DEEDS, RESCISSION, AND RESTITUTION

At first glance, the Privy Council's judgment in *Moses v Moses (Trinidad and Tobago)* [2022] UKPC 42 appears unremarkable. It seems to involve little more than a dispute as to whether the Court of Appeal of Trinidad and Tobago should have interfered with the primary judge's finding that a deed conveying title to land had not been made as a result of a mistake. But on closer inspection, the decision raises three significant issues, touching on the law of rescission and the law of restitution. First, is it always necessary to rescind a deed before advancing a claim for restitution? As will be seen below, the outcome of the case indicates that the answer is 'no'. Secondly, is the "causative mistake of sufficient gravity" test in *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108, a test for rescission or a special rule applicable to the restitution of gifts? One reading of the minority judgment of Lord Burrows and Lady Rose suggests that it is only a test for rescission. And finally, does the intervention of third-party rights—specifically, the conveyance of title to bona fide purchasers for value without notice—necessarily bar rescission in equity? The Privy Council ultimately did not consider it necessary to resolve the issue, but it is argued that this does not preclude rescission; it just precludes rescission having effects as against those third parties.

The claimant, Jude Moses, was the executor of her late husband's will. In 1984, Jude executed a "deed of assent" conveying title to approximately 3.5 acres of land to the defendant—her son, Selwyn Moses. The deed was executed in Jude's capacity as personal representative of her deceased husband's estate and purported to give effect to a bequest of title to the land. The deed was registered, although Selwyn was not informed about the deed or its registration.

However, no bequest of this specific property to Selwyn had been made under the will. Title to the land formed part of the residuary estate, which was left to Jude. In 1985, Jude executed another deed of assent, which was also registered, purporting to convey title to the same land to herself as the residuary beneficiary. In 1999, when Jude put the property on the market, Selwyn approached her about buying it. It was at this point, upon searching the land register, that Selwyn discovered the existence of the 1984 deed conveying title to the land to him.

In 2001, Selwyn sold and conveyed title to the land to Colvin Blaize for $300,000. Mr Blaize was a bona fide purchaser for value without notice of any interest Jude might have. Mr Blaize subsequently developed the land, sub-dividing it into 17 lots, and selling those lots to various third parties. Five of those lots were sold back to Selwyn who, in turn, on-sold them, obtaining a profit of $320,000.

In proceedings to which Selwyn was joined as an "ancillary defendant", Jude sought to set aside the 1984 deed in equity on the ground that it had been made as the result of a mistake; she also sought such "further and/or other relief" (at [31]).

At trial, Jude could not give evidence due to her age and infirmity. The primary judge, Seepersad J, while stating that he was not drawing any adverse inferences from this, ultimately held that there was insufficient evidence from which he could conclude that the deed had been executed by mistake and instead found that Jude had "elected to deprive herself of the said benefit and interest" in the land by conveying title to Selwyn (at [59]). Jude appealed, although she died before the appeal hearing; the proceedings were continued by her daughter on behalf of Jude's estate.

The Court of Appeal (Jones JA, with whom Bereaux JA and des Vignes JA agreed), applying the well-established principles for when an appellate court may disturb a trial judge's findings of fact, concluded that "the judge had erred in his approach" (at [49]). Jones JA concluded that "the appropriate inference was that Jude had made the 1984 deed by mistake" (at [52]) and that, in accordance with the test in *Pitt v Holt*, the mistake "was so grave that it would be unconscionable and unjust to leave it uncorrected and refuse relief" (at [53]). The problem, according to Jones JA, was that rescission of the 1984 deed was not possible because of the intervention of third parties who were bona fide purchasers for value without notice. But this did not preclude a claim in "unjust enrichment", which fell within the claim for "further and/or other relief" (at [53]). The extent to which Selwyn was enriched at the expense of Jude was determined to be $620,000, comprising the $300,000 obtained from Mr Blaize on the first sale and the profit of $320,000 obtained on the re-purchase and on-sale (at [53]). Selwyn appealed.

The Privy Council, by majority (Lord Sales, with whom Lord Kitchen and Lord Lloyd-Jones agreed; Lord Burrows and Lady Rose dissenting), agreed with the Court of Appeal that the primary judge had erred in finding that the deed was not made as the result of a mistake (at [57]). As for rescission, while stating that the Court of Appeal was "plainly entitled" to find that the mistake rose to the level of seriousness as set out in *Pitt v Holt* to justify rescission of the 1984 deed, Lord Sales noted that the "[t]he Board [had] heard no argument to question the conclusion … that rescission was barred" (at [66]). Moreover, because of the availability of the claim in unjust enrichment it was "unnecessary to consider other possibilities" (at [66]). In other words, the majority's view was that a claim in restitution could succeed even though the deed had not been rescinded; it was therefore unnecessary to consider whether it could have been.

As for the claim for restitution, applying the orthodox framework, the majority accepted that Selwyn had been enriched at Jude's expense as the result of a mistake. But the extent of Selwyn's enrichment at Jude's expense was not $620,000, as the Court of Appeal had held, but rather $300,000, which the majority took to be "a fair indication of the value" of the property transferred to Selwyn by mistake (at [72]). The additional profit of $320,000 was not a benefit provided "directly" to Selwyn as required by *Investment Trust Companies v HMRC* [2017] UKSC 29; [2018] A.C. 275 and *Prudential Assurance Co Ltd v HMRC* [2018] UKSC 39; [2019] A.C. 929. It was a consequence of the mistaken transfer and, though causally connected to it, it formed no part of the "transfer of value" to be reversed. It therefore fell outside the scope of the claim for restitution (at [73]). The Board allowed the appeal in part, reducing the amount recoverable to $300,000, but otherwise dismissed the appeal.

Lord Burrows and Lady Rose dissented only on the basis that the Court of Appeal had not been entitled to interfere with the finding of fact made by the primary judge. But if the Court of Appeal had been correct to conclude that Jude had made a mistake, the minority shared the view of the majority that this mistake prima facie would have justified rescission of the 1984 deed, although—going slightly further than the majority—they thought that rescission would, "at least normally", have been barred by the intervention of third party rights (at [90]). But this "would not prevent the award of a personal restitutionary remedy for a causative mistake of fact" (at [90]). Like the majority, the minority thought that this claim would have been limited to $300,000.

The importance of this case lies not in the dispute about the appropriate level of appellate intervention into findings of fact by trial judges, but in the claim for restitution. The first issue—although not discussed in the case—is why it was not necessary to rescind the 1984 deed before advancing a claim in restitution against Selwyn. It is said to be a general rule that a claim in restitution cannot "override a valid and subsisting legal obligation of the claimant to confer the benefit of the defendant": *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149; [2022] 1 All E.R. (Comm) 1244 at [70]. In *Dargamo*, the effect of this rule was that amounts paid pursuant to a valid deed (a share purchase agreement) were irrecoverable in restitution. Unless rescinded, the deed provided a reason, or justifying ground, for retaining the enrichment.

The reason it was unnecessary to rescind the deed on these facts is that a deed can be used in (at least) two ways: to create an obligation or to convey rights (Norton, *A Treatise on Deeds*, 1st edn (1906) at 3). The former type of deed is obligational, whereas the latter need not be. In the case of an obligational deed, if the obligation extends to the conferral of the right in question, it is necessary

to rescind the deed before a claim in restitution can succeed. In such cases, "the continuing validity of the transaction" under which the right was transferred is "fatal" to the claim: *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All E.R. 202 at 208; [1998] P.N.L.R. 664 at 670. By contrast, in the case of a non-obligational deed, the deed's continued validity is not an objection to a claim in restitution—it is simply the means by which the right was transferred. Nor does the registration of the deed provide a reason to deny restitution. In *Cressman v Coys of Kensington (Sales) Ltd* [2004] EWCA Civ 47; [2004] 1 W.L.R. 2775, which was concerned with the mistaken transfer of a vehicle registration mark, Mance LJ made precisely this point. He said: the fact that "it was the statutory scheme that meant that [the defendant] acquired the registration mark … does not mean that there was no enrichment or no unjust enrichment. On the contrary, it is the reason why there may have been" (at [24]).

Here, the "deed of assent" was functionally equivalent to a deed of conveyance (at [16]–[17]). It was the way Jude conveyed title to Selwyn but it created no obligation that Jude do so. This is why all members of the Privy Council took the view that a claim for restitution could be advanced even though the deed had not been rescinded. Title to the land had been conveyed to Selwyn, who was not entitled to it under the will. On the finding of the majority, this was a mistake and, on the orthodox account, the mistake provided a reason for restitution.

The second point that arises is the role of the "causative mistake of sufficient gravity" test in *Pitt v Holt*: is this simply a test for rescission of deeds and other voluntary dispositions, or a special rule for restitution of gifts, encompassing both personal and proprietary restitution? The reason this question matters is that in the law of restitution it is usually said to be sufficient for a prima facie claim that the mistake "caused" the transfer: *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] Q.B. 677 at 695; [1979] 3 All E.R. 522 at 535. By contrast, in *Pitt v Holt*, when reviewing the court's equitable jurisdiction to order rescission of a voluntary disposition on the grounds of mistake, Lord Walker (delivering the judgment for the Supreme Court) held that it was not sufficient that there was a "causative mistake"; it needed to be a "serious causative mistake" or a "causative mistake of sufficient gravity" (at [122], [127]). While the first view that *Pitt v Holt* was just about rescission accepts these differing tests for rescission and restitution, the second view suggests that the "serious causative mistake" test is a special rule applicable to restitution (both personal and proprietary) of gifts (Mitchell, Mitchell, and Watterson, *Goff & Jones: The Law of Unjust Enrichment*, 10th edn (2022) at [9-151]–[9-154], Watterson, [2013] 72 C.L.J. 501 at 503–504, although cf Häcker (2014) 67 C.L.P. 333 at 340–351).

The decision of the Privy Council lends some support to the first view, namely, that the test in *Pitt v Holt* is simply a test for rescission. This was not a case

concerned with gifts. The very fact of the mistake (i.e. that Jude thought that Selwyn was entitled to the property under the will) showed that the transfer was not intended to be a gift from Jude (as the person actually entitled under the will). The transfer was made pursuant to her purported obligation to do so as executor. Yet both the majority and the minority thought that *Pitt v Holt* was the applicable test for rescinding the deed (at [66], [90]), suggesting, at least, that the "serious causative mistake" test is not only a special rule applicable to gifts. Lord Burrows and Lady Rose also appeared to confine *Pitt v Holt* to rescission, stating that *Pitt v Holt* was "the leading case on rescission of a deed for a mistake" (at [90]).

As for the test applicable to the claim for restitution, the majority simply stated that "if the conveyance was made by mistake" then "this constituted a factor to show that for the purposes of such a claim the enrichment was unjust" (at [68]). The majority did not state whether the applicable test was simply a "causative mistake" or a "serious causative mistake". By contrast, Lord Burrows and Lady Rose referred to a "causative mistake of fact" (at [90]), specifically omitting any reference to the need for the causative mistake to be "serious" or "of sufficient gravity". On one reading, this would suggest that Lord Burrows and Lady Rose saw the simple "causative mistake" test as governing the claim in restitution. Again, on the first view—that *Pitt v Holt* is simply a test for rescission—it makes sense that a different test applies to the claim for restitution.

Of course, neither the fact that all members of the Board applied the test from *Pitt v Holt* to the question of rescission nor the omission of "serious" or "of sufficient gravity" by Lord Burrows and Lady Rose negates the possibility that the test from *Pitt v Holt* is both a rule about rescission (the first view) and a rule about restitution (personal and proprietary) of gifts (the second view). The present case was not concerned with a gift and so it was right not to apply any (possible) higher standard. But this case does provide a useful illustration of a circumstance in which the test for rescission would not be the same as the test for the personal claim in restitution. And this does raise the possibility that, on different facts, rescission might be denied on the ground that the mistake was not sufficiently "serious" while restitution is nonetheless permitted (though see Mitchell, Mitchell, and Watterson at [9-156]).

The third and final point to make about this case has to do with a possibility the majority expressly stated that they did not need to consider. As was noted above, the Court of Appeal had held that rescission of the 1984 deed was not possible because of the intervention of third parties who were bona fide purchasers for value without notice of any interest Jude might have (at [53]). In particular, title to the land that had been conveyed to Selwyn by the 1984 deed was subsequently sold to Mr Blaize and then onwards to various third parties

(either directly or through the re-purchase and subsequent on-sale by Selwyn). But there is an argument that the intervention of third-party rights has never barred rescission in equity: O'Sullivan, Elliott, and Zakrzewski, *The Law of* Rescission, 2nd edn (2014) at [20.23]. The majority, having heard no argument on this question, decided not to consider it (at [66]). The minority suggested that this is "at least normally" a bar to rescission (at [90]).

The argument is that the intervention of bona fide purchasers for value without notice does not preclude rescission; it just precludes rescission having effects as against those third parties: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2012] EWCA Civ 195; [2013] Ch. 91 at [50]. Moreover, there is a line of cases suggesting that following rescission in equity for fraud, the rescinding party retrospectively obtains a trust (a "rescission trust") of the original rights that passed to the transferee under the transaction: *Independent Trustee Services v Noble* at [53]; *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281 at [122]. This rescission trust then "enable[s] the rescinding party to trace into any substitute rights" acquired with the original rights (Hafeez-Baig and English, *The Law of Tracing* (2021) at [5.21]–[5.29]). And while the line of authorities has traditionally been concerned with rescission for fraud, in *Bainbridge v Bainbridge* [2016] EWHC 898 (Ch), [2016] 2 P. & C.R. DG16 at [24]–[32] it was applied to rescission in equity for a causative mistake of sufficient gravity.

Here, that analysis would have enabled Jude to rescind the deed in equity so as to retrospectively acquire a trust of title to the land, trace into the $300,000 obtained by Selwyn in exchange, and assert that he held the $300,000—assuming the money could still be identified—on trust. But that is all it would have enabled Jude to do. This route would still not have entitled Jude to the additional $320,000 profit obtained by Selwyn when he on-sold the five lots that he had re-purchased. This is because, unless the original $300,000 was used to re-purchase the five lots, the only connection between the profit of $320,000 and the transaction to be rescinded was a causal one, and in the law of tracing, a causal connection has never been sufficient to permit tracing: *Foskett v McKeown* [2001] 1 AC 102 at 137, [2000] 3 All E.R. 97 at 129.

Jordan English
St John's College, Oxford