Neutral Citation Number: [2023] EWCA Civ 534

Case No: CA-2022-000357

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
PROPERTY, TRUSTS AND PROBATE LIST
Mr. Justice Marcus Smith
[2021] EWHC 2581 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Thursday 18 May 2023

Before :
LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between :

(1) AMARJIT BHAUR
(2) JOGINDER BHAUR
(3) MANDEEP BHAUR
(4) BALDEEP BHAUR
(5) SAFE INVESTMENTS MANAGEMENT UK (an unlimited company) — **Claimants/ Appellants**

- and -

(1) EQUITY FIRST TRUSTEES (NEVIS) LIMITED (a Nevis corporation)
(2) STRATTON INVESTMENT MANAGEMENT (SEVENTEEN) LIMITED (a Nevis corporation)
(3) JAMES O'TOOLE
(4) NATIONAL SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN
(5) IVM PCC (a Mauritius protected cell company in respect of Cell IVM 020) — **Defendants/ Respondents**

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David Mitchell (instructed by **Kangs Solicitors**) for the **Appellants**
Michael Avient (instructed by **Greenwoods Legal LLP**) for the **Third Respondent**
The First, Second, Fourth and Fifth Respondents did not appear and were not represented

Hearing dates : 7 and 8 February 2023

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Approved Judgment

Remote hand-down: This judgment was handed down remotely at 12 noon on 18 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Snowden :

The appeal

1. This appeal concerns the court's equitable jurisdiction to set aside a voluntary disposition of assets on the ground of mistake in the context of a failed inheritance tax avoidance scheme.

2. It is an appeal against a decision of Marcus Smith J (the "Judge") given after a six-day trial: see [2021] EWHC 2581 (Ch) (the "Judgment"). The Judge refused a claim by the Appellants to set aside the disposition of assets in question because he held that they had made no relevant mistake when entering into a tax avoidance scheme (the "Scheme") which involved an employee benefit trust. The Scheme had been devised by the Third Defendant ("Mr. O'Toole") who was a solicitor and operated a tax advisory business under the name "Aston Court". The Scheme was marketed as an "Asset Liberation Solution" and the Appellants paid substantial fees to Aston Court for their services.

3. The Judge held that the Scheme did not merely involve tax avoidance, but that it amounted to tax evasion because the picture that was presented to HMRC was of a trust which was genuinely intended to benefit qualifying employees of the Fifth Appellant company ("Safe Investments UK"), when there was in fact no intention whatever to benefit any such employees. The Judge held that in this respect, Mr. O'Toole dishonestly intended to mislead HMRC, and that the Appellants knew of and endorsed that approach.

The background

4. The Judgment contains a lengthy exploration of the documents and evidence concerning a complex series of events spanning more than a decade. It is, however, possible to deal with the appeal on the basis of a much simplified outline of the facts.

5. The underlying assets with which this case is concerned were the beneficial interests of the First and Second Appellants ("Mr. and Mrs. Bhaur") in a substantial property business which they had built up over several decades and to which changes were made from time to time after the Scheme had been implemented. The beneficial interests in these assets were compendiously referred to by the Judge as "the Estate".

6. After being introduced to Aston Court in late 2006, the implementation of the Scheme commenced in February 2007 when Mr. and Mrs. Bhaur incorporated their business and transferred the beneficial interests then forming the Estate to Safe Investments UK. That was a newly formed English company of which they were both directors and shareholders and with whom they both entered into contracts of employment. The transfer of the Estate was made in consideration of an issue of shares. Safe Investments UK then hived the Estate down to its newly created wholly-owned BVI subsidiary, referred to in the Judgment as "Gooch Investment".

7. The voluntary disposition said to give rise to the court's jurisdiction to set aside for mistake was the disposal in March 2007 by Safe Investments UK of the shares in Gooch Investment to a BVI trust company, Equity Trust (BVI) Limited, to be held on the terms of a settlement for the benefit of qualifying employees of Safe Investments UK (the

"First Staff Remuneration Trust"). The case was argued before us on the basis that the jurisdiction to set aside for mistake applies as well to voluntary dispositions by companies as to dispositions by individuals. For this purpose the relevant states of mind to be attributed to Safe Investments UK were those of Mr. and Mrs. Bhaur.

8. The beneficiaries of the First Staff Remuneration Trust were widely defined and included any employee or former employee or spouse, children or dependents of such employees or former employees of Safe Investments UK or any 75% or more subsidiary of that company. Importantly, however, the terms of the settlement excluded from the class of employees who could benefit from the trust, any persons who were "participators" in Safe Investments UK or persons connected with them (save to the extent that payments of income could be made to such persons).

9. The intention of the Scheme was that the transfer of the Estate to Safe Investments UK would be tax neutral, and the transfer of the shares in Gooch Investment into the First Staff Remuneration Trust would take advantage of a particular exemption in the Inheritance Act 1984 (the "IA 1984") for property transferred to an employee benefit trust. I shall describe that exemption in greater detail below, but in simple terms, the supposed tax loophole which the Scheme sought to exploit was that on one reading of the relevant exemption, although Mr. and Mrs. Bhaur and their two sons ("Mandeep" and "Baldeep") could not benefit from the First Staff Remuneration Trust whilst Mr. and Mrs. Bhaur were alive (save to the extent of payments of income), the exemption would still be available if Mandeep and Baldeep were entitled to benefit from distributions of assets from the trust after Mr. and Mrs. Bhaur died, and could do so free of inheritance tax.

10. The Scheme was, however, challenged by HMRC, who served a statutory notice on Safe Investments UK in July 2010. HMRC contended that on the true interpretation of the relevant provisions of the IA 1984, the disposals by Safe Investments UK did not qualify for the relevant tax exemption because of the possibility that Mandeep and Baldeep might eventually benefit from the First Staff Remuneration Trust. That dispute and the tax consequences for the Appellants has not formally been resolved, but the claim to set aside for mistake is in part premised on the assumption that the Scheme will not only not confer the inheritance tax savings which Mr. and Mrs. Bhaur desired for Mandeep and Baldeep, but will very likely have seriously disadvantageous tax consequences for the Appellants. The Judge expressly declined to make any findings on that point, and neither do we.

11. Although not critical for the determination of the issues on this appeal, the arrangements recommended by Aston Court subsequently became more complex when the First Staff Remuneration Trust was in effect replaced by a second employee benefit trust on the same terms as the first (the "Second Staff Remuneration Trust") in 2010 and 2011. That change involved the Estate being transferred by Gooch Investment to the Second Respondent, whose shares were held by the First Respondent ("Equity First") as trustee of the Second Staff Remuneration Trust. Equity First is trustee corporation incorporated in Nevis which is connected with Mr. O'Toole and Aston Court. A Swiss company connected with Mr. O'Toole, Aston Court and Equity First ("ACCI") was subsequently appointed as the "Protector" of the Second Staff Remuneration Trust, with significant powers in relation to it.

12. Thereafter, from about September 2012, when it became apparent that HMRC probably had the better of the arguments under the IA 1984, there were a series of what the Judge described as "untransparent" further changes to the structure. Again, the detail of these changes does not matter for the resolution of the issues on this appeal. Suffice to say that the Judge found that the Estate ended up being held by the Fifth Respondent ("IVM PCC") which is a Mauritius protected cell company capable of holding assets for the benefit of different shareholders of the company in segregated "cells". The shares in "Cell 020" relating to the Estate were held pursuant to the terms of a Mauritius purpose trust which the Judge found was a sub-trust of the Second Staff Remuneration Trust.

13. In 2016 HMRC pursued investigations into a number of the tax schemes promoted and administered by Mr. O'Toole and Aston Court. This seems to have prompted Equity First to seek to administer the Second Staff Remuneration Trust according to its terms, making proposals in 2017 to distribute £120,000 in income derived from the Estate to each of Mr. and Mrs. Bhaur, Mandeep and Baldeep. These proposals were strongly opposed by the Bhaur family, who stated that they had no need or desire for such income, and that they "would be demotivated to work for direct remuneration" if such payments were made.

14. This disagreement was not resolved, and in late January 2017 Equity First nonetheless passed resolutions to make the proposed distributions to the members of the Bhaur family together with other distributions to "unconnected employees". It also resolved to collapse the Mauritius sub-trust structure and to approach ACCI to use its powers as Protector to appoint a UK charitable beneficiary that could benefit from the Second Staff Remuneration Trust at any time.

15. When the Bhaur family continued to object and refused to accept the payments of income offered, in May 2018 Mr. O'Toole passed resolutions on behalf of Equity First to bring the Second Staff Remuneration Trust to an end, and the Protector of the trust appointed the Fourth Respondent, the NSPCC, as the recipient of the entirety of the remaining trust fund.

16. The Appellants have challenged the process leading to the termination of the Second Staff Remuneration Trust and the appointment of the trust fund to the NSPCC, claiming that it was a flagrant and dishonest breach of trust by Mr O'Toole, Equity First and ACCI. The NSPCC, as appointee, played no part in that process and has played no part in the subsequent dispute, indicating by letter that it wished to play no part in the appeal.

17. Against that background, in October 2018 the Appellants issued the claim herein (the "Claim"). In the Claim, in addition to seeking extensive relief in relation to the subsequent events, the Appellants asked the court to set aside the initial voluntary settlement by Safe Investments UK of the shares in Gooch Investments on the terms of the First Staff Remuneration Trust in March 2007 on the grounds of mistake.

18. That relief is seen by the Appellants as a step which would lead to the unravelling of the Scheme in its various subsequent manifestations, and the restoration of the Estate for the benefit of the Bhaur family. Mr. Mitchell candidly accepted, however, that if the Appellants were successful in persuading this Court that the Judge should have exercised the jurisdiction to set aside that original disposition for mistake, the working out of the consequences in terms of relief against the Respondents who were involved

in the structure that subsequently evolved would require further thought and court proceedings in the UK (and possibly in other jurisdictions).

The tax legislation (in outline)

19. Before turning to the way in which the Appellants put their case on mistake in the Claim, it is convenient to outline in slightly greater detail the tax exemption which the Scheme sought to exploit.

20. A transfer of property to a trust, without more, will attract charges to tax. There are, however, various tax concessions which avoid those charges. One of these is the establishment of an employee benefit trust ("EBT"). In Barker v Baxendale Walker [2017] EWCA Civ 2056 at [8], Asplin LJ described an EBT as,

> "… a trust for the benefit of employees of a company or body which attracts generous tax concessions. The trustees of the [EBT] must hold more than 50% of the shares in the company in question and the settled property must not be applied otherwise than for the benefit of employees of the company and their families and dependants and the class of beneficiaries must include all or most of the persons employed or holding office with the company."

21. Because of the tax advantages conferred, the requirements that have to be met when establishing an EBT – whether the settlor is an individual or a company – are strict and are intended to ensure that the trust cannot be used to benefit the settlor or those close to the settlor. The tax concession in relation to dispositions by companies are set out in section 13 IA 1984, which at the relevant time included the following,

> "(1) A disposition of property made to trustees by a close company whereby the property is to be held on trusts of the description specified in section 86(1) below [an EBT] is not a transfer of value if the persons for whose benefit the trusts permit the property to be applied include all or most of either -
>
> (a) the persons employed by or holding office with the company or
>
> (b) the persons employed by or holding office with the company or any one or more subsidiaries of the company.
>
> (2) Subsection (1) above shall not apply if the trusts permit any of the property to be applied at any time (whether during any such period as is referred to in section 86(1) below or later) for the benefit of -
>
> (a) a person who is a participator in the company making the disposition, or
>
> (b) any other person who is a participator in any close company that has made a disposition whereby property became comprised in the same settlement, being a disposition

> which but for this section would have been a transfer of value, or
>
> (c) any other person who has been a participator in any such company as is mentioned in paragraph (a) or (b) above at any time after, or during the ten years before, the disposition made by that company, or
>
> (d) any person who is connected with any person within paragraph (a), (b) or (c) above.
>
> (3) The participators in a company who are referred to in subsection (2) above do not include any participator who -
>
> (a) is not beneficially entitled to, or to rights entitling him to acquire, 5 per cent, or more of, or of any class of the shares comprised in, its issued share capital …
>
> (4) In determining whether the trusts permit property to be applied as mentioned in subsection (2) above, no account shall be taken -
>
> (a) of any power to make a payment which is the income of any person for any of the purposes of income tax …"

22. In the instant case it was common ground that Safe Investments UK was a close company; that Mr. and Mrs. Bhaur were both participators in it because they each owned 50% of its issued share capital; and that Mandeep and Baldeep were connected with them, being their sons. Accordingly, at the time when the First Staff Remuneration Trust was established, it was clear that the terms of the trust had to exclude (and did exclude) the members of the Bhaur family from benefit (other than as to income) if it was to qualify for the exemption under section 13 IA 1984.

23. However, at the time when the First Staff Remuneration Trust was established, there was a view held by some in the tax planning industry that section 13 IA 1984 (and the very similar section 28 of the same Act for individual participators who wished to settle shares in their company upon an EBT) ought to be interpreted as meaning that once the participators had died, those who had been connected to those participators when alive would no longer be connected persons under section 13(2)(d). Accordingly, so the argument ran, the possibility that such persons could benefit from an EBT after death of the participators, would not prevent the inheritance tax exemption from applying. The design of the Scheme was plainly premised upon this view.

24. This view of the legislation was upheld in the context of a professional negligence claim by Roth J at first instance in Barker v Baxendale Walker [2016] EWHC 664 (Ch). It was, however, firmly rejected on appeal by this Court: see [2017] EWCA Civ 2056. Asplin LJ observed, at [47], that the interpretation adopted by the Court of Appeal,

> "… avoids attributing to Parliament the implausible intention that an employee benefit trust could be used for dynastic estate planning and enable the family of the owner of a major

> shareholding in a company to benefit from the proceeds of sale of that holding entirely tax free after the owner's death."

The pleadings

25. The Claim Form was issued in 2020. The Points of Claim were signed with a statement of truth by Mr. Bhaur and included the following,

> "8. Aston Court…operated a scheme known as the Asset Liberation Solution (the Solution). This scheme involved setting up an employee benefit trust (EBT) for the purpose of incentivising and remunerating employees. If operated lawfully for that purpose, the Solution was capable of sheltering assets placed into the trust from capital gains and inheritance tax.
>
> 9. However, the Solution could not lawfully be used to shelter assets from such taxes by putting them offshore for the benefit of their original owners, under the guise of incentivising and remunerating employees.
>
> …
>
> 14. The Solution was unsuitable for the claimants, and the representations [by Aston Court that it was suitable for them] were false in that:
>
> (a) The Solution was unsuitable for the claimants because at no time did any of the claimants have any intention or need to set up a trust to incentivise or reward employees, and had no employees who could lawfully benefit from such a trust.
>
> (b) The claimants did not intend the Solution as a genuine part of the remuneration structure of their business, and had no idea that it would need to be presented to HMRC in that way.
>
> (c) Aston Court intended, but did not inform the claimants, that the scheme would be presented to HMRC as if it was a genuine EBT when its true purpose was to shelter the claimants' assets from UK taxes without any benefits to relevant employees."

26. In support of a further allegation that Mr. O'Toole and Aston Court had falsely represented to Mr. and Mrs. Bhaur that they were respectable persons loyally providing advice for their clients, the Points of Claim contended that Mr. O'Toole and Aston Court were dishonest and had persuaded the Appellants to enter into the Scheme without caring whether it was appropriate for them. In support of that allegation, the Points of Claim relied upon a number of matters, including an allegation that Mr. O'Toole and Aston Court had created communications that falsely misrepresented the purpose of the Appellants in entering into the Scheme.

27. One of those documents said to have falsely misrepresented the purposes of the Appellants was tax advice from Aston Court dated 15 March 2007 which stated,

> "[Safe Investments UK] was concerned to build a commercial staff incentive vehicle to ensure the hard work of employees who make a contribution to the success of the business."

It was alleged that this was false because,

> "inheritance tax planning … was the only purpose which the claimants ever communicated to Aston Court".

28. The Points of Claim also alleged, in this respect,

> "In May 2007, after the Solution had been put into place, [Mr. O'Toole] advised the claimants that the Solution required [Safe Investments UK] to take on employees. [Safe Investments UK] had no business reason to do so, and was not told of this requirement until after the claimants had entered into the Solution."

29. The advice referred to in that paragraph came in an email exchange of 21/22 May 2007 between Mr. Bhaur and Mr. O'Toole and followed a meeting between them. The relevant parts of the emails were as follows,

> Mr. Bhaur to Mr. O'Toole on 21 May 2007:
>
> "… could you also clarify that, we need two employees apart from the family working for the company. Or is it the total employees on the PAYE?
>
> I will appreciate your quick response."
>
> Mr. O'Toole to Mr. Bhaur on 22 May 2007
>
> "I confirm that we would prefer you had two employees of the UK company who are wholly unconnected with you or any family member please. Both these employees will have to be on the PAYE scheme that you administer."

30. In relation to the steps leading to termination of the Second Staff Remuneration Trust, paragraph 59 of the Points of Claim further alleged,

> "…[Mr. O'Toole] and others were being investigated by HMRC for cheating the public revenue, fraud and money laundering in promoting the Asset Liberation Solution … [Mr. O'Toole's] … actions … constituted a cynical attempt by [Mr. O'Toole] and his associates to create evidence that [the First Staff Remuneration Trust] had been a genuine EBT created as part of the remuneration structure of the claimant's business, and thereby to provide a defence to the criminal prosecution which [Mr. O'Toole] anticipated."

31. Mr. O'Toole acknowledged service, but did not file a defence. The only defendant to put in a defence or play any further role in the proceedings was IVM PCC, which by

the time that the proceedings commenced had been placed under the control of the Official Receiver in Mauritius. In its defence, IVM PCC made a large number of assertions, a central one of which was that the Appellants made no mistake because the Scheme was in fact suitable for them and they knew that it was intended to benefit employees of Safe Investments UK.

32. In reply to that contention, the Appellants' Points of Reply, again signed with a statement of truth by Mr. Bhaur, responded,

> "17. When the structure was established in 2007, [Safe Investments UK] had only one employee and she was married to [Mandeep]. There were no employees qualifying for benefit under the [First Staff Remuneration Trust] and to [Mr. O'Toole's] knowledge the claimants had no intention that the trust would make significant distributions to any qualifying employee. There was no commercial purpose in establishing a fund of that size for the benefit of qualifying employees."

The trial

33. The only parties who appeared at the trial were the Appellants and IVM PCC. The Appellants were represented by Mark Anderson KC and David Mitchell, and IVM PCC was represented by Michael Ashe KC and Julian Hickey.

34. Although IVM PCC had filed a detailed Defence, and had given some disclosure, there were concerns that these were the result of the Official Receiver in Mauritius being used by Mr. O'Toole to advance a case on the basis of partial disclosure that he was not prepared to turn up and advance in person at a trial. Those concerns were reflected in a judgment given by HHJ Cooke on 22 October 2020 in which the judge recorded his view that it would be inappropriate for the Official Receiver to permit this to occur.

35. These concerns were addressed at the pre-trial review before the Judge, and led to the trial taking an unconventional course which he explained in his Judgment at [86] in the following terms,

> "86. At the pre-trial review, I directed that evidence be given in a relatively unusual way. Because it would not be appropriate for Mr Ashe, QC to cross-examine the Bhaur Family (even if he were instructed to do so – which he was not), I directed that Mr Anderson, QC open the case very fully on the documents, but with the relevant witnesses in the witness box whilst he was doing so. In that way, Mr Anderson, QC (or I) would be able to elicit evidence from the witnesses as and when appropriate, in light of the documents being opened. This process took most of five days, between 26 and 30 April 2021. I gave Mr Ashe, QC a limited ability to cross-examine during this process. At the end of the process (on 30 April 2021) Mr Ashe, QC cross-examined the witnesses – that is Mr Bhaur, Mandeep and Baldeep, Mrs Bhaur having no relevant evidence to give – on topics or bullet points that I identified. In this way, it was possible to test the evidence of the witnesses in a manner that Mr Anderson, QC,

> could not. Because it was quite clear that the Bhaur Family was a close-knit one, in which Mr Bhaur, Mandeep and Baldeep took decisions to a degree collectively, although Mr Bhaur was, throughout, accorded great respect by his sons and was very much in charge, I permitted Mr Bhaur, Mandeep and Baldeep to give evidence together, at the same time, and they were cross-examined on this basis by Mr Ashe, QC."

The evidence at trial

36. In his evidence at trial, Mr. Bhaur confirmed that he knew that he was buying a tax avoidance scheme from Aston Court which included a staff remuneration trust as an important element, for the purpose of minimising inheritance tax. He described the Scheme as a "complex solution" and accepted that some complexity was inevitable because it was an artificial device.

37. One of the specific topics upon which Mr. Bhaur gave evidence related to the employment of staff by Safe Investments UK, and the identity of the employees who were able to, and were intended to, benefit from the First Staff Remuneration Trust. In his second witness statement for trial, when commenting on correspondence received from Aston Court in February 2008, Mr. Bhaur had stated,

> "One of the most significant elements of this correspondence was the paragraph relating to employees. At the point that we created the trust, there were no employees. We never intended on having any employees – the purpose of the structure was to benefit the family by mitigating any inheritance tax that may be incurred, and so, we only took [on] staff under the explicit direction of Mr. O'Toole. Of the staff we did have, one was an apprentice (who undertook a day a week in line with his college course), an office manager (who left after 10 months) and a handyman (who left after 4 months). There was never the intention of enabling them to benefit under the trust…"

38. During the course of oral evidence, it became clear that Mr. Bhaur's evidence in this regard concerned "non-family" employees. Safe Investments UK had no such employees when the First Staff Remuneration Trust was established, but this changed as a result of the advice received from Aston Court in May 2007 (above), following which, as Mr. Bhaur described, he caused the company to employ some non-family staff members. He agreed that this was to "fit in to the design of the tax avoidance scheme".

39. As Mr. Bhaur's witness statement indicated, however, there was never any intention to enable such non-family employees to benefit under the First Staff Remuneration Trust. In cross-examination, Mr. Bhaur was asked about his understanding of which employees of Safe Investments UK qualified to benefit under the First Staff Remuneration Trust. His answer was that he thought that benefits could be obtained by himself, his wife and his daughter-in-law. When asked whether he understood that he and his wife were in fact excluded from benefitting from the capital of the trust, Mr. Bhaur said that he did not go into that level of detail or give much attention to the point.

40. Mr. Bhaur also confirmed that he had understood that once his interest in a property had been transferred into the First Staff Remuneration Trust it no longer belonged beneficially to himself (or to his wife or Safe Investments UK), so that when any assets were sold, the proceeds would be paid to the trustees of the trust. Mr. Bhaur said, however, that it had been explained to him by Aston Court that the Scheme would enable him to continue to have daily control running the property portfolio the way he had before (e.g. renting or disposing of properties), but also taking the properties out of the scope of UK inheritance taxes.

41. Mr. Bhaur and Baldeep also answered questions on their appreciation of the risks which the members of the Bhaur family incurred when entering into the Scheme. The background to these question was that when Aston Court had first offered their "solutions", including the use of an off-shore remuneration trust to avoid inheritance tax, to Mr. and Mrs. Bhaur in December 2006 in a document entitled "Wealth Management Report", they made a promise (referred to as the "Fee Guarantee") that if a solution failed to meet the specific objectives for which it was implemented, Aston Court would not charge, or would reimburse, any success fees.

42. The evidence given by Mr. Bhaur and Baldeep was to the effect that the family members had appreciated that there was a risk that the Scheme might not work, but they had been comforted and given confidence by the apparent credibility of the people at Aston Court and the Fee Guarantee. Mr. Bhaur stated that he thought that if the Scheme did not work, his sons would be exposed to the inheritance tax charge that the Scheme had sought to avoid, but that he did not appreciate that there was any greater level of risk than that.

The closing arguments

43. As set out in their closing submission to the Judge, the Appellants contended that the disposition by Safe Investments UK under the Scheme should be set aside for mistake on three bases:

i) Tax The Appellants made two mistakes about tax: (i) that the Scheme would save inheritance tax in due course, and that if it did not succeed, their loss would be limited to the fees paid to Aston Court (or such part thereof as they failed to recover from Aston Court under the Fee Guarantee), and (ii) that (subject to future negotiation with HMRC) the failure of the Scheme had the potential to wipe out the entire Estate because of tax, interest, penalties and legal costs.

ii) Honesty and loyalty of Aston Court The Appellants mistakenly believed that the advice to enter into the First Staff Remuneration Trust was the advice of an honest solicitor given in their best interests, and that the trust structure would be administered in their best interests with similar professional loyalty.

iii) Retention of control The Appellants mistakenly believed that they would retain control of their properties. Although they knew that they were entering into transactions which in law involved parting with ownership of the Estate, the Bhaur family thought that they would remain in control of their wealth in the sense of being able to decide whether to keep it or give it away. They also

> contended that "to the extent that it must have been obvious that putting money into a trust involved some concession of control, the [Appellants] believed that control was being given to regulated and respectable people".

The Judgment

44. In his Judgment, the Judge made a number of relevant findings of fact.

45. As regards Aston Court's basic approach to the Scheme, the Judge held, at [151],

> "(1) First, in order to derive the benefit of the employee remuneration trust tax concession, the settlement incorporated the exclusions of persons required by section 13 of the Inheritance Act 1984. On its face, the settlement was consistent with the Act, and a reader of the settlement (and other documentation) together with the communications to Mr. Bhaur would certainly be left with the impression that a genuine staff remuneration trust was intended.
>
> (2) That, of course, was not the case. But Aston Court may well have considered that Mr. Bhaur's objectives (of avoiding Inheritance Tax, and not particularly being concerned about payment of income, but rather the accumulation of capital) could well be achieved through the Roth J construction of section 13 [in Barker v Baxendale Walker]. That is to say that Mandeep and Baldeep would not be able to benefit whilst Mr. and Mrs. Bhaur lived, but could do so after they died.
>
> (3) Clearly, the risks of this very aggressive approach to tax management were never explained to Mr. and Mrs. Bhaur, and in failing to do so, Aston Court were either grossly negligence or (as I find) dishonest. But Aston Court may not have been dishonest in considering that there was the possibility that this evasive Scheme might actually deliver the tax benefits they had promised, provided HMRC did not look too closely at the nature of the company setting up the trust."

46. At [154] – [155] the Judge referred to an email exchange between Aston Court and Mr. Bhaur on 2 May 2007 in which Mr. Bhaur responded to a number of questions about his intentions as regards the number of employees which were described as "loose ends", together with the email exchange between Mr. O'Toole and Mr. Bhaur on 21/22 May 2007 (paragraph 29 above). The Judge concluded that these documents illustrated the fact that the First Staff Remuneration Trust was self-evidently not suitable for the Bhaur family, and that Aston Court would have known this. He added that it was "quite clear … that Aston Court knew very well that the Scheme was, on the facts of this case, basically a sham."

47. On the question of the Appellants' knowledge, the Judge considered what he described as the "mismatch" between the substance of the Bhaur family business and the terms of the First Staff Remuneration Scheme. He illustrated that at [157]–[160] by reference

to a letter written by Aston Court to Safe Investment UK on 10 July 2017. That letter read as follows, (emphasis added by the Judge)

> "Taxation Advice: Fee Guarantee
>
> [Aston Court] has advised [Safe Investments UK] (the "Company") on the incidental taxation side effect of the transfer of an asset from the Company to a remuneration trust for commercial reasons.
>
> **Your instruction to your solicitors to build your staff incentive vehicle was not motivated by tax concerns but purely by a desire to build a staff incentive vehicle.**
>
> **Part of the advice given is that, upon any sale by the Company of the assets, the gain will accrue to the trustees of the remuneration trust. As the trustees are non-UK resident, they will not be chargeable to UK capital gains tax.**
>
> In the event that [Aston Court] is incorrect in this advice and the Company is assessed and pays corporation tax on the gain in relation to the asset, any fees retained by [Aston Court] will be refunded to the Company."

48. The Judge found that Mr. Bhaur saw this letter. He continued,

> "157. …. When giving evidence, Mr. Bhaur could not explain the passages I have highlighted in bold, save to say that he regarded Aston Court as his trusted advisors. I accept this, but it does not answer the point. The point is that Mr. Bhaur's trusted advisors were telling him that the Scheme was not motivated by tax concerns (which was plainly wrong) and that the objective was to build a staff incentive vehicle (which was not Mr. Bhaur's intention).
>
> 158. I have absolutely no doubt that this letter was written by Aston Court with a view to (i) covering themselves if something went wrong and (ii) having on file something to show HMRC in order to persuade HMRC that this was indeed an employee remuneration trust. It seems to me that Mr. Bhaur's failure to push back on the entirely and obviously incorrect statements in this letter justifies an inference that his intentions were aligned with those of Aston Court. In other words, he was perfectly content for Aston Court to describe the Scheme as an employee remuneration trust entered into for that purpose and not because of the tax concessions that such trusts benefitted from."

49. The Judge then posed the following question,

> "160. Whilst I have no doubt that Aston Court failed to tell Mr. Bhaur that the First Staff Remuneration Trust was an

> unworkable arrangement – an abuse of a legitimate tax concession – the fact is that Mr. Bhaur himself failed to follow up on the clear statements addressed to him that this was an employee remuneration trust. The question – which I will consider later – is the nature of the inferences that I can draw from transactions that were – when considered on their face - economically indefensible from both the company's and the Bhaur Family's point of view; and with explicit objectives that were way out of line with what Mr. Bhaur and the Bhaur Family actually wanted."

50. Later in the Judgment, the Judge returned to consider this question in the context of the claim in mistake. As background, he first addressed the conduct and state of mind of Aston Court in promoting the Scheme. In that regard he held, at [208]-[210],

> "208. … Aston Court sold a tax scheme to the Bhaur Family, that could have been used legitimately, for a manifestly inappropriate use, thereby rendering the purpose inappropriate, illegitimate, evasive and illegal. There is, to my mind, no doubt that Aston Court knew that they were peddling an evasive scheme to the Bhaur Family. In saying this, I take fully into account the fact that – at the technical level – it is possible that the Scheme might have delivered tax benefits for Mandeep and Baldeep after the deaths of Mr. and Mrs. Bhaur.
>
> 209. That, as it seems to me, makes no difference to the evasive nature of the scheme – even if Aston Court had been aware of this possibility. The fact is that this was never a proper employee remuneration trust and there was never any intention – whether on the part of the Bhaur Family or Aston Court – to benefit employees of Safe Investments UK. There were, in reality, no such employees, and (had there been) Mr Bhaur's intention would not have been to benefit them. Had Aston Court and the Bhaur Family pulled off the essential lie, and persuaded HMRC that this was a genuine employee remuneration trust, then there might have been a way for Mandeep and Baldeep to benefit from the Scheme on the demise of Mr. and Mrs. Bhaur. But that is irrelevant to the essentially evasive nature of the Scheme.
>
> 210. It is clear that Aston Court oversold the scheme. The Wealth Management Report and the other documents that I have described above make statements and fail to disclose risks in a manner that is indefensible. These statements and failure of disclosure were not just negligently or incompetently made, but were knowingly done or omitted to be done by Aston Court, and so were (as I find) dishonest. The critical question – to which I return below – is against whom that dishonesty was directed. Was it to dupe the Bhaur Family? Or to dupe HMRC? Or both?"

51. The Judge then turned to the state of mind of Mr. Bhaur at the inception of the Scheme. He held, at [215]-[216],

> "215. It seems to me that it is necessary that I begin with my evaluation of the Bhaur Family generally – and Mr. Bhaur, Mandeep and Baldeep in particular. As I have noted, their evidence was honestly given, with a clear desire to assist the Court. It seems to me that their assertions – made in the pleadings underlying these proceedings and in their evidence, both written and oral – that they were mistaken in entering into the Scheme is entitled to great weight, particularly given the (as I have found it) dishonest conduct of Aston Court. The suggestion that they were mistaken in entering into the Scheme is one that has to be taken extremely seriously. My starting point is that the Bhaur Family were innocent victims of a rogue undertaking in the form of Aston Court.
>
> 216. Nevertheless, giving their subjective statements as to their state of mind as much weight as I do, I am firmly of the conclusion that the Bhaur Family in general, and Mr Bhaur in particular, were <u>not</u> mistaken at the time they signed up to the Scheme…."

52. The Judge then explained the reasons for reaching this conclusion. The essence of his reasoning is to be found in [217(2)] as follows,

> " …. In documentation that the Bhaur Family saw and considers, Aston Court made various statements as to the nature of the Scheme that Aston Court were inviting the Bhaur Family to subscribe to. Those statements … cannot be explained away by Mr. Anderson's contention that Aston Court were "papering the file" for deployment in precisely this case and in order to dupe the Bhaur Family. The point is unsustainable because these communications were made <u>to</u> the Bhaur Family, and considered by them. It seems to me that whilst these statements (and the other transactional documents) were undoubtedly "window dressing", this was "window dressing" done in order to dupe HMRC and with the Bhaur Family's tacit assent. With great regret, and taking fully into account Aston Court's dishonesty, that is my conclusion on this critical point."

53. The Judge then expanded upon his reasons in [217(2)(a)-(d)] in an important section of the Judgment which I should quote at length as follows,

> "(a) Mr. Bhaur and his sons were careful and painstaking in their approach to the family business. Documents were read; points considered; issues evaluated. We are talking about prudent, careful individuals, who would have considered Aston Court's proposals with attention and diligence. That is all the more the case given the very large fees Aston Court were

charging. The Bhaur Family would have wanted to know what they were getting, and would have probed accordingly.

(b) I accept that the Bhaur Family would have considered Aston Court both "expert" and "respectable" and would have placed weight on the fact that Mr. O'Toole was a solicitor. There would have been a considerable element of trust in Aston Court, but that cuts both ways. Of course, if Aston Court stated to the Bhaur Family that something was the case, then I consider that the Bhaur Family did and was entitled to believe Aston Court. But, conversely, if Aston Court said (as they did) that they (Aston Court) were relying on the Bhaur Family for information, then that is something that the Bhaur Family would (and should) have taken seriously. Equally, where Aston Court made what now appears to be an error regarding the Bhaur Family's intentions (e.g., as regards any desire to benefit employees) the Bhaur would have pushed back to correct such errors if they had not wanted the Scheme to proceed as it did.

(c) The "papering the file" comments of Aston Court are significant precisely because they were made to Bhaur Family…

(i) In the original Wealth Management Report, Aston Court stressed that their proposals were based on information provided by the Bhaur Family. I accept that the Wealth Management Report was extremely sketchy about the nature of the Scheme, referring only to a "Remuneration Trust". But it would have been clear to Mr. Bhaur that direct control of the family's assets was being removed, and that the control of the Bhaur Family over their assets was, from the outset, was going to be exercised indirectly, through a trust controlled by a management company. At the end of the day, that is exactly what Aston Court delivered, and I can see no mistake on the part of the Bhaur Family so far as "control" is concerned. The Bhaur Family was told, from the get-go, what was going to happen. What they were told would happen, did happen.

(ii) In later communications, the Bhaur Family was told in terms that the trust would be a remuneration trust, "for the benefit of current, past and present employees". Whilst I fully appreciate, and accept, that Mr. Bhaur had no idea about the tax law … the fact is that he (Mr. Bhaur) was told, in terms, who the beneficiaries of the trust would be. Those beneficiaries obviously did not align with Mr. Bhaur's intended beneficiaries of his (and his wife's) money. The mismatch between what Mr. Bhaur was told and what he wanted to do is palpable. None of Mr. Bhaur, Mandeep or Baldeep could explain this mismatch, save through a reference to "trust" in Aston Court. But that is, I am afraid, no explanation. Either the Bhaur Family trusted Aston Court to set up a scheme legitimately in accordance with their needs – in which case these errors were obvious and had to be

corrected. Or the trust of the Bhaur Family was that Aston Court would set up a Scheme that said one thing, but did another. Whilst I have no doubt that – even at the time – Mr Bhaur, Mandeep and Baldeep would have reacted with dismay and denial to the suggestion that they were participating – albeit perhaps as silent partners – in an evasive and illegitimate scheme, that is, I find, precisely what they did. Their dishonesty or otherwise is not something I need consider: what is important for the purposes of this case is that they were not mistaken in the essential tax evasiveness of the Scheme. The Scheme was an employee remuneration trust in form only, and the Bhaur Family knew and endorsed this approach.

(iii) Mr. Bhaur and the Bhaur Family would have appreciated that the bulk of their property – the Estate – was not only being transferred into a trust, but into a trust for employees that their newly incorporated company did not have. The essential absurdity of transferring considerable wealth into a company remuneration trust for employees the company did not have – and did not propose to have – cannot have escaped Mr. Bhaur. He would have known it was a fiction. The reference, by Aston Court, to "loose ends" [in the email of 2 May 2007] to my mind conveys how both the Bhaur Family and Aston Court saw the transaction. It was, in essence, a sham, where the very beneficiaries of the trust (the employees) who would and should have been front- and-centre in any legitimate trust were relegated to the status of "loose ends". "Window-dressing" would be a better term – and that, I find, is what the Bhaur Family intended.

(d) I accept that Mr. Bhaur and the Bhaur Family miscalculated in terms of the consequences to them if the Scheme went "wrong", i.e. if the tax authorities became involved. Their thinking, as I find, was that the Scheme could simply be reversed and that they could opt back into the tax regime that they had sought to evade. The only downside, to their way of thinking, was the fees that they had paid to Aston Court; and that explains why they repeatedly stressed the importance of the fee refund offered by Aston Court and accepted by them. This was undoubtedly wrong, but it was not a mistake. It was a misprediction. The Bhaur Family assumed – and, in the event, were entirely wrong in this assumption – that the downside to them if the Scheme went wrong was containable and confined to the fees paid over. They gave no thought to the point that the transactions they freely entered into were not things writ in water and reversible at will, but proper transfers of their property that could only be reversed if certain conditions were met. That, in my judgment, is not a mistake."

(underlining in the original)

The Grounds of Appeal

54. There are four grounds of appeal which can be summarised as follows,

i) Mistake as to tax consequences The Judge erred in concluding (at [217(2)(d)]) that the Appellants' belief that they would incur no additional tax liabilities in entering into the Scheme, even if it failed, was a misprediction rather than a mistake. The Appellants argue that because they were not honestly advised by Aston Court, they thought entering into the Scheme would not, even if it failed, cause them additional and significant ("ruinous") tax charges. The Appellants contend that this was neither inadvertence nor misprediction, but a mistake as to the immediate tax consequences of the transaction they were entering into.

ii) Findings of complicity in duping HMRC The Judge's factual finding at [217(2)], that the Appellants signed documents containing false statements in order to dupe HMRC, was not open to him because (i) the point was not put to the Appellants in cross-examination and they did not have a fair opportunity to deal with it; and (ii) the Judge overlooked evidence from Mr. Bhaur in his witness statement that he raised concerns about the legitimacy of the Scheme with Mr. O'Toole who reassured him that it was legal.

iii) Mistaken belief as to the honesty of Aston Court The Judge did not deal with the Appellants' pleaded case that they believed Aston Court to be honest solicitors and signed the documents in reliance upon the trust they placed in Aston Court as such.

iv) Mistaken belief as to loss of control The Judge misunderstood the basis of the Appellants' case on the loss of control. The Appellants' case was that they were told that they would retain *de facto* control of their assets and could continue to benefit from them under a scheme administered by trustworthy people. They were mistaken "because they ceded control to rogues".

The law on mistake

55. The Judgment contains an extended analysis of the law on the setting aside of voluntary dispositions for mistake. The leading authority in the area is the decision of the Supreme Court in Pitt v Holt [2013] 2 AC 108.

56. In Pitt v Holt, at [103], Lord Walker accepted, as a convenient framework for analysis, albeit one involving some element of overlap between the three components, the approach of Lloyd LJ in the Court of Appeal ([2011] EWCA Civ 197 at [210]-[211]). Under that framework, for the exercise of the equitable jurisdiction to set aside a voluntary disposition there must be (1) a mistake, which is (2) of the relevant type, and (3) sufficiently serious so as to render it unjust or unconscionable on the part of the donee to retain the property given to him. The third part of that framework was derived from a dictum of Lindley LJ in Ogilvie v Littleboy (1897) 13 TLR 399 at 400.

Mistakes and mispredictions

57. In relation to the first component of the framework – the requirement that there should be a mistake - it is clear that the law distinguishes between a mistake and a

misprediction. Equity may intervene to correct a mistake, but it will not do so in relation to a misprediction.

58. In Pitt v Holt, at [109], Lord Walker identified in general terms the difference between the two concepts,

> "A misprediction relates to some possible future event, whereas a legally significant mistake normally relates to some past or present matter of fact or law."

59. *Goff & Jones, The Law of Unjust Enrichment* ("*Goff & Jones*") (10th ed.) at [9-06] and [9-07] expands upon this distinction by describing a mistake as an incorrect belief or assumption about a past or present state of affairs, whereas a misprediction is a present belief or assumption about a future state of affairs that is subsequently falsified.

60. In Pitt v Holt at [104], Lord Walker observed that the distinction between a mistake and a misprediction is reasonably clear in a general sort of way, but tends to get blurred when it comes to the facts of particular cases, and he endorsed the view of the editors of *Goff & Jones* that the distinction can lead to "some uncomfortably fine distinctions". At [109] Lord Walker repeated that the distinction "may not be clear cut on the facts of a particular case".

61. The fineness of the distinction can be illustrated by the facts of Re Griffiths, decd [2009] Ch 162. In three stages, two in 2003 and one in February 2004, Mr. Griffiths settled some valuable shares on trust as part of an inheritance tax planning exercise, the full benefit of which would only be obtained if he survived for at least seven years. He declined to follow professional advice that he should obtain term insurance to guard against the risk that he might not survive for seven years. Unfortunately he was diagnosed with lung cancer in October 2004 and died in April 2005.

62. Lewison J (as he then was) found as a fact that Mr. Griffiths did not have lung cancer at the time of the 2003 settlements, and so had made no relevant mistake about his health or life expectancy. He simply predicted (wrongly) that he would survive for seven years and, in not insuring, took the risk that his prediction might turn out to be wrong.

63. However, on the basis of the (somewhat unsatisfactory) medical evidence, Lewison J found (by a narrow margin) that by the time of the third settlement in February 2004, Mr. Griffiths had developed lung cancer of which he was unaware. This meant that his chance of surviving seven years was very remote. Lewison J was therefore able to find that in deciding to enter into the 2004 settlement, Mr. Griffiths was operating under a sufficiently serious mistake of present fact (as to his health) which, if he had known the true position, would have caused him not to make the disposition, but to make other arrangements (e.g. by will). This operative mistake justified the setting aside of the 2004 settlement. In Pitt v Holt, at [113], Lord Walker commented that,

> "Had the judge not made his hair's breadth finding about the presence of cancer in February 2004 it would have been a case of misprediction, not essentially different from a failure to predict a fatal road accident."

Mistakes as to the consequences of a transaction

64. For many years, a distinction was drawn between a mistake as to the effect of a transaction and its consequences. This originated in Gibbon v Mitchell [1990] 1 WLR 1304 in which, after reviewing a number of older authorities (but not Ogilvie v Littleboy), Millett J stated, at 1309,

> "In my judgment, these cases show that, wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponor did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it. "

65. That approach led to considerable academic and judicial debate given that the difference between the legal effect of the transaction and its consequences was often unclear, and the distinction was rejected by Lord Walker in Pitt v Holt on the basis that it was too uncertain and rigid. Lord Walker held, at [122],

> "I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. If the Gibbon v Mitchell test is further widened in that way it is questionable whether it adds anything significant to the Ogilvie v Littleboy test. I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction."

Risk-taking and injustice

66. The editors of *Goff & Jones* justify the refusal of the law to intervene in a case of misprediction by pointing out that a mispredictor can generally be viewed as a conscious risk-taker, who assumes the risk of his speculation proving to be incorrect. That point is explained by a passage from *Birks, Introduction to the Law of Restitution* which was approved by the Privy Council in Dextra Bank & Trust v Bank of Jamaica [2001] UKPC 50, [2002] 1 All ER (Comm) 193 at [29],

> "The reason is that restitution for mistake rests on the fact that the plaintiff's judgment was vitiated in the matter of the transfer of wealth to the defendant. A mistake as to the future, a misprediction, does not show that the plaintiff's judgment was vitiated, only that as things turned out it was incorrectly exercised. A prediction is an exercise of judgment. To act on the basis of a prediction is to accept the risk of disappointment. If

> you then complain of having been mistaken you are merely asking to be relieved of a risk knowingly run …"

67. It is, however, now also clear that even where there is a mistake of a relevant type rather than a misprediction, questions of whether the donor should be denied relief on the grounds that he had taken the risk of being wrong can still arise. In Pitt v Holt, at [114], in discussing the type of mistake that can bring the equitable jurisdiction into play, Lord Walker commented,

> "It does not matter if the mistake is due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong."

68. Conceptually, this probably fits best into the third limb of Lord Walker's analytical framework - the conscience test based upon Lindley LJ's dictum in Ogilvie v Littleboy. That appears from Lord Walker's comments in Pitt v Holt on the result in Re Griffiths in relation to the third (2004) settlement which was made at a time when Mr. Griffiths was found to have been under the mistaken belief that he was in good health and was unaware that he had developed lung cancer. At [110] Lord Walker expressly agreed with the observations of Lloyd LJ in the Court of Appeal at [198],

> "198. I wonder whether the judge would have come to the same conclusion on the law (quite apart from the facts) if the case had been argued in a fully adversarial manner. It seems to me that there would have been a strong argument for saying that, having declined to follow the recommendation that he should take out term insurance, Mr. Griffiths was taking the risk that his health was, or would come to be, such that he did not survive. If that was the correct view, it seems to me that the answer to the Ogilvie v Littleboy test would have been that it was not against conscience for the recipients of the gift to retain it. Ogilvie v Littleboy was cited by the judge, but he did not pose the question derived from that case in terms when he came to state his conclusion. I do not criticise the judge, given the limited argument before him, but I do question his conclusion. I do not see what there was in the case that could have justified a favourable answer to the Ogilvie v Littleboy test."

69. On this basis, even if a person is operating under a mistaken belief of fact or law that is relevant to their assessment of the risks of making a gratuitous disposition, they can still be denied relief if they deliberately decide to go ahead and run the risk of being wrong.

The merits of the case

70. In Pitt v Holt at [124], Lord Walker also explained that the gravity of the causative mistake is relevant to an assessment of injustice or unconscionability. He explained, at [125]-[126] that the injustice (or unconscionability) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an "intense focus" on the facts of

the case including the circumstances of the mistake and its consequences for the person who made the disposition.

71. In this regard, Lord Walker rejected a suggestion in *Goff & Jones* that the court ought not to form a view about the merits of a claim. He drew a comparison with the approach in cases of proprietary estoppel, and concluded, at [128],

> "128. … In my opinion the same is true of the equitable doctrine of mistake. The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It 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. The court may and must form a judgment about the justice of the case."

Mistakes about tax

72. Having set out the principles relating to the equitable doctrine in general terms, Lord Walker turned specifically to consider the approach to mistakes about tax. He rejected a suggestion that the equitable jurisdiction to set aside voluntary dispositions could not apply in tax cases, and indicated that the tax consequences of a mistake would be relevant to an assessment of its gravity.

73. Lord Walker then addressed the question of whether there were some types of mistake about tax that should not attract equitable relief. In that regard, Lord Walker noted that in the case of Futter v Futter which was heard together with Pitt v Holt, the Supreme Court had refused to allow mistake to be raised for the first time on a second appeal. In Futter v Futter, trustees had exercised a power to enlarge a discretionary trust so as to make a husband absolutely entitled, and had then exercised a power of advancement to appoint monies to his children. The only purpose of doing so was to avoid a charge to capital gains tax, but due to the negligence of the trust's legal advisers in overlooking a statutory provision, a large CGT liability was triggered.

74. In an important passage, Lord Walker commented, at [135],

> "Had mistake been raised in Futter v Futter there would have been an issue of some importance as to whether the court should assist in extricating claimants from a tax avoidance scheme which had gone wrong. The scheme adopted by Mr Futter was by no means at the extreme of artificiality (compare for instance, that in Abacus Trust Co (Isle of Man) v NSPCC [2001] STC 1344) but it was hardly an exercise in good citizenship. 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 grounds of public policy. Since the seminal decision of the House of Lords in WT

> Ramsay Ltd v IRC [1982] AC 300 there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures. But it is unnecessary to consider that further on these appeals."

75. In the time since Lord Walker identified the use of an artificial tax avoidance scheme as a possible basis for the refusal of equitable relief, the point has been considered in several cases. Two merit mention. In Van der Merwe v Goldman [2016] EWHC 790 (Ch) Morgan J granted equitable relief on the grounds of mistake in relation to an inheritance tax scheme and found, on the facts, that the parties involved had not been engaged in artificial tax avoidance. More recently, in Dukeries Healthcare Limited v Bay Trust International Limited [2021] EWHC 2086 (Ch) Deputy Master Marsh held that, on the facts, there was insufficient evidence as to the states of mind of the relevant persons at the claimant company to justify setting aside a disposal on the grounds of mistake, but that in any event relief should be refused because the disposal in question to what was described as a "remuneration trust" was an artificial tax avoidance scheme. The Deputy Master referred to ten factual matters concerning the design and operation of the scheme upon which HMRC had relied to demonstrate that the scheme was artificial. These included the fact that although the scheme involved the use of what were described as "remuneration trusts", all of the past and present employees of the applicant company were excluded from benefit.

Analysis

76. Against that background, I turn to the Grounds of Appeal.

77. As indicated above, the central findings of the Judge were,

    i) that Mr. Bhaur and the other members of the Bhaur family did not make any relevant mistake but simply mispredicted the adverse consequences of the Scheme failing: see [217(2)(d)]; and

    ii) that Mr. Bhaur and the other members of the Bhaur family were not mistaken about the essentially tax evasive nature of the Scheme but gave their tacit assent to Aston Court's dishonest attempt to mislead HMRC as to the true nature of the First Staff Remuneration Trust: see [217(2)(c)(ii) and (iii)].

78. The finding in (ii) that the Bhaur family were complicit in attempted tax evasion is the subject of Ground 2 of the appeal. I shall return to that point later, but for the purposes of analysis of the other Grounds of Appeal it is convenient to assume that the Bhaur family were, as they contended, and the Judge indicated in [215] was his starting point, "innocent victims of a rogue undertaking in the form of Aston Court".

Ground 1

79. In relation to Ground 1, the first issue is whether the Judge was right in [217(2)(d)] of his Judgment to find that Mr. Bhaur and the other members of the Bhaur family had not made a mistake, but rather that they had mispredicted the financial consequences to them if the Scheme "went wrong".

80. The instant case is a good example of the point made by Lord Walker and the editors of *Goff & Jones*, that when applied to the facts of a particular case, the distinction between a mistake and a misprediction can become blurred.

81. I can quite see the Judge's view that in deciding to implement the Scheme, Mr. Bhaur was in essence making a prediction or judgment as to whether, if HMRC chose to challenge the Scheme, the adverse consequences could be minimised and contained by the reversal of the transactions and the Fee Guarantee offered by Aston Court.

82. On the other hand it could, as the Appellants contend, be said that when causing Safe Investments UK to dispose of its shares in Gooch Investment, Mr. Bhaur was not predicting or exercising a judgment as to whether some future event would or would not happen. The Scheme which he was implementing either did, or did not, have the desired effect of avoiding inheritance tax; and Mr. Bhaur's error related to the legal nature and effect of the transactions forming the Scheme, which he wrongly believed were reversible at will, when they were not. Framed in that way, neither matter related to the occurrence of any future event.

83. I do not, however, think that it is necessary to resolve this interesting point in the instant case. That is because even if the Judge was wrong and this was a case of a mistake rather than a misprediction, for the reasons that follow I would still be of the view that relief should be refused when the remainder of Lord Walker's analytical framework in Pitt v Holt is applied.

84. In that regard, the key point is that Mr. Bhaur knew that there was a risk that the Scheme would not work – i.e. that it could be successfully challenged by HMRC. It may well be that, because they were badly advised (or indeed misled) by Aston Court, Mr. Bhaur and his family did not appreciate the full extent of the potential adverse consequences for them if the Scheme did not work. But it is implicit in the Judge's findings in [217(2)(d)] that Mr. Bhaur must at very least have appreciated that there was a risk that the financial consequences of the Scheme failing would not be entirely neutral, and indeed might be worse than the inheritance tax regime that would have applied in the absence of the Scheme. Otherwise there would have been no need for Mr. Bhaur to contemplate reversing the Scheme in order (as the Judge put it) to "opt back" into that previous tax regime. On the Judge's findings, therefore, Mr. Bhaur made a deliberate decision to implement the Scheme, knowing that there was a risk both that it might fail to achieve the desired tax benefits, and that he and his family might, unless they took certain steps to address the position, end up worse off than before.

85. Accordingly, even if Mr. Bhaur made a relevant mistake as to his ability to reverse the relevant transactions, in my judgment the facts of this case engage the question identified by Lord Walker in Pitt v Holt which I considered in paragraphs 66-69 above. That is whether, applying the Ogilvie v Littleboy approach and depending on a close examination of the facts, it would be unconscionable or unjust for a donee to be permitted to retain the benefit of a gratuitous disposition by a person who has deliberately run the risk that the scheme of which the disposition forms part might not work. I shall return to consider that question after dealing briefly with Grounds 3 and 4.

Ground 3

86. Under Ground 3, the Appellants contend that the Judge did not deal with their pleaded case that in deciding to cause Safe Investments UK to dispose of its shares in Gooch Investments as part of the Scheme, they acted on a mistaken belief as to the honesty of Mr. O'Toole and others at Aston Court.

87. It is true that the Judge did not deal with this argument separately, but that is because he found, contrary to the Appellants' contentions, that Mr. Bhaur and his family were complicit in Aston Court's dishonest behaviour.

88. Even on the basis of the Appellants' pleaded case, however, I do not consider that a mistaken belief as to the honesty of one's own adviser is a type of mistake which can possibly justify setting aside a gratuitous disposal in favour of a third party donee who has no knowledge of the dishonesty.

89. To pick up Lord Walker's comments on the second stage of his analytical framework at [122] of Pitt v Holt, such a mistake is not basic to the transaction. Indeed, it does not relate to the transaction at all. A person who is not complicit in any impropriety who seeks advice from a professional adviser will naturally believe that the adviser is acting honestly, irrespective of the nature or details of the transaction in question.

90. The victim of a dishonest adviser may have other remedies, but in my view it simply cannot be a basis for invoking the equitable jurisdiction in mistake that they later discover, contrary to their belief at the time, that the adviser had acted dishonestly. Indeed, since a donor will also invariably believe that their adviser is careful as well as honest, were this to be a basis for invoking the equitable jurisdiction in mistake, it would open the door to any gratuitous disposal being set aside on the basis of the negligence of the professional adviser. There is no indication in the decided cases that this is, or has ever been thought to be, the law.

Ground 4

91. Ground 4 contends that the Judge misunderstood the Appellants' case on loss of control of the Estate. The Judge dealt with his understanding of the Appellants' case in [217(2)(c)(i)] by concluding that it would have been clear to Mr. Bhaur that control of the Bhaur Family over their assets was, from the outset, going to be exercised indirectly, through a trust controlled by a management company, and that this is what Aston Court delivered.

92. It seems to me that this finding dealt entirely accurately with the primary way in which the case was put in closing to the Judge, namely that the Appellants mistakenly believed that they would retain control of the Estate.

93. On appeal, the emphasis focussed on the alternative way in which the Appellants had put their case on loss of control in closing (see paragraph 43(iii) above). It was accepted that the Appellants knew that they were putting their beneficial interests in the Estate into a trust which would result in them having no further beneficial ownership, but it was said that the Judge failed to deal with the argument that the Appellants' mistake was to think,

> "that the trust was administered by trustworthy people who had devised a scheme giving them *de facto* control".

94. To the extent that this argument depends upon a generalised assertion that Aston Court were acting dishonestly when the Scheme was implemented in March 2007, it adds nothing to Ground 3 that I have considered and rejected above.

95. Alternatively, this argument appears to be based upon an assertion that the Bhaur family mistakenly believed that, after the First Staff Remuneration Trust had been established and the shares in Gooch Investments transferred to it, they would be permitted to carry on running the Estate, buying and selling properties as they had before, and that the trustee of the First Staff Remuneration Trust would not deny them access to the benefits of such activities.

96. That alternative argument must also necessarily fail, because it does not identify anything which qualifies as a causative mistake made at the time of the relevant disposition by Safe Investments UK in 2007. Instead, this argument is based entirely upon the expectations of the Bhaur family in 2007 as to what would happen in practice in the future under the trust structure established as part of the Scheme.

97. In that respect, although the Judge noted in his Judgment (at [185]) that the trust structure created some practical difficulties for the Bhaur family in the day-to-day buying, selling and financing of properties forming the Estate, it is clear that the gravamen of the Appellants' complaint that those administering the trust structure were not trustworthy relates to what occurred in 2017. As described in paragraphs 13-15 above, that was when Aston Court proposed to distribute income derived from the Estate against the wishes of the Bhaur family, and thereafter took steps to terminate the Second Staff Remuneration Trust and to distribute the remaining trust fund to the NSPCC. Such matters cannot conceivably amount to a legally relevant mistake justifying the setting aside of the disposition by Safe Investments UK a decade earlier.

The Ogilvie v Littleboy test

98. I therefore return to consider the application of the test in Ogilvie v Littleboy on the assumption, for the purposes of argument, that Mr. Bhaur was operating under a relevant mistake rather than making a misprediction, and that (contrary to the Judge's finding), the Bhaur family were innocent of any involvement in tax evasion.

99. I consider that even on that basis, the appeal against the Judge's refusal to set aside the relevant disposition must fail.

100. In taking the broad view of the justice of the case envisaged by Lord Walker in Pitt v Holt at [128], I entirely accept that the consequences for the Appellants of entry into the (failed) Scheme may be very serious indeed. Although the evidence is unclear and the Judge declined to make any specific findings in this respect in his Judgment (see [139]), the argument at trial and before this Court proceeded upon the basis that, subject to their negotiations with HMRC and their attempts to retrieve the remainder of the Estate from NSPCC, the Appellants may be left with large tax liabilities and no assets with which to satisfy them.

101. This was, however, a case in which Mr. and Mrs. Bhaur deliberately chose to implement what they knew to be a tax avoidance scheme which, to their knowledge, carried a risk of failure and possible adverse consequences. Their mistake was to think that those adverse consequences could be avoided by the reversal of the transactions and the reclaim of the fees paid to Aston Court under the Fee Guarantee. That mistake might well have had an important influence on their decision-making, and I do not lose sight of the fact that it may well have been the result of bad or misleading advice from Aston Court. However, these factors do not alter the fact that in implementing the Scheme Mr. and Mrs. Bhaur knew there was a risk and decided to take it anyway.

102. It also seems to me to be of considerable weight that the Scheme was, on any objective view of the facts, an entirely artificial tax avoidance scheme.

103. As the Appellants had themselves pleaded (affirmed by a statement of truth from Mr. Bhaur) and the evidence made crystal clear, (see paragraphs 25, 28, 32 and 37-39 above), Safe Investments UK had no need whatever to set up a trust to incentivise or reward any employees, still less one of the size of the Estate that was transferred to the First Staff Remuneration Trust. At the outset the newly formed company had only three employees, who were all members of the Bhaur family and who were not intended to benefit under the trust. The company also had no business reason to employ any persons after the First Staff Remuneration Trust was established, and only did so because Aston Court advised that it would be preferable for the company to employ some non-family members for the purposes of the Scheme. But even then, Mr. and Mrs. Bhaur had no intention whatever that those non-family members should benefit in any way from the trust.

104. It is, in the circumstances, difficult to imagine a more artificial construct than the First Staff Remuneration Trust established under the Scheme. The pleadings and evidence to which I have referred make clear that the trust had no independent business or commercial purpose and that it was brought into existence, and the Estate transferred to it via the transfer of the shares in Gooch Investment, purely and simply for the purposes of tax avoidance.

105. I fully accept that tax avoidance is not unlawful, but I agree with Lord Walker's observations in Pitt v Holt at [135] that *artificial* tax avoidance is a social evil that puts an unfair burden on the shoulders of those who do not adopt such measures. In my view this is a very weighty factor against the grant of any relief.

106. Taken together, I am firmly of the view that even on the basis that the Appellants were not complicit in the dishonesty of Aston Court, it would not be unjust or unconscionable to refuse equitable relief and to leave the consequences of the Appellants' mistaken belief uncorrected.

Ground 2

107. That conclusion makes it unnecessary to determine Ground 2 of the appeal relating to the Judge's finding that the Appellants were complicit in Aston Court's attempt to mislead HMRC as to the true nature of the First Staff Remuneration Trust. However, since the point was argued and relates to serious findings which the Judge made against the Bhaur family, I shall express my views briefly on it.

108. The first point to make is that the Appellants do not contend that there was no evidence upon which the Judge could properly have reached his conclusion that the Appellants knew and tacitly assented to Aston Court presenting the Scheme to HMRC on the false basis that the First Staff Remuneration Trust had been established for the genuine purpose of benefitting qualifying employees of Safe Investment UK. On the contrary, there was evidence available to support that conclusion, which the Judge analysed in detail in his Judgment.

109. The Appellants' criticism of the Judge in this regard has two elements. The first is essentially a procedural fairness objection, namely that the Judge should not have made the findings that he did, because the allegation that the Appellants were complicit in the dishonest presentation of the nature of the First Staff Remuneration Trust by Aston Court to HMRC was not put in terms to the Appellants in cross-examination so that they did not have an opportunity to deal with it. The second is that the Judge did not mention in his Judgment, and thus may have overlooked, evidence from Mr. Bhaur to the effect that he raised concerns about the legitimacy of the Scheme with Mr. O'Toole and was assured that it was legal.

110. I do not think that there is anything in the first point. For reasons that I have explained, the Judge conducted the trial under conditions of some difficulty caused by the non-appearance of Mr. O'Toole and the limitations on the involvement of IVM PCC. However, a review of the transcript of proceedings shows that the Judge made conspicuous efforts throughout to be fair and to accommodate the giving of evidence by the members of the Bhaur family.

111. More specifically, in the document entitled "Areas for Cross-examination of [Mr. Bhaur, Mandeep and Baldeep] by Counsel for IVM PCC", which the Judge circulated after the long opening of the case and prior to cross-examination of the Appellants by counsel for IVM PCC, the Judge indicated that he wished cross-examination to focus on the states of mind of the Appellants rather than the transaction documents, and the first, third and fifth bullet point areas of concern which the Judge specifically mentioned were as follows,

> "1. The fact that the vehicle offered by Aston was explicitly an employee benefit trust unsuited to the [Appellants'] commercial situation (being at the outset, an unincorporated partnership, with very few qualifying employees)…
>
> …
>
> 3. The continued (and asserted implicit) reliance by the [Appellants] on Aston despite "red flags" existing, giving rise to a possible inference that the [Appellants] were aligned with (and not innocent of) Aston's dishonest and tax evasive structures. The "red flags" that the Court has in mind are … the points arising out of … point 1 …
>
> …
>
> 5. The fact that various of the emails written by the [Appellants] to each other and to Aston disclose an interest in

> the detail of the transactions, and a grasp of that detail, that might be suggested to indicate an appreciation of the true nature of the schemes being propounded or else a wilful blindness to the nature of those schemes."

Before Mr. Bhaur was cross-examined, he was expressly asked whether he had read the Judge's document, and confirmed that he had.

112. A substantial part of the Appellants' closing argument was addressed to "The Court's areas of concern" that had been raised by the Judge. Among the various points made in the closing was that "there is no hint in subsequent emails over 10 years that the Appellants knew that they had to disguise the true purpose of the trust" (paragraph 65) and there was an entire section under the heading, "[The Appellants'] participation in the masquerade by signing misleading documents" (paragraphs 67-74).

113. In my judgment it is quite clear from this that when the Appellants were cross-examined they must have appreciated that one of the main issues in the Judge's mind to which he had directed cross-examination was the possibility that they had been (as the Judge had put it in his document),

> "aligned with (and not innocent of) Aston's dishonest and tax evasive structures."

114. I consider that it is also perfectly clear from the closing submissions that the Appellants' counsel were well aware of the concern that the Judge had raised that the Appellants had (as counsel themselves put it) "participated in the masquerade". However, counsel did not seek to suggest (either whilst evidence was being given or in closing) that a finding that the Appellants had been complicit in Aston Court's dishonesty was not available to the Judge because it had not been put fairly to the witnesses.

115. On the second point, I accept that the Judge did not expressly refer, for example, to the particular passage in Mr. Bhaur's witness statement in which he stated,

> "My reputation has always been very important to me and so I raised my concerns over the legitimacy of the Trust that Aston Court was proposing … My family and I were advised that these schemes were perfectly legal, in that they complied with the respective legislation, that Aston Court was a properly regulated solicitor's practice and that they were relying upon the Opinion they had received previously …"

116. It should be noted, however, that this evidence (and other statements made by Mr. Bhaur to similar effect in writing and whilst giving evidence) was in entirely general terms and did not identify any specific date or occasion upon which the alleged exchange had taken place. I also do not think that there can be any doubt that the Judge had well in mind that it was the Appellants' evidence that they had been led to believe that the Scheme was lawful by Aston Court, who they trusted because Mr. O'Toole was a solicitor. So, for example, in the Judgment at [217(2)(b)] the Judge expressly accepted that the Bhaur family considered Aston Court to be "expert" and "respectable" and would have placed weight upon the fact that Mr. O'Toole was a solicitor. I therefore do not think that the fact that the Judge did not expressly refer to the written

evidence of Mr. Bhaur is significant, and I would also observe that it is not a requirement that a trial judge should expressly deal with each and every piece of evidence in his judgment.

117. Although I would therefore reject the two bases upon which Ground 2 of the appeal was advanced, the argument on this ground did identify two areas which give me significant concern about the Judge's findings in [217(2)] that the Bhaur family "tacitly assented" to the preparation of documents by Aston Court that were designed as "window dressing" to mislead HMRC about the true nature of the First Staff Remuneration Trust, and that the Bhaur family were not mistaken as to the essential tax evasiveness of the Scheme, but knew and endorsed this approach.

118. The first is that these findings, of "tacit assent" to "window dressing", and of "knowledge and endorsement" of what the Judge found to be dishonest tax evasion, are plainly findings of dishonesty on the part of the members of the Bhaur family. If a person knows that his agent is going to submit to HMRC documents that falsely describe the nature of a transaction or arrangement for the purposes of obtaining tax advantages, and agrees (expressly or tacitly) that this should occur, that would be dishonest. But in making the findings against the members of the Bhaur family that he did in [217(2)(c)(ii)], the Judge expressly stated that,

> "Their dishonesty or otherwise is not something that I need to consider".

119. I regret that I cannot understand this statement. The Judge clearly appears to have had some sympathy for the predicament that the Bhaur family found themselves in, and may have been trying to soften the blow for them, but in my view the Judge should have appreciated that the findings that he made did require him to consider whether the Appellants had been dishonest, and his findings should not have been made unless he was so satisfied. A finding of dishonesty is a serious matter that needs to be approached with due caution by identifying the subjective state of mind of the individual and then testing the individual's conduct in light of that state of mind against an objective standard: see Ivey v Genting Casinos [2018] AC 391 at [74].

120. My concern that the Judge may not have recognised that the findings that he made were findings of dishonesty is heightened because the Judge also did not address the question of how his conclusions could be reconciled with his assessment, in [215] of his Judgment, that Mr. Bhaur, Baldeep and Mandip all gave evidence honestly at the trial with a desire to assist the court.

121. Whilst of course it is conceptually possible that a person might be found to have fallen short of the objective standard of honesty in relation to their past conduct notwithstanding that they give honest evidence at trial about what they thought at the time, it is not entirely easy to see how that could be so in the instant case. As I have indicated, at the request of the Judge, much of the cross-examination of Mr. Bhaur and his sons was directed at identifying their contemporaneous states of mind and knowledge of the Scheme and what Aston Court were proposing to tell HMRC about the First Staff Remuneration Trust. At very least I consider that the point required to be specifically addressed by the Judge in reaching his conclusion.

122. Although these concerns might have formed a basis for allowing the appeal and remitting the matter for determination if the point had been central to the outcome of the case, for the reasons that I explained earlier, I do not consider that even were the questions of (dis)honesty and whether the Scheme amounted to tax avoidance rather than tax evasion were to be resolved in favour of the Bhaur family, it should make any difference to the outcome of the appeal. Hence I propose to say no more about it.

Disposal

123. For the reasons that I have given, I would dismiss the appeal.

Postscript

124. As a postscript I should record that, at the hearing of the appeal, the Court refused an application from counsel for Mr. O'Toole, who sought to appear, essentially to contend that the Judge was right to conclude that the Appellants had not been operating under any mistake because they fully understood the nature of the Scheme, but to dispute the Judge's findings of dishonesty and involvement in tax evasion against Mr. O'Toole and Aston Court.

125. In an *ex tempore* judgment given on behalf of the Court by Lewison LJ, the point was made that Mr. O'Toole had acknowledged service, but then not put in a Defence, which had the result that he was taken to admit the allegations against him: see CPR 16.5(5). As I have outlined above, these included clear allegations of dishonesty on the part of Mr. O'Toole. However, Mr. O'Toole had not made any application to withdraw those deemed admissions, still less one that explained in evidence why he had taken the course of disengaging from the proceedings and not appearing at trial to contest any of the allegations against him.

126. Lewison LJ also pointed out that the question of whether Mr. O'Toole and Aston Court were dishonest was either not relevant at all, or only marginally relevant, to the question of whether the Appellants were operating under a mistake. Although, as I have explained by reference to Lord Walker's judgment in Pitt v Holt, a court is invited to take a broad view of the merits of a claim for equitable relief, for the reasons also outlined above, in determining whether a mistake of law or fact is basic to a transaction, it generally makes little or no difference whether it is the result of carelessness, negligent advice or even fraud by an adviser.

127. Finally, we were not satisfied that the course of the proceedings and the trial would have been the same if, instead of disengaging, Mr. O'Toole had filed a Defence and given disclosure. The course of oral evidence might also have been very different if Mr. O'Toole had chosen to attend trial and to give evidence to explain his actions. On the basis of the approach to such applications which I explained in Notting Hill Finance v Sheikh [2019] EWCA Civ 1337, referring to Singh v Dass [2019] EWCA Civ 360, those factors told heavily against permitting Mr. O'Toole to re-engage with proceedings and to contest the allegations against him at the appeal stage.

Lord Justice Arnold:

128. I agree.

Lord Justice Lewison:

129. I also agree.