Van der Merwe v Goldman and another

[2016] EWHC 790 (Ch)

Chancery Division

Morgan J

11 April 2016

Richard Wilson QC (instructed by Berwin Leighton Paisner LLP) appeared for the claimant; James Weale (instructed by Berwin Leighton Paisner LLP) appeared for the first defendant; Philip Jones QC (instructed by HMRC Solicitor’s Office) appeared for the second defendant

The claimant and his wife (the first defendant) were the joint freehold owners of a substantial house in Oxford, where they lived. On 24 March 2006, they executed a transfer of the title to the house to the claimant alone, for no stated consideration. On 27 March 2006, the claimant executed a deed of settlement whereby he settled the house on the terms of that deed and appointed himself and the first defendant as trustees of the settlement. On the same day, the claimant executed a transfer of the title to the house to himself and the first defendant as the trustees of the settlement.

An unintended consequence was that the claimant became liable to pay a substantial sum of inheritance tax at the rate of 20% of the value of the house on 27 March 2006, pursuant to sections 1, 2 and 3 of the Inheritance Tax Act 1984 and became liable to pay a further charge on every 10th anniversary of 27 March 2006 at the rate of 6% of the value of the house at that anniversary, pursuant to section 64 of 1984 Act. Those provisions applied by reason of a change in the law effected by the Finance Act 2006, the relevant amendments having retrospective effect from 22 March 2006. The claimant and the first defendant were not aware of the changes when they executed the various documents and believed that the steps taken would not result in an immediate charge to tax nor a 10-year anniversary charge.

The claimant alone applied to the court for an order setting aside the settlement and the transfer of 27 March 2006, on the basis that he was mistaken as to the tax consequences of creating that settlement. The first defendant did not oppose the relief sought. The Commissioners for HM Revenue and Customs were joined as second defendants. They contended that, on a proper analysis of the relevant transactions, the settlement and the transfer of 27 March 2006 were not transactions in favour of a volunteer so that the court could not set aside the settlement and the transfer of 27 March 2006 unless they could be held to be void for mistake at common law, which was not suggested by the claimant. That gave rise to a question whether the position would be different if the application before the court had been an application by the claimant and the first defendant, acting together, to set aside all the transactions on 24 March 2006 and 27 March 2006. In turn, the claimant and the first defendant indicated that they wished the court to consider the claim as involving a claim by the claimant to set aside the settlement and the transfer of 27 March 2006, alternatively, a claim by the claimant and the first defendant, acting together, to set aside all the transactions on 24 March 2006 and 27 March 2006. The second defendants did not oppose that request.

Held: The claim was allowed.

*The procedural history*

6. In August 2012, the Claimant became aware of the tax consequences of the transactions of March 2006. On 9 February 2015, he brought the present proceedings by a Part 8 Claim Form, supported by his witness statement dated 14 January 2015. Initially, the sole Defendant was his wife who filed an acknowledgment of service stating that she did not intend to contest the claim. On 27 August 2015, Master Bowles ordered that HMRC be added as Defendants. The claim was due to be tried on 8 and 9 October 2015. On 6 October 2015, on the application of HMRC, the court adjourned the trial and gave directions. In accordance with those directions, HMRC served Points of Dispute in relation to the claim and the Claimant served Points of Reply. The claim was then listed for trial with a listing category of A. I assume that the choice of listing category was influenced by the fact that HMRC had pleaded that it would contend that, as a matter of public policy, the settlement ought not to be set aside. HMRC plainly wished to rely upon the dicta of Lord Walker in Pitt v Holt [2013] 2 AC 108 at [135] which have given rise to considerable debate and some uncertainty. It may be that HMRC wished to use the present claim to lead to a clarification of the law in this respect. In the event, as will be seen, considerations of public policy rather fell away in the course of the argument and the case involved more of an examination of the correct legal analysis of the specific transactions which occurred on 24 and 27 March 2006.

7. At the trial, the Claimant gave evidence and was cross-examined by counsel for HMRC. I was provided with a witness statement of the First Defendant. Counsel for HMRC indicated that he would wish to cross-examine the First Defendant but that he would not need to do so if certain passages in her witness statement (dealing with the prejudice to herself and her family if the settlement were not set aside) were not relied upon. In the event, those passages did not need to be relied upon by the Claimant and the First Defendant and she did not attend for cross-examination. The Claimant also called a Mr North, solicitor who had advised the Claimant in relevant respects in 2001 and in 2005 and he was cross-examined by counsel for HMRC.

*Findings of fact*

8. At the end of the trial, there was little or no dispute about the facts although there remained considerable argument as to the right analysis of the transactions of 24 and 27 March 2006. I will now set out my findings as to the essential facts.

9. In 2002, the Claimant and the First Defendant acquired the house at 23 Lathbury Road, Oxford and they were registered as the joint registered proprietors of it at the Land Registry under Title No. ON234445. I am not clear whether they were joint tenants or tenants in common in equity although I note that in an email of 13 January 2006, the Claimant stated that he and his wife were tenants in common. They acquired the house as a family home and at all material times they lived there with their three children. Two of those children are now over 18 and one of those two is at university in Cambridge.

10. At all material times up to March 2006, the Claimant was domiciled in South Africa. On 9 April 2002, the Inland Revenue wrote to the Claimant’s then solicitors confirming that the Claimant was being treated as not domiciled in the United Kingdom at that time. The Claimant had income arising outside the United Kingdom and for that, and other, reasons he sought this confirmation from the Inland Revenue.

11. At all material times up to March 2006, the First Defendant was also domiciled in South Africa. The First Defendant had not sought and had not been given a confirmation from the Inland Revenue as to her non-United Kingdom domicile. Her income position meant that it was not of any importance for her to seek such confirmation.

12. The effect of section 267(1)(b) of IHTA was that, from 6 April 2006, the Claimant (and, indeed, the First Defendant) would be treated for the purposes of IHTA as domiciled in the United Kingdom. This was because, by that date, the Claimant and the First Defendant would have been resident in the United Kingdom for the period of time referred to in that sub-section.

13. The Claimant wished to take steps to mitigate the consequences of his being treated for the purposes of IHTA as being domiciled in the United Kingdom. The Claimant sought and obtained advice as to what steps were open to him in this respect. In particular, he obtained advice on that question in November 2005. He was advised that his position would be improved if he placed the house in Oxford into an interest in possession settlement. The advice was sought by the Claimant alone and the advice did not directly consider the separate position of the First Defendant nor the fact that the house was in joint names.

14. As the law stood prior to 22 March 2006, if the Claimant were the sole owner of the house and placed it into an interest in possession settlement prior to 6 April 2006, then by virtue of section 49(1) of IHTA, the Claimant would be treated as beneficially entitled to the property in which the interest subsisted. That would mean that the Claimant would not make a transfer of value by creating a settlement of a house which he owned: see section 3 of IHTA. Accordingly, the Claimant would not be liable to pay inheritance tax on the creation of such a settlement.

15. The placing of the house into an interest in possession settlement would give the Claimant (more accurately, the trustees of the settlement) certain advantages. One such advantage would be that the trustees of the settlement could borrow money and secure the repayment of those monies against the house. The resulting charge of the house would reduce the value of the house under section 162(4) of IHTA. The money borrowed could be remitted outside the United Kingdom or invested outside the United Kingdom. The money or the investment outside the United Kingdom would be excluded property pursuant to section 48(3)(a) of IHTA if the settlor was not domiciled in the United Kingdom at the time the settlement was made; hence, the importance of creating the settlement before the Claimant became treated as domiciled in the United Kingdom on 6 April 2006, pursuant to section 267 of IHTA. In March 2006, the Claimant saw this as the principal advantage of creating an interest in possession settlement. It should be noted at this point that the law in this respect was subsequently changed by section 162A of IHTA (introduced by Finance Act 2013, section 176, schedule 36 para. 3 with effect from 17 July 2013) in that the charge on the house to which I earlier referred would not be taken into account so as to reduce the value of the house.

16. Another possible advantage of creating a settlement, on the basis of the law as it stood before 22 March 2006, was that if the Claimant wished to leave the United Kingdom, to sell the house in Oxford and to buy a replacement property abroad, the trustees of the settlement could sell the house and remit the proceeds of sale abroad and buy a replacement property so that if the Claimant died while he was still treated as domiciled under section 267 of IHTA (for approximately another three years after ceasing to be resident in the United Kingdom) the monies or the replacement property outside the United Kingdom would be excluded property under section 48(3)(a) of IHTA. As the Claimant and the First Defendant were domiciled in South Africa they might have wanted to cease to reside in the United Kingdom at some time in the future.

17. I have described what the position would have been, as the law stood before 22 March 2006, if the Claimant (as a sole settlor) had placed the house into an interest in possession settlement. As I understand it, the position would have been the same if the Claimant and the First Defendant, as joint owners of the property, had done so. It is clear that the Claimant did not wish to proceed that way in conjunction with the First Defendant. It is not completely clear why the Claimant wanted the title to the property to be transferred by himself and his wife to himself alone. It must be the case that the Claimant thought that it would assist him if that transfer occurred. On the evidence before me, both the Claimant and the First Defendant were domiciled outside the United Kingdom and were therefore in the same position in that respect. There was however a difference between them in that the Claimant had an Inland Revenue confirmation of non-domicile status whereas the First Defendant did not. As at March 2006, the Claimant seems to have thought that it would not be possible to get a confirmation from the Inland Revenue as to his wife’s non-domicile status in time to allow the settlement to be created before 6 April 2006. He seems to have conceived that it would be better from a presentational point of view if he could present himself (armed with the Inland Revenue confirmation of non-domicile) as the sole settlor of the settlement. This seems to have been the reason for the transfer of the house to the Claimant on 24 March 2006. In fact, as counsel for HMRC pointed out, this presentation of the position would probably not have resulted in the Claimant being regarded as the sole settlor. Section 44 of IHTA defines “settlor” so that where a settlement is made directly by one person, any other person with whom that one has made a reciprocal arrangement to make the settlement is also within the definition of settlor.

18. As between the Claimant and the First Defendant, it was the Claimant who took the initiative in taking advice on inheritance tax in November 2005 and giving instructions to solicitors to draw up the appropriate legal documents. However, the Claimant fully explained his intentions and his reasons to the First Defendant. The First Defendant agreed that the Claimant and the First Defendant would act together to give effect to the Claimant’s proposal. The First Defendant’s reasons for doing so were the same as the Claimant’s reasons. The Claimant told the First Defendant that, as a first step, it was necessary for the Claimant and the First Defendant, acting together to transfer the property to the Claimant alone so that he would be the sole settlor who created the settlement.

19. Neither the Claimant nor the First Defendant was aware prior to 27 March 2006, nor indeed for many years later, of the budget announcement on 22 March 2006 to the effect that a settlement of this kind, created on or after 22 March 2006, would be a chargeable transfer for value. At the time of the transactions, the Claimant and the First Defendant believed that the Claimant would not become liable to pay tax in these ways. The Claimant and the First Defendant wished to enter into the transactions in order to obtain the advantages referred to in paragraphs 15 and 16 above.

20. If the Claimant had been aware of the change announced in the budget on 22 March 2006, he would not have pursued the idea of a settlement after that date. If he had not pursued the idea of a settlement after that date then neither would the First Defendant. The result would have been that the house would not have been transferred to the Claimant on 24 March 2006 and the settlement and the transfer of 27 March 2006 would not have taken place. The house would have remained in the joint names of the Claimant and the First Defendant as it did before 24 March 2006.

21. In the event, on 24 March 2006, the Claimant and the First Defendant executed a TR1 of the property in favour of the Claimant alone. The TR1 stated that the transfer was not for money or anything which had a monetary value. On 27 March 2006, the Claimant executed the deed of settlement as settlor and the Claimant and the First Defendant executed the deed of settlement as trustees. On 27 March 2006, the Claimant executed a TR1 in favour of himself and the First Defendant as trustees of the settlement. This TR1 also stated that the transfer was not for money or for anything which had a monetary value. I was not told whether the Claimant and the First Defendant applied to the Land Registry to register both TR1s or whether the registered title remained as before in the joint names of the Claimant and the First Defendant. As a TR1 does not transfer the legal estate in the registered property unless it is subsequently registered, it is therefore not clear whether the legal estate in the property at all times remained in the Claimant and the First Defendant jointly or whether the legal estate vested in the Claimant alone for a short period of time between the effective dates of the registrations of the two TR1s (if they were registered).

22. The consequence of all the steps taken on 24 and 27 March 2006 and, in particular, the steps taken on 27 March 2006 was that the Claimant became liable to pay tax of 20% of the March 2006 value of the property, of between £1.3m and £1.4m, together with interest of £60,000 or more and possible penalties for late payment and became liable on 27 March 2016 to a 10-year anniversary charge under section 64 of IHTA of 6% of a current value of about £2m. These provisions applied by reason of a change in the law brought about by the amendment of section 49 of IHTA by Finance Act 2006, section 156, schedule 20(2) para. 4(1). The relevant provisions of the Finance Act 2006 were enacted after March 2006 but gave effect to a budget announcement which was made on 22 March 2006 and the relevant amendments had retrospective effect from 22 March 2006.

*The terms of the settlement*

23. The following are the principal terms of the settlement, so far as relevant:

(1) the Claimant was the Settlor and the Claimant and the First Defendant together were the Trustees;

(2) the settlement recited that the Settlor wished to make the settlement;

(3) the initial trust property was the house, referred to as the Trust Fund;

(4) the Principal Beneficiaries were the Settlor and the First Defendant;

(5) the Beneficiaries were the Principal Beneficiaries and the children and remoter issue of the Principal Beneficiaries;

(6) “interest in possession” was defined by reference to section 71 of IHTA;

(7) the Trustees had power to add beneficiaries;

(8) the Trustees were to hold the Trust Fund for the Principal Beneficiaries who were referred to as Life Tenants;

(9) the income of the Trust Fund was to be paid to the Life Tenants during their joint lifetimes and the lifetime of the surviving Life Tenant;

(10) the Trustees had power to apply the whole or any part of the Trust Fund to or for the advancement of a Life Tenant; it was stated that in exercising such a power the Trustees were entitled to have regard solely to the interest of the Life Tenants and to disregard all other interests or potential interests under the settlement;

(11) subject to the interests of the Life Tenants, the capital and income of the Trust Fund were to be held upon trust for the children and remoter issue of the Life Tenants;

(12) the Trustees had a power of appointment upon trust for or for the benefit of any of the Beneficiaries;

(13) there were provisions dealing with the removal of, and the appointment of, trustees;

(14) the Trustees had power with the consent of the Settlor, or after his death with the consent of the First Defendant, to vary the terms of the settlement.

*The law as to mistake*

24. There are two quite distinct sets of rules dealing with setting aside, or declaring to be void, transactions on the ground of mistake. Later in this judgment, I will attempt to describe the two different types of case where the different rules apply. For present purposes, it is sufficient to say that one set of rules applies to contracts and the other set applies to gifts.

25. In a case concerning a contract entered into as the result of a mistake, the relevant legal principles are those expressed in Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (“The Great Peace”) [2003] QB 679. This case established that there is no equitable jurisdiction which allows a court to order rescission of a contract for common mistake in circumstances that fall short of the circumstances in which the common law would hold the contract to be void. The grounds on which a contract could be declared void for mistake at common law are very narrow. They were described in The Great Peace at [76] as follows:

“the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.”

It was common ground that if the contract rules apply in this case, the Claimant cannot satisfy them.

26. In a case concerning a gift made as the result of a mistake, the relevant legal principles are those which were recently restated in Pitt v Holt [2013] 2 AC 108. These principles apply even if the transaction is under seal: see at [115]. For present purposes, the principles can be summarised as follows (references in square brackets are to the paragraphs in Pitt v Holt):

(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: [101], quoting Ogilvie v Littleboy (1897) 13 TLR 399 at 400;

(2) a mistake is to be distinguished from mere inadvertence or misprediction: [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: [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: [114];

(5) equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability: [124];

(6) the evaluation of unconscionability is objective: [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: [126];

(8) the court needs to focus intensely on the facts of the particular case: [126];

(9) a mistake about the tax consequences of a transaction can be a relevant mistake: [129]-[132];

(10) where the relevant mistake is a mistake about the tax consequences of a transaction, then:

“[i]n 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.” [135];

(11) it is not pointless, nor is it acting in vain, to set aside a transaction and to remove a liability to pay tax, even where that is the principal, or the only, effect of the setting aside: [136]-[141].

*Which principles apply?*

27. It is accepted that if I were to apply the legal principles relating to contracts to the facts of this case, then the Claimant, or the Claimant and First Defendant acting together, would not be able to show that the transactions on 24 and 27 March 2006, or any of them, were void at common law for mistake.

28. If on the other hand the relevant principles are those which apply to gifts then the result might be different. Later in this judgment, I will apply this set of principles to the facts of this case but I can state at this stage that the result of doing so is that the transactions were vitiated by mistake and may be set aside. Accordingly, I have to decide whether this case is governed by the common law rules for declaring a contract to be void by reason of mistake or the equitable rules for setting aside a gift for mistake.

29. The parties did not agree as to which principles applied and made the following submissions. The Claimant and the First Defendant argued that the settlement and the transfer of 27 March 2006 were voluntary dispositions to which the equitable rules applied. HMRC argued that the settlement and the transfer of 27 March 2006, which were the only subject of the relief sought in the Claim Form, were not voluntary dispositions. I referred earlier to the agreement between the Claimant and the First Defendant to enter into the relevant transactions. This led to argument as to whether the Claimant had contracted with his wife, the First Defendant, to execute the settlement and the transfer of 27 March 2006. HMRC argued that there was such a contract. The Claimant and the First Defendant argued that there was no contract; in particular, they argued that there was no intention to create legal relations and, in any event, an apparent contract binding the Claimant to create the settlement and execute a transfer to the trustees of the settlement would have been void by reason of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

30. So far I have divided the relevant cases into two broad classes, distinguishing between contracts and gifts. It is now necessary to consider more precisely the boundaries between these two classes of case. Some of the decided cases which discuss the equitable rules describe when they do, and when they do not, apply. Different terminology is used. There are references to “voluntary dispositions”, “unilateral transactions”, “gifts”, an intention “to confer a bounty” and these are contrasted with “contracts” and “bargains”. It has been said that the equitable rules apply where the recipient of benefit is “a donee” or “a volunteer”. In Re Butlin’s Settlement Trusts [1976] Ch 251 at 260F-G, Brightman J distinguished between “a voluntary settlement” and “the result of a bargain, such as an ante-nuptial marriage settlement”. In Pitt v Holt [2013] 2 AC 108 at [115], Lord Walker distinguished between a “voluntary disposition” and “a commercial bargain” and held that a voluntary disposition which was effected under seal was still a voluntary disposition; he referred to the presence or absence of consideration, and not merely the presence of a seal, as the critical distinction.

31. In my judgment, the difference between the cases where the equitable rules apply and those where they do not turns on whether consideration has been given for the benefit conferred by the transaction. If the effect of rescission (or a declaration that a transaction is void) would deprive a party of a benefit for which he gave consideration, then the common law rules apply and there is no separate equitable jurisdiction to order rescission. Conversely, if the effect of rescission would deprive a party of a benefit for which he gave no consideration, then there is a separate equitable jurisdiction to order rescission, applying the principles in Pitt v Holt. Although the argument in the present case focussed on whether the Claimant and the First Defendant made a prior contract to execute the settlement and the transfer of 27 March 2006, the present issue does not turn on whether there was such a prior contract. Consideration can exist for an ante-nuptial marriage settlement even though the intended husband and wife did not make a prior binding contract. Further, to take an example suggested by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, if A and B enter into an apparent contract, which is void by reason of that section, but they nonetheless complete the intended transaction by A transferring a property to B in return for the agreed price, A could not seek to set aside that transfer in reliance on the equitable rules by pointing out that the apparent contact was void so that there was no prior contract. The transfer is itself a contract for which consideration is given by both parties.

*The correct analysis of the transactions*

32. I will next analyse the steps which were taken in this case in order to determine whether the present case is governed by the equitable rules. I will therefore consider whether consideration was given for the benefits which would be taken away by an order for rescission. In so far as the settlement conferred benefits on persons other than the Claimant and the First Defendant, it is clear that those persons did not give consideration for those benefits. The analysis therefore focuses on the position of the Claimant and the First Defendant alone and, in view of the way that HMRC argued the case, on the position of the First Defendant in particular.

33. Before 24 March 2006, the Claimant had decided that he wanted to effect a transaction which consisted of a transfer by the Claimant and the First Defendant to the Claimant alone, followed by the creation of the settlement and a transfer of the settled property by the Claimant to the Claimant and the First Defendant together as trustees. The First Defendant was aware of what was contemplated and she agreed to join in the intended steps. The fact of her agreement to the proposed steps gave rise to the argument between the parties. HMRC argued that the Claimant and the First Defendant contracted to take these steps so that when the Claimant settled the property on himself and his wife and their children and remoter issue, the First Defendant had given consideration for the benefits which she took under the settlement; the consideration was her joining in the transfer on 24 March 2006 to the Claimant alone. The Claimant and the First Defendant argued that the First Defendant did not give consideration for those benefits. They argued that the transfer of 24 March 2006 was a gift to the Claimant alone. Following that gift, the Claimant was the legal and beneficial owner of the property. In theory, he could do with the property whatever he pleased. In practice, it was expected that he would take the next step which was always intended, that is, to create the settlement.

34. I am not persuaded to adopt either of these analyses. There is a further analysis which seems to me to fit the facts rather better. The further analysis is that the Claimant held the property on a resulting trust under which he was able to create the intended settlement but if he did not do so, then he held the property on the same trusts as existed prior to the transfer to the Claimant alone. In Lewin on Trusts, 19th ed., at para. 8-005, it is said:

“If a person transfers property to a person to hold upon trusts that are to be declared in the future, a resulting trust will arise upon the transfer and will subsist until the trusts have been effectively declared.”

I consider that this passage applies to the facts of this case.

35. In view of the fact that the law of resulting trusts produces a fair and rational result in this case, I am not persuaded that it is necessary or appropriate to hold that the facts also give rise to the implication of an informal contract between the Claimant and the First Defendant. In those circumstances, it is not necessary to consider the effect of section 2 on such a contract. Nor am I persuaded that the transfer of 24 March 2006 to the Claimant alone was by way of an outright gift. The First Defendant did not intend to give the property to the Claimant beneficially for him to do with as he pleased. She transferred the property to the Claimant alone so that he could carry out their common intention to create the intended settlement. When the analysis based on the law of resulting trusts was identified in the course of argument, the Claimant and the First Defendant adopted that analysis as an alternative to their submission that the transfer of 24 March 2006 was by way of gift.

36. Having analysed the transactions I will now consider whether the equitable rules as to rescission for mistake apply to them. As I have explained, the Claimant’s pleaded case claimed rescission of the transactions which took place on 27 March 2006 but did not claim rescission of the transfer of 24 March 2006. However, I consider that it is more logical to consider the series of transactions as a whole. It was always intended that the transactions would be effected by two steps, the first which took place on 24 March 2006 and the second which took place on 27 March 2006. The parties intended to take both steps and not to stop after the first step.

37. Considering the transactions as a whole, the position is as follows. Before 24 March 2006, the Claimant and the First Defendant as the legal and beneficial owners of the property wished to settle the property on themselves and their children and remoter issue. By taking two steps on 24 and 27 March 2006 they implemented their intentions. The position of the two of them acting together is no different from the position of a sole legal and beneficial owner settling his property on himself and members of his family. He and the other beneficiaries do not give consideration for the settlement. Using the language of the decided cases, the case is one of a unilateral transaction and all of the beneficiaries are volunteers. I do not see how the fact that the settlors are joint owners acting together leads to any different conclusion. They do not give consideration to themselves.

38. Even if I were to consider the steps taken on 27 March 2006 in isolation (I think somewhat artificially), I would reach the same conclusion. Immediately prior to the 27 March 2006, the property was held by the Claimant alone on a resulting trust under which he was permitted to create the settlement and, failing the creation of the settlement, the property was held on the trusts which existed before 24 March 2006 under which the Claimant and the First Defendant were the beneficial owners. What the Claimant then did on 27 March 2006 was to give effect to the common intention of the Claimant and the First Defendant. The fact that the legal interest in the property was transferred into the name of the Claimant alone (assuming that that is what happened under the rules as to land registration) does not seem to me to make any difference. The position was that the beneficial owners of the property settled it on themselves and their children and remoter issue.

39. In view of my earlier analysis, it is not strictly necessary to consider what the position would be if I had to: (1) consider the transactions of 27 March 2006 separate from the transaction of 24 March 2006; and (2) adopt the analysis that the transfer to the Claimant on 24 March 2006 was by way of outright gift. If the Claimant really had been the sole beneficial owner of the property on and after 24 March 2006, then it would seem to follow that his decision to settle the property on 27 March 2006 was a unilateral act by way of gift. Of course, that analysis does not feel right. It seems inappropriate to regard the settlement of 27 March 2006 as a gift to the First Defendant but that is because it seems inappropriate to regard the transfer of 24 March 2006 as an outright gift to the Claimant alone.

40. It follows that the equitable rules do apply to a claim to set aside the transactions of 24 and 27 March 2006 and to the alternative claim to set aside the transactions of 27 March 2006 alone.

*The application of the equitable rules*

41. Applying the equitable rules to the above analysis of this case, I consider that the position is as follows:

(1) the Claimant and the First Defendant made a relevant mistake when they entered into the transfer of 24 March 2006 and the settlement and transfer of 27 March 2006; they and, in particular, the Claimant were ignorant of the budget announcement on 22 March 2006; that ignorance cannot be regarded as “mere ignorance” which would not give rise to a relevant mistake because the ignorance in the present case led them to a false belief or assumption that the creation of the settlement did not involve a chargeable transfer so that no inheritance tax would be payable as a result;

(2) the Claimant and the First Defendant would not have entered into the transactions of 24 and 27 March 2006 if they had not made the mistake described above;

(3) their mistake did not involve them running a risk about a possible liability to pay inheritance tax by reason of the creation of the settlement; they believed that there was be no question of a charge to tax by reason of the creation of the settlement;

(4) the fact that the mistake was a mistake about tax is irrelevant;

(5) in view of the amount of tax and interest payable in this case, their mistake was sufficiently grave to satisfy the relevant test;

(6) their mistake was of so serious a character as to render it unjust on the part of a volunteer to resist rescission of the transactions.

42. The parties’ skeleton arguments in advance of the trial addressed the question whether this was a case of artificial tax avoidance where the court ought to withhold relief on the ground of public policy, a possibility which was mentioned by Lord Walker in Pitt v Holt [2013] 2 AC 108 at [135]. The parties’ arguments were of considerable interest but in the course of closing submissions, HMRC accepted that it was unrealistic for them to ask a judge at first instance to give effect to Lord Walker’s suggested possibility on the facts of this case. HMRC accepted that at this level of decision, in the light of recent decisions of the Supreme Court on the principle of *ex turpi causa* and public policy, in particular, the decision in Le Laboratoires Servier v Apotex Inc [2015] AC 430, the court could not be expected to withhold relief on this ground in this case. Having considered the arguments in the skeleton arguments, I can say that I do not think it appropriate for me to hold, on my own initiative, that it would be contrary to public policy to grant relief in this case.

43. HMRC had served a pleading which took a number of other points with which I ought to deal.

44. HMRC analysed the terms of the settlement and argued that the position of the Claimant and the First Defendant had not really changed as a result of creating the settlement. In particular, it was said that they could exercise their powers as trustees to advance the whole of the Trust Fund to themselves. It was then submitted that the Claimant and the First Defendant had not “conferred any bounty” on the children and remoter issue and they had not conferred any bounty on themselves as they owned the property before the transactions were entered into. Counsel for the Claimant pointed out that this was a somewhat odd submission in view of the fact that HMRC also contended (indeed it was agreed) that the creation of the settlement gave rise to a chargeable transfer under IHTA. This exchange then gave rise to a discussion as to what the position would be if A, the sole legal and beneficial owner of property, transferred that property to B to hold on a bare trust for A and a taxing statute provided that such a transfer gave rise to a charge to tax. Would A be able to set aside the transfer to B (on whom A conferred no bounty) on the grounds that he was mistaken as to the tax treatment of the transfer? I consider that a question of that kind does not arise in this case. The settlement was not a sham and it did alter the legal and equitable position of the Claimant and the First Defendant. The fact that in the future the Claimant and the First Defendant could take steps to end the settlement or to confer upon themselves the same benefits as they held before the creation of the settlement does not seem to me to affect the position while the settlement subsists. In any case, I do not consider that asking the somewhat general question whether a transaction “conferred a bounty” on another is a particularly useful question to ask for the purposes of the analysis which is needed in the present case.

45. HMRC also submitted that it was not unconscionable for the beneficiaries under the settlement to resist rescission of the settlement. It did not seem to be disputed that it would be unconscionable for the children and remoter issue to resist rescission in circumstances where the Claimant would bear a heavy tax liability as the result of a mistake. What was said was that if one confined oneself to the transactions on 27 March 2006 which conferred a benefit on the First Defendant amongst others, it would not be unconscionable for the First Defendant to resist rescission. This was on the basis that the effect of rescission of those transactions would leave the First Defendant in a situation where she had no beneficial interest in the property having made a gift of it on 24 March 2006. On my analysis of the facts, that would not be the effect of rescission of the transactions of 27 March 2006. In any event, I consider that the more realistic way of approaching this case is to consider it as an application by the Claimant and the First Defendant together to set aside the transactions of 24 and 27 March 2006 in which case the only beneficiaries whose conscience needs to be considered are the children and remoter issue.

46. HMRC next submitted that the court would be acting in vain by making an order of rescission. This was on the basis that it was open to the Claimant and the First Defendant under the terms of the settlement, and without any order of the court, to vest the property in themselves beneficially. However, if they did so they would not avoid the liability of the Claimant to pay inheritance tax. A court order for rescission would remove that liability from the Claimant. In those circumstances, the court would not be acting in vain.

47. HMRC also submitted that an order for rescission should be withheld because the Claimant and the First Defendant had accepted the risk that their transactions might be caught by taxing provisions of which they were unaware. That risk had come about in this case because they were unaware of the budget announcement of 22 March 2006 and they had not asked anyone to check on 24 or 27 March 2006 whether anything had changed since the earlier advice had been given in November 2005. I do not consider that this is a case where the parties did not make a mistake but instead accepted a risk that a scheme might not have its intended results in the way described by Lord Walker in Pitt v Holt at [114]. The Claimant and the First Defendant made a mistake for the purposes of the principles in Pitt v Holt because, being ignorant of the budget announcement, they wrongly believed that their transactions would not give rise to a charge to tax. In so far as HMRC relied upon the reference by Lord Walker in Pitt v Holt at [135] to a party taking a risk that a tax avoidance scheme would prove ineffective, that comment has no relevance in the present case.

*The result*

48. In the result, I hold that the Claimant and the First Defendant acting together are entitled to an order setting aside the transfer of 24 March 2006 and the settlement and transfer of 27 March 2006, on the grounds of mistake. I am also prepared to hold that the Claimant acting alone is entitled to an order setting aside the settlement and the transfer of 27 March 2006. The First Defendant said in her witness statement that if the settlement and transfer of 27 March 2006 were set aside, then the Claimant and the First Defendant intended to transfer the property back into their joint names. In these circumstances, it would seem to be more appropriate for the court to set aside all of the transactions of 24 and 27 March 2006. Following the hand down of this judgment, I will hear counsel as to the precise form of order which I should make in this respect.