 2018 the then Defendants (two of the four trustees of the Trust) were represented by Mr Waldegrave of counsel.

21. At some date before 28th November 2018 the Claimants and the then Defendants had signed a draft consent order. This draft consent order provided that the parties had agreed its terms and that by consent it was to be ordered as follows:

21.1. All the transfers by the First and Second Claimants (amounting to £4.1 million and £11,600,780 respectively) prior to 27 November 2015 to the Trust to be set aside on the grounds of mistake.

21.2. A declaration to be made that the sums transferred to the Trust (either by way of transfers into the Trust or by discharging liabilities of the trustees) by the First Claimant after 27 November 2015, which totalled £2,405,000, are held by the trustees on resulting trust for the First Claimant.

21.3. Within 14 days of the Order, the trustees to transfer legal title in the Property to the First and Second Claimants.

21.4. Within 14 days of the order, the First and Second Claimants to settle £10 onto a new disabled persons trust (the "New Trust") which complied with s.89 Inheritance Tax Act 1984. A draft of the New Trust was attached to the draft consent order. The "disabled person" for whose benefit the New Trust was to be made was to be Stefan. The trustees of the New Trust were to be the Second Claimant, the Defendants and Isabella.

21.5. Within 28 days of the order. The Claimants to settle into the New Trust by way of gift:

21.5.1. Flat 2, Parkgate House, SW11.

21.5.2. £850,000.

21.6. No order as to costs.

22. I was not asked to approve the trustees' agreement to the consent order. I was asked to make an order in its terms. Both counsel submitted that in order to make the order setting aside the payments, the Claimants needed to prove to the court's satisfaction that the relief sought ought to be granted.

23. Mr Conolly submitted that because rescission was not necessarily an all or nothing remedy, and the remedy awarded was fact sensitive, and permitted what was practically just, it was within the power of the court to set aside the transfers on the basis that alternative provision was made for Stefan in accordance with the terms of the draft consent order. In support of this submission Mr Conolly referred me to the decision of Master Matthews in *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch), and in particular

to his dictum at paragraph 21 as to the fact sensitive nature of rescission and the doing of what was practically just.

24. The issues in *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch), and in the cases referred to by Master Matthews at paragraph 21 of his judgment in that case were very different from the issue raised by the draft consent order in the present case. In *Bainbridge* the relevant issues were (i) whether there could be rescission of part only of a transaction on the grounds of voluntary mistake and (ii) whether, where a third party had acquired part of the property which had been voluntarily transferred to trustees, the mistaken donors, although barred from recovering against the third party, could trace and recover from the donee trustees the price paid by the third party. Master Matthews held that both those things could be done. In contrast, in the present case in substance what the draft consent order seeks to achieve is a quasi-rectification or purchase of rescission by funding the proposed New Trust, for the benefit of some or all of the beneficiaries of the Trust in exchange for the trustees' consent to rescission.

25. Point (ii) in *Bainbridge* is relevant to the analysis of what order I might make if and to the extent that there is a prima facie case for setting aside the payments made into the Trust. That is because, taking the original £4.1 million payment as an example, the payment was used to purchase the Property, so, as contemplated by the originally proposed draft consent order, in addition to setting aside the payment, I might make an order for the transfer of the Property to the Claimants.

26. I was and remain concerned that quasi-rectification or "purchase" of rescission could not be made as proposed by the draft consent order, or at least that I did not have jurisdiction to make the orders sought requiring the Claimants to settle property onto the New Trust as a condition of granting rescission. In the light of these concerns the parties modified their position by:
    26.1. Mr Conolly proposing to convert the orders as to the creation of the New Trust into undertakings by the Claimants and
    26.2. Mr Conolly submitting that the undertakings went to the unconscionability or injustice of leaving the mistaken transfers uncorrected or at least to the exercise of any discretion I might have as to whether to order rescission.

27. Mr Waldegrave stated in his skeleton argument that the parties had agreed to settle the proceedings on the terms of a draft consent order and that on that basis the then Defendants were not contesting the proceedings. Mr Waldegrave did (i) assist the court by outlining some possible arguments against the Claimants' case and (ii) explain why his clients considered that it was in the interests of the beneficiaries of the trust for the proposed consent order to be made.

28. As regards Mr Waldegrave's (i): Mr Waldegrave did not attempt to explore by way of cross-examination the doubts or ambiguities which he raised on questions of fact.

29. As regards Mr Waldegrave's (ii): the position of Stefan has been overtaken by my joinder of him and his representation by a litigation friend as explained below. As regards the Defendants themselves, Isabella, the Defendants' issue, Isabella's issue, Stefan's issue and the remoter possible beneficiaries under the Trust, Mr Waldegrave explained that the approach of the then Defendants (who were 2 of the Claimants' 4 children) was that, broadly, the probable benefits in the form of their expectations under the proposed consent order and their parents' wills in the event that the relief sought was granted were greater than the possible benefits to them if it was not. In addition, as at 23rd November 2018 the Defendants confirmed that Stefan and Isabella had been consulted about the proposals in the draft consent order and were content with them.

30. By the end of the hearing time on 28th November 2018 I had indicated various concerns as to Stefan's and Isabella's positions; as to certain aspects of the evidence; and as to the difficulty in dealing with the claim in the absence of any substantive opposition to the relief sought or challenge to the evidence. In the light of those concerns, on 28th November 2018 I made the following order:
    30.1. Adjourn the claim part heard.
    30.2. Permission to the Claimants to file and serve further evidence.
    30.3. Upon the Claimants undertaking, if practicable, to pay for advice to be given by independent counsel to Stefan and Isabella and, if after such advice was given, Stefan and Isabella consented in writing to the proposed consent order, for the provision of such consents to the court.
    30.4. Notice of the claim to be given to HMRC by 12th December 2018 in accordance with CPR 19.8A(4)(a) and (b) and that the notice be accompanied by copies of the hearing bundle and the order.
    30.5. The Defendants to have permission to make further submissions at the adjourned hearing in writing if so advised.

31. I have not seen such a written consent from Isabella. However, she was present at the hearing on 28th November 2018, and must have known from that that the claim was not bound to succeed. There is no reason for me to suppose that she was not at least offered the advice of independent counsel as per the undertaking of 28th November 2018. She has not chosen to apply to be joined. I consider Stefan's position below.

32. The adjourned hearing was listed for and took place on 15th January 2019. By then certain things had changed. In particular:
    32.1. The proposed consent order had in part been abandoned in favour of the provision of an undertaking as explained above.
    32.2. The First Claimant's supplemental statement had been filed.
    32.3. It had become apparent that Stefan lacked relevant capacity.
    32.4. An application was made to join Stefan and to have a litigation friend appointed for him.
    32.5. HMRC had been served as required by my order of 28th November 2018. HMRC had not acknowledged service, but in response to the Claimants'

solicitors' letter dated 2nd November 2018 had, by a letter dated 5th December 2018, stated that they did not wish to be joined in the mistake claim proceedings. HMRC asked that my attention be drawn to *Pitt v Holt* [2013] UKSC 26. It was. HMRC also noted that the First Claimant had said in paragraph 12 of his statement that he had "never been involved in setting up a trust before and did not know how trusts operated or the potential tax consequences involved in setting up a trust". HMRC drew attention to a decision of the FTT which they attached to their letter. The decision concerned a settlor interested trust of which the First Claimant was the settlor. The trust was a Jersey based discretionary trust called the Olaf Rogge Discretionary Trust. The decision followed a hearing on 23rd November 2011. The decision was to the effect that the First Claimant was liable as settlor for income tax on the interest paid by him to the trustees of the settlement on a loan made to him in his capacity as a beneficiary of the settlement.

33. What the First Claimant said in response to HMRC's reference to the Olaf Rogge Discretionary Trust and the FTT decision in relation to it was that the Olaf Rogge Discretionary Trust was set up in 1985 and was an offshore discretionary trust which was dissolved in 2008. He said that he and his family were discretionary beneficiaries and that the trust was set up to hold assets outside of the UK. It held (a) quoted investments and (b) cash with a combined approximate value of £3 million. He says that it was an "excluded property" trust which he understood to mean that it was outside the scope of IHT altogether and did not give rise to any of the issues which have arisen the present case. As regards the part of paragraph 12 of his earlier statement quoted above, the First Claimant said:

> "What I meant at paragraph 12 of my First Witness Statement dated 20 December 2017 is that I had never been involved in setting up a UK trust let alone a Disabled Person's Trust before and I did not know how these types of trust operated or the potential tax consequences involved."

34. Neither HMRC nor the Defendants nor any of the other persons who has known of these proceedings have chosen to challenge the Claimants' evidence by way of their own evidence or by way of cross-examination. In the absence of any such challenge, I cannot disregard the Claimants' evidence. Nor, generally, should I treat it as inaccurate. HMRC's approach in relation to paragraph 12 of the First Claimant's first statement shows that they were, in Pope's words, willing to wound and yet afraid to strike. Nevertheless, I do not find the First Claimant's response to HMRC's reference to the FTT proceedings convincing. In my judgment the First Claimant's original statement that he had "never been involved in setting up a trust before and did not know how trusts operated or the potential tax consequences involved in setting up a trust" was inaccurate. Its inclusion in his evidence indicates at best carelessness in reading and signing the witness statement which contained it; at worst a deliberate intention to mislead. The unconvincing explanation might make the latter more likely than the former, but in the absence of cross-examination I do not so find. What I do as a result is to take what is said

in the First Claimant's statements with caution; bearing in mind that those statements were prepared and made against the background of a desire to have the gifts set aside, as per these proceedings, and to recover compensation in relation to the transactions from Taylor Wessing. On the other hand, ironically, the inclusion of the inaccurate statement in the First Claimant's witness statement goes to some extent to support his case on mistake as showing that he was not a man who read documents as carefully as he might, and that he might well execute them under a mistaken belief as to their contents or effect, which a careful reading would have disabused him of.

35. By an order dated 15th January 2019 I ordered, amongst other things, that:
    35.1. Stefan be added as the Third Defendant.
    35.2. Mr John Bolsover be appointed as litigation friend to Stefan, on the footing that Stefan lacked capacity to conduct these proceedings.
    35.3. The parties inform the court in writing by 4 p.m. on 6th February 2019:
        35.3.1. As to whether the litigation friend on behalf of Stefan wished to make representations against the granting of the relief sought; and
        35.3.2. As to the terms of the proposed undertaking to the Court.

36. By a letter from the parties' solicitors dated 6th February 2019 they complied with the last-mentioned order and informed the court, amongst other things, that:
    36.1. If I were to make a finding that the transfers into the Trust between 31 March 2011 and 27 November 2015 were made by mistake and should be set aside and that the payments made by the First Claimant to the trustees from 27 November 2017 are held on resulting trust, or in the alternative constructive trust, for the First Claimant, it was proposed that the terms of the undertaking should be as follows:
        36.1.1. The First Claimant undertakes to transfer his interest in Flat 2, Parkgate House, 40 Parkgate Road, Battersea, London SW11 4JH to a new Disabled Persons Trust;
        36.1.2. The Claimants transfer £850,000 to the new Disabled Persons Trust.
    36.2. In various other alternatives as to what I might find, what undertakings were proposed should those alternatives eventuate.
    36.3. Mr Bolsover as Stefan's litigation friend (i) consented to the terms of the proposed order as originally sought; (ii) had received advice relating to the variation of the proposed undertaking and was in agreement with the variation; (iii) a copy of the 6th February 2019 letter had been sent to Mr Bolsover's legal advisers; (iv) "therefore" (wrote the parties' solicitors) the parties confirmed that Mr Bolsover did not wish to make representations against the relief sought.

37. The letter of 6th February 2019 enclosed a consent to the terms of the originally proposed consent order. I repeat that I have not been asked to approve the trustees' agreement to the consent order. Nor have I been asked to approve any consent order as a compromise involving Stefan. No attempt has been made to comply with the requirements of CPR 23.10.

38. One of the assumptions on which the alternative undertakings specified in the 6th February 2019 letter were given was that in the event that I was to find that there were some transfers or payments which should neither be set aside for mistake nor give rise to a resulting or constructive trust, then the trustees would become liable to "repay the payments made for rent under the terms of the lease". I have not been asked to set aside the lease or the payments of rent either for mistake or otherwise. It is not apparent on what ground I might make a free-standing order for the repayment of the rents. However, as explained below, I might require an allowance in respect of the rents received as part of any condition or requirement for counter-restitution which I might impose as a condition of granting rescission.

39. Appropriate undertakings by the Claimants might be relevant for the purpose of restricting the impact of any order for rescission on the recipients or third parties in terms of the proprietary or personal remedies against them which rescission would give rise to, and hence on whether I should order rescission.

40. Undertakings offered by the Claimants might also form or form part of the consideration for a bargain between the Claimants and the trustees under which, amongst other things, the trustees agreed to consent to the orders sought by the Claimants. If there was such a bargain, then the consent of the trustees to the orders for rescission might avoid the need for the court to protect the trustees and their beneficiaries by way of conditions and requirements for counter-restitution.

41. I reject the concept that the existence of the particular undertakings proposed in the present case should have a more general impact on whether or not I should order rescission. If such an impact was made by the undertakings, I consider that I would in substance be allowing rectification or something approaching it in circumstances where a case for rectification did not exist. That is something which in a case such as the present the law does not allow. The point was decided by Sir Andrew Park in *Smithson v Hamilton* [2007] EWHC 2900 (Ch) at paragraphs 61 – 80. This decision was not affected by the subsequent compromise of that case effected with the assistance of the Court of Appeal ([2008] EWCA Civ 996). At paragraph 61 Sir Andrew Park summarised his view as follows:

> "The key points which I make in this part of my judgment are the following. The nature of the mistake in rule 3.5.2.1 was such that it could only be corrected by changing the rule, as opposed to nullifying it. The only way to change the rule retrospectively was by an order of rectification. That could only be achieved if the circumstances of the case qualified for rectification, but they did not. Where the rule in Hastings-Bass applies the effect is not to change something that trustees have done, but rather to set it aside altogether. But in this case rule 3.5.2.1 needed to be changed, not set aside. The claimants seek to navigate round this obstacle by their undertaking that, if the court sets the rule aside, they will make an amendment which introduces a new rule 3.5.2.1 that does not suffer from the mistake contained in the present one.

This is rectification by the back door, and in my judgment it is not an acceptable way for the court to proceed."

The Pitt v Holt test for mistake

42. In *Pitt v Holt* [2013] UKSC 26 [2013] 2 AC 108, the Supreme Court held that the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief; that the test would normally be satisfied only when there was a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which was basic to the transaction; that a causative mistake differed from inadvertence, misprediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not as such a mistake, could lead to a false belief or assumption which the law would recognise as a mistake; that the gravity of the mistake had to be assessed by a close examination of the facts, including the circumstances of the mistake, its centrality to the transaction in question and the seriousness of its consequences, including tax consequences, for the disponor, and the court then had to make an objective evaluative judgment as to whether it would be unconscionable, or unjust, to leave the mistake uncorrected.

43. The various aspects of the test set out by Lord Walker in *Pitt v Holt* and were summarised as follows by Sir Terence Etherton C in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) at paragraph 36 as follows:

> (1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a "misprediction" relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.
>
> (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.
>
> (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.

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

The relevant terms of the Trust and the IHT effects

44. The Trust was created by a Settlement deed dated 31st March 2011 and made between the First Claimant as "the Settlor" and the First Claimant, the Second Claimant and the first two Defendants as Trustees.

45. The initial trust property was £10.

46. The Settlement contains, amongst others, recitals to the following effect:
    46.1. At the date of the Settlement the Principal Beneficiary (Stefan) was entitled to and in receipt of the highest rate of the care component of disability living allowance.
    46.2. It was intended that the Trustees would initially use the Trust Fund to purchase Medstead Grange and to carry out such repairs and alterations as were required to accommodate the needs of Stefan.
    46.3. It was anticipated that a proportion (if not all) of the property contributed by the Settlor would not be a transfer of value for IHT purposes by virtue of subsection 11(3) of the Inheritance Tax Act 1984.

47. The last of those recitals represents what, in the circumstances as they actually existed, was a substantially hopeless suggestion that the payments into the Trust might be justified as payments in favour of a dependant relative which were reasonable provision for his care or maintenance.

48. The Discretionary Beneficiaries are defined as meaning (a) the Principal Beneficiary (Stefan), (b) the children and remoter issue of Stefan; (c) the children and remoter issue of the First Claimant; (d) such other persons as may be added as a Discretionary Beneficiary under a power in that regard contained in clause 3 of the Settlement.

49. Clause 4 of Part 1 contains a wide power of appointment exercisable in favour of the Discretionary Beneficiaries in respect of capital and income. The exercise of this power is restricted by clause 5 which provides that any appointment under the clause which takes effect during Stefan's lifetime shall comply with the provisions of clause 16 and, in particular, taking account of any previous exercise of the powers contained in clauses 4 and/or 7, shall secure that not less than half of the Trust Fund which is applied during the lifetime of Stefan is applied for his benefit.

50. Clause 16 of Part 1 contains a catch all provision barring any exercise of a power or provision of the deed operating directly or indirectly so as to prevent the operation of s.89 Inheritance Tax Act 1984 from applying to the Trust during Stefan's lifetime.

51. Clause 6 of Part 1 contains a default discretionary trust of income in favour of the Discretionary Beneficiaries, subject to a power to accumulate.

52. Clause 7 of Part 1 contains a power of advancement in favour of Stefan.

53. Clause 17 of Part 1 excludes the Settlor (the First Claimant) and his spouse (the Second Claimant) or civil partner from benefit.

54. Part 2 contains various administrative provisions, including at clause 10 of Part 2, power to permit any Beneficiary to occupy, reside in or upon any real or immovable property and to have the enjoyment and use of chattels or other movable property for the time being comprised in the Trust Fund.

55. When it was created the Trust was a trust for disabled persons within the meaning of the then provisions of s.89 IHT Act 1984. The then requirements of s.89 IHT Act 1984 were that the trusts should be such that (a) during the life of a disabled person, no interest in possession in the settled property subsisted, and (b) they secured that not less than half of the settled property which was applied during his life was applied for his benefit.

56. The relevant effects from an IHT perspective of s.89 IHT Act 1984 applying to the Trust were that by s.89(2) Stefan was treated as beneficially entitled to an interest in possession in the settled property. In consequence:
    56.1. Gifts into the Trust were generally "potentially exempt transfers". In effect no IHT would be payable in respect of them if the donor survived his or her gift by 7 years.
    56.2. Payments or applications out of the Trust to or for the benefit of persons other than Stefan would be treated as gifts by him and would give rise to charges to IHT by reference to his status in relation to IHT. By that I mean that the rate of IHT payable would be measured by reference to the rate which would have been payable had Stefan himself made the transfers. This is relevant to one of the Claimants' concerns because it means that payments or applications out of the Trust for the benefit of the Claimants' children other than Stefan would be susceptible to an IHT charge if Stefan died within 7 years of the payment or application.
    56.3. On Stefan's death the then value of the Trust assets would be aggregated with Stefan's free estate for the purpose of calculating an overall rate of IHT. IHT at that rate would be chargeable on the then value of the Trust's assets. This is relevant to one of the Claimants' concerns because it means that an IHT charge at, broadly, 40% would arise on Stefan's death.

57. The conditions which a trust had to satisfy in order to qualify under s.89 IHT Act 1984 were changed by the Finance Act 2013 in respect of property transferred into a settlement on or after 8th April 2013. In respect of such property the requirement as to securing that not less than half of the settled property which was applied during the disabled person's life was applied for his benefit was replaced by a requirement that any of the settled property or its income applied during the lifetime of the disabled person should be applied for his benefit. However, this change does not apply where property is added to a settlement (such as the Trust) which was created before 8th April 2013, the trusts of which have not been altered on or after that date (paragraphs 6 and 20 of Schedule 44 to the Finance Act 2013).

Other tax background

58. At a very elementary level, broadly IHT is charged, subject to various exceptions and exemptions, in the following circumstances:
    58.1. On a person's death IHT is charged at 40% on the value of his estate over and above the amount then available as part of his or her "zero rate band". Currently the zero rate band is £325,000. However, subject to tapering provisions, the value of gifts made during the last 7 year's of a person's life may use up all or part of the zero rate band.
    58.2. Lifetime gifts by individuals to another individual or into a s.89 IHT Act 1984 disabled persons trust or into a "bereaved minor's trust" are "potentially exempt transfers". Other lifetime gifts are chargeable at 20%, unless made within 7 years before the donor's death.
    58.3. The broad effect of a gift being a potentially exempt transfer is that if the donor survives the gift by 7 years, it will be wholly exempt from IHT. If the donor dies within three years of the gift, IHT will be chargeable (subject to the application of the zero rate band) at the full 40%. If the donor dies between 4 and 7 years after the gift, the rate of IHT applicable will range from 32% down to 8%.

59. The GWROB rules were put as being central to the case based on mistake. I focus on them as they existed in 2010 to 2011, though so far as this case is concerned they were no less stringent in subsequent years. The GWROB rules are contained in ss.102 - 107 Finance Act 1986 as supplemented by Schedule 20 to that Act and regulations.

60. Under s.102(1) Finance Act 1986, the rules apply where an individual disposes of any property by way of gift after 17 March 1986 and: (a) possession and enjoyment of the property is not bona fide assumed by the donee at or before the beginning of "the relevant period", or (b) at any time during "the relevant period" the property is not enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor (limb 1) and of any benefit to him by contract or otherwise (limb 2).

61. *"The relevant period"* means a period ending at the donor's death and beginning seven years before the death or, if it is later, on the date of the gift. Under s.102(2) property within subs.(1)(*a*) or (*b*) is referred to as "property subject to a reservation". Whether there is any such property has to be decided by looking back from the donor's death to the beginning of "the relevant period".

62. When there is a reservation of benefit in gifted property at the date of death, that property is treated for IHT purposes as property to which the donor was beneficially entitled at his death. Where the reservation ceases at any time during the donor's life, he is treated as making a potentially exempt transfer at that time.

63. There is no "safe period" after which benefits can be taken in gifted property. The example given in Dymond's Capital Taxes at 5A-201 is that a gift might have been made in 1987 and the donor wholly excluded from all benefit until 2015 (when he resumed the occupation of—say—a gifted house). On these facts if the donor were to die in 2016 the conditions of s.102(3) would be met and the property would be taxed as part of his estate. The fact that the donor survived seven years from the date of the gift would be irrelevant: for reservation of benefit purposes the question of whether there is a reserved benefit is judged in the seven years prior to the donor's death.

64. Paragraphs 2 and 5 of Schedule 20 to the Finance Act 1986 essentially provide that in the circumstances of the present case the property which represented the gifts of money made by the Claimants was itself property in respect of which a reservation of benefit to the Claimants might exist.

65. So, in the present case, if the Claimants' use or occupation of the property which was purchased by the Trust with the money gifted by them to the Trust amounted to a reservation of benefit within 7 years before their deaths; IHT would be charged on the Claimants' deaths as if they owned the property.

66. By paragraph 6 of Schedule 20 to the Finance Act 1986, in determining whether any property which is disposed of by way of gift is enjoyed to the entire exclusion, or virtually to the entire exclusion, of the donor and of any benefit to him by contract or otherwise, in the case of property which is an interest in land or a chattel, retention or assumption by the donor of actual occupation of the land or actual enjoyment of an incorporeal right over the land, or actual possession of the chattel shall be disregarded if it is for full consideration in money or money's worth.

67. So, in the present case the Claimants entered into the lease of the property so as to avoid their occupation or enjoyment of its constituting a reservation of benefit.

The creation of the Trust; its funding and the alleged mistakes

68. I have already summarised the background.

69. After Stefan's accident the Claimants were concerned as to how his needs might be met after the Claimants were no longer around to assist him.

70. In July 2009 the First Claimant's accountant, Mr Broom, advised that the appropriate vehicle for making provision for Stefan was a "Disabled Trust". In an email dated 31st July 2009 to the First Defendant, Mr Broom explained, amongst other things, that sums paid into a Disabled Trust would be treated as a potentially exempt transfer ("a PET") for IHT purposes, "so that no IHT would be paid provided the Donor survives 7 years from the date of the gift". Mr Broom advised that the field of Disabled Trusts was a narrow specialised area. He suggested using the firm of Wrigleys LLP in Sheffield.

71. At that time the First Claimant was still hoping that Stefan would make a full recovery and he did not contact Wrigleys.

72. In or around May 2010 the First Claimant was introduced by one of his corporate lawyers at Taylor Wessing LLP to Mr Mark Buzzoni of that firm, with a view to obtaining advice on his will and estate planning in the light of Stefan's accident. One of the First Claimant's concerns was that he and the Second Claimant should transmit their wealth to their children in a tax efficient manner.

73. At a meeting between the First Claimant and Mr Buzzoni on or about 17th May 2010, the First Claimant indicated that he had in mind that Stefan might get about 40% of his wealth, with his other three children getting 20% each. Mr Buzzoni floated the idea of establishing a disabled trust for Stefan, with a view "either to organising that the transfer was exempt or a PET". The quoted words come from Mr Buzzoni's attendance note of the meeting. At that time there was no question of the acquisition of a residential property.

74. In around mid-2010 the First Claimant and the SCL resumed their search for a country house. They found Medstead Grange. Its site lent itself to building an entirely new house which could be designed to meet Stefan's needs as well as the Claimants and those of the family as a whole. The intention was to develop the property into a substantial family home which all family members could stay in, but that a wing be specially designed to cater for Stefan's needs.

75. It was always the Claimants' intention that the property would not be for Stefan's exclusive use, but for the family as a whole to enjoy. This intention is expanded upon by the Second Claimant in her statement. In particular she says:

    75.1. She and the First Claimant intended to develop the property by building an entirely new family home on the site which all family members could stay in, but with a wing specially adapted for Stefan's needs.

75.2. The property offered her husband and her the ability to create a home suited to their long-planned retirement needs, which could also allow them to involve Stefan in family life as closely as possible.

75.3. It was always the Claimants' intention that they would spend an increasing amount of time at the property as the First Claimant eased into retirement, and that the property would be available to the family as a whole to enjoy, including grandchildren as they came along, and also for Stefan's and other family friends to visit.

75.4. It was never the Claimants' intention that the property would be for Stefan's exclusive use.

75.5. In fact it remains "obvious" now as it was in 2010 that most of Stefan's time would be spent in London close to all the best care facilities, which he continues to need.

76. The Claimants say that it was made clear to Mr Buzzoni that they intended to spend a considerable amount of time at the property, increasing as the First Claimant wound down into full retirement.

77. In contrast in Taylor Wessing's letter to the parties' solicitors dated 12th April 2017, which was written in answer to a letter of claim, it is said that Mr Buzzoni's understanding at the time his initial advice was given in 2010 was that the house that was to be purchased outside of London was intended to be a home for Stefan but that the Claimants would spend some time there, so that they and in particular the Second Claimant could assist with Stefan's care. Mr Buzzoni believed that the Claimants would continue to live in their London property as their principal residence and would spend most of their time there. Mr Buzzoni's position is that it was only after Medstead Grange was purchased and renovated that it became clear that the Claimants would spend significant time in the country and would derive a substantial benefit from being at the property and that the GWROB rules would therefore almost certainly apply.

78. The First Claimant says that Mr Buzzoni advised that the property not be acquired by the Claimants as they had intended, but by a trust. The evidence does not explain exactly when this advice was given, and there does not appear to be a document recording it, though subsequent documents emanating from Mr Buzzoni make it clear that he had in mind that the property would be acquired by a trust.

79. By a memorandum from Mr Marsh of Taylor Wessing to Mr Buzzoni dated 28th January 2011, Mr Marsh reported to Mr Buzzoni a "few points arising out of the lunch" he had with the First Claimant on 27th January 2011. The memorandum refers to the prospective purchase by the First Claimant of a property of about 150 acres near Petersfield for £4m. The memorandum records that the house was being bought "primarily as a place for Stefan". In his Supplemental Statement the First Claimant says that this was incorrect. He says that neither the house near Petersfield (which was not bought) nor Medstead Grange were bought primarily for Stefan's use.

80. Mr Marsh's memorandum also states that the First Claimant "basically wanted Stefan to have this property". The First Claimant says that he did not wish Stefan to have the whole interest in the property, either directly, or through a trust, which (says the First Claimant) would have been excessive.

81. On 31st January or 1st February 2011 the First Claimant met with Mr Buzzoni. In their Defence to the professional negligence claim Taylor Wessing allege that at this meeting the gist of the instructions and advice given included:
    81.1. An instruction that the property was to be purchased for Stefan's benefit, although it was important that it should be adapted so that friends and family could visit.
    81.2. The Claimants would want to visit the property so that they (and in particular the Second Claimant) could care for Stefan, but they would continue to reside in London.
    81.3. Mr Buzzoni said that there was a strong argument that if the First Claimant occupied the property on an occasional basis only to look after Stefan, then Stefan would enjoy the property to the exclusion or virtually to the exclusion of the First Claimant as transferor for the purposes of the GWROB regime.

82. After this meeting Mr Buzzoni sent the First Claimant an email dated 1st February 2011. The important part of this for present purposes was Mr Buzzoni's point 2, as to which he said:
    "Even though you and your wife will not need to be beneficiaries of the trust we are going to need to show that there is an agreement with the trustees that you are entitled to be at the property in order to care for Stefan. Although this agreement is going to need some careful thought, I think it should be possible to show that you are not "reserving a benefit" providing that you use the property only to care for him".

83. Mr Buzzoni's idea that the Claimants would only occupy the property as Stefan's carers ("the carer idea") might have worked to avoid the GWROB rules for IHT in a particular case, but in reality it was never going to work in the circumstances of Medstead Grange and the Claimants' intended use of it as now stated by them. The property and the Claimants intended use of it was inconsistent with the carer idea.

84. The First Claimant says that he cannot recall giving any thought to the point raised by Mr Buzzoni's point 2 and that he did not specifically respond to it. The First Claimant thinks that it is likely that because Mr Buzzoni thought the "reserving a benefit" problem could be overcome, he (the First Claimant) had no reason to pursue the matter further.

85. On 7th March 2011 Mr Buzzoni's secretary sent an email on his behalf to the First Claimant. This email explained that the usual 20% IHT entry charge for a gift into trust might be avoided "if the trust complies with certain rules". Those were the rules concerning disabled trusts. This email contained the sentence:

"The trust will clearly be intended to provide a home for Stefan and will provide that during Stefan's lifetime, not less than half of any distributions from the trust must be made to Stefan or for his benefit …"

86. It is debateable whether it was even literally correct that the trust was to provide a home for Stefan, as opposed to somewhere he might go when he was not in London. Be that as it may, the possible implication that the trust and therefore the property was only to be used to provide a home for Stefan was contrary to what the Claimants state were their intentions.

87. On 17th March 2011 Mr Buzzoni sent the First Claimant a letter of advice enclosing a draft settlement deed. The Claimants say that it was in reliance on this letter and the email of 7 March 2011 that they and the Defendants signed the Trust Deed on 31st March 2011.

88. The 17th March 2011 letter explained, amongst other things, that:
    88.1. The express power to add beneficiaries could not be exercised in favour of the Claimants.
    88.2. Although the Trust did not give Stefan any immediate right to income or capital, there was an express power which allowed any beneficiary to be given a right to occupy a property owned by the Trust. It provided:
        "The Trustees shall have power to permit any Beneficiary to occupy, or reside in or upon, any real or immovable property, or to have the enjoyment and use of chattels or other movable property for the time being comprised in the Trust Fund, on such terms as to payment of rent, rates, taxes and other expenses and outgoings and as to insurance, repair and decoration, and generally upon such terms as the Trustees think fit."
    88.3. That express power would be utilised once Medstead Grange had been purchased.
    88.4. The funds put into the Trust would not be subject to the upfront 20% charge which would ordinarily apply in relation to gifts made into a settlement, nor to subsequent 10-yearly charges. Two different reliefs might apply so as to cause that effect:
        88.4.1. Gifts for the care and maintenance of a dependant.
        88.4.2. Gifts into a disabled trust, which would be PETs.
    88.5. The assets of the Trust would be considered to form part of Stefan's estate upon his death.
    88.6. In order that the money being settled was not inadvertently brought back into First Claimant's own estate for IHT purposes, it was "important that careful consideration was given to the way in which you use Medstead Grange".
    88.7. The Claimants were both excluded from being beneficiaries of the Trust. The relevant clause provided:

"No discretion or power conferred on the Trustees or any other person by this Deed or by law shall be exercised, and no provision of this Deed shall operate directly or indirectly so as to cause or permit any part of the capital or income of the Trust Fund to become in any way payable to or applicable for the benefit of the Settlor or any person who shall previously have added property to the Trust Fund or the spouse or civil partner for the time being of the Settlor of any such person."

88.8. "Since Stefan will be living in Medstead Grange" if, in future, the decision was taken to sell Medstead Grange, then the Trustees would be able to use the Principal Private Residence Exception from CGT.

88.9. If the Claimants' use of the property constituted a "reservation of benefit", the effect would be that the gifts would be treated as still being in the First Claimant's estate.

88.10. On the occasions when the Claimants were staying for the purpose of acting as Stefan's carer it was less likely that a claim for "gift with reservation" could be made.

88.11. There could be no certainty that the "gift with reservation" rules could be avoided, but in order to minimise the risk of them applying, Mr Buzzoni would advise the First Claimant to enter into an arms length agreement with the Trustees which provided that he would pay a market rent for his deemed "use" of the property when staying overnight and not in the capacity of Stefan's carer.

89. Taylor Wessing's Defence to the professional negligence claim; Mr Buzzoni's emails of 1st February and 7th March 2011; and his letter of 17th March 2011, all indicate that Mr Buzzoni may well have had the beliefs as to the Claimants' intended use of the property as stated in Taylor Wessing's letter of 12th April 2017. On a careful perusal of those documents with the benefit of hindsight they can also be read as indicating that the Claimants knew or should have known that those were Mr Buzzoni's beliefs and that his advice was given on the basis of a false belief as to their intentions in respect of the property. If so, a possible consequence would be that the Claimants were not mistaken, but took a risk as to the tax consequences of the arrangements, because they knew or should have known that the advice on which their beliefs as to the tax consequences was based was itself based on a false premise as to the intended use of the property and hence was unreliable. In this context the "close examination of the facts" which Lord Walker identified has to be made with reference to whether there was (1) a causative mistake, including forgetfulness, inadvertence or ignorance which lead to a false belief or assumption which the law would recognise as a mistake or (2) mere inadvertence, misprediction or ignorance; bearing in mind that a mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.

90. The Claimants have not been cross-examined as to their intentions. Taylor Wessing's Defence to the professional negligence claim, Mr Buzzoni's emails of 1st February and 7th March 2011 and his letter of 17th March 2011 all tend to show that the Claimants intentions were that the property should be Stefan's home and that the Claimants' visits should only be occasional and, at least in the case of the Second Claimant, for the purpose of caring for Stefan. However , Mr Buzzoni and Mr Marsh have not given evidence in the proceedings before me, let alone been cross-examined. On the evidence and material before me there is ample scope for finding that neither the Claimants nor Mr Buzzoni or Mr Marsh are substantially incorrect in what they say, but that there was a misunderstanding between them as to the nature of the Claimants' intentions in respect of the property. I so find. I accept the Claimants' evidence as to their intentions in respect of the property. It is corroborated by the nature and cost of the property itself and that of the property near Petersfield considered earlier. A property of the size and value of Medstead Grange, with or without alterations, would have been unsuitable for use as a home for Stefan alone. The First Claimant says so in his supplemental statement. That is supported by the documentary evidence:
    90.1. The estate agent's Sale Particulars make it clear that the property was being sold effectively as a site for the construction of a grand new house.
    90.2. The Particulars state:
        > "Planning permission for a 15,643 sq.ft classically designed new country house with grand hall, 6 reception rooms, 8 bedroom suites, games room, billiard room, indoor swimming pool. In all about 148 acres"

91. My acceptance of the Claimants' evidence as to their intentions in respect of the property in the period leading up to execution of the Trust in 2011 is not necessarily inconsistent with Mr Buzzoni's and Mr Marsh's contrary understandings as to the Claimants' intentions at that time. Mr Buzzoni and Mr Marsh may simply have misunderstood what the Claimants' intentions were, whether by reason of a failure by the Claimants sufficiently or clearly to have articulated them or otherwise.

92. As regards the advice in the 17th March 2011 letter that the assets of the Trust would be considered to form part of Stefan's estate upon his death: the First Claimant says in his first statement that he was not advised that this would give rise to an IHT charge on Stefan's death. The First Claimant says that he "did not understand that this charge would apply." This negative way of putting the First Claimant's belief, in contrast to a positive "I believed or assumed that this would not give rise to an IHT charge on Stefan's death", would not give rise to a mistake within the rule in *Pitt v Holt*. It would indicate "mere ignorance" rather than ignorance giving rise to a conscious belief or tacit assumption.

93. The Second Claimant relied on what she was told by the First Claimant in relation to the creation and funding of the Trust. She says she understood that the Trust would be a "tax efficient way to deal with our Estate to benefit our children in the future." In my

judgment that does not take the question of belief in respect of IHT on Stefan's death any further forward because there are so many "ifs and buts" in that regard that in some circumstances the arrangement could have been described as tax efficient. In others not. At paragraph 25 of her statement the Second Claimant says in respect of the time after she says she became aware of the application of the GWROB rules that it came "as a great surprise" when the First Claimant informed her that there would be IHT to pay on Stefan's death." A tacit assumption that no IHT would be payable on Stefan's death might be inferred from that; but in my judgment the possibility of drawing that inference is removed by the next sentence of the Second Claimant's statement where she says: "I had understood from my husband, in reliance upon the advice provided by Mr Buzzoni, that the setting up of the Trust would mean that there would be no IHT or other tax liabilities. Then in paragraph 27 of the Second Claimant's statement she says:

> "My husband and I were disturbed greatly by the suggestion that IHT would be payable on Stefan's death as his life expectancy was uncertain. Whilst I had understood from my husband that any money he and I put into the trust could be subject to IHT on our deaths within seven years, it was never suggested to me, and certainly never occurred to me, that if Stefan died within this period there could be an extra 40% liability…"

94. At paragraph 30.1 of her statement the Second Claimant says that she "mistakenly did not appreciate that when I made transfers into the Trust there would be IHT to pay if Stefan died." In my judgment this statement and that quoted from paragraph 27 of the Second Claimant's statement show, and I find, that her evidence, like that of her husband's, and contrary to such inference as might otherwise be drawn from paragraph 25 of her statement, is to the negative effect that she neither was positively mistaken, nor made a tacit assumption as to there being no IHT payable on Stefan's death.

95. In my judgment the position in that regard is not changed, but overall is confirmed by the other references which are made to this point in the evidence. Thus:

95.1. At paragraph 35 of the First Claimant's first statement he says that he did understand that 50% of the trust fund was ring-fenced for Stefan, but "because I did not understand the IHT consequences of the Trust, I did not consider the consequences of 50% of the trust being appointed for Stefan's siblings, in order to mitigate the potential IHT liability on his death".

95.2. In paragraph 45 of his first statement the First Claimant is a bit more ambiguous. He refers to a statement made by him in an email dated 6th August 2015 where he said: "After 7 years I thought everything would be tax free!". The First Claimant says in paragraph 45 of his first statement that by that he meant that he "was under the impression that there would be no further IHT consequences to the Trust". He says that he had been led to believe that the whole arrangement was efficient in terms of IHT. He says that it "was clearly not tax efficient, particularly given Stefan's precarious state of health, and I would not have agreed to the Trust being set up had I known about this IHT consequence." That can be read as an indication that the First Claimant thought there would be no IHT payable on Stefan's

death. He goes on to say (in the same paragraph) that "it had never occurred to [him] that there could be a tax charge on Stefan's death as [he] had not been warned before the Trust was set up". In my judgment what is said in paragraph 45 of the First Claimant's first statement is consistent with either a tacit assumption or mere ignorance.

95.3. In paragraph 47 of his first statement the First Claimant says: "… it was not obvious to me as a lay person that a result of placing assets into the Trust Fund would be that Stefan would be deemed to be entitled on his death to the entirety of the Trust Fund, giving rise to a 40% IHT charge on the value of that fund." In my judgment this indicates a lack of thought, conscious or otherwise as to the position on Stefan's death at the time that the arrangements were entered into.

95.4. The First Claimant's "Summary of Mistakes" in paragraph 57 of his first statement is entirely couched in the negative form of "I did not appreciate …"

95.5. At paragraph 14 of his Supplemental statement the First Claimant says that his understanding in 2011 of the tax position was quite simple. He says that his then understanding of the position with IHT was "that there would be none to pay providing my wife and I survived for 7 years following making the transfers into the trust." That was true insofar as the setting up and constitution of the Trust was concerned. It really does not address the position on Stefan's death, and I do not accept that the Claimants can have believed that by putting the funds into the Trust those funds would be insulated against IHT for ever more whatever was done with them.

96. As regards the advice in respect of the possibility that there was a gift with reservation, the First Claimant says that the advice "was highly unclear in this regard". The First Claimant quoted the relevant passage of the 17th March 2011 letter in his first statement and then expressed the view that, on re-reading it, it was extremely unclear to him exactly what it stated. The lack of clarity is debateable, but if the advice on a particular point was unclear to the First Claimant, as he says, but he went ahead nevertheless, in my judgment the First Claimant would have been deliberately running a risk or must be taken to have run the risk of being wrong as to that point. If the advice was unclear to him, then in order to avoid a risk as to the point at which the advice was aimed the First Claimant should have sought clarification of the point, rather than going ahead without knowing what the position was.

97. My conclusion at the end of the immediately foregoing paragraph based on the First Claimant's general complaint about the alleged lack of clarity in the advice given to him is potentially fatal to the Claimants' case based on mistake. Similarly, if and insofar as it was or should have been apparent to the First Claimant that Mr Buzzoni's advice was based on a misunderstanding as to the Claimants' intentions in respect of the property. If and so far as the First Claimant realised that Mr Buzzoni's advice was based on a false assumption as to the Claimants' intentions, the First Claimant would not have been mistaken in relying on that advice, but would have knowingly taken the risk that the advice was incorrect because of its false foundations. However, those potential fatalities

to the Claimants case are partly avoided by an examination of the detail of what was advised and what the Claimants consequently thought would be the position under the Trust proposal.

98. In his first statement the First Claimant particularises his criticisms of the advice in terms which in my view show that he was mistaken and not taking a risk in relation to at least one aspect of the proposal. The First Claimant's particularisation and my views on its impact on the case for mistake are as follows:

98.1. The First Claimant complains that the 17th March 2011 letter was unclear as to whether the GWROB rules would apply at all. I agree, but in my view the letter does make it clear that there was a risk that the GWROB rules would apply.

98.2. The First Claimant complains that the letter "reiterates the point that had been made in the 1 February 2011 email" as to his and the Second Claimant acting as "carer" for Stefan. The First Claimant says that neither he nor the Second Claimant were carers for Stefan in the ordinary sense of the word as professional carers. The First Claimant says that his current understanding is that the notion that the Claimants could avoid the application of the GWROB rules by virtue of being "carers" had no prospect of success. In the circumstances I agree. However in my view the fact that the Claimants knew they were not carers meant that so far as they were concerned the advice was at least unclear as to how the carer idea would work, and that they took the risk that it might not.

98.3. The First Claimant complains that the letter appears to indicate that if the GWROB rules did apply, and necessitate rental payments, that would only be for days which the First Claimant spent there. I agree. In my judgment the letter is clear on this point. The advice was that in order to minimise the risk of the GWROB rules applying the First Claimant should enter into an arms length agreement with the trustees which provided that he would pay a market rent for his deemed use of the property when staying there overnight otherwise than in the capacity of Stefan's carer. This advice was incorrect. Not only were the Claimants not going to occupy the property as Stefan's carers, but in order to avoid the application of the GWROB rules the rent would have had to be paid by reference to the whole period of the Claimants' occupation and use of the property, including the times when they were not physically present at the property. In my judgment this advice did give rise to a relevant mistake in the First Claimant. The advice was as to the minimising of risk, but the proposal in that regard as to paying rent by reference to when the Claimants were physically present at the property would not minimise or avoid the risk. The advice was incorrect, whether or not the property was intended to be Stefan's home and whether or not the Claimants intended to spend a substantial amount of time at the property. Accordingly the Claimants mistaken reliance on this advice is not susceptible to being changed into a knowing taking of a risk by reason of their knowing about Mr Buzzoni's false assumptions as to their intentions for the property. Accordingly the Claimants were mistaken in thinking that they could have minimised the risk of the GWROB rules applying by paying for their enjoyment of the property

only in respect of the periods when they were present at the property otherwise that in their roles as Stefan's care

98.4. The First Claimant complains that the letter did not state that the rental agreement would, in order to be effective in avoiding the GWROB rules, have to stay in place for the joint lives of the Claimants. In my judgment this complaint is only partly correct. The rental agreement would only have had to stay in place for so long as the Claimants wished to occupy or make use of the property. If that was for the whole of their lives then the rental agreement would have to be in place for the whole of their lives. If after, say, 10 years, the Claimants did not wish to and did not use the property at all (for example because they had emigrated), there would be no need for there to be a rental agreement in place in order to avoid the application of the GWROB rules. I consider that this did not constitute a mistake, or at least not separately from the mistake mentioned in the immediately foregoing sub-paragraph.

98.5. The First Claimant complains that the letter did not state that the trust fund would be charged at 40% IHT in the event of Stefan's death. It does not say so in so many words; but it does say that the assets of the Trust would be considered to form part of Stefan's estate upon his death. From that it might be deduced that IHT would be payable on them on Stefan's death. However, the First Claimant did not make that deduction. It was submitted by Mr Conolly that the First Claimant proceeded on the conscious assumption or mistaken belief that there would be no such IHT charge. It was submitted that although on analysis there was no advice to that effect, nevertheless, perhaps carelessly, the First Claimant thought that there was and that that would be the position. Carelessness does not prevent a mistake from being within the scope of the rule in *Pitt v* Holt. However, as explained above, in my judgment the negative way in which the First Claimant explains his belief in this regard, in contrast to a positive "I believed that this would not give rise to an IHT charge on Stefan's death", means that on the evidence there was not a mistaken belief or tacit assumption on this point within the rule in *Pitt v Holt*.

99. At the end of the paragraph of his first statement in which the First Claimant makes the above complaints, he says with reference to the 17th March 2011 letter and those complaints: "Had it contained this information I would not have agreed to the proposal." It is unclear as a matter of grammar whether the First Claimant is referring only to the last of the matters referred to (IHT on Stefan's death) or to all of them or to any one of them. In order for the rule in *Pitt v Holt* to apply a mistake must be causative of the transaction. Having regard to the Claimants' intended use of the property and the very substantial impact of their having to pay a full market rent to be able to enjoy the property and avoid the GWROB rules, I would have inferred that had the Claimants not been mistaken as to the need to pay a full market rent, they would not have agreed to the Trust proposal. That inference is unnecessary because later in his statement the First Claimant says expressly that the fact that he and his wife face a lifetime expenditure of in excess of £3m in rent in order to live in a home financed by them, giving rise to very significant tax charges on the Trust is also to his mind "a separate and decisive objection to this course of action". The

"course of action" referred to is the settling of substantial amounts of money into the Trust.

100. The First Claimant makes essentially the same point in paragraphs 12 - 15 of his supplemental statement where, under the heading "My understanding in February/March 2011". At paragraph 12 he referred to Mr Buzzoni's point 2 of his email of 1st February 2011 as to an agreement being needed between the trustees and the Claimants that the Claimants would be entitled to be at the property in order to care for Stefan. The First Claimant says that he does not remember this point being raised by Mr Buzzoni at the meeting on 1st February 2011. The First Claimant says that had Mr Buzzoni mentioned paying market rent at the meeting he "would not have proceeded along this line".

101. At paragraph 13 of his supplemental statement the First Claimant says that he "would have read" the 17th March 2011 letter, but that he does not have a specific recollection of his reaction to its contents at the time it was received. He says that his understanding was that Taylor Wessing, who were his trusted lawyers of long standing were recommending that a Disabled Persons Trust should be set up and he relied upon their advice.

102. At paragraph 15 of his Supplemental statement the First Claimant says:
"… I understood that an agreement had to be put in place to avoid problems but I did not consider this matter any further but relied upon their [Taylor Wessing's] advice. I never understood the GWROB issues and the fact that my wife and I would have to pay full market rent to occupy Medstead Grange for the rest of our lives, a property which we had purchased. If I had understood this I would never have agreed to Medstead Grange being transferred into the trust. As I have already said I had no objection to a trust being set up for Stefan."

103. The Settlement Deed creating the Trust was executed on 31st March 2011. The initial Trust Fund was £10, but on the same day the First Claimant settled £4.1 million into the Trust. The Trustees then exchanged contracts for and purchased the property simultaneously on 1st April 2011 for a consideration of £4.1 million.

104. What the Particulars of Claim, the Claimants' evidence and Mr Conolly's skeleton and submissions only touched upon was the fundamental question of how, leaving aside GWROB rules and other tax considerations, it was contemplated that the Claimants could have enjoyed rights to occupy the property. The Claimants were expressly excluded from benefit under the Trust. Stefan could have been permitted to occupy the property, but not with a view to allowing the Claimants to enjoy a benefit from his occupation. The nature of the property was such that it was intended to be occupied and used substantially, as to at least the greater part of it by the Claimants for their own benefit. I have already said that I accept the Claimants' evidence as to their intentions in respect of the property and have referred to the estate agent's Sale Particulars. The practical position is explained by the Second Claimant in her statement where she says at paragraphs 15 and 16:

"15. … We intended to develop the property by building an entirely new family home on the site, which all family members could stay in, but with a wing specifically adapted to cater for Stefan's needs, and a lift to allow Stefan access to all parts of the house. Having been forced to move from Upper Phillimore Gardens to a London property better suited to Stefan's immediate needs, Medstead Grange offered my husband and I the ability to create a home suited to our long-planned retirement needs, which could also allow us to involve Stefan in family life as closely as possible.

16. It was always our intention that my husband and I would spend an increasing amount of time at the property as he eased into retirement, and that the property would be available to the family as a whole to enjoy, including grandchildren as they came along, and also for Stefan's friends and other family friends to visit. It was never the intention of my husband and myself that the property would be for Stefan's exclusive use as I understand from my husband that TW [Taylor Wessing] seem to suggest. In fact it remains obvious now as it was in 2010 that most of Stefan's time would be spent in London close to the best care facilities, which he continues to need."

105. I fully accept that evidence of the Second Claimant.

106. In the course of argument I suggested to Mr Conolly that the Claimants were mistaken in thinking that when they enjoyed the property otherwise than in their capacities as Stefan's carers they could have done so without paying for that enjoyment, and that in itself, leaving aside the possible GWROB consequences of their occupying the property, constituted a serious mistake. Mr Conolly agreed. In my judgment, subject possibly to two points, that was the position. As I have just explained, the Claimants were expressly excluded from benefit under the Trust. Stefan could have been permitted to occupy the property, but not with a view to allowing the Claimants to enjoy a benefit from his occupation. The nature of the property was such that it was intended to be and was used substantially and as to far the greater part of it by the Claimants for their own benefit.

107. The first of the possible two points is that part of an email dated 5th February 2016 from Mr Broom to Mr Buzzoni, copied to the First Claimant, might be taken as showing that the First Claimant was not mistaken about the ability of the Claimants to enjoy the property without paying for it. In that Mr Broom says, amongst other things:

"Olaf's [the First Claimant's] original understanding was that whilst he could not benefit from the Trust *Kristina was to be able to benefit*, but all along Medstead was to be their "country retreat" but not their "principal residence" for CGT."

108. In my judgment that statement is not inconsistent with (i) the First Claimant's belief as to his possibly needing to have to pay for his occupation of the property being only for the purpose of minimising the GWROB rules and (ii) as to his belief or tacit assumption that he would not have to pay for that occupation for other reasons.

109. The second of the possible "two points" is whether the Claimants knew or took a risk as to whether they would have to pay for their use of the property even in respect of times when they were not there. As regards the First Claimant: his understanding at the time of the purchase of the Property was, at most, as explained above, that if the GWROB rules did apply, and necessitate rental payments, that would only be for days which the Claimants actually spent there. The advice he had received was that in order to minimise the risk of the GWROB rules applying the First Claimant should enter into an arms length agreement with the trustees which provided that he would pay a market rent for his deemed use of the property when staying there overnight otherwise than in the capacity of Stefan's carer. This advice was not only incorrect so far as the GWROB rules were concerned, but also was incorrect as regards the underlying law of trusts and property. As regards the Second Claimant: it appears from her statement that until mid-January 2015 she did not think that any rent would need to be paid in respect of the Claimants' occupation of the property.

110. Mr Buzzoni's letter dated 17th March 2011 states under the heading "Capital Gains Tax and Income Tax" that "You [the First Claimant] and Katerina [the Second Claimant] are both excluded from being beneficiaries of the settlement so that any income and gains of the settlement are assessed on the Trustees of the Settlement, rather than on you personally." That advice was given in the context of possible the CGT and income tax liabilities, it does not advise clearly that the Claimants could not occupy or benefit from the property at all, otherwise than on fully commercial terms.

111. I infer from (i) the belief that the Claimants had (in the case of the Second Claimant, through the First Claimant) that in order to minimise the risk of the GWROB rules applying the First Claimant should enter into an arms length agreement with the trustees which provided that he would pay a market rent for his deemed use of the property when staying there overnight otherwise than in the capacity of Stefan's carer and (ii) the absence of any clear advice about the impact of the exclusion of settlor from benefit provision in the Settlement so far as the use and enjoyment of the property was concerned, that the Claimants mistakenly believed that otherwise than for the purpose of minimising the GWROB rules, they would not have to pay for their occupation of the property.

112. The time that the Claimants intended to spend at the property and the things they intended to do there were inconsistent with the bulk of their occupation being explicable under the carer theory. The property was clearly intended and in the event has been built and maintained substantially for the benefit of the Claimants. At times when the Claimants would not be at the property, substantial parts of it would be available for and be being maintained primarily for their use. It would not have made sense for the Claimants to have entered into the Settlement and acquire the property through the Settlement if they had thought that, tax considerations aside, they would have to pay substantial sums in the way of rent to make use of it.

113. It follows that in my judgment, at the time of the creation of the Trust, the payment into the Trust of the first 4.1 million by the First Claimant and the purchase of the property, the Claimants were mistaken in the two respects I have adverted to:

113.1. In thinking that otherwise than for the purpose of minimising the GWROB rules, they would not have to pay for their occupation of the property.

113.2. In thinking that they could have minimised the risk of the GWROB rules applying by paying for their enjoyment of the property only in respect of the periods when they were present at the property otherwise that in their roles as Stefan's carers.

114. In my judgment those were distinct mistakes or tacit assumptions as distinguished from mere ignorance or inadvertence.

115. In my judgment those mistakes were also causative within the meaning of the rule in *Pitt v Holt*. It is clear on the First Claimant's evidence and not in the least surprising that had the Claimants known that they would have to pay a full market rent in order for them to be able to use the property and avoid the GWROB rules, the First Claimant would not have settled the £4.1 million onto the Trust for the purchase of the property and the Second Claimant would not have given £8million or more to the trustees to spend on improving the property.

116. In my judgment those mistakes were sufficiently grave as to make it unconscionable, absent a relevant change of circumstances, for the recipient (the Trustees and the beneficiaries and potential beneficiaries of the Trust) to retain the gift of the £4.1 million. The mistake had a very serious impact on the Claimants. It is only necessary in that regard to contrast very briefly the situation they thought they were creating, with that which eventuated to see the grave nature of the mistakes. The Claimants thought they were acquiring the property through the Trust and would be able to use it themselves, though possibly paying a rent by reference to the days when they were physically present at the property. In the event, in order to be able to use the property and avoid the GWROB rules they had to take a lease of the property from the Trustees at a rent of £102,000, subject to a 20% discount for the period down to 30th November 2016 and to future review. This rent is taxable at 45% in the hands of the trustees.

117. If the question of setting aside the initial transfer of £4.1 million had arisen immediately after the acquisition of the property, there would have been no relevant change of circumstances and nothing except possibly the costs and expenses of purchase, in respect of which counter-restitution might be required. The transfer of the £4.1 million could have been set aside; the £4.1 million less the costs of purchase and associated administrative costs and expenses of the Trust, could have been traced into the property and the property could have been ordered to be transferred to the First Claimant. There would have been no material change of position or expenditure on the property by the trustees or their beneficiaries or potential beneficiaries and no third party rights would have arisen. Whether there has been a change of circumstances or expenditure which impacts on the conscionability of setting aside the initial transfer of £4.1 million or whether any and if so what counter-restitution should be ordered requires some examination of what was done after the initial transfer and purchase.

118. I have already explained why in my judgment the other alleged mistakes (i.e. the mistakes other than those summarised at paragraph 113 above) were not mistakes within the rule in *Pitt v Holt*. Whether or not I am correct in that regard, in my judgment those other alleged mistakes would not be so grave as to make it inequitable for the trustees and their beneficiaries or potential beneficiaries to retain the transferred sums or the property that they now represent, and the third requirement for the *Pitt v Holt* principle to apply would not be satisfied.

119. All the other alleged mistakes relate to things at one remove from the Claimants and their transfers of money into the Trust. They all relate either to the IHT which would be payable on the Trust Fund on Stefan's death; or to the IHT which would potentially be payable if payments or applications out of the Trust Fund were made to or for the benefit of Stefan's siblings, and Stefan did not survive those payments out or applications by 7 years; or to the reduction of the availability of CGT private residence relief on future sales of the property and possible fragmentation of ownership of the property; all of which would make it more difficult or impossible for the Claimants to achieve one of their goals; that is to make substantial provision for Stefan's siblings.

120. In my judgment the matters mentioned in the immediately foregoing paragraph do not come within the category of rare cases where the mistake is not as to the nature or legal effect of the transaction itself or as to some matter of fact or law which is basic to the transaction, but is as to its consequences, and yet still within the *Pitt v Holt* principle. The rarity of this category of case was described by Lord Walker in *Pitt v Holt* at paragraph 122:

> "But I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. If the *Gibbon v Mitchell* test is further widened in that way it is questionable whether it adds anything significant to the *Ogilvie v Littleboy* test. 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.

121. Of the various authorities cited to me, the nearest on its facts to the position in respect of the other alleged mistakes is *Wright v National Westminster Bank plc* [2014] EWHC 3158 (Ch) (Norris J). There the applicant husband and wife (H and W) applied to set aside a discretionary settlement nominally made by H on the first respondent bank's advice. H had created a discretionary trust of which the bank was the trustee. The beneficiaries were defined as H's widow, his four children, who were the second to fifth respondents, and his remoter issue. The settlement specified that the bank's power to apply income for the benefit of the beneficiaries could not be exercised so as to cause any part of the fund's income to be applied for the benefit of H or his wife. Along with the settlement, H provided a letter of wishes for the bank's guidance as trustee. The letter

explained that H's aim in establishing the trust was to provide for his family in a tax-efficient manner, and that his intention was that the income from the settlement would be applied for the benefit of both his wife and children. W subsequently executed a deed of gift which was expressed to transfer investments to H for him to add to the trust fund, but in the event most of such investments were passed directly into the trust fund and in respect of which W accordingly became the settlor. Attached to the deed of gift was a schedule specifying that W was transferring "324,999 cash / investments" to the fund. H argued that he would not have executed the settlement if he had realised that its effect would be to deprive W of any income from the fund during his lifetime. W submitted that in executing the deed of gift she had not intended to transfer property to the fund directly so that she became settlor in respect of that property and was thereby deprived under the settlement's terms from ever receiving income from it. The respondents did not oppose H's application to set aside. Norris J set the settlement aside. Unlike the other alleged mistakes in the present case, the impact of the questioned transaction in *Wright v National Westminster Bank* was immediate. From the moment the settlement was executed and the funds added to it, W was unable to receive income from it or the added property. One of the main objects of the transaction failed. Put at its highest one of the main objects in the present case was to make provision for Stefan and his siblings in a tax efficient manner. The initial and immediate stage of creating the settlement and adding funds to it achieved that object; the arrangements only potentially ceased to be tax efficient in the various sets of circumstances mentioned. In my judgment those sets of circumstances and their possible consequences are substantially more remote to the transaction than was the impact of the arrangements on W in *Wright v National Westminster Bank plc*.

122. In the present case the persons who will suffer from the consequences of the alleged additional mistakes are not the First Claimant or the Second Claimant who provided the funds for the Trust, but potentially some of the beneficiaries or potential beneficiaries of the Trust who the Claimants had intended to benefit. In my judgment, looked at objectively, as required by *Pitt v Holt,* those beneficiaries or potential beneficiaries would not be acting unconscionably in relation to the alleged additional mistakes if they said that they would prefer to stick with such rights or interests as the Trust gave them in the settled funds and the property, rather than effectively letting it all go back to the Claimants for them to deal with under an undertaking to the court or, perhaps otherwise as they saw fit.

123. Over the period 10th May 2012 to 1st December 2014 the Second Claimant transferred a total of £8,700,000 to the Trust. I refer to these transfers as "the First Additional Mistaken Transfers". The Claimants' evidence is that these transfers were made by the Second Claimant rather than the First Claimant because she is 11 years younger than the First Claimant and it was thought that she had a greater chance of surviving 7 years following any transfer. It is unclear whether the money to make these transfers came from the First Claimant; whether they were made by the Second Claimant as the First Claimant's agent or whether the "associated operations" rule in relation to IHT would apply so as to treat them as the First Claimant's payments for IHT purposes. For present

purposes nothing turns on those matters. What is relevant is that in my judgment during that period down until at earliest early-December 2014 the First Claimant was still labouring under the same mistakes as the First Claimant was in relation to the £4.1 million initial transfer. It follows that my above analysis in relation to the initial £4.1 million also applies to the First Additional Mistaken Transfers. The First Additional Mistaken Transfers were causative within the meaning of the rule in *Pitt v Holt*. It is clear on the evidence and not in the least surprising that had the Claimants known that they would have to pay a full market rent in order for them to be able to use the property and avoid the GWROB rules, they would not have paid or cause the First Additional Payments to be made. Again, as with the original £4.1 million transfer, in my judgment the mistakes in relation to the need to pay a substantial rent for the property were sufficiently grave as to make it unconscionable, absent a relevant change of circumstances and subject to a consideration of the impact of rescinding the payments, for the recipient (the Trustees and the beneficiaries and potential beneficiaries of the Trust) to retain the gifts of the First Additional Mistaken Transfers.

124. Except for relatively small amounts which were spent on the costs of management and administration, the funds transferred by the First Additional Mistaken Transfers were spent on works of building, improvement and maintenance at the property.

125. The position from early-December 2014 down to 27th November 2015 is less straightforward. During this period the following payments were made by the Second Claimant to the trustees on the following dates:

9/1/15	£400,000
20/1/15	£5,000
10/2/15	£170,000
12/3/15	£350,000
20/4/15	£200,000
13/5/15	£300,000
10/7/15	£240,780
7/8/15	£265,000

126. Following a meeting between the First Claimant and Mr Buzzoni in December 2014, Mr Buzzoni sent the First Claimant an email dated 12th December 2014. In this email, amongst other things:

126.1. Mr Buzzoni recorded that: apart from the initial cost of the property, the First Claimant had spent or anticipated spending approximately £9 million on construction; that the First Claimant hoped the property would be habitable in 4-6 months' time; that up until then (December 2014) there had been no question of the Claimants being able to enjoy a benefit through living at the property.

126.2. Mr Buzzoni advised that once the property was completed and available for occupation, care needed to be taken about the basis on which the Claimants occupied the property because they "might be said to be "reserving a benefit" so that the gift into trust would essentially be ineffective for inheritance tax purposes".

126.3. Mr Buzzoni advised that on the basis that the Claimants' occupation would be for more than 30 days per annum, things needed to be arranged so that the Claimants paid a rent to the trustees for the occupation of the property in the future.

126.4. Mr Buzzoni asked what part of the property the Claimants occupied.

126.5. Mr Buzzoni advised that if a particular part of the property could not be identified, then the rental was going to need to relate to the whole property "for the whole year which is potentially quire expensive".

126.6. Mr Buzzoni advised that when he and the First Claimant met again, possibly in January 2015, he (Mr Buzzoni) would like to talk a bit more about how the Claimants intended to use the property and whether the part of it which the Claimants were going to occupy could be limited in some way.

126.7. Mr Buzzoni advised that once that (intended use etc) had been agreed, there would be a need to instruct two firms of surveyors to negotiate a rent; one to represent the Claimants and one to represent the trustees.

127. The effect of this advice was that the First Claimant then knew that a full market rental valuation would be needed. The First Claimant confirms this in his first statement. The email of 12th December 2014 left open the possibility that the market rental might only extend to a particular part of the property which would be occupied by the Claimants. The Claimants knew that they were going to be occupying a very substantial part of the property and hence in the light of that advice the First Claimant must have known that even on a proportionate basis the required rent was potentially going to be very substantial if the Claimants were going to avoid the GWROB rules.

128. On 9th January 2015 the Second Claimant settled a further £400,000 onto the Trust. The implication from the Second Claimant's evidence is that at this stage she did not know what in my judgment the First Claimant knew as a result of the 12th December 2012 email, that is that even on a proportionate basis the required rent was potentially going to be very substantial if the Claimants were going to avoid the GWROB rules. Even if she had, that would only have gone towards the correction of one of the two mistakes which I have identified. It would have left the other in existence, that is to say the mistake of thinking that otherwise than for the purpose of minimising the GWROB rules the Claimants would not have to pay for their occupation of the property. The £400,000 was paid on the basis of that mistake and in my judgment that payment falls within the same category, with the same consequences as the earlier payments which I have referred to as the First Additional Mistaken Transfers.

129. On 16th January 2015 the First Claimant, Mr Buzzoni and Mr Broom had a meeting. During this meeting Mr Buzzoni advised that the running costs of the property, which were to be met by the First Claimant, could be set off against any rent which had to be paid in relation to the occupation of the property, and in all probability eliminated altogether. The First Claimant's evidence in this regard is corroborated by Mr Broom who, in his statement, says:

"Once the construction works were well advanced and Olaf and his wife were looking to occupy the property in the near future, Olaf arranged a meeting with Mr Buzzoni on 16 January 2015 at which I was in attendance. This was the first time I had met Mr Buzzoni. At this meeting the gift with reservations of benefit ("GWROB") provisions were discussed. Mr Buzzoni assured Olaf that, although he and his wife would need to pay rent to the Trust for the occupation of the property, the running costs could be offset against the rent payments. I was surprised by this as I had never heard of this before and I questioned how the rent could be eliminated by running costs but Mr Buzzoni said that this was quite common for properties of this kind and that there were property agents that should be able to assist in achieving this goal. This led myself and Olaf to believe that there would be no rent to pay for Olaf and his wife's occupation of the property as this would be eliminated altogether by the running costs."

130. The effect of that advice was in substance to reinstate in slightly varied form the mistake of thinking that to minimise the risk of the GWROB rules applying the Claimants would only have to pay a small amount for their use of the property. It did not affect the other mistake, that is to say the mistake of thinking that otherwise than for the purpose of minimising the GWROB rules the Claimants would not have to pay for their occupation of the property.

131. The evidence is fairly vague as to what happened between the 16th January 2015 meeting and early August 2015. In May 2015 Mr Broom's firm submitted an election for "special income tax treatment" so that the Trust income would be treated for income tax purposes as arising to Stefan instead of the trustees. This was rejected by HMRC because the Trust did not meet the test of being a disabled person's trust for income tax purposes because the rules changed in 2013. Mr Broom informed Mr Buzzoni that the election had been rejected. This prompted an exchange of emails between Mr Broom and Mr Buzzoni in August 2015. The exhibited copy emails for this period start with two on 5th August 2015. They are focussed on the income tax treatment of the trust, though in the second of them, being an email from Mr Broom to Mr Buzzoni, Mr Broom asked: (1) "does this mean that from an IHT point of view the current trust works and there is no IHT liability; and (2) will the Trust also be exempt from any 10 year anniversary charge?

132. Mr Buzzoni responded by an email to Mr Broom dated 6th August 2015, timed at 12:19. Mr Buzzoni answered Mr Broom's questions (1) and (2) by explaining, as was the case, that from an IHT perspective the Trust was treated as if Stefan had a pre-2006 interest in possession. In other words the trust capital was treated as if it formed part of his estate. Transfers to the Trust are PETs and the 10 year and exit charges do not apply. Mr Buzzoni wrote: "So far as I am concerned, in terms of Olaf's objectives, the trust works for IHT, but there would be tax to pay if Stefan died." That ignores the impact in the circumstances of the GWROB rules. Later in the email Mr Buzzoni said:

"… At present, there is significant flexibility as to who distributions are made to. I think a decision on this should probably be made when we have a sense of the rental income and how much the net taxable income from property is going to be in future.

I attach a copy of an email from Charlie Seligman at Savills who Olaf asked to advise on the rental position. The main thing he is going to need guidance on is the extent of the property which Olaf will be renting from the trust and how much can safely be excluded on the basis that Olaf and his wife won't use it. It is clear, however, from my conversation with him that the rent that Olaf is going to need to pay will be quite significant (well north of £100,000 per annum). You will know better than I do what expenses might be capable of being set against that income."

133. As between Mr Buzzoni and Mr Broom, it was now clear that a substantial rent was going to have to be paid by the First Claimant. At least £100,000 per annum. It remains unclear whether this was generally or only so as to avoid the application of the GWROB rules. The fact that the First Claimant had earlier asked Mr Seligman to advise on the rental position indicates that the First Claimant was aware that some rent might be payable, but that does not take the matter much further.

134. Before looking at the position on and from 7th August 2015, I consider the position from January 2015 down to the payment on 10th July 2015. The instruction of Mr Seligman by the First Claimant during this period indicates that some doubts may have been creeping into the First Claimant's mind as to how much rent would be payable; but there is nothing more to indicate that Mr Buzzoni's optimistic advice of January 2015 was not still operative on the Claimants' minds, and on balance I consider that the payments made during this period were made on the basis of a mistake within the principle of *Pitt v Holt*. Accordingly the payments made to the Trust in this period and in my judgment that payment fall within the same category, with the same consequences as the earlier payments which I have referred to as the First Additional Mistaken Transfers.

135. By an email headed, amongst other things "Sent: Friday, August 07, 2015 05:10 PM", Mr Broom forwarded the emails of 5th and 6th August 2015 to the First Claimant. Mr Broom stated in his email that the emails were "self-explanatory".

136. The First Claimant responded to Mr Broom by an email headed, amongst other things "Sent: 07 August 2015 17:06". Mr Broom's and the First Claimant's computer, server or email service provider's computer clocks appear from these timings to have been unsynchronised, because the time quoted in the immediately foregoing paragraph for Mr Broom's email to the First Claimant appears to be after the time quoted in this paragraph for Mr First Claimant's response. This apparent discrepancy is not expressly explained in the evidence. In his supplementary statement the First Claimant says Mr Broom forwarded Mr Buzzoni's email to him at 5.10 p.m. He also says there with reference to his response that "as my email was sent in response to Mr Broom's after 5.10 p.m. GMT…". That reference to GMT does not explain the discrepancy. If Mr Broom's

email was sent at 05:10 P.M. GMT, that would be 06:10 p.m. BST. On the other hand if it was the First Claimant's computer which was still set on GMT, then that would explain the discrepancy. His email in response would have been sent at 18:06 BST.

137. The First Claimant's email of 7th August 2015 reads:

> "That is absolutely awful !
>
> […]
>
> The whole proposal from Buzzoni seems not to have worked. 50 per cent should be for Stefan and the remaining 50 per cent should be divided between Kristina, Sophia, Ralph and Isabella in case the property will be sold one day. We have payments vis Kristina to be sure the gift tax will not apply i.e. after 7 years I thought everything would be tax free !"

138. In his first statement the First Claimant focusses on his surprise to find that there would be an IHT charge on Stefan's death. I have explained above, why I consider that that does not give rise to a mistake within the principle of *Pitt v Holt*. More materially to the relevant mistakes, he says that he was not warned that he and the Second Claimant, if she survived him, would have to pay an enormous rent, which would reduce the funds available in due course not just for Stefan but also for their other children.

139. In his first statement the First Claimant says that the amounts which he contributed to the Trust after November 2015, "when I realised that the Trust was problematic", he initially understood to be loans.

140. In his supplemental statement the First Claimant says that he only became aware that full market rent was going to have to be paid for his and the Second Claimant's occupation of the property when he received Mr Broom's email of 7th August 2015.

141. The Second Claimant does not deal in her evidence with the timing of the events in August 2015 down to the grant of the lease on 8th December 2016. The Second Claimant says that it was a shock to her to learn that rent would be payable at a rate of about £100,000 pa for as long as the First Claimant or she continued to live at the property, but she does not say when she learned that this was the position.

142. Mr Broom says that on 15th August 2015 he had lunch with the First Claimant when they discussed the emails and the First Claimant told him that had he known that the Trust fund would be deemed to be in Stefan's estate on his death and would give rise to a 40% IHT charge on his death, he would never have agreed to the Trust being set up.

143. In my judgment the evidence is insufficient to justify a finding that on the balance of probabilities, after 7th August 2015, the Claimants continued to be mistaken as to the need for one reason or another to pay a substantial rent (more than £100,000 p.a.) for their occupation of the property. The First Claimant knew that the rent was going to be "well north of £100,000 per annum". The Second Claimant does not explain when she learnt of

this, but having regard to what the First Claimant says in his email of 7th August 2015 as to the payments to the Trust having been made "vis Kristina" which I read as "via Kristina", in my judgment it is unreal to suppose that when the Second Claimant made payments into the Trust she did not first discuss the situation with the First Claimant. Accordingly in my judgment after 7th August 2015 the payments were not made in the mistaken belief that no substantial rent would have to be paid for the Claimants' occupation and use of the property.

144. In respect of this period (7th August 2015 onwards) the evidence does not distinguish between the two reasons why a substantial rent would be payable. In my judgment the focus probably remained on avoiding the GWROB rules. However, in my judgment, this and the lack of attention in the evidence as to the requirements of the terms of the Trust means that when once it was understood that a substantial rent would need to be paid in order to avoid the GWROB rules, the second reason for the mistake as to the need to pay a substantial rent (i.e. the terms of the Trust) ceased to be causative of the making of payments into the Trust. That the Claimants perceived a need to pay such a rent is evidenced by the fact that in due course they took the lease. Put slightly differently: once it had been realised by the Claimants that a substantial rent (more than £100,000 p.a.) would need to be paid for their occupation and use of the property, they ceased to be mistaken in thinking that, for whatever reason, they would not need to pay a substantial rent for their use and occupation of the property. Accordingly in my judgment, after 7th August 2015 the Claimants were not labouring under a mistake which was capable of bringing the principle of *Pitt v Holt* into operation in relation to payments made by them.

145. It follows that in my judgment the payments made into the Trust by the Second Claimant on and after 9th September 2015 are not susceptible to being set aside for mistake.

146. The payment of £265,000 made on 7th August 2015 requires special consideration. Specifically, was it made before or after the Second Claimant became aware of the fact that a substantial rent (more than £100,000 p.a.) would need to be paid for their occupation and use of the property which the First Claimant was informed of by the attachments to Mr Broom's email timed at 05.30 pm on 7th August 2015?

147. The exhibited copy of the draft balance sheet and statement of receipts and payments for the Trust for the year ended 5th April 2016 shows an addition of capital of £265,000 on 7th August 2015. The only evidence before me as to the timing of this relative to the receipt of Mr Broom's email of 7th August 2015 is paragraph 22 of the First Claimant's supplemental statement where he says the following:

> "There was a payment made into the trust of £265,000.00 on 7 August 2015 which was before the email forwarded to me by Mr Broom at 5.10 p.m. on that day which was the email from Mr Buzzoni. This was, in fact, a payment made to the trust by my wife and not by me. As my email was sent in response to Mr Broom's after 5.10 p.m. GMT, if the payment of £265,000.00 had been made after this, it would not have been

credited to the trust account until the following day so it would be showing as having been made on 8 August 2015. Therefore, the payment must have been sent prior to my receipt of Mr Broom's email."

148. By reason of the evidence being given by the First Claimant, whilst the payment was made by the Second Claimant, and in the absence of any express statement as to the source of the First Claimant's belief in that regard, I read the first sentence of that paragraph as merely representing the First Claimant's deduction from what he says in the remainder of the paragraph. Given the potential importance of this evidence which was raised at the hearing on 28th November 2018 and the opportunity which my order of that date gave as to the filing of further evidence, I would have expected this point to be dealt with more satisfactorily in the evidence. Given the hypothesis on which the First Claimant's deduction is based, I would agree with him. What is far less clear is the accuracy of the hypothesis that an instruction received after 5.10 in the evening would not be actioned until the following day or, in the case of a Friday, which 7th August 2015 was, until the following Monday. With electronic and remote banking, it is quite possible for a payment to be instructed and effected outside normal banking hours. In the circumstances I am not satisfied on the balance of probabilities that the instructions for the payment of £265,000 were given before the Claimants know that the rent they needed to pay would be £100,000 or more.

149. The upshot of that is that the payments made by or through the Second Claimant to the Trust from 9th January 2015 down to and including the payment made on 10th July 2015 were made on the basis of a causative mistake within the rule in *Pitt v Holt*. These payments therefore fall into the same category, with the same consequences as the earlier payments which I have referred to as the First Additional Mistaken Transfers.

150. The payments made by or through the Second Claimant to the Trust on and after 7th August 2015 were not made on the basis of a causative mistake within the rule in *Pitt v Holt*. This conclusion is accepted by Mr Conolly in paragraph 16 of his Supplementary skeleton argument (though not in respect of the payment on 7th August 2015). These payments total £1,235,000. These payments were paid to the trustees to be added to the trust fund. I will not set them aside. I refer to them as "the Non-voidable Payments". They became assets of the Trust which the trustees could spend in accordance with the terms of the Trust.

151. It is apparent from the draft balance sheet and statement of receipts and payments for the Trust for the year ended 5th April 2016 that at least the greater proportion of the Non-voidable Payments were spent on building or related works to the property. That statement shows the total of the payments made out of the Trust for that year, all under the heading "PROPERTY Additions at cost" to be £2,645,652.67. The statement shows a balance left at the end of the period of £23,953.23 cash at the bank. The "Additions" include £125,904.72 paid to Strutt & Parker and £12,360.20 paid to Taylor Wessing. Strutt & Parker are estate agents; Taylor Wessing were solicitors. I do not understand

how payments to them can be said to be additions to the property rather than, perhaps, expenses incurred in connection with the building works. Even if those payments were made wholly out of the Non-voidable Payments, the larger proportion of the Non-voidable Payments must have been applied in making improvements or additions to the property. Whether and to what extent the payments made in that regard added to the value of the property is not something which the evidence deals with. What I have in mind in this context is that, for example, the £59,000 spent on decorative concrete may not have added as much as £59,000 to the value of the property – or it may have added more.

Other payments

152. On 26th October 2015 the First Claimant started to pay many bills relating to the property. The evidence as to the way in which he did this has changed over time:

152.1. In paragraph 21 of the Particulars of Claim it is stated that the First Claimant made further transfers to the Trust.

152.2. In paragraph 40 of the First Claimant's first statement he says:

> "The amounts which I contributed to the Trust after November 2015, when I realised that the Trust was problematic, I initially understood to be loans. It is my current understanding that, as the trustees did not all agree to this, those payments cannot be classified as loans. I understand that because I did not intend to give those sums to the Trust [….] those sums are (or the proceeds thereof) are held by the trustees on resulting trust for me."

152.3. In Mr Conolly's skeleton argument for 28th November 2018 he submitted that the First Claimant made payments to the trustees, and discharged their liabilities in relation to construction costs, after 27 November 2015, which total £2,405,000 … A declaration is sought that these sums, and any assets representing them, are held on resulting, or in the alternative, constructive trust for [the First Claimant]."

152.4. In paragraph 23 of the First Claimant's supplementary statement he says:

> "I started paying bills relating to Medstead Grange from my own account on 26 October 2015. All the transfers into the trust were made by Kristina and I did not pay any monies into the trust. All bills relating to Medstead Grange were paid directly from my own account and I would then be credited for the sums paid. […]"

153. I consider that the First Claimant's last version of events describes what occurred. It fits with the schedules of bills paid which are contained within the exhibits. Mr Conolly submitted that these payments totalled £2,405,000. The schedules of bills show that the First Claimant paid at least £2.1 million of bills. If the detailed sum needs to be worked out, that can be done by agreement or on an inquiry. I refer to these payments by the First Claimant as "the First Claimant's Bill Payments".

154. In the light of the First Claimant's evidence in his supplementary statement and the terms of the exhibited schedules of payments made by the First Claimant, it appears, and I find, that the First Claimant made the First Claimant Bill payments directly to the relevant contractor. Whether a relevant contractor's contract was with the trustees or with the First Claimant is not something which the evidence reveals. I assume that in some cases it was the one, and in other cases it was the other.

155. As with the Non-voidable Payments, whether and to what extent the works to which the First Claimant's Bill Payments related added to the value of the property is not something which the evidence deals with.

156. The Claim Form and Particulars of Claim seek a declaration that the First Claimant Bill Payments are held on resulting trust for the First Claimant. Similarly the draft consent order and the orders proposed in the parties' solicitors' letter dated 6th February 2019 provide for a declaration that the sums transferred to the Trust (either by way of transfers into the Trust or by discharging the liabilities of the Trustees) by the First Claimant after 27th November 2015 are held by the trustees on resulting trust for the First Claimant. Such a resulting trust cannot exist. The First Claimant Bill Payments went to pay contractors in satisfaction of what was due to them under their contracts. The First Claimant Bill Payments are no longer held by the trustees. I cannot and will not make a declaration that the First Claimant Bill payments are held on resulting trust for the First Claimant.

157. There is no reason to think that the contractors obtained the payments due to them and paid out of the First Claimant Bill Payments otherwise than as bona fide third parties for full consideration. Accordingly the contractors took the sums paid to them by the First Claimant free from any trusts which might have effected them and did not and do not hold the payments on resulting trust for the First Claimant.

Preliminary Conclusions

158. Taking stock. The payments in relation to which relief is sought fall into the following categories:

158.1. The initial transfer of £4.1 million which was used to purchase the property.

158.2. The First Additional Mistaken Transfers to the Trust totalling £8,700,000 and the sums transferred to the Trust in January to July 2015 which I have held were paid on the basis of a relevant mistake and fall within the same category, with the same consequences as the First Additional Mistaken Transfers. These total £1,670,780. Adding the £1,670,780 to the £8,700,000 gives a total of £10,370,780. I call this combination "the Additional Mistaken Payments". Except for relatively small amounts which were spent on the costs of management and administration, the funds transferred by the Additional

Mistaken Transfers were spent on works of building, improvement and maintenance at the property.

158.3. £1,235,000 was added to the Trust by the Second Claimant between 7th August 2015 and 27th November 2015. These are the Non-voidable Payments. The larger proportion of the Non-voidable Payments was applied in making improvements or additions to the property.

158.4. £2.1 million or more was spent by the First Claimant in the form of the First Claimant Bill Payments. The First Claimant Bill Payments potentially divide into two categories: those which went to pay contracts entered into by the trustees and those that went to pay contracts entered into by the First Claimant.

158.5. On 8th December 2016 the lease was granted and substantial payments of rent have been paid or are due under it.

159. The initial payment of £4.1 million and the Additional Mistaken Payments are within the principle of *Pitt v Holt* and can be set aside subject only to the questions of whether rescission is possible and what, if any, conditions I should impose or counter-restitution I should order.

160. The First Claimant Bill Payments are not held by the trustees on resulting trust for the Claimants.

161. My decision as to the payments which can and can not be set aside and as to the suggested resulting trust of the First Claimant Bill Payments mean that I will not make an order in the form or to the effect sought in the draft consent order or as mentioned in the letter from the parties' solicitors dated 6th February 2019.

The order which I would be willing to make – law as to rescission for mistake in respect of a voluntary transaction

162. I consider that some of what might be termed the ancillary rules as to rescission in the context of the rescission of contracts only carry across in a more or less modified form to rescission of voluntary transactions for mistake under the principle in *Pitt v Holt*. Specifically I consider that in the case of a voluntary disposition the rules as to affirmation, change of position, and the possibility of complete or near complete or equivalent restitution and counter-restitution are not absolute. They are all matters which can be taken into account in an overall assessment of whether it would be unjust, unfair or unconscionable to leave the mistaken disposition in place.

163. I consider that the fourth requirement for the principle of *Pitt v Holt* to apply, that is that it must be unjust, unfair or unconscionable to leave the mistaken disposition in place includes within it a requirement to assess the impact of setting aside the transaction on the terms and conditions on which it might be set aside. Thus if a particular order would operate unfairly on a voluntary recipient, that would be an important and frequently a conclusive factor in deciding that it would not be unjust, unfair or unconscionable to leave the mistaken disposition in place. However, I consider that the impact of any relief and of the terms of any condition or counter-restitution which might be required also needs to be considered as a separate matter with a view to ensuring that in all the circumstances the order would operate justly and fairly. This follows as a matter of principle and authority.

164. As a matter of principle:

164.1. The different contexts should give rise to different considerations of what law and equity require. In a contractual context the parties will usually have bargained for their rights. If the contract is set aside on a ground which is not regarded as reflecting too badly on the party against whom rescission is ordered (e.g. an innocent misrepresentation), it is important from the perspective of fairness and justice that the parties should so far as possible be put back into the position they would have been in had the contract not been entered into. In contrast in the case of a voluntary disposition the recipient has not provided consideration for what he has received, and justice does not require that either he or the donor should necessarily be placed in the same position as they would have been had the transaction not been entered into.

164.2. The broad approach specified in the fourth requirement of the principle of *Pitt v Holt* requires a focus on whether it would be unjust, unfair or unconscionable to leave the mistaken disposition in place. The unjustness, unfairness or unconscionability of leaving the mistaken disposition in place is to be assessed objectively, but with an intense focus on the facts. The unjustness, unfairness or unconscionability of leaving the mistaken disposition in place must in my view include a consideration of the unjustness, unfairness and unconscionability of setting it aside. Whether it was unjust not to set a transaction aside in many if not all cases would depend substantially on the counter consideration of whether it would be unjust to set the transaction aside on particular terms.

164.3. Rescission of voluntary transactions for mistake under the principle of *Pitt v Holt* is an equitable remedy and it should not be granted in such a way or on such terms that would operate unjustly, unfairly or unconscionably.

165. As a matter of authority, the decision in *Pitt v Holt* itself is authority for the proposition that rescission of a voluntary transaction may be ordered, notwithstanding that complete restitution is impossible. Very briefly, for present purposes the relevant facts of *Pitt v Holt* were that by mistake some £800,000 worth of assets had been put into a "Special Needs Trust", referred to as a "SNT". By the time the mistake was realised and an application was made to set aside the SNT and the transfers into it, there were only a few thousand ponds left in the SNT. The bulk of the fund had been spent by the trustees in accordance with the terms of the SNT. In particular in paying for care for the principal beneficiary.

166. The decision in *Pitt v Holt* is also authority for affirmation not necessarily preventing rescission. Thus, in *Pitt v Holt*, after the mistake was discovered, the SNT continued to be administered and Mrs Pitt in her capacity as the receiver of the beneficiary of it continued to receive and apply payments from the SNT, but that did not prevent the SNT and the transfers onto its trusts from being set aside. No argument was addressed to me about affirmation in the present case. If there was affirmation by the Claimants, I

consider that it would not necessarily prevent my ordering rescission if I could make an order which did not operate unjustly, unfairly or unconscionably.

167. The decision of Sir Terence Etherton C in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) is further authority that the rules applicable to rescission in a contractual context do not always apply or may not apply with their full rigour in the context of the setting aside of voluntary dispositions. There cannot be partial rescission of a contract, but the Chancellor held that there could be partial rescission of a voluntary disposition. In *Kennedy v Kennedy* the voluntary disposition was an appointment effected by a deed of appointment. The Chancellor only set aside one clause of it. At paragraph 46 he said:

> "Returning to rescission, I consider that the claimants are entitled to the last alternative head of relief claimed in the amended Particulars of Claim, namely an order setting aside clause 2.1(c) of the October 2008 Appointment. Mr and Mrs Kennedy and Mr Sturrock have all given evidence that, if they had been aware of their mistake, they would have omitted clause 2.1(c) from the October 2008 Appointment. That is a self-contained and severable provision in the deed. There is authority that there cannot be partial rescission of a contract; it must be set aside as a whole and not only as to part: see *De Molestina v Ponton* [2002] 1 LL Rep 70 , 286–289 and the cases cited there. That limitation makes sense in a contractual context and as preventing the court in effect imposing a different contract to the one the parties actually made. I see no reason, however, why that limitation should apply to a self-contained and severable part of a non-contractual voluntary transaction. In such a situation the allied principle that rescission can only be granted if both sides can substantially be restored to their pre-contractual positions is irrelevant. Again, no authority was cited to me on this point one way or the other. In the absence of authority to the contrary, I can see no reason in principle why, on the facts of the present case, clause 2.1(c) should not be set aside for mistake pursuant to the principles in *Pitt v Holt* ."

168. The possibility of rescission in relation to part only of the property voluntarily transferred subject to a vitiating factor was considered and effected by Master Matthews in *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch).

169. The test of justness and fairness fits with Lord Walker's approach in *Pitt v Holt*.

170. At paragraph 127 of Lord Walker's judgment in *Pitt v Holt* he said:

> "… Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion. Justice Paul Finn wrote in a paper, Equitable Doctrines and Discretion in Remedies published in Restitution: Past, Present and Future (eds WR Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo) (1998), p 260:
>
> > the courts quite consciously now are propounding what are acceptable standards of conduct to be exhibited in our relationships and dealings with others . . . A clear consequence of this emphasis on standards (and not on rules) is a far more instance-specific evaluation of conduct.
>
> The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus (in Lord Steyn's

well-known phrase in In re S (A Child) [2005] 1 AC 593, para 17) on the facts of the particular case."

171. At paragraphs 136 et seq. Lord Walker considered the application of the point to the facts of *Pitt v Holt*. Lord Walker summarised and disposed of an argument raised by HMRC against rescission as follows:

> "136. Mr Jones's second new point was that Mrs Pitt should be refused relief because the granting of relief would serve no practical purpose, other than saving inheritance tax…
> 137. The fund subject to the SNT had many calls on its resources, with heavy professional costs and expenses as well as making provision for the welfare and care of Mr Pitt and the maintenance of his wife. On his death on 25 September 2007 there was only £6,259 in the trust (the deputy judge added, [2010] 1 WLR 1199, para 15, that that was "on Mrs Pitt's case" but he had earlier stated, para 4, that the material facts were not in dispute at all). On Mr Pitt's death this sum, subject to any outstanding liabilities, vested in his personal representatives under clause 3 of the SNT. Any remaining value in the fund was therefore in the same beneficial ownership as if the SNT had been set aside by the court.
> 138. On 22 November 2011, after this court had granted permission for Mrs Pitt to appeal from the Court of Appeal's decision, her solicitors wrote to the Solicitor's Office of the Revenue drawing attention to a submission in the Revenue's skeleton argument before the Court of Appeal, para 105: "But, in any event, the settlement should not be set aside after this period of time, especially when the court does not know what proprietary claim would vest in the estate against third parties." Apparently with a view to avoiding any doubt on this point, Mrs Pitt's solicitors set out the factual position as it was at that time and stated in the last paragraph of their letter:
>
> > "Please note that Mrs Pitt and Mr Shores [her co-executor] have irrevocably instructed us to indicate, that if the Supreme Court orders that Mr Pitt's settlement is set aside, no further claim (to moneys or other relief), will be made by them in their capacity as Mr Pitt's personal representatives, or by Mrs Pitt in her capacity as sole beneficiary of his estate, whether against the trustees (from time to time) of Mr Pitt's settlement or the recipients of distributions or other payments from the trustees. Our clients will be satisfied with the effect of section 150 IHTA 1984 (consequent on the order setting aside Mr Pitt's settlement)."
>
> 139. In these circumstances Mr Jones has submitted that it would be pointless, and so contrary to equity's practical approach, to grant relief that would achieve nothing, apart from a tax advantage to Mrs Pitt…
>
> ….
>
> 141. Until the solicitor's letter of 22 November 2011 there was at least a possibility of third party claims arising, and the Revenue placed reliance on that as a reason for refusing relief. But for the letter, the court might, if minded to grant relief, have required an undertaking to the same effect as the one that Mrs Pitt and Mr Shores have volunteered. Moreover the Revenue's argument ignores the fact that unless and until the SNT is set aside, there are potentially contestable issues between the Revenue and any persons who, not being purchasers for value without notice, have received distributions from the SNT. The statutory charge under section 257 of the

Inheritance Tax Act 1984 would prima facie give the Revenue a proprietary claim against such third parties. For these reasons I would reject the Revenue's second new point also."

172. The important point for present purposes is that made by Lord Walker at paragraph 141 where he said that but for Mrs Pitt's solicitors' letter, the court might, if minded to grant relief, have required an undertaking to the same effect as the one that Mrs Pitt and Mr Shores volunteered by that letter. Similarly in the present case, if I set aside the transfers to the trustees, I might, as a condition of making such an order, require an undertaking that no personal claims are made against them or that no other personal or proprietary claims arising out of the transactions are made by the Claimants.

173. A requirement to make an order on rescission which produces a just and fair result or what "is practically just" is reinforced by reference to the contractual rescission cases. This is exemplified by the following extract from Lord Blackburn's speech in *Erlanger v New Sombrero Phosphate* Co (1877-78) LR 3 App Cas 1218 at pp. 1278-1279 which was made in the context of a discussion as to rescission and the possible impact of exact restitution being impossible:

> "But a Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. And a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in mora,* than a similar change before he was *in mora* should do."

174. More recently in the contractual case of *O'Sullivan v Management Agency and Music Ltd* [1985] QB 428 at p.458 Dunn LJ identified "practical justice" as the key to the ability to effect rescission in equity:

> "This analysis of the cases shows that the principles of restitutio in integrum is not applied with its full rigour in equity in relation to transactions entered into by persons in breach of a fiduciary relationship, and that such transactions may be set aside even though it is impossible to place the parties precisely in the position in which they were before, provided that the court can achieve practical justice between the parties by obliging the wrongdoer to give up his profits and advantages, while at the same time compensating him for any work that he has actually performed pursuant to the transaction."

175. In something of a *reprise* of what I have said above about the terms proposed in the draft consent order, I note that, at least in a contractual context, the conditions imposed by a court in relation to a proposed rescission and the terms as to counter-restitution must be such conditions and terms as are necessary to ensure *restitutio in integrum* (*TSB Bank Plc v Camfield* [1995] 1 WLR 430 (CA)). I have already indicated that *restitutio in integrum* is not an absolute requirement in relation to rescission for mistake under the principle in *Pitt v Holt*. However, any terms and conditions imposed on an order for rescission should at least so far as possible be aimed at putting the parties against whom rescission is ordered substantially into the positions they would have been in if the mistaken transaction had not taken place. In my judgment this follows from (i) the very meaning of the word "rescission" as a setting aside; (ii) analogy with the contractual rescission cases; (iii) the impermissibility of allowing rectification in disguise; (iv) the need for there to be some practical control on the scope of the terms and conditions imposed and (v) the need to do that which is just and equitable.

The way forward – the order I might make

176. If I simply set aside (rescinded) the original payment of the £4.1 million and the Additional Mistaken payments without imposing any conditions or requirements for counter-restitution, the position would be that:

176.1. The First Claimant could trace his £4.1 million into the property and make a proprietary claim in respect of his consequent equitable interest in the property. That proprietary claim would extend to any products of the property; specifically the rent paid under the lease and any rent which the trustees may have received for the property from other sources. In that respect I note that there is a reference in the exhibited correspondence to an agricultural or farming tenancy of part of the property.

176.2. The First Claimant would probably have an entitlement to an order for an account and repayment against the trustees, though (i) possibly subject to his first having exhausted his proprietary remedies and (ii) possibly subject to a change of position defence in the trustees.

176.3. The Second Claimant could trace her £10,370,780 (the Additional Mistaken Payments) into money spent by the trustees on improving and maintaining the property and make a proprietary claim in respect of her consequent interest, if any. I have included here the words "if any" because as a general rule where a stranger makes improvements to another person's property he does not obtain a proprietary interest in that property unless he can show that there was a common intention that he should have a beneficial interest in the property; and that he acted to his detriment on the basis of that common intention so that it would be inequitable the owner to deny the improver an interest. This case is a long way from that general case. At the time when, as a result of an order for rescission what would become the Second Claimant's money in equity, was spent on the property (i) that money belonged in law and equity to the

Trust and (ii) it was spent on property which at that time belonged in law and equity to the Trust (strictly to the trustees on trust for the beneficiaries). There was no intention that the Trust should obtain any or any additional beneficial interest in the property as a result of the improvements paid for by it because at the time of those improvements the property belonged 100% legally and beneficially to the Trust, subject only to the equity in the First Claimant to trace his property into it. The question was not explored before me of whether the Second Claimant could claim a beneficial interest in the property in those circumstances, and if so whether it would be would be (i) a fractional interest calculated by reference to the increase in value of the property which resulted from the works paid for by the Second Claimant's in comparison with its overall value, or (ii) a fractional interest calculated by reference to the amounts of the various contributions; or (iii) a charge on the property for the amount of the Second Claimant's money which was spent on it. Having regard to my approach to rescission, to the figures and to the fact that the claim is a claim by both of the Claimants, as will become apparent, I do not have to resolve this point. If an order for rescission of the original £4.1 million is made, then the property would in equity retrospectively become the First Claimant's, but subject to such interest, if any, as the Second Claimant had in it by reason of my setting aside the Additional Mistaken Payments.

176.4. The Second Claimant would probably have an entitlement to an order for an account and repayment against the trustees, though (i) possibly subject to her first having exhausted her proprietary remedies and (ii) possibly subject to a change of position defence in the trustees.

176.5. The First Claimant would have a personal unjust enrichment claim against the trustees in respect of the amounts paid by him by way of the First Claimant Bill Payments in satisfaction of liabilities which had been incurred by the trustees.

176.6. The trustees might attempt to claim a beneficial interest in the property by reason of their contribution to its improvement by way of the expenditure of the Non-Voidable Payments; by reason of the improvements (if any) effected by reason of contracts entered into by them with contractors who were paid by the First Claimant as part of the First Claimant Bill Payments or by reason of any other improvements paid for by them from other sources which were not susceptible to tracing claims by the First Claimant or the Second Claimant. In my view such a claim would fail. That is because at the times when the trustees paid for the improvements (i) the money spent by them belonged in law and equity to the Trust and (ii) it was spent on property which at that time belonged 100% in law and equity to the Trust (strictly to the trustees on trust for the beneficiaries). There was no intention that the Trust should obtain any or any additional beneficial interest in the property as a result of the improvements paid for by it because at the time of those improvements the property belonged 100% legally and beneficially to the Trust, subject only to the equity in the First Claimant to trace his property into it. In the

circumstances of this case my judgment the expenditure on improvements to the property by the Trust using the Non-Voidable Payments and any other sources which were not susceptible or potentially susceptible to tracing claims by the First Claimant or the Second Claimant can and should be dealt with as a condition or a requirement for counter-restitution which I might require as a pre-condition to an order for rescission.

176.7. The First Claimant might attempt to trace or reverse trace those First Claimant Bill Payments which he made in payment of contractual liabilities incurred by him into the property by reference to the improvements effected by those contractors pursuant to those contracts and attempt to claim a beneficial interest in the property by reason of that contribution to its improvement. I have serious doubts as to whether this would be possible, but, as I will explain, this possibility can and should also best be dealt with as a condition or a requirement for counter-restitution which I might require as a pre-condition to an order for rescission.

176.8. The First Claimant may have a personal claim against the trustees for unjust enrichment in respect of those First Claimant Bill Payments which he made in satisfaction of liabilities owed to the trustees as I will explain, this possibility can and should also best be dealt with as a condition or a requirement for counter-restitution which I might require as a pre-condition to an order for rescission.

177. Overall I consider that it would be just fair and reasonable and would effect practical justice to set aside the original £4.1 million payment and the Additional Mistaken Payments if a position can properly be achieved under my order whereby, applying legitimate and appropriate conditions and requirements for counter-restitution:

177.1. The Claimants are able to recover the property and, insofar as they can be by way of set off, the benefits obtained by the trustees from the property, in particular the net rents paid in respect of it; plus interest thereon. By "net rents" in this context I mean the rents received by the trustees net of any irrecoverable tax they have or have had to pay by reference to them.

177.2. The Claimants provide counter-restitution to the trustees of the amounts spent by the trustees on improvements to the property out of the Non-Voidable Payments and any other sources which were not susceptible or potentially susceptible to tracing claims by the First Claimant or the Second Claimant; plus interest thereon.

177.3. The rescission gives rise to no outstanding possible personal or other proprietary claims against the trustees and the First Claimant makes no claim against the trustees in respect of or arising out of the First Claimant Bill Payments.

178. I refer to the order which would achieve that result as "my Proposed Order".

179. My Proposed Order would give the property to (or back to) the Claimants as it would have been if they had not mistakenly made the original £4.1 million payment and the Additional Mistaken Payments to the trustees, but had used them to buy and improve the

property for themselves; adjusted so as (i) to allow for some or all of the tax paid on the rents being irrecoverable from HMRC; (ii) to enable the Non-Voidable Payments and any other sources for the Trust Fund to be held, as intended, on the terms of the Trust.

180. I consider that imposing the conditions and counter-restitution necessary to create that result would be within the scope of what is legitimate as ancillary to an order for rescission. All the conditions and counter-restitution arise out of payments or arrangements which concern the property and its improvement and might be affected by the order for rescission.

181. I consider that in the circumstances it would be unjust, unfair and unconscionable if as a result of the order for rescission the trustees were left with potential personal liabilities which they could not reimburse themselves for from the Trust Eund because it was not sufficiently large for the purpose or otherwise.

182. I have held that the Non-Voidable Payments to the trustees should not be set aside for mistake. It follows that they and funds from any other sources of the Trust Fund which are not susceptible or potentially susceptible to tracing claims by the Claimants were intended to be held on the terms of the Trust. They were also intended to be spent, at least in part, on improvements to the property for the benefit of the Trust and its beneficiaries. I consider it just fair and conscionable that in setting aside the original £4.1 million payment and the Additional Mistaken Payments, counter-restitution should be made in respect of those intended benefits to the Trust. The more difficult question is whether that counter-restitution should be in respect of (i) the amounts of the Non-Voidable Payments and funds from any other sources of the Trust Fund which are not susceptible or potentially susceptible to tracing claims by the Claimants, possibly plus interest, or (ii) the amount by which their expenditure increased or has increased the value of the property. I consider that it should be the former.

183. If the property had always been owned beneficially by the Claimants it is almost certain that the Non-Voidable Payments and funds from any other sources of the Trust Fund which are not susceptible or potentially susceptible to tracing claims by the Claimants would never have become assets of the Trust at all because on the hypothesis under consideration the Trust would not have come into existence or at least money would not have been out into it for the purpose of expenditure on the property. However, the payments were made and were intended to be held on the terms of the Trust. Hypothetical trustees having those funds in their hands and knowing that the property was or would become vested beneficially in the Claimants would not have spent the funds on the property and would have retained or used them for Trust or other Trust purposes. In my judgment that means that in unravelling what has occurred the full amounts of the expenditure of those funds should be provided to the trustees by way of counter-restitution, not the increase in the value of the property attributable to their expenditure.

184. It is necessary to consider the effect of the First Claimant Bill Payments a little further because an order for rescission may have an impact them and the First Claimant's rights arising out of them.

185. Perhaps at a time before he realised that as a matter of fact the First Claimant Bill Payments were paid directly by the First Claimant to the contractors, Mr Conolly submitted that by reason of the payments having been made to the trustees without donative intent they were held on resulting trust for the First Claimant. That submission must fall away by reason of the payments not having been made to the trustees. Even if they had been, in my judgment they would not have been held on resulting trust for the First Claimant. That is because they would have been paid by the Claimant for the purpose of paying off the contractors, which purpose was achieved.

186. If and insofar as the First Claimant Bill Payments were made by the First Claimant paying off liabilities owed by the trustees to the contractors, he would be subrogated to the contractors' rights to be paid by the trustees. In my judgment in those circumstances the First Claimant would not obtain any interest in the property merely by reason of the payments. There is no evidence that any of the contractors had an interest in the property to which the First Claimant might be subrogated. There is no evidence that the trustees agreed that the First Claimant should obtain an interest in the property as a result of the payments. The fact that the trustees did not agree to treat the payments as a loan mitigates against that possibility.

187. If and insofar as the First Claimant Bill Payments were made by the First Claimant paying off liabilities owed by the trustees to the contractors, the trustees' expenditure to which those First Claimant Bill Payments related would have been expenditure on property which, in consequence of my setting aside of the original payment of £4.1 million and the Additional Mistaken Payments was property which would belong and be treated as having belonged beneficially to the First Claimant or to the First Claimant and the Second Claimant. In ordering rescission of the original payment and restitution of the product of that payment (i.e. the property), one possibility is that I could make it a condition of my order that the trustees were fairly compensated for their expenditure. Depending on the circumstances, that might involve an allowance either for the amount of the trustees' expenditure or for the amount by which that expenditure had enhanced the value of the property. In my judgment in the case of the First Claimant Bill Payments which were made in payment of the trustees' liabilities, for the reasons given above in relation to the Non-Voidable Payments, the fair counter-restitution would be of the amount of the payments. On that basis, the First Claimant's right to recover the amounts of First Claimant Bill Payments of that kind from the trustees would be exactly cancelled out by the trustees' right to counter-restitution in respect of the expenditure to which those First Claimant Bill Payments related. Looked at broadly and equitably: essentially the First Claimant would have been paying bills for expenditure on what, by reason of my order, would, retrospectively, have been his own property, and there is no reason why the

trustees or the Trust should gain or lose as a result. On the contrary, fairness and equity would require that they did not.

188. If and insofar as the First Claimant Bill Payments were made in respect of contracts entered into by the First Claimant in his personal capacity and not by the trustees as such, the First Claimant would have been paying for work to be done to property which, at the time the work was done, belonged to another; namely the trustees as trustees of the Trust. However, if I was to order rescission of the original payment and restitution of the product of that payment (i.e. the property), the First Claimant would have been spending his money on his own property or on property owned by him and the Second Claimant, and whether or not that gave rise to a proprietary claim would not matter as between him and the trustees.

189. The amount or value of the aggregate of the net rents and other benefits received by the trustees from the property plus interest should be substantially less than the amount of the Non-Voidable Payments plus interest; so that under my Proposed Order the net rents and other benefits plus interest could be set off against the of the Non-Voidable Payments plus interest so that no liability was imposed on the trustees.

190. Where an order for rescission imposes conditions and requirements as to counter-restitution on the applicant, the order usually takes the form of a conditional order for rescission, the condition being as to the satisfaction of the specified conditions and requirements as to counter restitution.

191. My decision as to the payments which may be set aside and conditions and requirements as to counter-restitution which I would impose do not exactly match the proposal in the draft consent order or in the Claimants' solicitors' letter dated 6th February 2019. Accordingly, subject to what I say next, it would be appropriate for my Proposed Order to be in conditional form.

192. In the absence of further agreement between the Claimants and the trustees as to the conditions and counter-restitution, if the amounts of the net rents, the value to the trustees of their use of the property and the appropriate interest rates applicable to the conditions, set off and counter-restitution cannot be agreed, they will have to be the subject matter of inquiries before a Master before the orders for rescission and transfer of the property becomes unconditional.

193. My Proposed Order does not differ very greatly from one version of the order suggested in the Claimants' solicitors' letter dated 8th February 2019. It may well be that against the background of my Proposed Order, the Claimants, and the trustees will be able to agree conditions or undertakings in an alternative form and to an alternative effect to those which I specify in my Proposed Order. In my judgment that would be acceptable at this stage, even if the alternatives went beyond the scope of the conditions and counter-restitution which I can impose. However:

193.1. Unless the terms included one which meant that the trustees would not come under any relevant liabilities, proprietary or personal, which they were unable to satisfy out of the trust funds remaining in their hands, I would consider it unjust to make an order for rescission.

193.2. Although additional undertakings might be given which went beyond the scope of the conditions and counter-restitution which I could impose without consent (for example a requirement to settle funds on a new trust) it would not be acceptable to include additions of that kind in the body of any order I might make, whether by consent or otherwise.

193.3. The order I make cannot be a consent order unless the requirements of CPR 21.10 are complied with, because a consent order would involve a compromise of the proceedings to which, by reason of Stefan being a party, that rule would apply.

193.4. Alternative financial conditions or terms of counter-restitution which were within the scope of what I could order without agreement of the parties might be agreed between the Claimants, the trustees and Stefan to be included in the order; but that would involve a partial compromise of the proceedings and accordingly would require to be approved by the court on Stefan's behalf under CPR 21.10.

194. My Proposed Order should be in conditional form and contain the conditions and requirements for counter-restitution required by me; though some or all of those conditions or requirements might be incorporated as unconditional undertakings if the Claimants are willing to give them. The order should (not necessarily in this order):

194.1. Specify that the amounts of the net rents, the value of the trustees' use of the property and the appropriate interest rates should be determined by inquiries before a master if not previously agreed between the Claimants and the trustees.

194.2. Provide that subject to satisfaction of those conditions and requirements or undertakings, the original £4.1 million payment and the Additional Mistaken Payments be set aside, and the trustees do transfer the property to the Claimants.

194.3. Specify that the order and this judgment do not rule on the relative sizes of the beneficial interests in the property of the First Claimant and the Second Claimant.

Deputy Master Henderson, 23/7/19