Neutral citation number: [2021] EWHC 2086 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND & WALES
PROPERTY, TRUSTS & PROBATE LIST (ChD)

Judgment handed down remotely on 23 July 2021

DEPUTY MASTER MARSH

Rolls Building, Fetter Lane,
London EC4A 1NL

BETWEEN:

CLAIM NO: PT-2019-000747

DUKERIES HEALTHCARE LIMITED

Claimant

-and-

(1) BAY TRUST INTERNATIONAL LIMITED
(2) A P L MANAGEMENT LIMITED
(3) HER MAJESTY'S REVENUE & CUSTOMS

Defendants

CLAIM NO: PT-2019-000748

(1) ALLEV LIMITED
(2) ALLEN PAUL LEVACK

Claimants

-and-

(1) BAY TRUST INTERNATIONAL LIMITED
(2) A P L MANAGEMENT LIMITED
(3) HER MAJESTY'S REVENUE & CUSTOMS

Defendants

CLAIM NO: PT-2019-000749

RIVERSIDE HEALTHCARE LIMITED

Claimant

-and-

(1) BAY TRUST INTERNATIONAL LIMITED

(2) A P L MANAGEMENT LIMITED

(3) HER MAJESTY'S REVENUE & CUSTOMS

Defendants

CLAIM NO: PT-2019-000751

ALLEN PAUL LEVACK

Claimant

-and-

(1) BAY TRUST INTERNATIONAL LIMITED

(2) A P L MANAGEMENT LIMITED

(3) HER MAJESTY'S REVENUE & CUSTOMS

Defendants

FENNER MOERAN QC and **ANDREW THORNHILL QC** (instructed by M&S Solicitors Limited) appeared for the **Claimants**

The first and second defendants did not appear

MARK HERBERT QC and **EDWARD WALDEGRAVE** (instructed by Solicitors for HM Revenue and Customs) appeared for the **Third Defendants**

Trial by remote TEAMS hearing

9 -11 June 2021

Deputy Master Marsh

JUDGMENT:

1. These four Part 8 claims were listed for a disposal hearing on 10 and 11 June 2021 pursuant to an order for directions dated 18 November 2020. Prior to the hearing, an agreement was reached concerning claim number PT-2019-000748 ("the Allev Claim") and the court was not required to make a determination in that claim. This judgment concerns the remaining three claims. Where convenient they will be referred to respectively as "the Dukeries Claim", "the Riverside Claim" and "the Levack Claim" and the names of the claimants will be abbreviated accordingly.

2. The Dukeries, Riverside and Levack Claims each concern a tax avoidance scheme described as a 'Remuneration Trust' set up for them in 2010 by Baxendale Walker LLP. They were described as the "Founder" in the trust deeds and the first defendant, a company incorporated in Belize, was appointed as the trustee. The second defendant ("APL") was incorporated at the same time as the Remuneration Trusts as part of what was described as the "Onshore Wealth Administration Arrangement" and included in the tax avoidance package sold by Baxendale Walker LLP's associated company called Minerva. APL was set up with Mr Levack as its sole director and shareholder.

3. The claims are pleaded on the basis that the claimants seek as their primary relief orders setting aside *ab initio* the three trust deeds and the claimant's contributions to the trusts, together with orders that the assets held by the first and second defendants are re-vested in the claimants. They rely upon the doctrine of mistake as it is now understood in light of the decisions of the Supreme Court in *Pitt v Holt* and *Futter v Futter* [2012] UKSC 26.

4. In the alternative, the claimants in the Dukeries and Riverside Claims seek a determination, "upon a true construction of the respective trust deeds and in the events which have happened, whether all or some (and if so what) part of the assets of the trust (a) fall, by reason of not having been "Permitted Contributions" which were capable of acceptance into trust by the first-named Defendant, to be re-vested in the Claimant for its own use absolutely and free of any trust; or (b) are held upon some other (and if so what) trusts."

5. Logically the relief the claimants seek in the Dukeries and Riverside Claims falls to be dealt in the reverse order to which it is pleaded with the issue of construction being dealt with first. The court will decide, first, whether the first defendant was entitled to receive the contributions that were made to the trusts and, secondly, if that claim fails, whether the trusts should be set aside on the grounds of mistake. This order of events is appropriate because the court has been provided with evidence of subjective intent for the purposes of the claim in mistake, which must be ignored when construing the trust deeds.

6. The first defendant filed an acknowledgement of service saying that it did not contest the claims and did not intend to play any part in the proceedings. APL filed and acknowledgement of service stating that it intended to defend the claims but has not taken any steps to do so. Her Majesty's Revenue and Customs ("HMRC") was joined

as third defendant to the claim at its request and has actively opposed the grant of any relief.

7. Fenner Moeran QC with Andrew Thornhill QC appeared for the claimants and Mark Herbert QC with Edward Waldegrave appeared for HMRC. I am grateful to Mr Moeran and Mr Herbert for their helpful submissions.

8. The claimants rely upon two witness statements. The principal statement is made by Mr Levack. In addition, the claimants rely upon a statement made by Mr David Fell who acted as tax adviser to Mr Levack, Dukeries and Riverside. HMRC served statements from Michael Brotherton and Alan Harte who are both an Inspector of Taxes. Their evidence provides relevant background to the claim but has not played a central part in the claim and I do not need to refer to it any further.

9. The order for directions dated 18 November 2020 was made by consent between the claimants and HMRC. It directed that all four claims should be case managed and tried together. The claimants were required to give Model C disclosure in relation to a small number of issues and HMRC was given permission to cross-examine Mr Levack and Mr David Fell in relation to three limited topics that were specified in the order, namely:

    (a) Mr Levack's understanding and experience in regard to the taxation of earnings from the company, including allowable deductions; and

    (b) Mr Levack's understanding and experience in regard to the taxation of earnings for employees and office holders; and

    (c) Mr Levack's experience of receiving and acting on tax advice for employers and employees.

10. No consideration was given at the directions hearing to the possibility of making a representation order to ensure that the class of beneficiaries who might benefit if the claimants' case on construction failed was represented. No doubt that was because the court had the benefit of submissions made by HMRC against the relief that was sought. Had that not been the case, the court would have wished to consider the possibility of such an order being made.

Background

11. Mr Levack is a successful businessman. Taking the position as at early 2010, three elements of his businesses were relevant.

    (1) From the 1990s onwards he had developed a very profitable care home business. He built and personally owned four care homes which were leased by him to Dukeries. By early 2010, Dukeries had a turnover of £6 million, made profits of £1.2 million and was paying annual rent to him of £615,000.
    (2) He personally owned a hotel which he leased to a subsidiary of Dukeries at an annual rent of £135,000.
    (3) He developed and personally owned a 50% share of a secure hospital in Doncaster which was leased to Riverside. By early 2010 Riverside had an

annual turnover of £10 million, generated profits in the region of £3 to £4 million and was paying an annual rent of £1.3 million.

12. In 2010 Mr Levack was a director and the sole indirect owner of Dukeries. There were three other members of Dukeries' board: Mr Levack's, wife, Hilary Levack, his daughter Sadie Levack and Jacqueline Brayford. Mrs Levack was an employee of Dukeries and Sadie Levack was a former employee.

13. Mr Levack and Mr John Rhoden each held 925 ordinary shares in Riverside and Mr Richard Reason held 150 ordinary shares. In addition, Mr Levack held one ordinary A share, Mr Rhoden held one ordinary B share and Dr Pearson held one ordinary C share. All three were directors of Riverside. Sadie Levack was an employee of Riverside.

14. Mr David Fell acted as tax adviser for all four claimants. He trained as an Inspector of Taxes and worked for the Inland Revenue for 5 years. After working for several accountancy firms, he set up his own business advising clients on tax and business affairs. He describes himself as having a good working knowledge of tax law but would not hold himself out as an expert in tax planning. In complex matters he says he would seek expert advice.

15. In 2010 Mr Levack and his principal partner in Riverside, Mr Rhoden, were contemplating a sale of the Riverside Hospital for a sum in the region of £55 million. They were concerned about mitigating their liability to CGT and, on the advice of Mr Levack's bank manager at SG Hambro in Jersey, he was introduced to Paul Baxendale-Walker of Baxendale Walker LLP. Initial contact was between Mr Baxendale-Walker and Mr Fell. Subsequently, Mr Fell, Mr Levack and Mr Rhoden attended a meeting with Mr Baxendale-Walker in early February 2010 which lasted about 2 hours. Mr Andrew Liyanage who was associated with Baxendale Walker LLP, but apparently operating as Dal Finance amongst other trading names, was also present at the meeting.

16. After discussing how to reduce the CGT payable on the sale of Riverside Hospital, when it became clear that the sale of Riverside Hospital was unlikely to proceed, Mr Baxendale-Walker asked about the profitability of Dukeries and Riverside. Having been given an outline of the finances of the businesses, Mr Baxendale-Walker suggested that the companies, and Mr Levack as a sole trader in respect of his property-owning business, should each set up a 'Remuneration Trust'. Mr Levack says Mr Baxendale-Walker explained that offshore discretionary trusts would be set up for the benefit of persons who supplied services to the companies and also for the benefit of future, but not present or past employees.

17. Mr Levack had been introduced to Mr Baxendale-Walker by a reputable source for information about financial matters. However, the schemes that were sold by Mr Baxendale Walker were on any view out of the ordinary. Mr Fell's view at the time, he says, is that they were "somewhat unusual". They were, however, accepted by Mr Levack and Mr Fell (and Mr Rhoden) without query.

18. As had been predicted, the sale of the Riverside Hospital, which was the catalyst for the introduction to Mr Baxendale-Walker, did not proceed. However, Remuneration Trusts for Dukeries, Riverside and Mr Levack were set up. The necessary steps to achieve this objective took place quickly because Mr Levack and Mr Rhoden (who set up his own personal Remuneration Trust) wished to be able take advantage of the trusts, both for themselves and the companies, before the end of the current financial year on 31 March 2010. As a result, there was a great deal of activity within the weeks following the initial meeting. Although the steps taken in respect of Dukeries and Riverside varied slightly due to differences in ownership, and due to the fact that Mr Levack's property owning business was not incorporated, the steps broadly followed a common pattern under the guidance of Mr Liyanage and other persons working with or for Baxendale Walker LLP.

19. In summary, the following steps took place:
    (1) A minute of a meeting of the board of Riverside records that a meeting was held on 25 February 2010. Only Mr Levack and Mr Rhoden were present at the meeting. The third director, Mr Reason, does not appear to have been involved. The minutes record under the heading "Execution of documents by the company" that Mr Levack was authorised "to conduct business, initiate transactions and execute all agreements contracts and instruments as may be required by the Company for the purpose of instructing Baxendale-Walker LLP in establishing a Remuneration Trust, a Business Assets plan and an Onshore Wealth Administration Arrangement." The meeting took place some while before the draft trust deed for Riverside was produced and does not refer to any documents having been considered by the board. Mr Levack was authorised to take steps to instruct Baxendale Walker LLP to establish the Remuneration Trust. The purpose of the meeting was to enable Mr Levack to sign a retainer agreement on behalf of Riverside.
    (2) Minutes of a meeting of the directors of Dukeries record that a meeting of the board of Dukeries took place on 1 March 2010 with Mr Levack and his wife and daughter present (but not the fourth director, Ms Brayford). The minutes are in the same form as the minutes of the Riverside meeting of directors,
    (3) Baxendale Walker LLP was retained under the terms of letters of engagement dated 26 February 2010 that were counter-signed by Mr Levack in each case on 1 March 2010. Their fees were £15,000 + VAT for each trust together with 10% of each contribution made to each trust under what is described as the Minerva Plan. Minerva was based in the Channel Islands and claimed to own the rights to the arrangements that were put in place.
    (4) APL was incorporated with Mr Levack as the sole director and shareholder.
    (5) "Remuneration Trust Arrangements Completion Packs" were produced by Baxendale Walker LLP for each of the proposed Remuneration Trusts. The pack included in the case of Dukeries and Riverside (but not Mr Levack personally) a Cash Remuneration Trust Arrangements: Report to the Board ("the Report") and a Remuneration Trust Manual ("the Manual").
    (6) Dukeries, Riverside and Mr Levack were each provided with draft resolutions giving approval to the trusts being set up, the trust deeds being executed and the contributions for that financial year being made. The resolutions were signed on 25 March 2010 (Dukeries), 28 March 2010 (Mr Levack) and 29 March 2010 (Riverside).

(7) The three trust deeds were executed on 29 March 2010. In each case the deed records the trust held an initial settled fund of £100.

(8) On 29 March 2010 Mr Levack signed a letter to the first defendant at an address in Geneva saying he "hereby" lent £100 to the trustee of the recently incorporated trusts at a premium of a further £100, the loan and premium to be repaid on the tenth anniversary of the letter. It was intended that by making the loan he would become a "Provider" under the terms of the trusts and that APL would hold the net contributions paid into the trusts and be able at his direction to make loans back to him.

(9) On 30 and 31 March 2010 funds totalling £6,435,000 were transferred to Baxendale Walker LLP's client account by Dukeries, Riverside and Mr Levack for the purposes of making contributions to the settled property in the respective Remuneration Trusts and paying Minerva's fees. In the case of Riverside, the total sum paid over was £3,960,000 which included contributions relating to Mr Rhoden and Dr Pearson. The total fees paid to Minerva in respect of these initial contributions was £621,000.

(10) On 30 March 2010 Mr Levack signed letters addressed to the first defendant in Belize making requests for it, in its discretion, to make the following payments from the funds held by Baxendale Walker LLP:

- Dukeries Remuneration Trust: £180,000 to Minerva and £1,800,000 to APL.
- Riverside Remuneration Trust: £125,000 to Minerva and £1,250,000 to APL.
- Levack Remuneration Trust: £100,000 to Minerva and £1,000,000 to APL.

20. Three steps then occurred on 31 March 2010:

(1) The first defendant appointed Heduk Holdings Limited (another company incorporated in Belize and controlled by Mr Baxendale-Walker) as its delegated manager and custodian for each trust.

(2) A Fiduciary Services Agreement was executed for each trust between Heduk Holdings Limited and APL.

(3) Mr Levack entered into a Finance Agreement with APL. Mr Fell witnessed Mr Levack's signature. Under the agreement, APL acting as a nominee for the first defendant (as trustee of the Dukeries trust), provided a loan to Mr Levack £1,000,000.

21. On 1 April 2010 Mr Levack entered a similar Finance Agreement with APL, acting as nominee for the first defendant as the trustee of the Riverside trust, in relation to a loan to him of £1,600,000 from the Riverside RT.

22. The speedy flow through of cash into and out of the trusts, subject to deduction of Minerva's fees, is apparent from these transactions.

23. I refer now in more detail to the written resolutions that were signed on 25, 28 and 29 March 2010. The "Written Resolution of the Directors" of Dukeries and Riverside were in each case signed by two members of the board (two out of four in the case of Dukeries and two out of three in the case of Riverside). There is no indication in either document that a meeting of the full board was held.

24. The resolutions in the case of the two companies state that:

(1) The Company resolved to make contributions to a trust (described as "the Scheme") "… for the purpose of funding the provision of discretionary benefits to providers of services, products, custom and finance to the Company and of finance to the Trustees and their respective wives, widows and dependants. It was also resolved that providers of finance to the Trust and their respective wives, widows and dependants be included as discretionary beneficiaries …It is further noted that the establishment of the Scheme provides a means for trade of the Company to thereby be benefited. It is also noted the Scheme is not, nor part of any scheme or arrangement for the benefit of employees or former employees." [sic]
(2) The Scheme is not a pension scheme.
(3) The Directors have reviewed "the detailed Responses which the Directors had collectively agreed to a Questionnaire provided by their professional advisors" and that the Responses "… continue accurately to reflect the purpose of the Company in establishing the proposed Scheme."
(4) The Directors have agreed a "Providers List" of persons, other than employees, who have provided services etc to the Company in the last accounting period.
(5) After "due and careful consideration" the Directors resolve to adopt the trust deed and any two directors, or any director and the secretary, were authorised to sign the deed.
(6) In respect of the accounting period ending 31 March 2010 a contribution of £1,250,000 in the case of Dukeries and £3,600,000 in the case of Riverside was to be made to the trustee of the Scheme.

25. The Providers List for Dukeries includes seven suppliers six of which would appear to be companies. The Riverside list of Providers includes six suppliers some of which were likely to have been incorporated. No thought appears to have been given to the definition of Beneficiaries in the Remuneration Trusts and the incongruity of benefiting the wives, husbands, widows etc of suppliers who were corporate entities.

26. The Questionnaire that is referred to in the minutes is a pro forma prepared by Baxendale Walker LLP that includes the following questions and answers (the questionnaire they provided included the answers in a standard form):

"3. Are the directors taking independent professional advice on the creation of the incentive arrangements? *Yes.*

…

6. Does the company consider that it is possible to allocate any or all of the contribution to any particular Provider or Providers or that it is desirable to do so? Why? *The Company does not want to spend its expensive management time in determining which specific Provider should get what. The discretionary trust allows each potential beneficiary to make a case to the trustees for the receipt of a benefit.*

7. The discretionary trust will prohibit the refund of contributions to the company. Why do the directors think this is a good idea? *Because otherwise the Company could be said to have not in reality discharged its commercial liabilities.*

…

9. How and when will potential beneficiaries be informed? *That is the Trustees responsibility. The Company will provide them with a list of those who have provided service, services and custom to the Company."*

27. The resolution signed by Mr Levack in relation to his personal Remuneration Trust was adapted to take account of his status as a sole trader, but it is essentially the same document as that signed on behalf of Dukeries and Riverside. It refers to "The Business" making contributions to the Scheme. It records in a similar way to the resolutions of Dukeries and Riverside that the resolution is the product of "due and careful consideration". The questionnaire is in the same form and confirms that he was taking independent professional advice. The contribution for the year ended 31 March 2010 was to be £1,000,000.

28. Mr Levack listed four providers as persons who had provided services, custom or finance to his business in the last fiscal year. In his evidence under cross-examination he said he had left it to "his girl" to complete the list. The irony of including HMRC as a provider of services to his rental business was probably unintended.

29. I will come to his evidence later in this judgment, but I record here that no independent advice was in fact sought or obtained on behalf of the directors of Dukeries and Riverside, or Mr Levack personally. That is unless it can be said that the scheme provider, Baxendale Walker LLP, was also the provider of independent professional advice. Mr Rhoden who set up a personal Remuneration Trust at the same time as Riverside and Mr Levack obtained some limited advice which he provided to Mr Levack. However, he says he does not recall reading it.

30. Substantial Minerva fees amounting to £405,000 were paid immediately upon setting up the three Remuneration Trusts. In subsequent years up to and including 2016 further sums were paid as contributions by Dukeries and Riverside to the Remuneration Trusts. Dukeries contributed a further £10,650,000 and paid further fees to Minerva of £532,500. Riverside contributed a further £20,985,000. This figure includes fees paid to Minerva.

31. Mr Levack made only one further contribution to his Remuneration Trust in the year ended 31 March 2011 of £550,000. That figure also includes fees paid to Minerva.

32. I mentioned that Mr Fell acted as a witness to Mr Levack's signature on 31 March 2010. Mr Fell does not deal with his involvement in setting up the arrangements in his witness statement, but it is apparent from the email exchanges between 25 and 31 March 2010 that he provided active assistance as tax advisor to Mr Levack and the companies.

33. Mr Levack received at the first meeting with Mr Baxendale-Walker a suite of documents comprising:
    (1) An Onshore Wealth Administration Memorandum 2009 Update.
    (2) A short Remuneration Trust Summary.

(3) A Business Asset Plan Summary which was relevant the Allev Ltd Business Asset Trust.
(4) A list of Frequently Asked Questions ("FAQs").
(5) An example of a regular update sent out by the LLP after a change in the law or following a budget announcement.

34. The Memorandum 2009 Update explains over four pages how the onshore wealth administration (which Mr Levack adopted using APL) was intended to work. It is unnecessary to refer to it in any detail.

35. The Remuneration Trust Summary deals with a Remuneration Trust in one page. It says the benefits from the trust are provided through the implementation of a "highly technical product". It provides a list of those benefits in a series of bullet points:

> "Using legal strategies successfully implemented over a decade, the company, partnership or trader can fund an incentives plan, under statutory protection, through a tax free trust-based environment. Then:
> - Contributions are deductible against corporation tax/income tax
> - Post-tax profits can also be used
> - Incentives can be accessed tax free
> - Fund grow tax free
> - Fund available tax free to post-death beneficiaries"

36. This is followed by a number of statements that were designed to allay any concerns the client may have had about Remuneration Trusts. It says, for example, that there had been full disclosure to HMRC and the scheme had been known about by HMRC since 1994. Curiously, in light of the claimed benefits, it also says the scheme did not involve any "tax avoidance".

37. Dukeries and Riverside later received from Baxendale Walker the Manual and the Report. Given that Mr Levack's case is based upon him having made mistakes about the Remuneration Trusts it is necessary, in addition to the trust deeds themselves, to refer to these two documents because they describe (whether successfully or not) the thinking that lay behind the Remuneration Trusts. They vary slightly to take account of the differences of ownership and control of Dukeries and Riverside, but it suffices to refer only to the Dukeries version of these documents.

The Manual

38. The Manual runs to five pages. Mr Levack is described as "the Shareholder". The following points are of note:
(1) The manual is said to have written at the request of Mr Levack and the other three directors (who are named) and states that its intention is to explain the tax implications of the use and distribution of funds held by the Remuneration Trust to the board.
(2) Paragraph 3 describes the Shareholder's objectives as being:

> "3.1.1 to utilise the Remuneration Trust as a commercial incentive scheme;
>
> 3.1.2 to receive commercial loans and other financial assistance directly or indirectly from the Trust, free of tax;

3.1.3 for the Trust funds to be used to provide genuine benefits in cash and/or kind to suppliers of services, custom, products of [sic] finance to the Company;

3.1.4 for the Shareholder's family to be able to enjoy the trust funds tax free after the Shareholder's death."

(3) Paragraph 4.5 records that the Trust cannot be used to benefit employees or former employees and that any controlling shareholder (such as Mr Levack) is excluded from benefit under the Trust. "However, upon his death, his family become <u>full</u> beneficiaries" [emphasis in the original]

(4) Paragraph 4.9.1 notes that the Shareholder can write to the trustees to request a commercial loan as a provider of service and paragraph 4.14 states that commercial loans to the Shareholder and his family counts as investments, not distributions.

(5) Paragraph 6 explains how the system of loans was intended to work. It emphasises that the loans must be commercial and that loans could not be made to the Shareholder or a member of his family unless the intended borrower had first made a loan of £100 to the trust.

(6) The latter part of paragraph 6 deals with assets and records that the trust can buy a holiday cottage or yacht and rent it to the Shareholder.

(7) However, seemingly in contradiction to the preceding paragraph, paragraph 7 under the heading "Benefits to the Shareholder's Family" states: "**During the Shareholder's life, the Shareholder and his family are limited to receiving commercial loans from the Trust**." [emphasis in the original]. The implication is that after the Shareholder's death family members can benefit in other ways.

The Report

39. In the same way as the Manual, the Report states at the outset that it is written for the attention of all four directors of Dukeries and names them. It records that Dukeries "proposes to make a gift of cash to the Trustees of the Remuneration Trust …".

40. Paragraph 3 of the Report is headed "Summary" and after two formal paragraphs states:

> "3.3 The Company wishes to pay or provide benefits to its present suppliers and customers and future employees, together with other classes of potential beneficiary.
> 3.4 The Company's sole purpose in so doing is the discharge of its commercial liabilities to make payments to or for the benefit of contractors or customers and others with whom the Company has a commercial relationship …
> 3.5 In our Opinion, a Remuneration Trust (modified in accordance with the following recommendations) provides the appropriate type of trust vehicle for the achievements of the Company's commercial objectives.
> 3.6 The Company derives no corporation tax advantage from the Trust or any other means of payment or provision of such benefits, since direct payments would themselves be fully deductible in computing the Company's taxable profits …
> 3.7 Therefore, the establishment and funding of the Trust cannot in our Opinion properly be characterised as constituting "tax avoidance". The High

Court of Justice has ruled that the use of Remuneration Trusts does not constitute tax avoidance: *Macdonald (Inspector of taxes) v Dextra Accessories Ltd and Others* (2003). HM Revenue & Customs accepts and in any event is bound by this ruling."

41. Paragraph 4.1 says that Remuneration Trusts have been used throughout the 20th century, although the example provided does not appear to be in any way related to the structure of the Remuneration Trusts that were set up. Paragraph 4.2 summarises the "primary fiscal characteristics" of the Remuneration Trusts as being "it excludes the provision of "relevant" retirement benefits and that employees of the Company are excluded from benefit. This has the consequence that contributions made to the trust by the Company are not subject to income tax."

42. The remaining part of paragraph 4 is set out under the heading "Taxation". Particular points that are made include:

> "4.4 The Trust does not constitute a retirement benefits scheme. Therefore, contributions to it are <u>not</u> subject to income tax under the "retirement benefits schemes" rules.
> 4.5 Such contributions are <u>not</u> subject to PAYE, since none of the contribution constitutes assessable income of any employee, or indeed specific receipt by any person. Indeed, employees are specifically excluded from benefit in the trust.
> 4.6 Similarly, such contributions are <u>not</u> liable to Employers Class 1 NICs, since they are not "earnings" of any person, or indeed a specific receipt by any person.
> 4.7 Section 143 and Schedule 24 Finance Act 2003, as amended by Section 245 FA 2004 effectively specifies than a contributor to a Remuneration Trust should not obtain a corporation tax deduction for an "employee benefit contribution" until (and to the extent that) distributions are made by the Remuneration Trust. Since the Company's present and past employees (but not their families) are specifically to be excluded persons under the Trust, these statutory restrictions will not apply. Contributions will, in principle, become deductible in the accounting period in which they are made. The implications of the decision by the Special Commissioners in *Sempra Metals Limited v the Commissioners for HM Revenue and Customs* (2008) have been analysed. The Remuneration Trust Deed ensures that the Remuneration Trust falls outside the legislation of 2003 (as amended in 2004) as interpreted by the Special Commissioners in that case.
> 4.8 The contributions are intended to be and must be made to the Trust on a wholly commercial basis. The making of such contributions does <u>not</u> therefore attract any inheritance tax charge.
> 4.9 The contributions are therefore deductible in computing taxable profits of the Company where they are made "wholly and exclusively for the purposes of its trade."
> 4.9.1 The vital matter is the intention of the directors of the Company in making the contributions." [emphasis in the original]

43. Paragraph 5 is headed "Establishing the Remuneration Trust". It emphasises at 5.1 and 5.2 the role of the directors of the Company. At 5.2 it says that the directors will need to discuss how the trust will be used and at 5.5 the Company should then inform

"appropriate classes of discretionary beneficiary of the existence of the Remuneration Trust, in the usual manner that the Company conveys information of importance to such persons." This contradicts the Q & A prepared by Baxendale Walker LLP that formed part of the board resolution which says the trustees will inform beneficiaries about the Trust. The contradiction was not picked up by the participants in the scheme.

44. Paragraph 6 is headed "Choosing your Trustees". It states that the choice of trustee is entirely a matter for the Company. In fact, the Company was not given any choice and it was never suggested that anyone other than the first defendant should act as the trustee. The first defendant was provided as part of the package that Mr Levack and his businesses were paying for.

45. The principal objectives behind the Remuneration Trusts that can be discerned from these documents can be summarised as being that:
    (1) Contributions by the Founder were deductible for corporation tax in the case of Dukeries and Riverside and deductible for income tax in the case of Mr Levack's rental business.
    (2) Contributions would not be subject to income tax or national insurance contributions or inheritance tax.[1]
    (3) Contributions could be invested or used in any way Dukeries, Riverside or Mr Levack wished by making loans to him and his family. As the Report to the Board makes clear it was the directors of Dukeries and Riverside who were required to consider how the trust funds should be used and for the board to make requests to the trustee.
    (4) The loan and interest payable on them would be deductible as debts from Mr Levack's estate on his death.
    (5) Mr Levack's family would then be free to enjoy the capital and income of the trusts. Capital could be extracted at any time free of tax.

46. It is right to note, however, that the objectives summarised in the Manual and the Report were rather wider than just benefiting Mr Levack and his family. The structure of the Remuneration Trusts is premised upon contributions being held for the purposes of a "commercial incentive scheme" and to "provide genuine benefits in cash and/or kind to the suppliers of services, custom, products or finance". For Mr Levack to receive the benefit of loans, he had to be shoehorned into the role of a supplier, or Provider, by providing loans of a nominal £100.

The Remuneration Trust Deeds

47. It is convenient at this stage to set out the essential elements of the trusts. They are in common form and I will refer only to the Dukeries trust deed.

48. Dukeries is "the Founder" and the first defendant is "the Original Trustees". The deed recites that the Founder has provided £100 to the Trustees to be held and applied subject to and in accordance with the trusts created by the deed.

[1] NICs, IHT and CGT will be used as abbreviations hereafter.

49. Mr Levack is appointed as the Protector (with power to appoint someone to replace him) and given a wide power under clause 9, with the consent of the Trustees, to alter or add to the provisions of the trust deed. Clause 9.2 seeks to limit the exercise of the power to amend if its exercise "would give rise to any fiscal liability upon any person." It is also limited by clause 10 which contains restrictions on the exercise of the Trustees' powers.

50. Clause 2 requires the Trustees to hold the Trust Fund during the Trust Period (80 years) upon trust "… to apply the income and capital thereof to or for the benefit of all or any one or more exclusively of the others or other of the Beneficiaries in such shares and in such manner generally as the Trustees shall in their absolute discretion think fit …".

51. The Trust Fund is defined as being:

> "… the said sum of One hundred pounds all property at any time added thereto by way of further settlement accumulation of income capital accretion or otherwise and all property from time to time representing the premises respectively."

52. Most of the controversial elements of the trust deed are contained in the definitions that are set out in clause 1:

    (i) The definition of Beneficiaries has two distinct parts:

    Clause 1.1.4 **Beneficiaries**: " 'the Beneficiaries' means from time to time the wives husbands widows widowers children step-children and remoter issue of past and present Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue and also means from time to time future Providers and the wives husbands widows widowers children step-children and remoter issue of future Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue and "Beneficiary" has a corresponding meaning". This first part of the definition is not in itself controversial. However, it is followed by three provisos that seek to restrict the class of beneficiary with a view to ensuring that the trust cannot be construed as an employee benefit scheme."

    The continues with three provisos:

    "… PROVIDED THAT no Excluded Person shall be a Beneficiary AND FURTHER PROVIDED THAT the Trustees shall not have power under the trusts hereunder to provide and shall not (whether directly or indirectly) provide any benefit to or for any Excluded Person and nor shall the trustee participate in any trust, scheme or arrangement which is an "employee benefit scheme" for the purposes of Schedule 24 Finance Act 2003, or which participation would have the consequence that the provisions of Schedule 24 Finance Act 2003 apply so as to restrict the deductibility for corporation tax purposes of Founder contributions to the trusts hereof AND FURTHER PROVIDED THAT the Trusts hereunder shall not have effect so as to constitute an arrangement such that the Trust Fund from time to time falls to be accounted for as an asset of the Founder."

Where necessary I will refer to these provisos as Proviso1, Proviso 2 and Proviso 3.

(ii) Clause 1.1.5 **Providers**: "Subject to Schedule 2 to this Deed, a "Provider" means (i) a person who provides or has provided or may provide in future to the Founder services or custom or products or finance (save for items of a capital nature); and (ii) a person who provides or has provided or may in future provide finance to the Trustees or any manager from time to time of the Trust Fund." It is not clear why the definition of Providers is expressed to be subject to Schedule 2.

(iii) Clause 1.1.6 **Excluded Persons**: " 'Excluded Person' means any of the persons named in Schedule 2 to this Deed."

(iv) Clause 1.1.17 **Prohibited Benefits**: " 'Prohibited Benefits' means : (1) any holding or use of the Trust Fund for or in connection with the provision of benefits to or in respect of present or former employees of the Founder; (2) any "pension" for the purpose of the Companies Act 1985; and also means (3) any benefit in respect of qualifying service for the purposes of the Pension Schemes Act 1993; and (4) any money or benefit in kind which would otherwise fall within paragraph 1(2) Schedule 24 Finance Act 2003; (5) any benefit within the ambit of Section 43 FA 1989."

(v) Clause 1.1.8 **Permitted Contribution**: " 'Permitted Contribution', in respect of any contribution from the Founder to the trusts hereof, means a payment by the Founder which does not constitute an "Employee Benefit Contribution" (as that phrase is defined in Section 143 and Schedule 24 FA 2003 and Section 245 FA 2004) nor a sum which falls within the provisions of Section 43 FA 1989" .

53. Schedule 2 which describes Excluded Persons provides:

"1. Subject to paragraph 2 below, for the purposes of this Deed and Schedule, an Excluded Person is any person falling from time to time within any one or more of the following categories of description, where the words "Participator" and "connected with" shall have the meanings ascribed to them by the Income and Corporation Taxes Act 1988:

"1.1 the Founder;

"1.2 any person connected with the Founder;

"1.3 any Participator in the Founder;

"1.4 any person connected with any such Participator.

"1.5 each and every person who presently or at any future time falls within the definition of "present or former employee" for the purposes of Section 143 and Schedule 24 Finance Act 2003 and section 245 Finance Act 2004.

"2. Any person who is or becomes an Excluded Person shall cease to be an Excluded Person if such person for any reason ceases to fall within the categories of description specified in paragraph 1 above and from the date of such cessation."

54. The thinking behind paragraph 1 of Schedule 2, in common with Provisos 1 and 2 in the definition of Beneficiaries, and the definitions of Prohibited Benefits and Permitted Contributions, was to try to prevent the Remuneration Trust from having the fiscal effects of it being treated as an employee benefit scheme. The intention lying behind paragraph 2 of Schedule 2 appears to have been that Mr Levack would cease be an

Excluded Person upon his death and this would enable Mr Levack's wife and daughter to become Beneficiaries at that point because they were no longer connected with him.

55. Clause 3.8 deals with loans to an Excluded Person:

> "Nothing in this Deed shall prohibit the exercise of any administrative or investment power by the Trustees, as a result of which any Excluded Person receives any form of loan and the Trustees shall have power to make any form of loan to any Excluded Person PROVIDED THAT the same does not constitute a gift of the principal amount of the loan, nor the use of money, nor form part of any trust scheme of arrangement which is an "employee benefits scheme" for the purposes of Schedule 24 Finance Act 2003, or which participation would have the consequence that the provisions of Schedule 24 Finance Act 2003 apply so as to restrict the deductibility for corporation tax purposes of Founder contributions to the trusts hereof."

56. Schedule 1 sets out what are described as being additional powers of the Trustees. Two paragraphs deal with loans:

> "The Trustees shall have the following additional powers …
>
> 1.2.16 power to lend any part of the Trust Fund to any person, including an Excluded Person, and to provide guarantees to any person (including the Founder) whether or not taking security for the same and on such terms as the Trustees may think fit.
>
> 1.2.17 power to lend on beneficial terms to an Excluded Person, provided that the object of benefit is a person or person who either is not an Excluded Person, or is a death beneficiary of an Excluded Person."

57. The only other term that is material is clause 10 which contains what Mr Moeran describes as a 'catch-all" provision:

> "<u>10. Irrevocable Limitations of Trustees' Powers.</u>
>
> 10.1 Notwithstanding anything to the contrary express or implied in this Deed, no power or discretion hereby or by law conferred on the Trustees shall be exercisable nor exercised by the Trustees in such manner as to cause any part of the Trust Fund or the income thereof to be used to provide a Prohibited Benefit or to become payable to or applicable for the benefit of the Founder PROVIDED THAT where the Trustees make any payment to or provide any benefit for a Beneficiary in circumstances where the Founder is liable to account to the Revenue Authorities of the United Kingdom for income tax and/or national insurance contributions in respect of such payment or benefit then the Trustees shall pay to the Founder such sum as shall be required to fully discharge that liability.
>
> 10.2 Notwithstanding anything to the contrary express or implied in this Deed, no power or discretion hereby or by law conferred on the Trustees shall be exercisable nor exercised by the Trustees in such manner as to permit any settlement of property by the Founder upon the trusts hereof unless such settlement of property constitutes a Permitted Contribution".

58. I will discuss these provisions later in this judgment. I observe at this stage that the terms of the trust seek to achieve a number of objectives that are hard to reconcile. An unusual proportion of the trust is expressed in negative terms, stating what the effect of the trust will not be and how it will not operate. The core elements of the

trust, however, are uncontroversial. The Founder created a conventional discretionary trust. The definition of the Trust Fund does not adopt the language of "Contributions" to the fund but refers to the "further settlement" of property. There is a wide class of beneficiaries with some specific exclusions and the definition of Beneficiaries requires reference to the definition of a Provider. To the extent that there are difficulties with the way in which the deed is drafted, they are connected with the efforts that were made to avoid the trust being an employee benefit scheme. This is the intended effect of all three provisos to the definition of Beneficiaries. Schedule 24 of the Finance Act 2003 is referred to expressly within the definitions of Prohibited Benefits, Permitted Contribution (which operates as a definition by excluding an "employee benefit contribution") and Excluded Persons as set out in Schedule 2.

Deeds of Amendment

59. On 9 July 2012 Mr Levack as Protector and the first defendant executed deeds of amendment that had the effect of entirely replacing the deeds executed in 2010. The changes made to the deed were substantial and included an entirely new definition of Beneficiaries and a simplified definition of Excluded Person in Schedule 3 (formerly Schedule 2) with only the Founder falling within that category of persons. It is unnecessary to refer to it in any detail. Mr Moeran helpfully accepted that if the court is not persuaded to set aside the 2010 trust deeds on the grounds of mistake, it was most unlikely it would be persuaded to set aside the 2012 deeds of amendment.

The Tax Framework

60. It will be necessary to consider the tax framework that informed the way in which the Remuneration Trusts were drafted and whether as a matter of construction the Remuneration Trusts operated as they were intended to.

61. The relevant tax provisions, including those that relate to Employee Benefit Trusts ("EBTs"), that were applicable in 2010 can be summarised briefly in the following way:

    (1) A contribution to an EBT could avoid being a transfer of value for IHT by falling within sections 13 or 28 of IHTA 1984.
    (2) Section 13 applies to transfers into trusts by close companies. Under section 13(1) the EBT must benefit all or almost all employees and/or office holders of the company and fall within section 86(1) IHTA 1984. However, under section 13(2), section 13(1) does not apply if the EBT permits benefit to a "participator" in the company or any person connected with them. Mr Levack was on any view a participator.
    (3) Section 28 contains similar provisions that apply to the transfer of shares into an EBT by individuals. In *Barker v Baxendale Walker Solicitors (a firm)* [2018] 1 WLR 1905, in relation to section 28(4) the Court of Appeal held that "very probably" for the purposes of section 13 and section 28 to avoid being an employee benefit scheme, the trust must exclude from benefit the family of the settlor (or a participator) at all times. The decision concerned a claim for professional negligence but for present purposes can be taken as determinative of what has been described as the "post-death construction" of these provisions. Its relevance to this claim is that it negates the effect of paragraph 2 of Schedule 2 to the trust deeds. Mr

Levack would not, therefore, cease to be a participator upon his death on the principle 'once a participator, always a participator'.

(4) Under section 12 of the Inheritance Taxes Act 1984 a disposition is not a transfer of value if it is an allowable deduction for income or corporation tax.

(5) A contribution to an EBT would usually be deductible for income or corporation tax. This is subject to (a) whether the trust might fail the "wholly and exclusively" test under section 54(1)(a) Corporation Tax Act 2009 and (b) whether the contribution was to an employee benefit scheme in which event deduction is postponed until benefits are paid out to employees as taxable earnings.

(6) In 2010, the decision of the Supreme Court in *RFC 2012 plc (in liquidation) v Att Gen for Scotland* [2017] 1 WLR 2767 had not taken place. Based upon the decision in *Dextra Accessories Ltd v MacDonald (Inspector of Taxes)* [2002] STC (SCD) 413 (which is referred to in the Report) benefits under arrangements similar to those in the Remuneration Trust had been held not to constitute taxable income.

HMRC's case in the First Tier Tribunal (Tax Chamber)

62. There are current proceedings in the First Tier Tribunal (Tax Chamber) between Dukeries and HMRC which have been stayed pending the outcome of these proceedings.

63. The principal position adopted by HMRC in the tribunal is that the tax avoidance scheme fails with the consequence that Dukeries does not reduce its taxable profits by reason of the contributions it made to the Remuneration Trust and that the contributions made by Dukeries were payments of taxable earnings to Mr Levack as a director of Dukeries and APL and subject to PAYE and NICs: [paragraph 5].

64. The additional corporation tax that is payable according to HMRC for the accounting periods ended 31 March 2009 to 31 March 2014 amounts to approximately £2,148,010. In addition, HMRC claims PAYE of £967,500 for tax years 2012 to 2014 and NICs of £865,982.47 for the same period.

65. The majority of HMRC's case concerns whether the contributions are properly deductible for Corporation Tax on the basis that they should not have been recognised as an expense in the profit and loss accounts of Dukeries and/or that the contributions were not wholly or exclusively for the purposes of Dukeries' trade.

66. HMRC goes on to state:

> "90. Further and alternatively, where deductions would otherwise be allowable, HMRC consider that the deductions are disallowed by s.1290 CTA

2009[2] on the basis that the contributions by DHL[3] to the Remuneration Trust are "employee benefit contributions" made under an "employee benefit Scheme" as defined by s.1291(1) and (2) CTA 2009.

91. The arrangements of which the Remuneration Trust is a part have been utilised for the benefit of persons who include employees of DHL, namely APL [APL is an abbreviation in this document for Mr Levack]. The contributions to the Remuneration Trust were made on terms that the Trustees would pass the funds contributed on to Management, a company controlled by APL, a director of DHL, which could, and did, use the funds to benefit APL by providing unsecured loans on uncommercial terms. These arrangements are therefore an "employee benefit Scheme" as defined at s.1291(2) CTA 2009.

92. Further, or alternatively the Remuneration Trust arrangements are an employee benefit scheme by virtue of s.1291(4) CTA 2009 because the arrangements are an arrangement to which s.554A ITEPA 2003 applies.

93. Each contribution to the Remuneration Trust arrangements constitutes an act by which property is held under an employee benefit scheme and is therefore an employee benefit contribution. As such, under s.1290 CTA 2009 no deduction is allowed for DHL's contributions to the Remuneration Trust except to the extent that "qualifying benefits" or "qualifying expenses" as defined in s.1292 and s.1296 CTA 2009 are provided out of the contributions. Subject to any charges under Part 7A ITEPA 2003 being finally determined, HMRC understand that no such qualifying benefits or qualifying expenses have been provided."

67. The references to the applicable tax legislation do not match those in the trust deeds. Indeed, curiously Mr Baxendale Walker did not adopt references to the legislation that was current in 2010 when the trusts were executed. However, the drafting of the trust deeds go out of their way to seek to exclude the possibility that contributions or benefits could be construed as falling within an Employee Benefit Scheme.

68. The claimants' case is that the schemes did not work successfully for tax purposes. Their case is that the schemes did not:

(1) Avoid contributions being earnings for Mr Levack for income tax and NIC purposes; or,
(2) Avoid contributions being an IHT transfer of value either by the contributions being deductible for corporation and income tax or by the definition of Excluded Persons in Schedule 2 replicating section 13(2) and 28(4) of IHTA; or,
(3) Provide tax free commercial loans to Mr Levack in his lifetime or benefits to his family after his death.

69. The trusts attempted to prevent benefits being available to present and former employees by the definition of Excluded Persons, and thus avoid the trusts being employee benefit schemes and avoid contributions being treated as Mr Levack's earnings, by only providing benefits to future employees and Providers. Alongside these restrictions the schemes were intended to enable commercial loans to be made

[2] A successor to the provisions in section 143 and schedule 24 Finance Act 2003 and section 245 Finance Act 2004.
[3] Dukeries Healthcare Limited.

to any person, even an Excluded Person (Schedule 1 paragraph 1.2.16). The claimants give six reasons why these provisions do not operate as they were intended to:

(1) By making loans to Mr Levack on beneficial terms, as was intended, he will be provided with a benefit. The claimants go on to say, however, that such loans were Prohibited Benefits under clause 1.1.17 and that the express power to make such loans was overridden by the terms of clause 10.1.

(2) The trusts were in fact employee benefit schemes as being a scheme or other arrangement for the benefit of persons who are, or include, present or former employees of the employer and contributions would be employee benefit contributions under paragraph 1(2) of Schedule 24 Finance Act 2003. Furthermore, contributions could never be accepted by the trustee in light of clause 10.2 of the trusts.

(3) Benefits to an employee's family, even after the employee's death, are still benefits – see *Sempra Metals Ltd v Revenue and Customs Commissioners* [2008] STC (SCD) 1061.

(4) On the assumption that HMRC's case in the First Tier Tribunal is correct, contributions to the trusts are taxable as earnings of Mr Levack.

(5) The arrangements do not pass the "wholly and exclusively of the benefit of the trade" test.

(6) The class of beneficiaries was wider than is permitted under sections 13(1) and section 86(1) of IHTA because it included Providers and contributions would be transfers of value.

The issue of construction

70. Mr Moeran submits that the terms of clause 10.2 have the effect that all contributions should never have been accepted by the trustees and as a result all contributions are held on automatic resulting trusts for Dukeries and Riverside. This part of the case is not available to Mr Levack due to the nature of his business property rental business. His family were not employees or former employees of that business.

71. Mr Moeran relies upon the principles summarised at paragraphs 23.2 and 23.7 of *Underhill & Hayton; Law of Trusts and Trustees* 19th ed and the observations made by Megarry J in *Re Vandervell's Trusts (No 2)* [1974] Ch 269 at 294. The starting point is that all the evidence of subjective intent that is deployed for the purposes of the claim in mistake is inadmissible. Mr Moeran accepted that documents such as the Report and the Manual were not part of the matrix of fact that the court could consider. The court must construe the deeds, however, recognising that they were created in the context of the tax regime which I have summarised earlier in this judgment. I do not accept, however, that when seeking to construe what the deeds mean, the court necessarily must determine whether they succeed or fail for tax purposes. Dukeries and Riverside have accepted for the purposes of these claims the analysis put forward by HMRC in the First Tier Tribunal. That is an approach that is convenient for Dukeries and Riverside. However, the task for this court is to construe the deeds, not to reach conclusions about a liability to tax. That role falls to the First Tier Tribunal.

72. The starting point is the trite observation that the deeds must be construed by reference to all their terms. As it seems to me Mr Moeran's approach starts and ends with the difficult definitions rather than adopting a more holistic approach. As drafted the deeds provide:

(1) A standard declaration of trust creating a discretionary trust for a class of beneficiaries. The Founder and the Trustees must be taken to have intended to create operative trusts.
(2) The principal class of beneficiaries is a wide one being the wives, husbands, widows, children etc of past, present and future Providers.
(3) The trustees are given the usual suite of powers including the additional powers in schedule 1. The power to make loans is a wide one and is not limited to making loans to an Excluded Person.
(4) The Protector (Mr Levack) with the consent of the trustees is given a wide power to amend the deed albeit that any amendment must not place any fiscal liability on any person. Mr Levack has already exercised when executing the deeds of variation in 2012 which, amongst other things, amended schedule 2 to the deeds. He was and is quite capable of exercising the power again.

73. The first two provisos to the definition of the Beneficiaries prevent certain persons from being beneficiaries. They narrow the class of beneficiaries but even with those two provisos there is a potential class of persons who may benefit. The third proviso, although part of the definition of Beneficiaries, seeks to prevent the Trust Fund be accounted for as an asset of the Founder. It is not an obstacle that is material for these purposes.

74. A Permitted Contribution means a contribution by the Founder that is not an Employee Benefit Contribution and clause 10.2 purports to prevent the trustees exercising their powers to permit any settlement of property "unless such settlement of property constitutes a Permitted Contribution".

75. The trusts came into being upon the execution of the trust deeds. The Trust Fund at that point comprises the sum of £100 and the intention was to receive further sums to add to the Trust Fund. It seems to me the right approach to construing the deeds is to view the overarching purpose as being the creation of discretionary trusts for the class of beneficiaries. There is nothing to prevent the Founder making contributions to the trustees to enable them to provide benefits to that class provided they do not benefit Excluded Persons. There remains a class of persons who can benefit. If the trustee makes loans to the Founder there may be tax consequences, but that is beside the point. The trustees may be obliged to seek return of the loans. The more important point is that the trustee may provide benefits to those in the class who may benefit.

76. Dukeries and Riverside contend that the trusts authorise payments to employees of the Founders which makes them an employee benefit scheme and this makes contributions to the trusts void as not being permitted contributions. Clause 10.2 prohibits the trustee from exercising its powers to permit settlement of property unless it constitutes a Permitted Contribution.

77. The issue of construction turns on Paragraph 1(2) of Schedule 24 of the Finance Act 2003 which makes a transfer of money or assets to a third party an employee benefit contribution if:

> "…(b) the third party is <u>entitled or required</u>, under the terms of an employee benefit scheme, to hold or use the money or assets for or in connection with the provision of benefits to employees of the employer." [my emphasis]

78. Is the trustee entitled or required to hold or use the money for the provision of benefits to Dukeries and Riverside's employees? The issue of construction concerns the validity of the trusts and contributions made to it, not whether the trusts were effective for fiscal purposes. As I have indicated there are residual purposes for which the trusts can receive contributions. The income and capital can be applied in accordance with clause 2 for the benefit of members of the families of Providers who are not past or present employees of the Founder.

79. I accept Mr Herbert's submission that there are numerous provisions that would have to be disregarded to justify the conclusion that the trusts are employee benefit schemes. These include:
    (1) Proviso 1 prohibits an Excluded Person from benefiting and Proviso 2 prohibits the trustee from participating in an employee benefit scheme.
    (2) The proviso to clause 3(8) prohibits a loan, including a loan to an Excluded Person from forming part of an employee benefit scheme.
    (3) Clause 10.2 prevents the trustees from exercising powers in such a way that contributions to the trusts are not Permitted Contributions. This prevents the trustee's powers from being exercised in such a way as to make a contribution an employee benefit contribution.
    (4) Clause 11.1 rules out payments which are emoluments and clause 11.2 prevents anything that would make trust assets potential emoluments.

80. It is also right that although the scheme appears to contemplate loans being made to an Excluded Person, such as Mr Levack, there are restrictions that prevent this happening:
    (1) Clause 3.8 contains a proviso prohibiting a gift of the money loaned and prevents the trustee from participating in an employee benefits scheme.
    (2) Paragraph 1.2.16 of Schedule 1 is restricted by the general principle that administrative powers are only exercisable for the purposes of the trust and its beneficiaries.
    (3) Paragraph 1.2.17 is self-contradictory and must be construed in favour of validity rather than invalidity.

81. In conclusion, I reject the construction placed upon the deeds by Dukeries and Riverside. Properly construed they permitted the trustee to receive contributions that do not fall foul of clause 10.2 and be Permitted Contributions.

Mistake

82. I will now deal with the law of mistake and the correct approach of the court to dealing with applications of this type.[4]

83. Although it will be necessary to refer to the judgment of Lord Walker in *Pitt v Holt* [2013] UKSC 26, the judgment of Morgan J in *Van der Merwe v Goldman* [2016] EWHC 790 (Ch) provides a convenient summary of the factors that are relevant to the doctrine of mistake. The summary that follows includes references to the relevant paragraph in Lord Walker's judgment:

> (1) A donor can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift; *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400; para [101].
> (2) A mistake is to be distinguished from mere inadvertence or misprediction; para [104].
> (3) Forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake; para [105].
> (4) It does not matter that the mistake was 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; para [114].
> (5) Equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability; para [124].
> (6) The evaluation of unconscionability is objective; para [125].
> (7) The gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequences for the party making the mistaken disposition; para [126].
> (8) The court needs to focus intensely on the facts of the particular case; para [126].
> (9) A mistake about the tax consequences of a transaction can be a relevant mistake; paras [129–132].
> (10) Where the relevant mistake is a mistake about the tax consequences of a transaction, then— '. . . 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.' para [135].

84. I would however sound a note of caution. The ten point summary is extracted from a lengthy discussion about the law in paragraphs [104]-[141] of Lord Walker's judgment. Some care is needed when applying them because each point is not self-contained and, in most instances, they overlap to a greater or lesser degree. For example, factor (1) concerning the seriousness of the mistake will involve factor (5) by requiring the court to assess the gravity of the mistake in terms of injustice or unconscionability. Furthermore, in a passage commencing at [124], under the

[4] It is not suggested that the doctrine of common law mistake that applies to bilateral or commercial contracts is of any relevance.

heading "The conscience test", after identifying that the test of unconscionability is objective and that the court should form a view about the merits of the claim, Lord Walker referred to his speech in *Gillett v Holt* [2001] Ch 210 at 225. He was dealing there with in the doctrine of proprietary estoppel. He observed that although the constituent elements of proprietary estoppel may have to be considered, "they cannot be treated as watertight compartments" and the court must look at the matter in the round. He went on to say in *Pitt v Holt*:

> "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."

85. In this case it is also necessary to have in mind what Lord Walker said in relation to a tacit mistake and the express or tacit acceptance of risk. The latter point also involves considering whether the trusts should properly be regarded as artificial tax avoidance and, if so, what affect that may have on the court's approach.

86. Lord Walker discusses in some detail what will, and will not, be treated as being a mistake at paragraphs [104]-[113] and in the course of that discussion refers to the treatment of the topic in *Goff & Jones, The Law of Unjust Enrichment* 8th ed. at 9-32 – 9-42. He refers to the distinction that is made in that work between "… incorrect conscious beliefs, incorrect tacit assumptions and true cases of mere causative ignorance ("causative" in the sense that but for his ignorance the person in question would not have acted as he did)." He goes on to observe:

> "It may indeed be difficult to draw the line between mere causative ignorance and a mistaken conscious belief or a mistaken tacit assumption. I would hold that mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption where there is evidence to support such an inference."

87. Lord Walker later discusses in a passage starting at [114] the type of mistake that may qualify for relief. A careless mistake will suffice "… 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. Having reviewed and rejected the distinction between a mistake as to the effects of the transaction and its consequences[5], and after considering the approach adopted by Lloyd LJ in the Court of Appeal and the criticisms of his approach by the editors of *Goff & Jones*, Lord Walker said:

> "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."

[5] Deriving from the judgment of Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304, at 1309.

88. The final section of Lord Walker's judgment is of particular relevance in this case. It concerns mistakes about tax. Lord Walker accepts that a mistake about tax can be a relevant mistake and the tax consequences of a mistake are relevant to its gravity. He concludes his discussion on this topic at [135] by considering whether the court will assist "in extricating claimants from a tax-avoidance scheme which has gone wrong." He went say:

> "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 National Society for the Prevention of Cruelty to Children* [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 Inland Revenue Comrs* [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."

89. As I have indicated, HMRC does not rely upon public policy as a ground for refusing relief in these cases. It does, however, rely upon the notion that the Remuneration Trusts were artificial tax avoidance. HMRC's skeleton argument has an appendix containing a summary of the facts in a number of cases, including *Abacus Trust Co v NSPCC* (to which reference was made by Lord Walker in the passage cited above) and *Futter v Futter*. I am, however, not convinced it is helpful to calibrate decisions concerning tax avoidance on a spectrum of artificiality and, in any event, it is unnecessary to do so by a detailed reference to other cases. It is more helpful to consider whether the schemes under consideration in this case should properly be regarded as being 'artificial tax avoidance' and, if so, to consider what consequences that may have.

90. HMRC points to the following factors as being indicative of artificiality:
    (1) The use of a trust having trustee resident overseas.
    (2) The disregard or side-lining of that trustee.
    (3) The nominal interposition of a further overseas-resident company Heduk Holdings Limited ('Heduk') incorporated in Belize.
    (4) The disregard or side-lining of Heduk.
    (5) The payment of contributions through Baxendale Walker.
    (6) The use of trusts described as remuneration trusts while knowing that all past and present employees of the employing company were excluded from benefit.
    (7) The failure to inform beneficiaries of their potential interests under the trusts.
    (8) Artificially small loans made by Mr Levack to APL.
    (9) The disregard of the fiduciary nature of APL.
    (10) The non-commercial terms of the loans granted by APL to Mr Levack;
    (11) The stated intention that the loans would in practice not be repaid;

(12) The stated intention that, even if the loans did have to be repaid, members of his family were going to be beneficiaries of the trusts even though, to Mr Levack's knowledge, they were past or present employees of Dukeries.

(13) The speed in which, each year, the payments made indirectly by Dukeries to Mr Levack;

(14) The fees paid to Baxendale Walker, being a percentage of each contribution (annually, as it turned out) and several times larger than might be expected as professional fees for ordinary tax advice or for setting up a normal commercial trust.

91. It seems to me that there is no real answer to these factors. They illustrate that the Remuneration Trusts are properly regarded as artificial tax avoidance. This conclusion has relevance to the application of Lord Walker's guidance in paragraph [135] of *Pitt v Holt*. It is open to the court to decide that Mr Levack must be taken to accept the risk that the schemes would prove to be ineffective. As it seems to me, Lord Walker was saying that the court may impose an objective judgment if there is artificial tax avoidance, regardless of whether there was as a matter of subjective fact, an acceptance of the risk of failure. This is the distinction that is made at factor (4) between the settlor deliberately running the risk, and being taken to have run the risk, of being wrong.

92. I would add that when considering the evidence in this case, the doctrine of mistake should be put it in its legal context. It is, as the authors of *Lewin on Trusts* 20th ed. at 5-69 point out, closely related to the doctrine of rectification. Both doctrines permit the court to relieve a party of the consequences of a mistake and, as is well-established, rectification can apply in the case of voluntary dispositions such as the creation of trusts.

93. Where the court is asked to rectify a document because, due to a mistake, the words do not reflect the intention of the parties, or the settlor in the case of a voluntary settlement, there are two principles that guide the approach the court should take to the evidence. The first is that although the claimant must establish its claim on the balance of probabilities, the court requires the claimant to produce evidence that has been described in various different ways, but to the same effect. The court will wish to see evidence of the mistake that is "convincing"[6] or "cogent".

94. It is right, of course, that although the principles of rectification and equitable mistake are related, they are distinctly different. When considering at [134] the decision in *Racal Group Services Ltd v Ashmore* [1995] STC 1151, Lord Walker noted the difference between mistake and rectification in the following way:

> "Rectification is a closely guarded remedy, strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences."

95. Clearly, some caution is needed before simply cross applying the well-established approach to claims for rectification to a claim seeking relief based upon mistake. No

[6] Joscelyne v Nissen [1970] 2 QB 86

case has been cited to me in relation to mistake that deals with the standard of proof, although Lord Walker in *Pitt v Holt* indicated the court should focus "intensively on the facts in the case". The court will, of course, be unable to provide the appropriate depth of focus on the facts unless it has been provided with adequate evidence about the mistake and mere assertion by the person said to have been mistaken may, on its own, not suffice.

96. It seems to me that the court should adopt a careful approach to the evidence where, as here, the only witness who deals with the mistake in any detail is Mr Levack and the only active defendant is HMRC. As Lord Walker put it at [127]:

> "The fact that a unilateral mistake is sufficient means that the court may have to make findings as to the state of mind, at some time in the past, of a claimant with a lively personal interest in establishing that there was a serious causative mistake. This will often be a difficult task."

97. The second point to make concerning the evidence relates only to the two corporate claimants, Dukeries and Riverside. It is trite to record that:
    (1) Dukeries and Riverside could only act through their board of directors.
    (2) When determining whether Dukeries and/or Riverside were acting under a causative mistake of sufficient gravity, it is necessary to consider what was the collective intention of the board.[7] That will normally comprise a review, if they exist, of minutes of meetings of the board. However, in a case in which the provider of a tax avoidance scheme produces pro-forma minutes, it is likely to be necessary for the claimant to provide evidence that the minutes actually reflect the intentions and understanding of the board at the time.

The evidence

98. The claimants say they were mistaken about the four matters[8]:
    (1) That Mr Levack could benefit through commercial loans through his lifetime.
    (2) That his family could benefit after his death.
    (3) On the assumption HMRC's case in the First-Tier tribunal is correct, that the trusts would not trigger income and NIC tax charges as being earnings for Mr Levack.
    (4) That contributions would not be transfers of value for IHT purposes and the associated mistake that the trusts satisfied section 86 IHTA 1984.

99. These mistakes fall into two broad categories. The first is that, so it is said, the intended beneficiaries, Mr Levack and his family, could not benefit. The second is that (as it is put in the claimants' skeleton argument): "… the entire purpose of the Remuneration Trusts was to minimise tax, whilst providing for Mr Levack and his family. In fact, all that they did was trigger tax on Mr Levack, whilst at the same time positively removing him and his family from benefiting from the assets or even allowing them to use them to meet this tax liability."

[7] See: *AMP (UK) Ltd v Barker* [2001] Pens. LR 77 per Lawrence Collins J at [66]

[8] It is not part of the claimants' case that they were mistaken about contributions being deductible for corporation tax and income tax although this was one of the claimed benefits of the schemes.

100. HMRC's approach before Mr Levack gave evidence was that the court was invited to concentrate upon the factors at (4) and (10) in the ten point summary of the *Pitt v Holt* factors that is set out above. Mr Herbert made it clear in his submissions, however, that this court is not requested to reach any view about the way in which public policy considerations might affect the exercise of the court's discretion.

101. Mr Herbert intervened during the course of Mr Moeran's opening to say that HMRC accepted there had been an operative mistake. However, in light of what emerged from Mr Levack's cross-examination, in his closing submissions, Mr Herbert said it is open to the court to conclude that no mistake was made. This led Mr Moeran to submit that HMRC had made an admission from which it could not resile without the court's permission and there was a risk of unfairness if the court examined the issue because Mr Moeran did not re-examine Mr Levack about whether a mistake had been made. However, I do not consider that Mr Herbert's intervention, which was made on the basis of Mr Levack's witness statements, should be elevated to a formal admission and even if that is wrong, HMRC should be held to it in light of the unexpected turn of events that Mr Levack's evidence provided. In reaching this conclusion I have regard to the limited scope of cross-examination that was permitted under the agreed order for directions and the reasonable assumptions made by HMRC based upon the way Mr Levack's evidence was presented in his witness statement.

102. I start by considering Mr Fell's evidence. He made the initial contact with Mr Baxendale Walker and attended the meeting in February 2010 along with Mr Levack and Mr Rhoden. He says that Mr Baxendale Walker introduced the idea of the companies setting up Remuneration Trusts to reduce their profits. He says he was familiar with employee benefit trusts, without having a detailed knowledge of their workings. He says the concept of a 'Remuneration Trust' struck him as being "somewhat unusual" in that:

> "…it was a discretionary trust existing for the benefit of, firstly, persons who supplied services to Mr Levack's companies and, secondly, future but not present or past employees of the companies. Mr Levack was supposed to fall into the first category on the basis that he would supply services. The suggestion was that he would supply money loans. At the time I felt this was unusual, but I accept the advice of an expert."

103. He goes on to say:

> "11. We were not encouraged to ask any questions. Mr Baxendale-Walker claimed to speak authoritatively and also claimed that many of his clients had formed Remuneration Trusts and that they had worked very successfully. This did not surprise me. I knew that employee benefit trusts had been widely used.
> 12. Mr Baxendale-Walker explained that the Remuneration Trust would be via an offshore trust, but that the function of the offshore trustee to the Remuneration Trust was minimal. All funds would be held by a UK resident fiduciary management company. Mr Levack would be a controlling member (along with Mr Rhoden in the case of Riverside Healthcare Limited). The fiduciary management company would make investments as Mr Levack wished, or lend him funds to invest as he wished. The loans would not carry

periodic interest. Instead, a premium would be paid on redemption. He mentioned some decided cases which were in favour of his conclusions. I do not recall which ones, but I had heard of some of them."

104. Apart from commenting that the fees charged at 10% (later reduced to 5%) of the contributions made were "very large", Mr Fell says nothing more of importance about the setting up of the Remuneration Trusts although it is clear that he played some part in the arrangements in the latter part of March 2010. Mr Fell was cross examined briefly. Other than accepting that the Remuneration Trusts were out of the ordinary and that the fees were high, his answers added nothing to the evidence in his witness statement.

105. It is necessary to refer to Mr Levack's evidence in some detail.

106. Having provided the background to his introduction to Mr Baxendale Walker, Mr Levack says that at the first meeting with Mr Baxendale-Walker took place in early February 2010. Mr Baxendale Walker explained that offshore discretionary trusts would be set up for the benefit of persons who supplied services to the companies and also for the benefit of future, but not present or past employees. Mr Levack was not keen for the company's profits to be paid to an offshore trust or to see any assets transferred to offshore trustees. Mr Baxendale-Walker then said that the money would never in fact reach the offshore trustee. Instead, it would be paid to a fiduciary "personal management" company established in the UK of which he would be sole director and shareholder. This is described in the documents produced by Mr Baxendale-Walker as the "MINERVA Onshore Wealth Administration Option" sometimes abbreviated in the documents as "Minerva" or "OWAO". He said the company (in the event it was APL) could make loans to Mr Levack of the entire amount transferred to it. The loans would bear interest payable in arrears. The interest would be repaid on his death which would go to reduce the amount of IHT that was payable.

107. Mr Levack says in his witness statement:

"32. Mr Baxendale-Walker volunteered that many companies had carried out similar arrangements without difficulty. In particular, the companies obtained deductions for contributions just as they would if they paid suppliers of services. There was no mention of any risk of charge to income tax on directors who benefited. Mr Baxendale-Walker also said that the trusts could be used for my Schedule A business and contributions would be allowable.

33. Mr Baxendale-Walker spoke very quickly and with great confidence. I would not pretend that I understood everything that he said. He was an excellent salesman. I had no questions for him.

34. As Mr Rhoden and I departed the meeting, we agreed we would like to carry out the scheme. We considered that the only risk was a disallowance of the companies' payments to the proposed trust and that this was only a small one. In addition, we did not consider that there was any risk of a charge to ourselves on earnings or inheritance tax. I mention here, but do so in more detail at paragraph 97, that following our meeting, before committing himself to enter into the remuneration trusts, Mr Rhoden took separate advice in March 2010, which was circulated in an email dated 23 March 2010. As I explain in paragraph 97, I do not recall reading this email, but even if I had, I had at the

> time accepted as authoritative the advice that was given by Mr Baxendale-Walker, who had spoken with great authority and assured me that many taxpayers had achieved the successful results contended for by Mr Baxendale-Walker.
>
> 35. As a result of this meeting, Mr Rhoden and I, on behalf of [Riverside], and I on behalf of [Dukeries], decided to instruct Baxendale Walker LLP to form Remuneration Trusts, and on 1 March 2010 a resolution to instruct Baxendale Walker LLP to establish Remuneration Trusts were passed at a Board Meeting of [Dukeries].
>
> 36. A further resolution was passed to implement the scheme at a Board Meeting on 28 March 2010. I cannot recall why the same resolution was made on 25 March 2010.
>
> 37. Mr Rhoden joined me in instructing Baxendale Walker LLP. I believe he also separately instructed Baxendale Walker LLP on his own account.
>
> 38. I also instructed Baxendale Walker LLP on my own behalf to set up a Remuneration Trust in respect of my property business that I have described. Baxendale Walker LLP advised that, as a matter of record, I should, as a sole trader, also sign an appropriate resolution to implement the arrangements. I followed that advice and made the resolution on 28 March 2010."

108. Mr Levack's statement goes on to deal at length with the processes by which the Remuneration Trusts were set up and the "very considerable activity" in late February and March 2010. He refers to the documents that were provided at the meeting with Mr Baxendale Walker and he quotes extensively from the Manual and the Report to the Board which he recalls receiving, as well as the trust deeds themselves. He sets out nine passages from the Report to the Board and says the Report was presented to the board of Dukeries.

109. He says that "the intended workings of [APL] were explained by Baxendale Walker LLP in the *"Baxendale Walker LLP Onshore Wealth Administration Memorandum 2009 Update"* supplied by Baxendale Walker LLP and later in the statement that "further details regarding how OWAO worked was provided…" in the Onshore Wealth Administration Memorandum.

110. He goes on to say that the Manual "in particular, talked of the Trusts providing "*Benefits to Shareholders*", …" and then refers specifically to paragraphs 6 to 8 of the Manual and sets out passages from them saying what the text "stated". When referring to paragraph 6 of the Manual and the passages he quotes he says that they accord "with the respective instructions that were subsequently provided by Mr Liyanage and representatives of Baxendale Walker LLP …" to which he makes reference later in his statement.

111. So far as his personal Remuneration Trust is concerned, he notes that he was not provided with a separate Report to the Board and Manual but he "understood it to operate in exactly the same way as the companies' remuneration trusts and assumed that the documents supplied to the companies applied to this as well." In light of his acceptance when cross-examined that he did not read the Report and the Manual, this explanation of his understanding of the way in which his personal Remuneration Trust was to work does not make sense.

112. Mr Levack sets out certain passages from the trust deeds which were in a common form and sets out an explanation of the some of the terms, in particular the definition of Excluded Person by reference to section 143 and Schedule 24 Finance Act 2003 and section 245 Finance Act 2004. When referring to paragraph 2 of Schedule 2 of the trust deeds, he says:

> "73. These words were intended, as I understand it, to allow my family to benefit after my death. If that had not been the case, I would never have agreed to the setting up of the remuneration Trusts. As I have said above, there was no way I (or my wife or daughter) would have agreed to the permanent exclusion of my family."

113. The references to the terms of the trust deeds and the passage I have quoted may have been intended to create the impression that his understanding of the scheme was at least in part obtained at the time from the trust itself. However, Mr Levack accepted when cross-examined that he had not read the trust deeds and did not have the capacity to understand them.

114. It is necessary, with that conclusion in mind to consider what he says he understood at the material time and whether his evidence suffices to support his case that a causative mistake of sufficient gravity was made.

115. The main passages in his witness statement about his understanding of the intended effects of the schemes are paragraphs 43, 55 and 56 and 94 and 95. I will take them in turn.

116. Paragraph 43 appears in the witness statement at after Mr Levack has recounted the meeting in early February 2010 and referred to his and Mr Rhoden's decision, apparently immediately after the meeting with Mr Baxendale Walker, to give instructions to set up the Remuneration Trusts. It comes in the context of letters of engagement being received from Baxendale Walker LLP in late February 2010 and board resolutions being passed by Dukeries and Riverside respectively on 1 March and 25 February 2010. The resolutions were for the purpose of enabling Mr Levack to instruct Baxendale Walker LLP, not as the witness statement suggests authorising Mr Levack to give instructions to set up the Remuneration Trusts. Mr Levack refers at paragraph 42 to the resolution passed by the board of Dukeries at a meeting attended by him, his wife and daughter. He then says:

> "43. It was understood by myself, my wife and daughter and (through us) by Dukeries Healthcare Limited that ultimately my family, including my wife and daughter, would be beneficiaries of this (Dukeries Healthcare Limited) trust and these arrangements. I would **never** have considered, and I have absolutely no doubt that my wife in particular would not have agreed to cutting our daughter or herself out of inheriting this property. It was an absolutely basic requirement that my family, as well as myself, would benefit from all the trusts being set up, at a minimum from the capital. Income was obviously important, at least during my lifetime, but by this stage I had enough wealth for neither of these points to be an overwhelming concern in relation to any one asset. However, passing on the capital to my wife and children when I die was, and is, my main concern. I

> do of course fully acknowledge that tax reduction was the trigger for entering into these arrangements. Again, however, tax reduction was not even my primary, let alone my only, concern. My primary concern was (and is) to make sure my family was safe." [The emphasis is in the witness statement]

117. The passage is intended to provide evidence about not just Mr Levack's understanding of the intended effects of the scheme at March 2010 but also that of his wife and daughter. There is, however, no evidence from them to support the assertion Mr Levack makes. In any event, it is not clear how they could have obtained that understanding. Mr Levack does not say what it was he said to them about the scheme or when he discussed it with them. The Report and the Manual had not been produced by the beginning of March and he does not say whether Mrs Levack or his daughter read the documents that were provided at the meeting with Mr Baxendale Walker.

118. Paragraphs 55 and 56 of the witness statement appear after Mr Levack has set out passages from the Manual and the Report (which he had not read) and paragraph 54 which sets out his understanding about how the commercial loans were supposed to work and the effect of contributions to the Remuneration Trusts being "employee benefit contributions". He ends the paragraph by expressing a legal view about the meaning of "Permitted Contributions" based upon advice he has received recently. He then says:

> "55. My understanding at this time (March 2010) was that:
>
> 55.1 I would receive commercial loans during my lifetime;
>
> 55.2 On my death, my executors would repay them; and
>
> 55.3 My family would be the beneficiaries of the trusts from then on.
>
> 56. At the time, this was about the limit of my understanding of how this was supposed to work, although I believe that my tax adviser, David Fell, had a more sophisticated understanding. I also understood that commercial loans could be made to my family during my lifetime, but it was not a particularly important issue for me then. I have had paragraph 7.2 of the Remuneration Trust Manual drawn to my attention. I cannot now recall whether I understood that my family could benefit during my lifetime if I divested myself of my shareholding but that they would not so benefit if I did not so do. I have also had paragraph 6.1.2 of the Remuneration Trust Manual drawn to my attention. This talks about the loans being "typically 5 or 10 years". I understood that the loans could be rolled over into new loans when they ended.

119. The understanding Mr Levack refers to in paragraph 55 cannot have come from reading the documents produced by Baxendale Walker LLP. He accepts this understanding of the way in which loans were intended to work was limited and, if he is right that Mr Fell had a more sophisticated understanding than him, Mr Fell decided not to share his understanding with the court in his evidence. Mr Fell's evidence is silent on this important point and it must be assumed that this is not accidental.

120. Paragraphs 94 and 95 appear in the witness statement immediately after Mr Levack has referred to HMRCs case in the Dukeries claim in the Tax Tribunal in which HMRC asserts that contributions made to the Remuneration Trusts constitute earnings by Mr Levack. He then says:

> "94. I was assured by Mr Baxendale Walker at my meeting with him in February 2010 that I would be entitled to benefit under the Remuneration Trust as a provider. To this end I made successive respective loans of £100 a time to [APL] for and on behalf of [the first defendant] as the trustee of each of my … Remuneration Trusts.
>
> …
>
> Furthermore, as I have already stated in paragraphs 55, 56, 72 and 73, it was a specific objective of the Remuneration Trusts that members of my family would be able to enjoy the trust funds tax-free after my death. Paragraph 7 of the Remuneration Trust Manuals supplied by Baxendale Walker LLP … stated in terms that:
>
> [He then sets out paragraphs 7.1 to 7.4 of the Manual]"

121. As will be clear from the summary of the Remuneration Trusts set out above, they are complex arrangements for a lay person to understand, particularly when set in the context of the tax framework. Mr Baxendale Walker described them as a "highly technical product". Mr Levack's principal statement, which deals with all four claims runs to 65 pages and 176 paragraphs. (His evidence in reply is relatively brief and makes submission in response to HMRC's evidence). Mr Levack sets out extensive quotations from the Report and the Manual provided to Dukeries and Riverside and the Trust Deeds themselves for the purposes of drawing attention to particular elements of the schemes and explaining their functioning. It is implicit in Mr Levack's evidence that he had some understanding of the detail and had read the documents he seeks to summarise and explain.

122. When Mr Levack was cross-examined he said:

(1) He did not remember reading the Report.
(2) He did not read the Manual.
(3) He did not remember reading the trust deeds.
(4) He read "hardly anything".
(5) He was inundated with paperwork by Baxendale Walker LLP and could not say he "understood the what and the when".
(6) He did not think about most of the aspects of the schemes.
(7) He did not have the knowledge to understand what was said in the Report to the Board and that it took him "ages to read a page or two".
(8) He was not sure whether the scheme involved offshore trusts.
(9) He could recall seeing the resolution of the board of directors for Dukeries but he did not say (he was not asked) whether he or other members of the board read the document.
(10) He did not read the Q&A document that was annexed.
(11) He had no input into the list of providers sent to Baxendale Walker LLP.
(12) The 2012 trust deeds were not read by him. He said Mr Liyanage would have telephoned to say he was sending documents to be signed and Mr Levack was not to worry about it. He signed them on that basis.
(13) Where he uses expressions in his witness statement such as "It will be noted that …" or "These words were intended …" he was not able to say whether he had considered the document to which he was referring.

Should the Remuneration Trusts be set aside for mistake?

123. It this case there are three points that are material, although I have Lord Walker's observation that the issues need to be looked at in the round firmly in mind.

(1) Is there sufficient evidence of a causative mistake of sufficient gravity having been made?
(2) If there was such a mistake, did Mr Levack run the risk of being wrong or must be taken to have run that risk?
(3) If not, is the mistake or mistakes such that it would be unconscionable for the Remuneration Trusts to remain in place?

124. So far as the first issue is concerned, the claimants must provide the court with evidence of their understanding at the material time, namely at the point of execution of the trust deeds. It does not suffice to look at an earlier point in time, such as immediately after Mr Baxendale Walker had met Mr Levack, Mr Rhoden and Mr Fell, unless there is evidence to show that the understanding continued and was unaffected by events up the date of execution of the deeds. It was necessary for the claimants to provide evidence about their understanding of the effects of the schemes both in light of Mr Baxendale Walker's explanation in early February 2010 and in light of documents that were provided then and subsequently. I do not suggest, of course, that it was necessary for the trust deeds themselves to have been reviewed by Mr Levack.

125. In the case of Dukeries and Riverside, their understanding must be distilled from the collective understanding of their respective boards of directors at or about the date of execution (assuming there is no express delegation of authority). As I have pointed out, the initial board minutes only authorised Mr Levack to instruct Baxendale Walker LLP. They were not authority for him to enter into the transactions themselves.

126. Clearly a lay person cannot be expected to obtain an understanding of the way in which the Remuneration Trusts were intended to work at a technical level. It suffices if the understanding, and therefore the mistake, is limited to the headline benefits that were expected to flow from the trusts. In order to be causative the understanding must flow through and be capable of being articulated when the deeds were executed.

127. It is instructive to start with Mr Fell's evidence. As the tax adviser to Mr Levack personally, and to Dukeries and Riverside, it might have been thought that he would be in a position to say what he understood the intended effects of the schemes were and what he said to Mr Levack about them. He was in a better position than Mr Levack to understand the schemes and their intended effects. It is curious that although Mr Levack states that Mr Fell's understanding was better than his, the invitation to reveal his understanding is not taken up in his evidence. Furthermore, Mr Fell does not say:

(1) whether he read any of documents that were produced by Baxendale Walker LLP either at the meeting or subsequently;
(2) whether he sought independent advice on behalf of Mr Levack and the companies given his unfamiliarity with Remuneration Trusts;

(3) anything concerning his discussions or written communications with Mr Levack, such as they may have been, about the schemes;
(4) what he understood from Mr Baxendale Walker was the intended effect of the Remuneration Trusts. He only says in paragraph 10, when contrasting the Allev with the Dukeries and Riverside Remuneration Trusts, that "deductions were being sought for contributions by …" Riverside and Dukeries.

128. Mr Fell's evidence not only does not materially assist the claimants' case, his silence on topics that are crucial to the claimants' cases is positively unhelpful to the claimants' case.

129. It is not easy to discern from Mr Levack's oral evidence what his understanding of the effects of the Remuneration Trusts was from early February through to the end of March 2010. It was certainly much less complete than his witness statement would suggest because he did not read the documents he refers to. He did say, however, in his oral evidence that all aspects of tax were touched on at the meeting with Mr Baxendale Walker, he expected he would get loans, there would be no tax liability and his family would be looked after and that was the reason why the trusts were set up. He said he did what he was told in order to get commercial loans from the trusts.

130. I accept that in Part 8 claims the CPR requires the claimant to provide all the evidence that is relied upon when issuing the claim and it is in the nature of many Part 8 claims that the witness evidence has an explanatory function. A view may have been taken that Mr Levack was the right person to explain his case and therefore the witness statement needed to refer in more detail to documents than would be appropriate in a witness statement prepared for a Part 7 trial. Mr Levack's evidence was prepared long before Practice Direction 57AC came into force. However, on any view, it was entirely inappropriate for the witness statement to have given the impression that Mr Levack had read and considered the material documents in 2010. Although Mr Levack, when cross-examined, answered questions in a straightforward and candid manner, his evidence overall is unimpressive. It is clear that his witness statement was constructed with only passing reference to what his evidence in chief would be if called to give oral evidence. HMRC naturally assumed, as they were intended to, that Mr Levack had obtained some contemporaneous understanding of the Remuneration Trusts and the way they were intended to operate from the documents that Baxendale Walker LLP provided.

131. If a claimant brings a Part 8 claim seeking relief based upon mistake, the claimant needs to be scrupulous to ensure that the court is given a complete and accurate picture. This is due to the importance the court will attach to an "intense on the particular facts of the case"[9] or as Lord Walker put it in *Pitt v Holt* at [126]:

> "The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition."

[9] Per Lord Steyn in *In re S (A Child)* [2004] 1 AC 593, para 17 cited by Lord Walker in *Pitt v Holt* at [126].

132. A close examination of the facts clearly involves examination both of the evidence that the claimant chooses to provide and gaps in that evidence, whether or not they are explained. In this connection I note that the court has not been provided evidence from a number of witnesses who are likely to have assisted the court. I have in mind Mrs Levack, Sadie Levack and Jacqueline Brayford, as directors of Dukeries and Mr Rhoden and Mr Reason as directors of Riverside.

133. I conclude that I can place little if any reliance upon Mr Levack's evidence about his understanding of way the schemes would affect his and the companies' liability to tax and his ability to pass wealth to his family. In addition to the concerns I have already expressed:

(1) It is apparent that the evidence in Mr Levack's statement is not the product of his recollection. It is not clear how he appears to be able to recall what Mr Baxendale Walker said to him nearly 10 years before the statement was signed.
(2) The witness statement was constructed to make a legal case rather than to provide evidence of Mr Levack's recollection. The limits to Mr Levack's ability to explain and to provide evidence should have been made clear.
(3) In light of Mr Levack's evidence about his ability to understand complex matters there is little to go on about what his understanding was.
(4) The statement is misleading because the reasonable reader would infer that Mr Levack had read the documents to which he makes reference in 2010. Indeed, that is the way it was understood by HMRCs advisers which gave rise to Mr Herbert's acceptance that there had been a relevant mistake.
(5) It is not possible to discern with sufficient certainty what his understanding of the schemes was when he signed, as a director, the minutes of the board meetings of Dukeries and Riverside in late March 2010.
(6) So far as Mr Levack's personal Remuneration Trust is concerned, his statement cannot be accurate where he says: "I understood it to operate in exactly the same way as the companies' remuneration trusts and assumed that the documents supplied to the companies applied to this as well" because he had not read the Manual or the Report to the Board.

134. I have referred earlier to the absence of evidence from witnesses who are likely to have been able to assist the court. When the court is asked to apply the doctrine of equitable mistake in the case of a company, the court must be able to establish what was the collective understanding of the board of directors. All the court has been given is a set of pro forma minutes produced by Baxendale Walker LLP signed by two directors without any evidence that the minutes reflect the collective views of the board of Dukeries and Riverside. Mr Levack's assertion in paragraph 43 of this statement of his wife and daughter's understanding does not suffice, even for Dukeries.

135. For the reasons I have already provided, the claims fail due to the inadequate evidence that has been provided about the claimants having acted under a mistake of so serious a character to render it unjust on the part of the first claimant to retain the gift.

136. It is strictly unnecessary to go further but I will briefly consider the elements of mistake that would be relevant on the assumption that that Mr Levack had a sufficient understanding of what the trusts were expected to achieve. Such evidence as there is points to Mr Levack being willing to run the risk of being mistaken. As Mr Herbert put it, he accepted the schemes warts and all.

137. Mr Levack says that he and Mr Rhoden decided to proceed with the Remuneration Trusts immediately after leaving the meeting with Mr Baxendale Walker in early February 2010. That is before they had any opportunity to consider the documents that were provided at the meeting, or the documents that were received later, or to take advice. The failure by Mr Levack to consider the documents provided by Baxendale Walker LLP, or to obtain advice from someone who could interpret them, also demonstrates a cavalier attitude to risk. There is no evidence of any due diligence having been undertaken by Mr Levack. He was prepared to accept Mr Baxendale Walker's views that were expressed in the course of a meeting without subsequently reading any of the documents that were provided or seeking independent advice. Were it necessary to do so I would conclude that the claimants deliberately ran the risk of the schemes not operating in the way Mr Baxendale Walker's sales pitch had suggested.

138. There is, equally, inadequate evidence about the attitude to risk of the board of directors of Dukeries and Riverside. The evidence comes nowhere near to demonstrating that the collective understanding of the respective boards was materially mistaken or what the board's view was about the risks involved. In the case of Mr Levack himself, his evidence does not meet the requisite threshold.

139. Furthermore, the schemes are properly characterised as being artificial tax avoidance. Even if there was no actual assumption of risk, it is reasonable in this case, based upon the factors I have summarised above, to conclude that Mr Levack and the companies must be taken to have accepted the risks of the schemes failing.

140. Looking at the claims in the round, and the overall merits, I do not consider that this is a conclusion that is unjust. Put another way, the claimants have not shown that it would be unconscionable for them to remain bound by the schemes.

Conclusions

141. The Dukeries, Riverside and Levack claims will be dismissed.