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**PITTED AGAINST EACH OTHER?  
MISTAKEN TRANSACTIONS IN UNJUST ENRICHMENT  
AND EQUITY**

***Tom Graham***<sup>1</sup>

**Abstract:**

This paper seeks to identify and examine the extent to which there are substantive differences between the common law and equitable tests for non-contractual mistaken transfers. As the title suggests, the discussion references the case of *Pitt v Holt* as invoking the analogy of law and equity being 'pitted' against each other.

**Keywords:** equity v common law, unjust enrichment, mistake, rescission, *Pitt v Holt*

**Introduction**

In his well-known article making the case for greater fusion between common law and equity, Andrew Burrows divided English law into three categories.<sup>2</sup> Firstly, there are those areas where both the substantive and terminological differences between law and equity are useful: Burrows' leading example here is the trust, a concept which, he notes, is difficult if not impossible to describe without resorting to the law-equity division. Secondly, there are those areas where the substantive differences are useful but where nothing is gained by retaining the labels of common law and equity. Here, Burrows cites duress at law and undue influence in equity as an example of useful, complementary concepts which gain nothing from still being pinned to their historical origins.<sup>3</sup> Finally, Burrows' third category comprises those areas where law and equity are pitted against one another: their rules are either not coherent with each other or are actively contradictory. The aim of this paper is to examine one particular area of the law to decide which category it falls into and, should the third of Burrows' categories be the most apt, to consider how it might be reformed.

The particular area of law under discussion here is the circumstances when a court will allow a claimant to reverse a unilateral, non-contractual transfer or to subsequently

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<sup>2</sup> Burrows A., 'We Do This At Common Law But That In Equity', (2002) 22:1 *OJLS* 1 at 5-7.

<sup>3</sup> Although note that this viewpoint is not universal: see e.g. Millett P., 'Equity's place in the law of commerce', (1998) 114 *LQR* 214 at 219.

recover value from the defendant on the grounds of mistake.<sup>4</sup> At common law, this is generally now analysed as a function of the law of unjust enrichment: the defendant is enriched at the claimant's expense, and the mistake serves to make that enrichment unjust, since the claimant did not truly intend the defendant to be enriched.<sup>5</sup> The claimant can thus seek restitution of the value of the enrichment. In equity, however, this situation is analysed differently and leads to a different remedy: a sufficiently serious mistake will make it unconscionable for the defendant to retain what was given to him and so the court has a discretion to order rescission to unwind the transaction.<sup>6</sup> The equitable jurisdiction is, moreover, thought to be limited to only *voluntary* transactions, whereas the common law is generally invoked in the situations where the claimant mistakenly thought he was *obliged* to make the transfer. A particular difference between the two approaches is the type of mistake which is necessary to support a claim. If the claimant's action seeks a remedy at law in unjust enrichment, the mistake need only to have caused the payment (and thus the defendant's enrichment).<sup>7</sup> By contrast, the test in equity, reformulated by Lord Walker in *Pitt v Holt*, is that the mistake must have been so 'serious' that it will cause 'injustice (or unfairness or unconscionableness)' if left uncorrected.<sup>8</sup> The remainder of this paper is dedicated to analysing the basis of this difference between law and equity, and to considering whether the different tests are justified. We will start by considering the decision in *Pitt v Holt* in an effort to understand the function and purpose of the more complex and stringent test in equity.

## **1 The Case of *Pitt v Holt***

Like almost every modern case concerning equitable mistake, *Pitt* related to a transaction which had produced unexpected adverse tax consequences. Mr Pitt had suffered incapacitating head injuries in a road traffic accident and received a settlement of £1.2m after compromising his action for damages. Mrs Pitt (as her husband's Court of Protection-appointed receiver) took professional advice on how to structure this settlement to minimise tax liabilities, but her advisers neglected to consider the

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<sup>4</sup> This paper will only briefly touch upon the concept of mistake as a vitiating factor in contracts: for this see *Bell v Lever Brothers Ltd* [1932] AC 161 and *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407.

<sup>5</sup> See e.g. *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Deutsche Morgan Grenfell Group Plc v IRC* [2006] UKHL 49.

<sup>6</sup> *Pitt v Holt* [2013] UKSC 26

<sup>7</sup> The test was formulated by Robert Goff J in *Barclays Bank v Simms* and has since been confirmed several times by the House of Lords and Supreme Court (e.g. in *Kleinwort Benson* and *Deutsche Morgan Grenfell*).

<sup>8</sup> Lord Walker in *Pitt* at [126]

inheritance tax implications. This omission was particularly unfortunate in the circumstances, since section 89 of the Inheritance Tax Act 1984 provides a special regime whereby trusts for disabled people can be structured so as to avoid any IHT liability. As such, when Mr Pitt's death led to a six-figure IHT assessment, Mrs Pitt sought a court order to unwind the settlement.

At first instance, Mrs Pitt succeeded under the so-called 'rule in *Hastings-Bass*', which was then thought to allow a court to reverse a disposition by trustees if they had failed to consider something which they should have considered, or considered something which they should not.<sup>9</sup> HMRC, however, appealed the decision, and in the Court of Appeal *Pitt* was joined with another appeal concerning the rule in *Hastings-Bass*.<sup>10</sup> This second case, *Futter v Futter*, related to the trustees of some discretionary family trusts who had received incorrect professional advice about tax liabilities and had thereby incurred a significant capital gains tax liability. In a lengthy judgment, Lloyd LJ examined the origins of the rule in *Hastings-Bass* and concluded that the purported rule was not supported by authority: this was sufficient to allow HMRC's appeal in *Futter*, but *Pitt* had been pleaded on the alternative ground of equitable mistake. After again surveying the authorities, Lloyd LJ held that rescission for equitable mistake was not available if the mistake was as to the *consequences* of the transaction: as the mistake in *Pitt* concerned the tax consequences, the equitable mistake argument was also dismissed and HMRC's appeal allowed. Both *Futter* and *Pitt* were then appealed to the Supreme Court.

Although a panel of seven was convened to hear the case, the only judgment was given by Lord Walker. His Lordship first considered the rule in *Hastings-Bass*, coming to the same conclusion as the court below. In short, the ratio of *Re Hastings-Bass* itself was concerned with trustees exceeding their powers, rather than making inadequate deliberations. The latter 'rule' had emerged from a misinterpretation of *Re Hastings-Bass* in *Mettoy Pension Trustees Ltd v Evans*, but it required that the trustees' deliberations fell so short of what was expected as to be a breach of trust.<sup>11</sup> As the trustees in *Futter* and Mrs Pitt in *Pitt* had both taken appropriate professional advice, their deliberations could not be held to be inadequate: both appeals therefore failed on this head.

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<sup>9</sup> *Re Hastings-Bass* [1975] Ch 25. This 'rule' was extended by analogy to Mrs Pitt's position as a receiver appointed by the Court of Protection, as that role has similar fiduciary responsibilities.

<sup>10</sup> *Pitt v Holt* [2011] EWCA Civ 197.

<sup>11</sup> *Mettoy Pension Trustees Ltd v Evans* [1990] 1 WLR 1587.

On equitable mistake, however, Lord Walker took a different view from Lloyd LJ and therefore allowed the appeal in *Pitt*. The judgments of Lloyd LJ and Lord Walker both centred on two competing lines of authority as to when mistake might be successfully pleaded in equity. The first of these was the *Ogilvie* litigation of the late-nineteenth century, in which a wealthy widow sought to set aside two deeds by which she had established charitable foundations. Although the case reached the House of Lords, the most significant judgment was that of Lindley LJ in the Court of Appeal, as he laid down the following statement of principle:

In the absence of all circumstances of suspicion [i.e. fraud, undue influence etc] a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.<sup>12</sup>

The second line of authority considered by both the Court of Appeal and the Supreme Court in *Pitt* originated in the influential modern case of *Gibbon v Mitchell*.<sup>13</sup> Here, Millett J had distinguished between mistakes as to the *effect* of a voluntary disposition and mistakes as to its *consequences*, holding that the former could ground a claim for rescission, but the latter would not. The origin of this rule is unclear: indeed, it appears to have been Millett J's own *ex tempore* formulation, based on his analysis of a handful of nineteenth and early twentieth century cases. As noted by, *inter alia*, Lord Walker in *Pitt* and the editors of *Goff & Jones: The Law of Unjust Enrichment*, there are two problems with the judgment in *Gibbon*. Firstly, the terms 'effect' and 'consequence' are arguably ambiguous, and some judges have found it difficult to draw a distinction between them in practice. Secondly, the *Ogilvie* litigation was not referred to in the judgment, nor cited before Millett J in argument.<sup>14</sup> After *Ogilvie* was re-discovered by counsel in the later case of *Sieff v Fox*,<sup>15</sup> first instance judges were left to grapple with two competing lines of authority, both of which were slightly doubtful: *Ogilvie* was a House of Lords decision, but dated to the late nineteenth century and had subsequently disappeared, while *Gibbon* was a modern case decided by one of the

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<sup>12</sup> *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400.

<sup>13</sup> *Gibbon v Mitchell* [1990] 1 WLR 1304.

<sup>14</sup> Lord Walker in *Pitt* at [116]-[123]; Mitchell C. *et al* (eds), *Goff & Jones: The Law of Unjust Enrichment* (9<sup>th</sup> ed., 2016), 9-135. Between the Court of Appeal and Supreme Court judgments in *Pitt*, Lord Millett himself wrote a forceful (and, for the present author, persuasive) defence of his decision in *Gibbon*, arguing both that the difference between 'effect' and 'consequence' was clear (and similar to the distinction between intent and motive in criminal law) and that it was entirely consistent with the decision in *Ogilvie*. Millett P., 'Second Thoughts on *Gibbon v Mitchell*', (2013) 19:2 *Trusts & Trustees* 124.

<sup>15</sup> *Sieff v Fox* [2005] EWHC 1312 (Ch).

most respected equity lawyers of the era, but was only a first instance judgment. It is perhaps unsurprising that judges responded to this conflict in different ways, with some following *Ogilvie*,<sup>16</sup> some following *Gibbon*,<sup>17</sup> and others taking the more radical step of expressing sympathy with the idea of adopting the common law's 'causative mistake' test.<sup>18</sup>

*Pitt v Holt* was the Court of Appeal's first opportunity to clarify the law, and Lloyd LJ chose to effectively combine the two tests. Firstly, he held, 'there must be a mistake on the part of the donor either as to the legal effect of the disposition or as to an existing fact which is basic to the transaction', but this mistake must also 'be of sufficient gravity as to satisfy the *Ogilvie v Littleboy* test, which provides protection to the recipient against too ready an ability of the donor to seek to recall his gift.' When Lord Walker examined this proposed test, he considered that the element requiring a mistake as to 'an existing fact which is basic to the transaction' should be expanded to include a mistake of law (following the abolition of the mistake of law 'bar' in *Kleinwort Benson v Lincoln City Council*).<sup>19</sup> Moreover, His Lordship held that, once expanded to include mistake of law, the first element of Lloyd LJ's test was so wide as to add nothing to the test from *Ogilvie*. He therefore adopted the *Ogilvie* 'serious mistake' test as the correct measure for when the equitable jurisdiction to rescind mistaken transactions might be invoked, although added a modified form of the *Gibbon* test as additional guidance to judges about when a mistake would normally be sufficiently serious.

## **2 Commentary**

Before concentrating on the possible justifications for Lord Walker's stricter test for equitable mistake, it is worth noting that the judgment in *Pitt* can be criticised both in principle and for how it has worked in practice. In particular, Lord Walker's endorsement of the concept of 'seriousness' has the potential to introduce significant uncertainty into this area of the law, since two judges' ideas of what is sufficiently serious may, of course, differ significantly. This is exacerbated by Lord Walker's insistence that judges employ 'an intense focus...on the facts of the particular case' when making decisions, which threatens to limit the development and application of

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<sup>16</sup> E.g. *Re Griffiths* [2008] EWHC 118 (Ch).

<sup>17</sup> Notably *Pitt* itself at first instance, where relief on the grounds of mistake was denied under the effect/consequence distinction from *Gibbon*: *Pitt v Holt* [2010] EWHC 45 (Ch).

<sup>18</sup> *Fender v National Westminster Bank Plc* [2008] EWHC 2242 (Ch).

<sup>19</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

precedent, which might otherwise help the courts produce a more uniform definition of seriousness.<sup>20</sup>

In practice, by contrast, the most dissatisfying aspect of the decision in *Pitt v Holt* is that it has failed to rebalance the consequences of poor trust and tax planning so that the bill is more often footed by incompetent professional advisers (via actions in professional negligence) rather than the taxpayer. This was one of the reasons why both Lloyd LJ and Lord Walker sought to cut back the 'rule in *Hastings-Bass*': it was, they believed, being used as a 'soft option' by trustees seeking to avoid the tax consequences of decisions which were later shown to have been misguided.<sup>21</sup> However, in the aftermath of *Pitt*, these cases have instead been pleaded on the grounds of equitable mistake and, seemingly without exception, the claimants have been able to persuade the court that their mistakes about tax consequences are sufficiently serious to ground rescission.<sup>22</sup> There has also been little judicial discussion of Lord Walker's *obiter* (and admittedly rather ambiguous) remarks about the possibility that equitable relief might be denied in cases of highly artificial attempts to avoid taxation.<sup>23</sup> In short, it seems quite likely that the relationship between equitable mistake and incompetent administration of tax planning trusts is a subject which will require reconsideration by the higher courts in the near future.

In the specific context of this paper, however, the critical aspect of the judgment in *Pitt* is that it forcefully reaffirms that the test which must be satisfied in order to invoke the equitable jurisdiction to correct mistaken transfers is stricter than the common law test of simple causation. It is noteworthy that Lord Walker's judgment (which, we must recall, was unanimously endorsed by the other six Justices of the Supreme Court who heard the case) does not truly engage with this distinction, let alone attempt to justify it. In some respects this is surprising, given that the common law test was discussed as an analogy during argument (with counsel citing leading cases such as *Kleinwort Benson* and *Deutsche Morgan Grenfell Plc v IRC*, as well as the seminal decision of Robert Goff J in *Barclays Bank v WJ Simms*) and also given Lord Walker's previously expressed views which appear sympathetic to expanding the law of unjust enrichment

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<sup>20</sup> Lord Walker in *Pitt* at [126], echoing Lord Steyn in *In re S (A Child)* [2004] UKHL 47.

<sup>21</sup> E.g. Lord Walker in *Pitt* at [7].

<sup>22</sup> See e.g. *Kennedy v Kennedy* [2014] EWHC 4129 (Ch); *Freedman v Freedman* [2015] EWHC 1457 (Ch); *Van der Merwe v Goldman* [2016] EWHC 790 (Ch). Also Pedley S., 'Lessons learned from *Kennedy v Kennedy*', [2015] 2 *Private Client Business* 66

<sup>23</sup> Lord Walker in *Pitt* at [135]. See also Lee J., 'Tax, equity and artificiality', (2017) 31:4 *TLI* 219.

and increasing its internal consistency.<sup>24</sup> The result is that it has been left to later commentators to address the question of *why* common law and equity should adopt different thresholds for when they will step in to correct a mistaken non-contractual transaction. Some have concluded that the difference is unsupportable: Birke Häcker, for instance, describes this as an area of the law where ‘the forms of action really do seem to rule us from their graves’.<sup>25</sup> The solution according to Häcker is to extend the causative mistake test so that it applies to the equitable jurisdiction.<sup>26</sup> Other commentators, by contrast, have accepted the different tests (often noting that arguing against the separate equitable test is pointless, since it has been reaffirmed so recently and forcefully by the Supreme Court) and have instead sought to explain the differences between them.<sup>27</sup> In general, these scholars have then sought a justification for the different tests in two distinct but not necessarily mutually-exclusive places: that equity needs a stricter test because it offers a more powerful remedy, and that there is something special about voluntary transactions which means that it should only be possible to unwind them if the donor’s mistake was particularly serious. I shall discuss each of these arguments in turn.

Firstly, it should be noted that there are some authorities which can be interpreted as endorsing the second of these possibilities. In *Deutsche Morgan Grenfell*, for instance, Lord Scott stated *obiter* his opinion that causative mistake alone ‘would not suffice’ to allow the recovery of a mistaken gift of money.<sup>28</sup> The context of this case was a common law action in unjust enrichment, suggesting that Lord Scott did not believe that such an action would be possible in the case of a gift without imposing a stricter test than simple causative mistake. This is also the implication of the more recent case of *Pagel v Farman*, in which Farman (as Part 20 claimant) sought to recover the value of shares which he had gifted to Pagel.<sup>29</sup> As this was an action to recover value rather than property *in specie* and there were no adverse tax consequences to avoid, it should have been possible to argue the case as a personal claim in unjust enrichment, and thus use the more liberal causative mistake test. Instead, counsel for both sides

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<sup>24</sup> E.g. on adopting the ‘absence of basis’ theory in *Deutsche Morgan Grenfell* at [150]-[158] and on the operation of the change of position defence in *Derby v Scottish Equitable Plc* [2001] EWCA Civ 369 at [45]-[48].

<sup>25</sup> Häcker B., ‘Mistaken Gifts after *Pitt v Holt*’, (2014) 67 *CLP* 333, at 353, echoing F.W. Maitland.

<sup>26</sup> *Ibid.*, 359-371.

<sup>27</sup> E.g. *Goff & Jones* at 9-144; Etherton T., ‘The Role of Equity in Mistaken Transactions’, (2013) 27:4 *TLI* 159; Watterson S., ‘Reversing Mistaken Voluntary Dispositions’, (2013) 72:3 *CLJ* 501.

<sup>28</sup> Lord Scott in *Deutsche Morgan Grenfell* at [87].

<sup>29</sup> *Pagel v Farman* [2013] UKHC 2210 (Comm).

accepted that the 'serious mistake' test from *Pitt* was applicable. As the editors of *Goff & Jones* point out, the choice of test was common ground between the parties rather than actually being argued and decided, and so *Pagel* is somewhat tenuous authority.<sup>30</sup> However, when taken alongside Lord Scott's dictum in *Deutsche Morgan Grenfell*, it must be noted that the debate over whether the stricter equitable test is justified by the available remedy or by the type of transaction may possibly have already been settled by the courts in favour of the latter.

### ***Personal and proprietary remedies***

As well as the different tests, the most obvious difference between the equitable and common law jurisdictions to reverse mistaken transactions is that the common law offers only a personal remedy: an unsuccessful defendant is ordered to disgorge his enrichment by paying restitutionary damages to the claimant. By contrast, the equitable remedy of rescission has the potential to be far more powerful because it acts to unwind the transaction (thus, *inter alia*, allowing recovery *in specie*, and sidestepping any unhelpful intervening events such as the defendant's insolvency and assessments for taxation) rather than only allowing the claimant to recover the value of whatever was mistakenly transferred. Writing extra-judicially soon after the decision in *Pitt*, Sir Terence Etherton MR argued that the more powerful remedy was what justified the stricter equitable test for mistake.<sup>31</sup>

At first sight, this explanation seems eminently plausible: it is a generally accepted principle of English law that the availability of proprietary relief should be restricted more than personal remedies such as damages.<sup>32</sup> However, on closer examination there are issues with this argument which make it a less satisfying explanation of the different tests. Firstly, if the justification for the stricter equitable test is that it is required to restrict the availability of a proprietary remedy, rather than to restrict the possibility of recalling mistaken gifts more generally, then what is to prevent a mistaken donor from also pleading his case in unjust enrichment to take advantage of the more liberal causative mistake test? Consider, for instance, a situation where a claimant has gifted away some jewellery while labouring under a mistake, and where the claimant would not have made the transfer were he not mistaken. On discovering his mistake, our claimant sues the transferee and advances two alternative arguments in court: firstly,

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<sup>30</sup> *Goff & Jones* 9-149

<sup>31</sup> Etherton, 'Role of Equity'.

<sup>32</sup> Good examples of this from different areas of law include conversion, the limits on specific performance, and the possibility of monetary payments being a just satisfaction of equities acquired through proprietary estoppel.

he submits that his mistake is so serious that the court should exercise its equitable discretion to order rescission and therefore allow him to recover the jewellery *in specie*. The court, however, disagrees that his mistake is sufficiently serious to ground rescission, and so the claimant falls back on his alternative argument: his mistake caused him to transfer the jewellery to the defendant, and so he is entitled to recover its *value* from the defendant at common law in unjust enrichment. Since the causative mistake test is clearly satisfied, the court concludes that he is entitled as of right to restitution of the value of the jewellery.

The possibility that restitutionary damages may be available as an alternative remedy for a mistaken gift might appear directly analogous to the relationship between damages and specific performance in contract and to the possibility of specific recovery of converted goods, but there is a significant difference. In contract and conversion, the ingredient which must be present to persuade the court to order a proprietary remedy is related to the nature of the asset transferred under the contract or converted by the defendant: it must generally be unique or uniquely valuable to the claimant. The underlying principle is that the value of the asset cannot be truly expressed in terms of money, and so a proprietary remedy is necessary to do justice and properly compensate the claimant. By contrast, the distinction contemplated here regarding mistaken gifts relates to the subjective mindset of the claimant: was their mistake sufficiently serious? If we are to accept that this should be the decisive factor in determining whether a proprietary remedy should be available to the claimant, then we must surely have to identify some underlying principle which means that a proprietary remedy is required to fully compensate the claimant. Such a principle is not easy to find, as can be immediately demonstrated if we consider the same dilemma which the rule on the availability of specific performance is designed to address. A claimant might, for instance, make an undoubtedly serious mistake and yet transfer a type of non-unique property (such as commodities or publicly-traded shares) for which damages would be an entirely appropriate compensation: why is it then necessary to order rescission and recovery *in specie*? Conversely, a simple mistake might cause someone to gift away a unique item (imagine, for instance, that the jewellery in the example above was a family heirloom) for which damages would be inadequate compensation, yet no proprietary remedy would be available.

One possible solution to this problem would be to treat the nature of property transferred as one of the factors used when calculating the 'seriousness' of the claimant's mistake. But this does not answer the question of why a proprietary

response would be justified in cases where non-unique property is gifted away pursuant to a mistake which is considered sufficiently serious due to other factors (such as the impact of the transfer on the claimant himself). Another solution would be to apply the *Pitt* test to unjust enrichment actions to recover the value of property transferred voluntarily (as in *Page*), but this would break the link between the *Pitt* test and proprietary consequences, and instead suggest that the stricter test is required to offer an enhanced level of protection for voluntary transactions.

As well as the question of why a mistaken donor should not be able to plead his case in unjust enrichment, Etherton's proposal of a link between the serious mistake test and proprietary consequences also raises the opposite question: why is the equitable jurisdiction to order rescission not available in the case of the commercial 'mistaken obligation' payments which tend to be the subject of actions in unjust enrichment? If we accept the premise that a serious mistake justifies a proprietary response, how can we then argue that equity should not step in to rescind a transfer made by a claimant labouring under the seriously mistaken belief that he was *obliged* to make the transfer? The only plausible reason to then deny such a claimant would be that there is something special about voluntary transactions which allows the equitable jurisdiction to be invoked, which would again break the link between the test and the proprietary consequences. The alternative is to follow the logic of the argument and accept a three-tiered hierarchy of mistakes universal to all non-contractual contexts. Firstly, there are those mistakes which are so serious as to prevent legal title to assets ever passing (i.e. mistakes as to the identity of the donee or the asset being transferred).<sup>33</sup> Next, there are those mistakes which satisfy the *Pitt* test of seriousness: in these circumstances, the court would allow the transferor to set aside the transaction. Finally, there are merely causative mistakes, which would allow the recovery of the value of the assets transferred.<sup>34</sup>

This is certainly a pleasingly neat structure which creates a unified system for approaching non-contractual mistaken transactions and arguably brings the common law and equity into harmony. In practical terms, adopting this structure would probably

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<sup>33</sup> *R v Middleton* (1873) LR 2 CCC 38; *R v Ashwell* (1885) 16 QBD 190; *Ilich v R* (1987) 162 CLR 110. Note that the decisions in these cases and thus the authority they provide for the effects of these types of 'fundamental' mistake have been powerfully questioned by William Swadling: Swadling W., 'Unjust Delivery', in Burrows A. & Roger A. (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford, 2006) pp. 277-298.

<sup>34</sup> Etherton himself notes the additional possibility that certain mistakes could be cured through the equitable jurisdiction to rectify documents, but this is beyond the scope of this paper.

not result in much change in how mistaken voluntary transfers are litigated: the overwhelming majority of mistaken voluntary transfers which come before the courts are cases where incompetent trust planning has produced adverse tax consequences, and so seeking a personal remedy against trustees would be mostly pointless.<sup>35</sup> Making rescission available in mistaken obligations cases could make a significant difference. Generally, these cases are brought by commercial claimants seeking restitution of money paid in satisfaction of an obligation which they believe they owe due to a mistake of fact (such as a bank mistakenly believing it had authority to honour a cheque)<sup>36</sup> or law (such as a bank mistakenly believing that a local authority was empowered to enter an interest rate swap).<sup>37</sup> As such, the availability of rescission would often be irrelevant, since the claimant is seeking the return of value rather than property *in specie*, and there are no taxation consequences to consider. However, there is a very significant exception: the proprietary consequences of rescission would be extremely attractive to a claimant seeking to recover money mistakenly transferred to an insolvent defendant, since it would give priority over other creditors.

This would not necessarily be an unwelcome development, so long as mistakes about the solvency of the transferee were never allowed to qualify. It would probably also be necessary to draw a distinction between those transferors who had genuinely chosen to enter commercial relations with the transferee on those terms (and thus chosen to risk the transferee's insolvency to that extent) and those who had mistakenly felt obliged to make the payment. For example, in *Kleinwort Benson* the claimant bank had deliberately chosen to enter a contract with the defendant on the agreed terms and thus had chosen to take the commercial risk of the defendant becoming insolvent: the later discovery that the contract was void *ab initio* was nothing more than a helpful opportunity to escape a bad deal. By contrast, in *Chase Manhattan Bank v Israel-British Bank* the claimant bank paid the defendant in the mistaken belief that it had not already done so: Chase Manhattan thereby became exposed to the defendant's insolvency when it had not chosen to take that risk.<sup>38</sup> Assuming for sake of argument that their mistakes were equally serious, it would surely be more just and fair for Chase Manhattan to take priority over other creditors than it would for Kleinwort Benson. Allowing the possibility of rescission in these circumstances would also arguably be a better way to introduce proprietary remedies for mistaken payments in the commercial

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<sup>35</sup> In the case of *Pitt* itself, it would have allowed Mrs Pitt to recover the tiny amount of money left in her husband's settlement, but would not have avoided the inheritance tax.

<sup>36</sup> *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677.

<sup>37</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

<sup>38</sup> *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch. 105.

sphere than the methods attempted by the courts in the past, since it would do far less violence to established trust law principles than, for instance, the decision to impose a resulting trust in *Chase Manhattan*.<sup>39</sup>

Extending the equitable jurisdiction to order rescission so that it encompasses all non-contractual mistaken transfers would bring into sharp relief the nagging question posed earlier: why should the 'seriousness' of the claimant's mistake determine whether the court should award a personal or a proprietary remedy? Unless a principled explanation can be found to answer this question, it is ultimately difficult to accept that the reason for equity's stricter test is the potential to award a more powerful remedy.

### ***Voluntary transfers as a special category***

The second argument advanced to justify the stricter equitable test for mistake is that the equitable jurisdiction applies only to voluntary transfers, and that there is something special about such transfers which makes it appropriate to give them greater protection. A parallel is often drawn with contracts: 'Conceptually, it amounts to saying that "gift" is a legal basis or justification for the transfer, in the same way that a valid contract is *prima facie* a justification for the recipient retaining what she has received in pursuance of it. If the transferor wants to recover, he has to invalidate the legal basis first.'<sup>40</sup> There are two questions to answer here: why, as a matter of principle, gifts and other voluntary transactions need greater protection, and how to give them that protection in practice. The first question is quite simply answered: recipients should not generally have to worry about a donor revoking a gift and, just as the law seeks to hold contracting parties to their bargains, so too should it prevent donors from too easily acting upon second thoughts. This is so obvious a moral principle as to require little explanation, although one scholar has nonetheless drawn on anthropological studies to produce a rather complex model of how gifts operate in a 'moral economy' and therefore deserve as much legal protection as their contractual equivalents in the 'market economy'.<sup>41</sup>

The more complex issue is whether the causative mistake test is sufficient to provide the necessary protection for recipients of gifts and other voluntary transactions: if so, we could simply extend that test to the equitable jurisdiction and resolve much of the

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<sup>39</sup> For criticism of this decision see e.g. Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at 714-715.

<sup>40</sup> Häcker, 'Mistaken Gifts' 341.

<sup>41</sup> Tang H.W., 'Restitution for Mistaken Gifts', (2004) 20:1 *Journal of Contract Law* 1.

friction between law and equity in one stroke. Birke Häcker, for instance, has argued that the causative mistake test is indeed sufficient, since unjust enrichment's 'change of position' defence will act to protect a donee who has relied on the gift in some way, thus avoiding any injustice.<sup>42</sup> However, this is not persuasive: can it really be said to be fair that only donees who have relied on the gift should be protected? As Häcker herself acknowledges, the courts would probably have to deny some claims on the basis that allowing the claimant to rely on his mistake would be contrary to public policy or else somehow morally objectionable.<sup>43</sup> The example Häcker gives is Lord Walker's suggestion that the courts might not assist aggressive tax avoidance schemes, but it seems likely that any such category would also include, for instance, the oft-cited example of the homophobic uncle who tries to revoke a gift upon discovering his nephew's sexuality. The result would be to entirely compromise the simplicity of the causative mistake test by introducing a large and ill-defined area of judicial discretion, since this 'public policy' exception would have to be judged on the facts of individual cases and, moreover, would fluctuate as public mores and morals shifted. Ultimately, therefore, the causative mistake test does not provide us with a satisfactory tool for determining whether a gift should be revocable because our moral faculties impress on us that only some mistakes should be 'good enough' to make revoking a gift legitimate and fair.

This in turn explains why the causative mistake test appears entirely appropriate in mistaken obligations cases but not for mistaken gifts. It is submitted that applying the causative mistake test to mistaken gifts is a form of category error, and that it is best exposed by adopting the 'absence of basis' language associated with unjust enrichment in civilian systems.<sup>44</sup> In short, the causative mistake test works in the context of mistaken obligations because in these cases there is plainly *no basis* for the defendant's enrichment. The test then simply supplies a means of checking factual causation, i.e. that it was the mistake which caused the transferor to enrich the transferee, rather than some other factor. However, when it is applied to mistaken gifts, the causative mistake test fails because it is being used inappropriately to address the separate (and logically prior) question of whether an apparent basis for enrichment is

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<sup>42</sup> Häcker, 'Mistaken Gifts' 359-371.

<sup>43</sup> *Ibid.* 363-5.

<sup>44</sup> This language has, of course, yet to be accepted in English law: see e.g. Lord Goff in *Woolwich Equitable Building Society v IRC* [1993] AC 70 at 172; Lord Hoffman in *Deutsche Morgan Grenfell* at [21]; Lord Clarke of Stone-cum-Ebony in *Patel v Mirza* [2016] UKSC 42 at [246]. For arguments that English law should adopt the civilian theory (or, more controversially, already has done) see e.g. Birks P., *Unjust Enrichment* (2<sup>nd</sup> ed., Oxford, 2006) chs. 5-6; Lord Walker in *Deutsche Morgan Grenfell* at [150]-[158].

*valid*. This question is much more complex and has a significant moral dimension: it cannot be answered by applying a simple, near-mechanical test.

A separate test is therefore necessary, and to be effective it must be capable of encompassing the moral aspects of when it is fair to allow a gift to be revoked. This necessarily means accepting a certain amount of subjectivity and judicial discretion, perhaps by adopting, as in *Pitt*, the equitable language of unconscionability. It is further submitted that Lord Walker's 'serious mistake' test from *Pitt* is preferable to the idea mentioned above of adding a broad 'public policy' exception to the causative mistake test: the law should be clear that merely causative mistakes are not sufficient grounds to invalidate a gift, rather than suggesting that they are sufficient but subject to a wide-ranging exception.

## **Conclusion**

This paper set out to investigate whether there was any justification for the different tests for reversing mistaken transactions in equity and in unjust enrichment: having considered two of the possibilities, we must now offer some conclusions. Firstly, although there is some persuasive force to the proposed link between the stricter equitable test and the availability of rescission, the logic of the argument ultimately demands the unification of the equitable and unjust enrichment jurisdictions to produce a sliding scale of tests and remedies for all non-contractual mistaken transfers. This in turn places unbearable strain on the 'serious mistake' test, as the seriousness of the mistake becomes the arbiter of whether the claimant is entitled to a personal or proprietary remedy. This is deeply unsatisfying, both because the concept of seriousness is far too vague to provide certainty and because the concept itself lacks any form of underlying principle.

The alternative argument that gifts need more protection than mistaken obligation payments is far more persuasive. The ultimate reason for this requirement is that mistaken gifts engage a range of moral considerations which are not appropriate in the commercial context of mistaken obligation payments. The result is that many mistaken gifts would pass the simple causative mistake test and thus be revocable despite the fact that, on a level of principle, we might consider the mistake in question to be insufficient or even to be a morally repugnant ground for offering redress. Not only do gifts therefore need a stricter test, but the test itself must be capable of greater nuance and be responsive to the individual facts of a case: whether Lord Walker's 'serious mistake' test is the best possible solution is difficult to say, but it is submitted that his

Lordship was correct to insist that judges closely examine the individual case before them when deciding whether a mistake is so serious as to make retaining the gift unconscionable.

To answer our original question, then, we may conclude that the substantive differences between the common law and equitable tests for non-contractual mistaken transfers are for the most part valid and justified, since the two jurisdictions are intended to operate in different contexts and under different principles. There are, however, some issues which remain to be addressed. Firstly, it is important that the courts should firmly reject any attempt to argue that the causative mistake test is appropriate when seeking to recover the value of a mistaken gift. Even though a claimant here would be seeking the value of the gift rather than restitution *in specie*, he is still trying to revoke a gift: the *Pitt* test is therefore the appropriate means of determining whether he should be allowed to do so (as agreed between the parties in *Pagel v Farman* and alluded to by Lord Scott in *Deutsche Morgan Grenfell*). Secondly, it is not entirely clear why the equitable jurisdiction over mistaken gifts is so willing to offer a successful claimant a proprietary remedy: what is the justification for allowing Mrs Pitt to rescind the payment into her husband's trust, rather than allowing her only to recover the value transferred? This question is beyond the scope of this paper, but there must be a suspicion that the answer is that this is a traditional equitable jurisdiction and equity traditionally operated through alternative remedies (often with proprietary effects) such as rescission, rather than through damages. Finally, we might also ask the opposite question of whether there is a role to be played by rescission in the context of mistaken obligations cases. In particular, we might ask whether it could play a similar role to specific performance in contract law and allow unique or uniquely valuable property to be recovered *in specie* if a party has transferred that property while under the mistaken impression that he was obliged to do so.