Misuse of Rectification in the Law of Trusts

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Trusts can be an effective mechanism for the mitigation of tax liability. Settlors wishing to use them for this purpose need to navigate complex statutory regimes, and it is no surprise that mistakes are sometimes made. When there has been a tax planning error, the settlor (and other affected parties, such as beneficiaries) may have a number of options, including variation, rescission and professional negligence claims. However, it has become increasingly common to seek rectification of the trust deed and, as we will see, courts have been willing to grant the remedy in several recent decisions. This article takes a critical approach to these cases, and suggests that it is becoming too easy to obtain rectification for tax planning errors. The article begins by describing the traditional scope of the remedy, before turning to its recent usage in the tax context.

A. The Traditional Scope of Rectification

The purpose of rectification, as stated by Mummery LJ in *Allnutt v Wilding*, is to bring the '... trust document into line with the true intentions of the settlor as held by him at the date when he executed the document.'[1] The principal requirements were stated by Baring J in *Giles v The Royal National Institute for the Blind*[2]:

> '[T]here must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended … [and]'
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> '[T]he specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did *not* intend what was recorded; they also have to show what they did intend, with some degree of precision …'[3]

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[1] [2007] EWCA Civ 412, [11]. If the trust is declared in pursuance of a contractual agreement, as happens with a pension trust, then the contractual test for rectification, which looks to the intention of both parties to the agreement, applies. See, for example, *Konica Minolta Business Solutions (UK) Ltd v Applegate* [2013] EWHC 2536.

[2] [2014] EWHC 1373 (Ch). Baring J was here summarising Peter Gibson LJ's judgment in *Racal Group Services Ltd v Ashmore* [1995] STC 1151.

[3] ibid [25].

There appears to be two types of case where this test is satisfied. The first is where there has been a 'mistake as to the contents' of a trust deed. This is where a settlor executes a trust deed in the false belief that it contains particular terms, when in fact it contains different terms. This typically happens when a clause is accidentally included in or omitted from the final draft of the deed. The second type of case is where there has been a 'mistake as to meaning', which occurs when a term has been deliberately included in the trust deed, but the settlor has misunderstood its meaning. In both cases it can be said that there is a 'flaw in the written document', such that its terms fail to reflect the settlor's intention.

1. Mistakes as to content

A mistake as to content occurs when a settlor executes a trust deed in the false belief that it contains particular terms. Consider the following example:

> A settlor writes to his solicitor, instructing him to draft a trust deed on terms [X]. The solicitor fails to follow these instructions and drafts a trust deed on terms [Y]. The settlor does not read the final draft carefully, and executes the document.

The simple fact that there is a literal disparity, a change from term [X] to term [Y], does not, in itself, prove that there has been a mistake. Settlors often change the terms in successive drafts as their intentions are refined and develop. The above example is different, however, as the change was introduced by the drafter's error, not a deliberate choice by the settlor. The settlor's lack of awareness of this change is what leads to the mistake: he executes the trust deed in the false belief that it contains term [X], when in fact it contains term [Y].[4]

An example of this kind of mistake can be found in the pension trust case of *Industrial Acoustics Co Ltd v Crowhurst*[5] where a company, planning to reform its pension trust, passed a resolution stating, amongst other things, that the age at which female members of the scheme would become entitled to benefits would increase from 'sixty' to 'sixty-five'. Yet when the trust deed was updated to give effect to the changes, the drafter failed to include this provision, and the final document stated that 'sixty' was the retirement age. The omission of the term was not noticed by the company when it executed the final deed. It subsequently applied, successfully, to have the document rectified.

The mistake in *Industrial Acoustics Co Ltd v Crowhurst* could not be cured by the normal process of construction. Earlier drafts and other statements of intent, such as the company resolution, may be appear to be clear evidence of what the settlor intended. However, the final document is meant to supersede these earlier statements; it has the purpose of '… defin[ing] authoritatively and clearly what the parties' respective rights and obligations are to be.'[6] The court was prevented from considering the earlier statement – the board resolution that female members retire at 'sixty-five' – when it construed the trust deed.

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[4] See PS Davies, 'Rectifying the Course of Rectification' (2012) 75 MLR 412, 420-423, for helpful discussion of how one proves a mistake.

[5] [2012] Pens LR 371.

[6] *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561, 573.

To have done so would have been contrary to the settlor's intention that the final document be the sole source of the terms of the trust.[7]

What rectification appears to do is allow the settlor to allege that his intention is vitiated by his mistake as to the contents of his trust deed.[8] If the settlor believed that the document contained term [X], when in fact it contained term [Y], then a court is justified in ignoring his intent for the final document to supersede all earlier statements of the terms. This then frees the court to consider earlier parol statements when it is ascertaining the terms of the trust.[9] So in *Industrial Acoustics Co Ltd v Crowhurst*, the settlor's mistake opened the door to the admission of earlier parol statements, including its resolution that female members retire at 'sixty-five', as evidence of the trust's terms. As Stevens puts it, rectification gives effect to the settlement that '… there would have been if it had not been agreed that the document was to constitute the parties' entire agreement.'[10]

A final point to make concerns an inherent limitation of this function of rectification. The remedy may facilitate the admission of parol evidence of the terms of the trust, but the burden remains on the claimant to prove what those terms are.[11] He will need to show that his parol statements are sufficiently certain, when construed objectively, to amount to terms, especially as those terms will be given retrospective effect.[12] In *Fowler v Fowler* it was said that the applicant needs to be able to show 'exactly and precisely the form to which the deed ought to be brought.'[13] This was satisfied in *Industrial Acoustics Co Ltd v Crowhurst*, where the claimant could point to a precise written statement, the company resolution, as evidence of the intended terms of the trust.

2. Mistakes as to meaning

[7] *Rabin v Gerson* [1986] 1 WLR 526, 531-532.
[8] *JJ Huber (Investments) Ltd v The Private DIY Co Ltd* [1995] NPC 102.
[9] See Law Commission, *Law of Contract – The Parol Evidence Rule* (Law Com 154, 1986) [2.13] and Wedderburn, 'Collateral Contracts' [1959] CLJ 58, 68.
[10] R Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in E Peel & A Burrows (eds), *Contract Terms* (OUP, Oxford 2007) 119.
[11] In earlier cases some courts insisted that not only must the parol statements be clear, but that they must be legally binding and enforceable. See *Lovell & Christmas v Wall* (1911) 104 LT 85, 88. The difficulty with this approach is that if the earlier statement is already enforceable, then rectification essentially collapses into a form of specific performance. The need for the parol term to be legally enforceable was decisively rejected in *Joscelyne v Nissen* [1970] 2 QB 86.
[12] In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 Lord Hoffmann said that rectification, in the context of contracts, still requires the parties' intention to be 'objectively determined'. See also D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 111.
[13] (1859) 4 De G & J 250, 265; 45 ER 97, 103.

The oldest examples of rectification in the context of trusts involve mistakes as to content.[14] Since the important decision of *Re Butlin's Settlement Trust*[15], it has become common for courts to award the remedy for a slightly different type of mistake, a mistake as to meaning. Consider the following example:

> A settlor instructs his solicitor to draft a trust containing term [Y]. The solicitor follows the instructions, drafting a trust deed that contains term [Y]. The settlor executes the document. It subsequently transpires that the settlor had misunderstood the meaning of [Y], falsely believing it to mean [X].

This is not a mistake as to the contents the document, as the inclusion of the problematic term, term [Y], was entirely deliberate. This is evident from the fact that there is no literal disparity between the settlor's parol statement (his instructions to the solicitor) and the terms in the final trust deed. The mistake in this case relates to the meaning of the term, with the settlor believing the words to convey one thing, but a reasonable person understanding them to mean another.

When drafting the terms of a trust, settlors sometimes fail to convey their intention because they have misunderstood the meaning of a particular word or phrase. The danger is especially acute when the settlor is using technical legal words. The facts of *Re Butlin's Settlement Trust* provide an example. The settlor executed a trust deed, the terms of which, when construed objectively, provided that the trustees could act only by unanimous decision. The words had been deliberately included by the settlor, but he had understood them to mean something else, specifically, he understood them to mean that the trustees could act by a simple majority. Brightman J held that this mistake as to the meaning of the words could be corrected by rectification:

> … rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying and the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction.[16]

Brightman J's judgment has been widely cited and seems to represent the current legal position. In *Allnut v Wilding*, for instance, Mummery LJ said that rectification could be used even though the words were deliberately included in the trust deed, but there was a '… misunderstanding by those involved about the meaning of the words or expressions …'[17]

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[14] The typical case involved a literal disparity between a marriage settlement and a trust declared in pursuance of the settlement. For examples, see *Thin v Thin* (1650) 1 Rep Chan 162, 21 ER 538, *Walker v Armstrong* (1854) 3 De GM & G 531, 44 ER 495 and *Meadows v Meadows* (1853) 16 Beav 401, 51 ER 833. For an historical account of this head of the equitable jurisdiction, see C MacMillan, *Mistakes in Contract Law* (Hart, Oxford 2010) 39-68.

[15] [1976] 1 Ch 251. c.f. *Constantinidi v Ralli* [1935] 1 Ch D 427 and *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* [1953] 2 QB 450, 461.

[16] ibid 260. See also *Jarvis v Howle* [1937] Ch 67, *Henley v Pearson* (1879) 13 Ch D 545, *James v Couchman* (1885) 29 Ch D 212 and *Whiteside v Whiteside* [1950] Ch 65.

[17] [2007] EWCA Civ 412, [11]. See also *T & N v Royal Sun Alliance* [2003] EWHC 1016, [136].

The use of rectification to correct mistakes as to meaning does raise some conceptual puzzles. The mistake in a case such as *Re Butlin's Settlement Trust* stems from a divergence between the settlor's subjective meaning (what *he meant* by his words), and the objective meaning of his statement (what *meaning is reasonably conveyed* to others). As is well known, the rules of construction give primacy to the latter.[18] The function of rectification in such cases is essentially to reverse the effects of construction, by re-writing the trust on terms that better reflect the settlor's subjective meaning.[19]

Although this function of rectification is well established, one can be forgiven for pointing out an obvious contradiction. If a settlor always has the option of having the terms of his trust re-written so that they give effect to his subjective meaning, then what point is there in conducting an objective inquiry in the first place?[20] To avoid this conceptual incoherence, one could emphasise the bars to rectification. Courts will not enforce the settlor's subjective intention if there has been a lapse of time or it would be prejudicial to a third party. This means that there is not the potential to undo the objective approach to interpretation in every single case. Further, any claimant seeking rectification for this kind of mistake faces a difficult task in proving their case. This type of claim – although the settlor said [Y], he meant [X] – is inherently difficult to prove given that the settlor never expressed [X]. The need for 'strong irrefragable' evidence seems particularly apt in such a case.[21]

Notwithstanding these difficulties, the use of rectification to cure mistakes as to meaning is, arguably, a principled application of the remedy. Courts are still giving effect to the settlor's intended terms. They are doing this by supplying words that accurately convey the settlor's intended meaning.

B. A New Role for Rectification?

The purpose of rectification, as we have seen, is to give effect to the settlor's intended terms. Yet one can see the remedy performing a very different function in several recent first instance decisions involving tax planning mistakes. This section will give a critical account of these cases and show that they represent an unprincipled extension of the remedy.

1. Tax mistakes

[18] See *Byrnes v Kendle* [2011] HCA 26, [114], *Gissing v Gissing* [1971] AC 886, 906, *Twinsectra Ltd v Yardley* [2002] 2 AC 164, 185 and *Rabin v Gerson* [1986] 1 WLR 526, 533.

[19] *Day v Day* [2013] EWCA Civ 280, [2014] Ch 114, 122.

[20] M Smith, 'Rectification of Contracts for Common Mistake, *Joscelyne v Nissen*, and Subjective States of Mind' (2007) 123 LQR 116, 127. In *Byrnes v Kendle*, for instance, after stating at length that the law gives effect to the objective meaning of the settlor's words, the High Court appeared to accept that this outcome could be reversed if the settlor had pleaded rectification: (2011) 243 CLR 253, 285.

[21] c.f. *Hanley v Pearson* (1879) 13 Ch D 545, a mistake as to meaning case, where the only evidence was an affidavit from the settlor asserting that she did not mean what she said.

What kind of mistake is a tax planning error? Consider the following example:

> A settlor is advised that if he declares a trust containing term [Y] he will achieve certain fiscal benefits, specifically a reduction in the amount of tax payable under the Inheritance Tax Act 1984. After the trust is declared, it transpires that the settlor had received incorrect advice, and term [Y] does not produce the intended tax saving. In order to achieve the tax saving, the trust should have contained term [X].

The distinctive feature of this mistake is that the settlor's false belief relates to something *other than the term* that he is applying to have rectified. Term [Y] was deliberately included in the settlement, and there was no confusion over what meaning it would convey to others. The settlor's mistake concerned something external to the terms. It was a false belief about the requirements of the relevant tax statute.

A real example of such a case is *Martin v Nicholson*[22]. Although not the most recent case of this kind to be decided, it does provide a neat illustration of the issue. The claimant sought advice from his solicitor on how to set up a 'nil-rate band discretionary trust', which is a common method of reducing inheritance tax. On his solicitor's advice, the claimant declared a discretionary trust of £200,000. When giving the advice the solicitor failed to notice that the nil-rate band had been lowered from £200,000 to £154,000 in the most recent budget, and the claimant became subject to an unanticipated tax charge. The claim for rectification was granted. Peter Smith J inserted the lower (and tax efficient) figure of £154,000 into the terms of the trust on the basis that the claimant's '… intention was to create a discretionary trust at the relevant applicable nil rate band.'

If Peter Smith J was correct to conclude that the settlor's 'intention' was to create a nil-rate band trust, then there can be no complaint with the outcome of the case. It is suggested, however, that the judge fell into error by failing to distinguish between the settlor's motive for declaring a trust, and the terms upon which he intended the trust to take effect. The settlor's motive can, of course, be an important piece of contextual information when a court is called on to interpret the trust. However, it is not the court's role, whether interpreting or rectifying a trust deed, to give effect to the settlor's motives. Rather, the court's task is to give effect *to the terms* upon which the trust is intended to take effect.[23] A term is something which defines the content of the legal relationship between the parties. A vague statement such as, 'I intend to save inheritance tax', is unlikely to constitute a term, as it does not describe the rights or duties of any particular person. On the other hand, statements which identify the beneficiary, specify the quantum of his interest, or enumerate the trustee's investment powers, are likely to be examples of terms. The more specific a statement, and the more particular its description of the legal relationship between the parties, then the more likely it is to amount to a term.[24]

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[22] [2004] EWHC 2135.

[23] *Commissioners of Inland Revenue v Raphael* [1935] AC 96, 142.

[24] The difficulties in distinguishing terms from motives was recently remarked upon by Master Clark, who said that there is always ' … a continuum moving from a formulation of a general intent or objective to a specific understanding of how that objective is to be achieved in documentary form.': *Prowting 1968 Trustee Ltd v Amos-Yeo* [2015] EWHC 2480, [32].

Returning to *Martin v Nicholson*, the crucial point is that the settlor, when drafting the trust, did not define the beneficiary's interest by reference to the 'nil-rate band', but by the very specific figure of '£200,000'. One must, therefore, query the judge's conclusion that the settlor intended to create a trust '… at the relevant applicable nil rate band.' It is perhaps more accurate to say that the settlor's *motive* was to take advantage of the nil-rate band allowance; but his *intention* was that the trust take effect on the terms articulated in the trust deed, including the term that specified the sum of '£200,000'. As Etherton LJ recently noted, 'Intention must be distinguished from motive.'[25]

What this analysis hopes to demonstrate is that the settlor's mistake in *Martin v Nicholson* is quite different from those found in the traditional categories of rectification, as it did not relate to the terms of the trust. The inclusion of the problematic term was the result of a deliberate choice made by the settlor, on the advice of his solicitor. Further, its meaning was clearly understood; it is not plausible to say that the settlor, in stating the figure '£200,000', subjectively meant some other sum. In short, the terms of the trust said and meant precisely what the settlor intended. The settlor's mistake related to his *reasons* for including the '£200,000' term. The poor advice he received led to a false belief the term would mitigate tax liability.

2. The authorities

Is the remedy of rectification available when a settlor has made a tax planning mistake of this kind? The traditional view is that it is not.[26] This stems from two Court of Appeal decisions, *Allnutt v Wilding*[27] and *Racal Group Services Ltd v Ashmore*.[28] *Allnut v Wilding*, like many cases in this category, involved an unanticipated inheritance tax charge. The settlor had been advised by his solicitor that inheritance tax could be mitigated if he declared a 'discretionary' trust in favour of his grandchildren. The advice was wrong, with such savings only possible where the beneficiaries' interests were vested. The inclusion of the problematic term, which referred to the 'discretionary' nature of the trust, was deliberate, not accidental. The highest the settlor's claim could be put was that his reasons for including the term were flawed, being based upon incorrect advice. In rejecting the claim for rectification, Mummery LJ said:

> I am unable to see any mistake by the settlor in the recording of his intentions in the settlement. The mistake of the settlor and his advisors was in believing that the nature of the trusts declared in the settlement for the three children created a situation in which the subsequent transfer of funds by him to the trustees [would be exempt from inheritance tax].[29]

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[25] *Kennedy v Kennedy* [2014] EWHC 4129, [43].

[26] A similar point can be made in the contractual context, where rectification has been denied where the only mistake is the failure of the contract to achieve its fiscal purpose. See *Connolly Ltd v Bellway Homes Ltd* [2007] EWHC 895, [109] and *Co-op Insurance v Centremoor* [1983] 2 EGLR 52, 55.

[27] [2007] EWCA Civ 412.

[28] [1995] STC 1151, 1158.

[29] [2007] EWCA Civ 412, [19]. See also *Kennedy v Kennedy* [2014] EWHC 4129 and *W G Mitchell (Gleneagles) Ltd v Jemstock One Ltd* [2006] EWHC 3644.

In the earlier case of *Racal Group Services Ltd v Ashmore* the claimant had covenanted to pay an annual sum to a charity over the course of three years. Tax relief was not available on the gift as it was not payable, as required by the statute[30], over a period 'exceeding' three years. As in *Allnutt v Wilding*, the problematic term, the 'three-year' clause, had been deliberately included in the deed.[31] The claimant's mistake related to the reasons for its inclusion, specifically their false belief that it would satisfy the relevant tax relief criterion. Rejecting the claim for rectification, Peter Gibson LJ said: ' … the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective.'[32]

The traditional approach, therefore, has been to refuse rectification when the settlement says and means what the settlor intended it to, even though the settlor's reasons for declaring the trust are flawed. Surprisingly, however, this position has not been followed in a series of first instance decisions. We have already discussed one of them, *Martin v Nicholson*, which was decided in 2004. There have been several others since then.[33] Whilst there is not space to analyse each case, their liberal attitude to rectification is exemplified by two of the most recent decisions, *Prowting 1968 Trustee Ltd v Amos-Yeo*[34] and *Bullard v Bullard*.[35] It is worth considering each case in a little detail.

In *Prowting 1968 Trustee Ltd v Amos-Yeo* trustees, who held company shares on a discretionary trust, made an appointment of 115,00 shares to a beneficiary. The purpose of the transaction was to take advantage of entrepreneur's relief on capital gains tax, which was available if the shares represented at least 5% of the total value of a company. The trustees had miscalculated the value of the company, so that the shares represented 4.97% of its value. The court allowed rectification, and the words '115,000 shares' were replaced with '150,000 shares' (which was enough to pass the 5% threshold). Master Clark justified his decision on the following basis:

> In my judgment the evidence sufficiently establishes that the parties' intention was that the defendants should receive from the 1968 settlement enough shares … to satisfy the [entrepreneur's relief] requirements.'[36]

If this finding of fact is correct, and the trustees' intention was to appoint 'enough shares' to satisfy the tax relief criterion, then the award of rectification was entirely proper. With respect to Master Clark, however, one must question this finding of fact. Nowhere did the trustees define the subject matter of the appointment as '5% of the total value of the

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[30] Under the Income and Corporation Taxes Act 1988, s 660(1).

[31] An attempt by a company solicitor to turn it into a 'four-year' clause was rejected by the company, with a senior officer pointedly re-inserting the original 'three-year' term.

[32] [1995] STC 1151, 1158.

[33] *Farmer v Sloan* [2004] EWHC 606, *Gallaher Ltd v Gallaher Pensions Ltd* [2005] Pen LR 103, *R J Price v Williams-Wynn* [2006] EWHC 788, *Wills v Gibbs* [2007] All ER 509, *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch), *Konica Minolta Business Solutions (UK) Ltd v Applegate* [2013] EWHC 2536, *Lobler v The Commissioners for HMRC* [2015] UKUT 152 and *RBC Trustees (CI) Ltd v Stubbs* [2017] EWHC 180. See also the recent case of *Jump v Lister* [2016] EWHC 2160 (Ch), which did not involve a tax mistake, but the similar problem of poor drafting of mirror wills which could have made a legacy payable twice.

[34] [2015] EWHC 2480.

[35] [2017] EWHC 3 (Ch).

[36] [2015] EWHC 2480, [36].

company'; rather, they defined it by the specific figure of '115,000 shares'. It is more accurate to say that whilst the trustees' *motive* was to transfer 'enough shares' to satisfy the 5% criterion, their *intention* was that the transfer take effect under the written terms of the deed of appointment, including the '115,000 shares' term.

If this analysis of the case is correct, then it follows that the trustees made no mistake in relation to the terms of the appointment: the document said and meant precisely what they intended it to. Their mistake related to something external to the terms, that is, the value of the company, with the trustees believing that it was worth less than it actually was. This places the case outside of the traditional purview of rectification. It was not the terms themselves that were mistaken, but the trustees' reasons for adopting them.

Similar issues can be seen in the case of *Bullard v Bullard*[37] where the settlor attempted, unsuccessfully, to create an 'interest in possession trust'. These are trusts where the beneficiary has an immediate interest in the trust income as soon as it is produced, and their attraction is that they can be exempt from inheritance tax.[38] The difficulty in the case arose from the fact that some of the beneficiaries were minors, which meant that under s. 31 of the Trustee Act 1925 their interests were contingent upon their reaching majority. This meant that the trust did not create an interest in possession and, consequently, inheritance tax became payable. To avoid this outcome the trust deed should have excluded the operation of s. 31. Far from doing that, a term in the deed expressly stated that the statutory provision applied to the trust. The claimant applied, successfully, to have the deed rectified.

The grant of rectification in *Bullard v Bullard* is problematic for the same reasons that it was in *Prowting 1968*. The settlor was not mistaken as to any terms in the trust. As Master Matthews accepted, the offending term, which referred to s. 31 of the Trustee Act 1925, had been deliberately included in the trust deed: '… the claimant made no mistake as to which document she intended to sign, or as to the words that she intended to be included in it.'[39] Nor was the settlor mistaken as to the meaning of the term. Again, as Master Matthews said: '[W]hat the claimant (and her draftsman) was mistaken about here was not actually the *meaning* of any of the words that she used in [the deed], or even of the words in section 31.'[40] It is suggested that these admissions take the case outside of the traditional categories of rectification, as the court was accepting that both the inclusion of the term, and the meaning conveyed by it, were deliberate choices. It follows that the only mistake made by the settlor related to her reason for including the term. Specifically, it was based upon poor advice, with her solicitor failing to appreciate the tax consequences of the term.

3. Criticism

[37] [2017] EWHC 3 (Ch).
[38] This only applies if the trust was created before 22nd March 2006, following changes introduced in the Finance Act 2006. It was ignorance of this change that led to the tax planning error in *RBC Trustees (CI) Ltd v Stubbs* [2017] EWHC 180.
[39] [2017] EWHC 3, [31].
[40] ibid [31].

Is this new role for rectification welcome? To answer this question it is worth reflecting on the function of the remedy in cases like *Prowting 1968* and *Bullard v Bullard*. The crucial point is that in such cases, as we have seen, the problematic term was deliberately included in the trust deed and its meaning fully understood. It is not possible to claim that a court, in re-writing the terms of a trust, is 'giving effect to the settlor's intention' when the trust deed already says and means precisely what its settlor intended.[41] What courts are actually doing in these cases is taking a view on what the terms of the trust *would have been* had the settlor been better informed and advised. In each case the court was effectively writing, with the benefit of hindsight, a better trust for the claimant. This is a role that has traditionally been denied to rectification. In the old case of *Tucker v Bennett*, Lopes LJ said that the court '… must look at the intention of the parties at the time when the deed was executed, and not what would have been their intent if … the result of what they did had been present in their minds.'[42] To similar effect is the Supreme Court of Canada's recent decision in *Canada (Attorney General) v Fairmont Hotels Inc*[43], that the remedy is not available '… to cure a party's error in judgment in entering into a particular agreement …'[44]

The use of rectification in cases such as *Prowting 1968* and *Bullard v Bullard* is inconsistent with Court of Appeal authority[45] and a departure from well-established principles. There are also normative objections to this new role for rectification. The first relates to solicitors and other professionals, who have been the principal beneficiaries of these developments in rectification. Incomplete or incorrect tax advice is the reason why settlors have come to regret their decisions. Take the case of *Ashcroft v Barnsdale*[46], where the claimant was advised to execute a deed of variation of a will which would re-distribute a deceased's estate in a way which made use of certain tax allowances more effectively. Whilst the deed did have this effect, it also led to a new inheritance tax charge on the claimant, which the solicitor had failed to warn him about. In the ensuing claim for rectification (which was successful), the claimant submitted the following statement: 'If this aspect of the deed's effect [i.e. the tax charge] had been explained to me I would not have executed it but would have asked for it to be amended …'[47] This evidence, which was accepted by the court, would equally support a claim for professional negligence against the solicitor. Rather than open up the alternative avenue of rectification, one may argue that the court should have encouraged the claimant to recover his loss from the party whose negligence had caused it. It is important to note that solicitors are insured against professional negligence claims. Yet by making rectification available for a tax planning error, the loss is borne by a different party, namely HM Revenue and Customs. The expansion of rectification has the potential to distort the settled distribution of risk, as it is effectively making the tax payer an insurer against the solicitor's carelessness.[48]

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[41] M Yip, 'Further Reflections on the Hastings-Bass Rule, Rescission for Mistake and Rectification' (2014) 8 Journal of Equity 46, 56.
[42] (1887) 38 Ch D 1, 16.
[43] [2016] SCC 56, overruling *Juliar v Canada (Attorney General)* (2000) 50 OR (3d) 728.
[44] Ibid [19]. See also *Tankel v Tankel* [1999] 1 FLR 676, 678.
[45] *Allnutt v Wilding* [2007] EWCA Civ 412 and *Racal Group Services Ltd v Ashmore* [1995] STC 1151.
[46] [2010] EWHC 1948 (Ch).
[47] ibid [5].
[48] c.f. J Hilliard, 'Limiting Re Hastings Bass?' [2004] Conv 208, 223.

The second objection to the expansion of rectification is that it is ill-equipped to deal with the difficult policy issues surrounding tax planning errors. Most would agree that equitable relief should not be available in every single case involving a tax error. Yet distinguishing the 'innocent' claimant, who has made a catastrophic but easily avoidable mistake[49], from the less deserving claimant, who has engaged in an artificial scheme that goes wrong[50], is difficult. It is, in a sense, just as difficult as drawing a line between tax mitigation and tax avoidance.[51] One suspects that these issues will start to play a more prominent role in rectification claims if its current popularity continues unabated. When this happens, courts may find that the remedy is ill-suited to make the types of distinctions necessary.

The specific grounds upon which rectification can be barred are quite limited. The only one that is potentially relevant in the present context is detriment to a third party.[52] Courts can reject a claim to have a document rectified if to do so would adversely affect an innocent third party.[53] Could the 'underserving' settlor, who has engaged in an artificial tax scheme, find his rectification claim barred on the grounds that it would adversely affect HM Revenue and Customs? The question does not appear to have been tested in any decisions, which is not surprising given HM Revenue and Customs' practice of not opposing such claims (an issue discussed below). However, such an attempt would be likely to fail. The 'third party' bar to rectification usually arises in the context of overreaching of property rights.[54] In the majority of cases where it has been applied, the document in question has been used to convey an interest in land or a chattel, title to which is subsequently acquired by a third party.[55] When the third party is a bona fide purchaser for value without notice, the bar is said to apply, and the claimant will not be able to have the original conveyance rectified.[56] The position of HM Revenue and Customs is far removed from this fact pattern, as they are not in any sense a 'purchaser for value' of rights. Further, even if this bar were to apply in the context of tax mistakes, it would be a rather blunt instrument. HM Revenue and Customs are adversely affected regardless of whether it is the 'innocent' or the 'less deserving' claimant trying to have their tax errors expunged, so it is not clear how courts could use this bar to distinguish between the cases.

What is most likely to happen is that courts, trying to draw distinctions between different types of tax errors, will fall back on the fact that rectification, as an equitable

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[49] Take the unfortunate Mr Joost Lobler, who was faced with a tax rate of 779% as a result of ticking the wrong box when he withdrew funds from a life insurance policy: *Lobler v The Commissioners for HMRC* [2015] UKUT 152.

[50] See, for example, the settlement created in *Abacus Trust Co (Isle of Man) v National Society for the Prevention of Cruelty to Children* [2001] STC 1344.

[51] For which, see *Inland Revenue Commissioners v Willoughby* [1997] 1 WLR 1071, 1079.

[52] A further basis on which the remedy can be barred is that the claimant has not demonstrated a 'real issue to litigate'. However, this requirement is so easily satisfied as to make the bar practically meaningless. See See M Yip, 'Further Reflections on the Hastings-Bass Rule, Rescission for Mistake and Rectification' (2014) 8 Journal of Equity 46.

[53] *Thames Guaranty Ltd v Campbell* [1985] QB 210, 240.

[54] See D Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, Sweet and Maxwell, London 2015) ch 6.

[55] See *Smith v Jones* [1954] 1 WLR 1089 for a typical example. The interaction of this principle with the modern registration system was discussed in *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305, [122].

[56] A helpful review of notice in this context can be found in *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P & CR 29, [48]-[60].

remedy, is discretionary.[57] There is, however, very little guidance for courts on how to exercise this discretion. Unlike a claim for specific performance, where a litigant will be entitled to damages in the alternative, in the normal claim for rectification there is usually no common law action to pursue should the claim fail. As such, courts have been very reluctant to exercise the discretion outside of the well established bars to the remedy, such as detriment to third parties.[58] Whilst it may be thought proper to start to apply this discretion on a more liberal basis in the context of tax mistakes, courts will need to return to first principles when so doing, as there is very little specific guidance in the case law on rectification.

C. What Next?

The use of rectification to cure tax planning mistakes represents a significant expansion in the scope of the doctrine, something which is at odds with Lord Walker's claim that it is a 'strictly guarded' remedy. How, one may ask, has this change happened? The principal reason, I would suggest, is the role (or lack of) played by HM Revenue and Customs. It is notable that in each tax mistake case where rectification has been granted, the claim has been unopposed. Although the re-writing of the trust sometimes affects the interests of the beneficiaries, they have typically supported the claim as the effect is to lower the overall tax burden on the estate. The only party that really stands to lose is HM Revenue and Customs, yet the Commissioners have so far declined all invitations to join proceedings.[59] The effect of this has been the absence of robust argument against the creeping expansion of the remedy.

The current position is not unlike that which prevailed when the 'rule in *Re Hastings Bass*' reached its high-water mark. This rule once provided that decisions made by trustees could be set aside when they had unintended (usually tax) consequences. The rule was thought by most[60] to be too liberal, with Lord Neuberger calling it a 'morning after pill' for careless trustees.[61] It was suggested at the time that one of the reasons why the doctrine had gone too far was the failure of HM Revenue and Customs to oppose the claims. Writing of their position, Mitchell said: '… the result of their stand-offishness has been that significant cases have been decided in the past few years without the benefit of counter-argument from a party with a real financial interest in opposing the application.'[62]

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[57] *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333, [223].

[58] D Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, Sweet and Maxwell, London 2015) [6-03].

[59] The standard practice is to decline the invitation to join the proceedings on the condition that two authorities, *Allnutt v Wilding* [2007] EWCA Civ 412 and *Racal Group Services Ltd v Ashmore* [1995] STC 1151, are drawn to the court's attention. See *Bullard v Bullard* [2017] EWHC 3, [36].

[60] c.f. J Hilliard, 'Limiting Re Hastings Bass?' [2004] Conv 208.

[61] Lord Neuberger, 'Aspects of the Law of Mistake: *Re Hastings-Bass*' (2009) 15 *Trusts & Trustees* 189, 192.

[62] C Mitchell, 'Reigning in the Rule in Re Hastings-Bass' (2006) 122 LQR 35, 36

The parallel with the 'rule in *Re Hastings Bass*' also provides a clue as to the future development of rectification. When the Commissioners finally decided, in the two cases of *Pitt v Holt*[63] and *Futter v Futter*[64], to oppose applications of the *Re Hastings Bass* rule, it was to decisive effect. It resulted in a conjoined appeal to the Supreme Court, the outcome of which was significantly to restrict the scope of the doctrine.[65] Should HM Revenue and Customs take a similarly bullish attitude in the context of rectification, and start to accept invitations to be represented, then we may see a similar outcome. As this article has attempted to show, they will have the better arguments.

If the rectification route is closed down in cases involving tax mistakes, what other avenues are there for redress? The obvious one, suggested above, is a claim for professional negligence against the advising solicitor.[66] Beyond this, the other possibility is a claim for rescission, which can result in the trust being set aside. Rescission is available when a settlor has made a mistake that is sufficiently serious for it to be unconscionable to leave it uncorrected. The test was set out in *Pitt v Holt* by Lord Walker:

> [The court] must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected.[67]

Although the use of rescission to cure tax planning mistakes raises the same difficult issues that one encounters in the context of rectification, rescission seems better equipped to deal with them. For one, the use of rescission to cure these types of errors does not require an unprincipled extension of the remedy. Whilst the test for rescission sets a high threshold, in that it requires a 'sufficiently serious' mistake, it also has a much wider scope than rectification, as it is not limited to any particular type of mistake. Specifically, rescission can apply, and often is applied, in cases where the claimant's mistake relates to their reasons for entering into a transaction.[68] *Pitt v Holt* itself was such a case, where the claimant had received poor tax planning advice when setting up a trust for her disabled husband. Rescission was granted as the claimant's reasons for executing a trust on those particular terms were seriously flawed.

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[63] [2010] 1 WLR 1199.
[64] [2010] STC 982.
[65] *Pitt v Holt* [2013] 2 AC 108.
[66] An application can also be made under the Variation of Trusts Act 1958 to vary the terms of the trust, but this will not have retrospective effect. If the trust is established in a will, it may be possible to execute a variation under the Inheritance Tax Act 1984, s. 142.
[67] ibid 158. Before *Pitt v Holt* there was much dispute over the relevant test for rescission, with particular difficulties arising from the distinction in *Gibbon v Mitchell* [1990] 1 WLR 1304 between mistakes as to 'effects' and 'consequences'. See B Häcker, 'Mistaken Gifts after *Pitt v Holt*' (2014) 67 CLP 333 and J Hilliard, 'Gibbon v Mitchell reconsidered: mistakes as to effects and mistakes as to consequences: Part 1' [2004] PCB 357.
[68] Recent examples include *In re Griffiths* [2009] Ch 162, *Kennedy v Kennedy* [2014] EWHC 4129 and *Freedman v Freedman* [2015] EWHC 1457. Older cases are *Meadows v Meadows* (1853) 16 Beav 401, 51 ER 833 and *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476. See B Häcker, 'Mistakes in the Execution of Documents: Recent Cases on Rectification and Related Doctrines' (2008) 19 KLJ 293, 322.

Second, it is important to stress the negative aspect of rescission. Unlike rectification, which results in the re-writing of the terms of the trust, rescission has the effect of setting aside the transaction, restoring the status quo ante.[69] It thus avoids the problem seen in the rectification cases where courts are constructing for settlors better trusts than they had made for themselves. Further, the test for rescission, which directs the judge to consider the 'unjust' and 'unconscionable' consequences of the mistake, seems better suited to allow for the difficult policy decisions that this area of law requires. Indeed, Lord Walker stressed the need to consider policy issues:

> In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on the ground of public policy.[70]

As explained earlier, rectification is ill-equipped to make these types of policy judgments, as it has not been the practice of courts adjudicating such claims to deny the remedy on broad grounds of 'equity' and 'conscience'. For these reasons, if courts are willing to relieve litigants from the consequences of tax planning errors, rescission, not rectification, is the appropriate remedy.

[69] *Smithson v Hamilton* [2007] EWHC 2900, [61]. See also *Kennedy v Kennedy* [2014] EWHC 4129.
[70] [2013] 2 AC 108, 160.