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1. JONATHAN MAYSON OGDEN
2. BRIAN HUTCHINSON
(executors of the estate of RONALD HENRY SAMUEL GRIFFITHS)

v

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1. Trustees of the RHS GRIFFITHS 2003 SETTLEMENT
2. Trustees of the 25 ROTHESAY ROAD SETTLEMENT
3. Trustees of the GRIFFITHS FAMILY TRUST
4. JANE HEDGES
5. MARK JULIAN GRIFFITHS
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6. MARCIA HEDGES
7. NATALIE JOANNE AMY GRIFFITHS (a child)
8. MEGAN BETHANY GRIFFITHS (a child)
9. DANIEL JAMES RONALD GRIFFITHS (a child)

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High Court of Justice (Chancery Division)
 Mr Justice Lewison

Neutral citation: [2008] EWHC 118 (Ch)

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Hearing: 24-25 January 2008
 Judgment: 25 January 2008

*Tax-planning exercise; lifetime gifts in trust; assignment of reversionary interest;
 unexpected death of donor; mistake; whether as to effect or consequence of transaction;
 serious mistake of fact; whether transaction void or voidable*

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In January 2003, when aged 73, Ronald Griffiths (G) and his wife took tax-planning advice with a view to mitigating inheritance tax on his estate – this included a half share in the matrimonial home at 25 Rothesay Road, Bournemouth (the house) and a valuable shareholding in a property holding company, Iota Properties Ltd (the shares). WJB Chiltern, tax consultants, produced a report which suggested that the shares should be transferred into a short term discretionary trust (an immediate chargeable transfer) but with a reverter to settlor, and if G were subsequently to assign his reversionary interest to the trustees of a family trust and survive for seven years then its value would fall out of his estate for tax purposes. It also suggested that the house should be made subject to the creation of a deferred lease in favour of trustees (a potentially exempt transfer), and if G and his wife were to survive the grant by seven years then its value would fall outside their respective estates for tax purposes. A reduced rate of inheritance tax would be payable in the event of death between three and seven years.

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G accepted these suggestions and, on 7 April 2003, he transferred the shares, valued at £83,000, into the RHS Griffiths 2003 Settlement, which provided for a discretionary trust of income for a period of ten months and, subject thereto, a reverter to the settlor.

Similarly, on 8 April 2003, G and his wife jointly granted a deferred lease valued at £280,000 over the house to the trustees of the 25 Rothesay Road Settlement, which provided for their two children to have life interests. Subsequently, on 3 February 2004, G transferred his reversionary interest in the shares valued at £2,644,000 to the trustees of the newly created Griffiths Family Trust. In the event, G did not survive for more than three years because he was diagnosed with cancer in autumn 2004 and died on 17 April 2005. As a result, all three transfers were chargeable with inheritance tax exceeding £1m. However, G had also made a will under which he had left a lifetime interest in his residuary estate to his widow, and, as that benefited from the spouse exemption, no inheritance tax would have been payable if he had not made those transfers. The claimants, who were his executors, now sought to persuade the Court to exercise its equitable jurisdiction to set aside the transfers on the ground that G had entered into those voluntary transactions on the basis of a mistake.

Held (granting relief in part)

1. As to the primary argument, that G mistakenly believed, at the times of the transfers, that there was a real chance that he would survive for seven years, whereas, had he known that his life expectancy was so short, he would not have made the transfers at all, the medical evidence did not establish that G was suffering from cancer in April 2003 (at which time his life expectancy exceeded seven years), though it did suggest on balance that he was suffering from cancer in February 2004 (at which time his life expectancy did not exceed three years) (paras [17]-[18]). Whether the mistake was of law or of fact, a voluntary deed would be set aside if the Court was satisfied that the donor did not intend the transaction to have the effect which it did and, for present purposes, it was not necessary to resolve the debate whether a mistake by an individual (as opposed to a trustee) about the fiscal consequences of entering into a transaction counts as a mistake about the effect of the transaction or a mistake about its consequences or advantages.

On the facts of this case, there was no mistake as to the fiscal consequences either of the transfer of the shares into the RHS Griffiths Settlement because that was, and intended to be, a chargeable transfer for inheritance tax or as to the subsequent grant of the deferred lease of the house to the 25 Rothesay Road Settlement because that was, and was intended to be, a potentially exempt transfer for inheritance tax. Similarly, the transfer of G's reversionary interest in the shares was, and was intended to be, a potentially exempt transfer for inheritance tax. Accordingly, there was no mistake as to the effects of any of the three transfers. The operative mistake must have existed at the time of entering into the transaction. What was unexpected was G's death just over a year later, and the mere falsification of expectations entertained at the time of the transactions was not enough for the Court to set them aside on the ground of mistake (para [23]).

2. The position was different as regards the claimants' alternative argument that G had made an operative mistake of fact, as to his state of health, at the time of the transaction, not a mistake about the effect of the transaction. In this respect, the

A equitable jurisdiction to relieve against the consequences of a mistake was not
 B limited to a voluntary deed in circumstances where the Court was satisfied that the
 C disporor did not intend the transaction to have the effect which it did. The
 D formulation of principle approved by the House of Lords in *Ogilvie v Allen* (1899) 15
 TLR 294 only required a mistake of a sufficiently serious nature as to render it unjust
 for the donee to retain the property given by the donor. A mistake about an existing,
 or pre-existing, fact if sufficiently serious was enough to bring the jurisdiction into
 play. As to what needs to be shown as to the consequence of the mistake, by
 reference to the discussion in *Sieff v Fox* [2005] WTLR 891 of the question whether
 trustees, had they taken all relevant considerations into account, 'would have' acted
 differently or merely 'might have' acted differently, Lloyd LJ had distinguished
 between a case in which trustees were under a duty to act, where it will be sufficient
 merely to show that they might have acted differently, and a case in which they had
 a discretion whether or not to act, where it was necessary to show that they would
 have acted differently. In a case where an individual (as opposed to a trustee) was
 disposing of his own property, it was the higher test that applied. Thus, the
 claimants had to show that, if G had been aware of the true facts, he would not have
 acted as he did – though it was not necessary for them to show what he would have
 done if he had not made the mistake (para [27]).

E On the facts of this case, there was no evidence that G had made a mistake about
 his state of health at the time of the first two transactions or that, if he did, he would
 have acted differently. Accordingly, the Court would not set aside either of the
 transfers entered into in April 2003 (para [29]). However, by the time G entered into
 the third transfer, he was labouring under a mistake as to his state of health because
 at that time he was suffering from cancer of which he was unaware. Had he known
 this, he would also have known that his chance of survival of survival for three years,
 let alone for seven years, was remote. In those circumstances, the Court was
 F persuaded that G would not have acted as he did by transferring his reversionary
 interest in the shares to the trustees of the Griffiths Family Trust. He would either have
 made a lifetime transfer to his wife or allowed her to inherit under his will (para [30]).
 As to the question whether the transaction was void, or merely voidable (on which
 G depended any claim to interest on overpaid tax), it was clear both from a description
 of the jurisdiction and from the authorities that unless and until a transaction is set
 aside, it did have legal effect. In other words the transaction is voidable, rather than
 void *ab initio* (para [31]). It followed that G's assignment of the reversionary interest in
 the shares was voidable and would be set aside as it was unjust for the trustees of the
 Griffiths Family Trust to retain them in circumstances which imposed upon the estate
 H an untended liability to substantial inheritance tax (para [35]).

Obiter

Lewison J was prepared not to follow that part of the judgment in *Gibbon v Mitchell* [1990] 1 WLR 1304 if, and to the extent that, Millett J intended to restrict the scope of the equitable jurisdiction to relieve against the consequences of a mistake to circumstances where the Court was satisfied that the disporor was mistaken as to the effect of a transaction.

Cases referred to*Anker-Peterson v Christenson* [2002] WTLR 313*Re Barr's Settlement Trusts* [2003] WTLR 149, [2003] Ch 409*Barrow v Isaacs* [1891] 1 QB 417*Gibbon v Mitchell* [1990] 1 WLR 1304*Re Hastings-Bass* [1975] Ch 25*Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476*Ogilvie v Littleboy* (1897) 13 TLR 399, aff sub nom *Ogilvie v Allen* (1899) 15 TLR 294*Sieff v Fox* [2005] WTLR 891, [2005] 3 All ER 693*Wolff & anr v Wolff & ors* [2004] 1349, [2004] STC 1633**Statute referred to***Inheritance Tax Act 1984, ss150, 235, 236***JUDGMENT**

MR JUSTICE LEWISON

[1] The late Mr Ronald Griffiths was born on 5 March 1929. During his lifetime he had acquired a number of substantial assets. These included a half share in the matrimonial home at 25 Rothesay Road, Bournemouth, and a valuable shareholding in a company called Iota Properties Ltd which owned a number of investment properties. In January 2003, then aged 73, Mr Griffiths and his wife Barbara took advice about tax planning in order to mitigate what would otherwise be the effect of inheritance tax on his death. Barbara Griffiths was a year younger than her husband. Tax consultants, WJB Chiltern, produced a comprehensive report, running to more than 50 pages, on the options open to him. Most of the options involved the making of potentially exempt transfers, that is to say a transfer made more than seven years before the transferor's death. The report was carefully thought out so far as the tax consequences of the various options were concerned.

[2] Their report dealt with the different assets of substantial value in different sections. So far as the shares in Iota Properties Ltd were concerned they suggested the creation of a short-term discretionary trust of the shares with reverter to settlor, and a subsequent assignment of the settlor's reversionary interest to trustees. Although the creation of the discretionary trust would be a chargeable transfer for inheritance tax, if Mr Griffiths were to follow this advice and survive the subsequent assignment by seven years then the value of the reversionary interest in the shares transferred by the assignment would fall out of his estate for inheritance tax purposes. The report also went on to consider what would happen if Mr Griffiths failed to survive the transfers by seven years. It pointed out that a reduced rate of inheritance tax would be payable if he died within three to four years of the transfers and a still further reduced rate if he died after that but before the seven years were up. So far as 25 Rothesay Road was concerned, the report recommended the creation of a deferred lease in favour of trustees. A deferred lease is a lease whose term is limited to begin at a future date. So the idea was that Mr and Mrs Griffiths would retain the right to continue to live in their matrimonial home, but that they would

A lose that right once the term of the deferred lease began to run. The deferred lease would also be a potentially exempt transfer, and if Mr and Mrs Griffiths survived the grant by seven years the value of the lease would fall outside their respective estates for inheritance tax purposes.

B [3] The final recommendation of the report was that Mr and Mrs Griffiths take out seven-year-term insurance in relation to those ideas that relied for their effectiveness on Mr and Mrs Griffiths surviving for between three and seven years.

C [4] Mr Griffiths decided to follow up some of the recommendations. On 7 April 2003 he transferred 4,897 shares in Iota Properties into a newly created trust called the RHS Griffiths 2003 Settlement. Clause 4 of the settlement provided for discretionary trusts of the income from the shares for a period of ten months from 7 April 2003. At the expiry of that period there was to be a reverter to the settlor. The value of this transfer was of the order of £83,000. On the following day, 8 April 2003, Mr and Mrs Griffiths jointly granted a deferred lease of their matrimonial home to themselves and their two children to be held on the terms of a trust embodied in the 25 Rothesay Road Settlement. Mr and Mrs Griffiths' two children have life interests under that settlement. The value of this transfer was of the order of £280,000. In the following year, shortly before the expiry of the discretionary trust period, on 3 February 2004 Mr Griffiths transferred his reversionary interest in the shareholding in Iota Properties to the trustees of the newly created Griffiths Family Trust. This was the most valuable of the assets transferred into the various trusts. Its value is of the order of £2,644,000.

E [5] Unfortunately in the autumn of 2004 Mr Griffiths was diagnosed as having lung cancer; and he died on 17 April 2005. Since Mr Griffiths had not survived for more than three years since the transfers were made all of the three transfers by Mr Griffiths are chargeable transfers for inheritance tax and subject to taxation in accordance with s7 of the *Inheritance Tax Act 1984*. The tax payable therefore exceeds £1m. Mr Griffiths also made a will under which he left a life interest in his residuary estate to his widow. Any assets in which she takes an interest under the will do not attract inheritance tax. If, therefore, Mr Griffiths had not made the transfers, there would be no inheritance tax immediately payable.

F [6] The claimants, as Mr Griffiths' executors, now seek to set aside the transfers on the ground that they were made under a mistake and that equity will set aside a voluntary transfer in such circumstances. The relevant mistake on which they rely is that Mr Griffiths mistakenly believed, at the times of the transfers, that there was a real chance that he would survive for seven years whereas in fact at that time his state of health was such that he had no real chance of surviving for that long. Had he known that his life expectancy was so short, he would not have made the transfers and so they should be declared void or set aside. There are two relevant times: first, April 2003 and secondly, February 2004. HM Revenue & Customs have been asked whether they wish to intervene in these proceedings in view of the large amount of tax potentially involved. They have declined to do so, but have asked for certain authorities to be brought to my attention. Mr Grierson, who appears for the executors, has complied with that request. None of the other parties opposes the

relief sought. There has therefore been no adversarial argument either on the law or on the facts.

[7] For some years before the transfers Mr Griffiths had been suffering from severe rheumatoid arthritis. It was effectively controlled by drugs, mostly immunosuppressants and steroids. He had been a smoker, but had given up in 1992. However, in October 2004 an abnormality was discovered in his left lung. Tests were carried out and they revealed a non-small cell lung cancer. In the following month it was discovered that there were suggestions of metastasis. Dr Laurence, the consultant oncologist, thought that in view of his long-standing rheumatoid arthritis, as well as recent illness, he was not fit for any form of systemic treatment. She therefore organised a short course of palliative radiotherapy to stop the recurrence of chest infections. She added in her letter to Mr Griffiths' GP, Dr Flack:

'I have explained that any form of systemic treatment would definitely cause deterioration in his quality of life. We did not put a timescale on his prognosis, but he is aware that the illness will be fatal in due course.'

[8] By March 2005 the cancer was well advanced; and no further active treatment was planned.

[9] Neither Dr Flack nor Dr Laurence have given evidence or made witness statements. However, both have expressed their views in correspondence.

[10] In her letter of 4 May 2006 Dr Laurence said:

'I am afraid it would not be possible to estimate when the lung cancer first occurred as this is a very varying feature and depends upon the natural biology of the tumour... I think it would be impossible to tell you when the cancer actually arose although it is likely that it arose within at least the six months prior to his diagnosis. One certainly couldn't say that it was present before this, although we do know that some cancers have a long natural history. The cancer at diagnosis was known to be in its advanced stage and treatment was palliative in nature. The average survival from diagnosis to death in a patient with this stage of disease is approximately six months. Mr Griffiths therefore fell into the average timescale from diagnosis to death. He was not felt to be terminal at diagnosis, but was not fit enough for any form of radical treatment and thus the minimum and maximum survival periods following palliative treatment tends to be of an order of weeks through to a maximum of one to two years. Only 10% of patients survive the one-year mark and a few per cent may survive to two years.'

[11] In her letter of 10 June 2006 Dr Laurence said:

'I have already stated that it is not possible to tell you when the cancer actually arose and although it was likely that he had cancer in February 2004, it is impossible to be precise about this, or to give you a percentage likelihood.'

A [12] In her letter of 14 July 2006 Dr Laurence said:

‘... it is impossible for me to comment as to whether or not Mr Griffiths had cancer present in either April 2003 or April 1999.’

B [13] In his letter of 7 August 2006 Dr Flack said:

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‘Having carefully examined Mr Griffiths’ records, I can find no evidence that he had a chest x-ray in the period between April 1999 and 29th September 2004. This latter date was the one on which he had a chest x-ray at Poole Hospital, which first suggested the possibility of lung cancer. As you know, this was subsequently confirmed by bronchoscopy and histology and which was the cause of his subsequent death in April 2005. I saw Mr Ronald Griffiths on a very regular basis from the time of his registration with this Practice in December 1996, until the time of his death. This included regular reviews for both his rheumatoid arthritis, his known cardiac conductive disease and the number of full medicals done for insurance purposes. At no time before the 29th September was I suspicious that Mr Griffiths had lung cancer. It is therefore impossible to know how long the cancer was present before it became symptomatic and was therefore detected, but given that he died within seven months of his diagnosis, my opinion is that it is biologically implausible that it could have been present as early as April 1999, and extremely unlikely that it was present in April 2003.’

F [14] In a subsequent letter of 1 September 2006 Dr Flack confirmed that it was ‘extremely unlikely’ that Mr Griffiths’ cancer was present in April 2003. He added:

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‘The basis of my opinion is that Mr Griffiths’ lung cancer was very small at presentation in September 2004, but still led to his death within 8 months. It seems unlikely that such an aggressive tumour would have been present 16-17 months earlier without making its presence felt.’

[15] Dr Paul Thompson was the consultant rheumatologist who had the care of Mr Griffiths. In his letter of 3 August 2006 he said that there was no clinical evidence to suggest that Mr Griffiths had lung cancer in 2003. However, he added:

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‘With regards his life expectancy, a patient on immunosuppressant drugs with rheumatoid arthritis is known to have reduced life expectancy by about 3-5 years. I would therefore suggest that his life expectancy would have been of a man of his age with co-morbidities reduced by about 3-5 years.’

[16] A table of life expectancies taken from the website of the Faculty and Institute of Actuaries indicates that the life expectancy of a 74-year-old male is just short of

12 years. In fact Mr Griffiths' parents had lived into their 90s, although his sister who also suffered from rheumatoid arthritis died some time before 2001 in her late 60s.

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[17] The claimants ask me to attach no weight to the opinions expressed by Dr Flack. The basis for this is the submission that he is 'only' a GP and according to the claimants' solicitor his views are 'unusually assertive' for a GP commenting on a specialist area. I do not know what expertise the claimants' solicitor has to be able to make that judgement. Since Dr Flack was Mr Griffiths' principal medical practitioner it would be quite wrong for me not to attach weight to his views. Moreover Dr Laurence was not asked to comment on Dr Flack's views, so to that extent there is no challenge to what he has said. Based on his evidence I find that Mr Griffiths did not suffer from lung cancer in April 2003. Based on Dr Thompson's evidence and the mortality tables I find that in April 2003 Mr Griffiths had a life expectancy of somewhere between seven and nine years.

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[18] Dr Flack does not address the question whether Mr Griffiths had lung cancer in February 2004, although he does say that he himself did not suspect cancer until the autumn. Based on that evidence I think that I can conclude that Mr Griffiths did not himself suspect lung cancer any earlier than the autumn. But Dr Laurence does say that it was likely that Mr Griffiths was already suffering from lung cancer in February 2004, although she cannot express a view about the percentage likelihood, and she does not specifically say whether the cancer was likely to have been present at the beginning of that month. It is unfortunate that in a case involving £1m-worth of tax a proper medical report was not placed before the Court and that the claimants are compelled to rely on a single sentence in a letter from Dr Laurence. Although I have hesitated about this finding, I am prepared to find, by a narrow margin, that he was suffering from lung cancer on 3 February 2004; and that following the onset of lung cancer at that time his life expectancy did not exceed three years in February 2004. Had the facts been contested, I might not have felt able to make this finding.

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[19] The executors rely on a broad equitable jurisdiction to set aside a voluntary transaction on the ground of mistake. The nature of the jurisdiction was described by Lindley LJ in *Ogilvie v Littleboy* (1897) 13 TLR 399:

'Gifts cannot be revoked, nor can deeds be set aside, simply because the donors wish they had not made them and would like to have back the property given. Where there is no fraud, no undue influence, no fiduciary relationship between donor and donee, no mistake induced by those who derive any benefit by it, a gift, whether by mere delivery or by deed, is binding on the donor... In the absence of all such circumstances of suspicion a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.'

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[20] An appeal to the House of Lords reported as *Ogilvie v Allen* (1899) 15 TLR 294 was dismissed. Lord Halsbury LC said that he agreed with the judgment of

A Lindley LJ, but he contemplated that there might be ‘circumstances when misunderstanding on both sides may render it unjust to the giver that the gift should be retained’. Lord Macnaghten and Lord Morris agreed.

B [21] In *Sieff v Fox* [2005] WTLR 891 Lloyd LJ said that this case established a broad principle of injustice as the test for setting aside a voluntary disposition, in the absence of any circumstances of suspicion. He added that because this case had not been reported in the Law Reports it does not appear to have been cited in any of the later cases that considered the ambit of the jurisdiction.

C [22] One of the areas of debate has been the nature of the operative mistake which brings the jurisdiction into play. In *Gibbon v Mitchell* [1990] 1 WLR 1304 Millett J expressed the principle as follows:

D ‘In my judgement, these cases show that, wherever there is a voluntary transaction by which one party intends to confer a bounty on another, the deed will be set aside if the court is satisfied that the disponent did not intend the transaction to have the effect which it did. It will be set aside for mistake whether the mistake is a mistake of law or of fact, so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it. The proposition that equity will never relieve against mistakes of law is clearly too widely stated.’

E [23] His Lordship’s distinction between the effect of the transaction and its consequences or advantages has proved a difficult one to grasp. Davis J in *Anker-Petersen v Christenson* [2002] WTLR 313, Lloyd LJ in *Sieff v Fox* and Mann J in *Wolff & anr v Wolff & ors* [2004] WTLR 1349 have all expressed that difficulty. The principal debate has been whether a mistake by an individual (as opposed to a trustee) about the fiscal consequences of entering into a transaction counts as a mistake about the effect of the transaction or a mistake about its consequences or advantages. I do not need to resolve this debate. Mr Grierson said that a mistake about the fiscal consequences of entering into a transaction was enough to bring the jurisdiction into play even in a case involving an individual rather than trustees. But even if he is right, I do not think that this helps him on the facts of this case. The initial transfer of the shares into the discretionary trust was a chargeable transfer for the purposes of inheritance tax and was intended to be a chargeable transfer. So there was no mistake about its fiscal consequences. The grant of the deferred lease was intended to be a potentially exempt transfer. That is precisely what it was. There was no mistake about the immediate tax consequences of the grant. Similarly the intended effect of the transaction consisting of the transfer of Mr Griffiths’ reversionary interest in the shares was intended to be a potentially exempt transfer for the purposes of inheritance tax. Again that is precisely what it was. There was no mistake about the immediate tax consequences of that transfer either. What was unexpected was Mr Griffiths’ subsequent death just over a year later. Mr Grierson accepted, as I understood it, that if Mr Griffiths had been a hale and hearty young man and had entered into all the relevant transactions but fallen under a bus the

following week, his executors would not have been able to ask the Court to set aside the transactions on the ground of a mistake. I think that is right. The operative mistake must, in my judgement, be a mistake which existed at the time when the transaction was entered into. The mere falsification of expectations entertained at the date of the transaction is not, in my judgement, enough.

[24] However, the claimants' alternative argument is that there was an operative mistake of fact which Mr Griffiths made at the time of the transactions. The relevant mistake was a mistake about Mr Griffiths' state of health. That was a mistake about a fact existing at the time of the transaction, not a mistake about the effect of the transaction. I do not read the formulation by Millett J as limiting the overall scope of the equitable jurisdiction to relieve against the consequences of a mistake. He said that a voluntary deed will be set aside if the Court is satisfied that the disponent did not intend the transaction to have the effect which it did. He did not say that a voluntary deed will only be set aside if the Court is satisfied that the disponent did not intend the transaction to have the effect which it did. The formulation of principle by Lindley LJ and approved by the House of Lords is not so limited. In *Lady Hood of Avalon v Mackinnon* [1909] 1 Ch 476 Lady Hood appointed sums of money to her daughters. She had intended to achieve equality between them but had forgotten that some years earlier she had already made appointments to her elder daughter. Eve J discussed at length whether forgetting an existing fact could amount to a mistake. He concluded that it could and said:

'I think she executed the deed under a mistake with regard to the existing facts, and I cannot myself see that it is material whether that mistake arose from her being misinformed as to the true state of things, or from her state of mind being such that she had not, at that moment, knowledge of the true state of things. The absence of knowledge arose from her not bearing in mind, or not appreciating, that she had already appointed to the elder daughter a moiety of the fund, and in these circumstances I feel bound to hold, and, having regard to the evidence, I am glad to be able to hold, that this deed which it is sought to rescind was executed by Lady Hood under a mistake brought about by such circumstances as entitle her to the relief she seeks.'

[25] It is plain in my judgement that a mistake of fact is capable of bringing the equitable jurisdiction into play. All that is required is a mistake of a sufficiently serious nature. In my judgement a mistake about an existing or pre-existing fact if sufficiently serious is enough to bring the jurisdiction into play. If and to the extent that Millett J intended to restrict the scope of the equitable jurisdiction to a mistake about the effect of a transaction, I respectfully disagree.

[26] The next question I must consider is what needs to be shown as the consequence of the mistake. In *Sieff v Fox* Lloyd LJ, as well as considering the circumstances in which a voluntary transaction may be set aside for mistake also considered the rule in *Re Hastings-Bass* [1975] Ch 25. In his discussion of the latter rule he considered whether having shown that trustees failed to take into account

A relevant considerations, it was necessary to show that had they taken all relevant considerations into account they 'would have' acted differently or merely that they 'might have' acted differently. He distinguished between a case in which trustees were under a duty to act and cases in which they had a discretion whether to act or not. In the former case it was sufficient to show that they might have acted differently, whereas in the latter case it was necessary to show that they would have acted differently. He said:

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'It seems to me that, for the purposes of a case where the trustees are not under a duty to act, the relevant test is still that stated in *Re Hastings-Bass*, namely whether, if they had not misunderstood the effect that their actual exercise of the discretionary power would have, they would have acted differently. In my judgement that is correct both on authority, starting with *Re Hastings-Bass* itself, and on principle. Only in a case where the beneficiary is entitled to require the trustees to act, such as *Kerr's case* or *Stannard's case*, should it suffice to vitiate the trustees' decision to show that they might have acted differently. The word "might" has been used, as matter of decision, only in those two cases. In two cases it has been said (not as a matter of decision) that the "might" test applies to a voluntary exercise of a power: *AMP (UK) Ltd v Barker* [2001] PLR 7 and *Hearn v Younger* [2002] WTLR 1317. I respectfully disagree with those observations, having had the benefit of what may have been fuller, and were no doubt different, submissions on the point. If an act by trustees is set aside, where the trustees have acted under an obligation, then the beneficiaries can require the trustees to start again, on the correct basis. It seems to me that the lower test of "might" is appropriate in such cases (see [55] above). If the trustees' act was voluntary, so that they cannot be compelled to act again if the act is set aside, the more demanding test of "would" is justified in order to decide whether the trustees' act can be set aside.'

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[27] In a case where it is an individual disposing of his own property, it seems to me that the higher test applies. Thus the claimants must show that if Mr Griffiths had been aware of the true facts he would not have acted as he did. I should add that I do not consider that it is necessary for the claimants to show what Mr Griffiths would have done if he had not made the mistake. It is sufficient for them to show that he would not have done what he in fact did. I say this because the evidence suggests that Mr Griffiths would have done nothing and simply left his widow to inherit under his will. But that course of action would only have been effective if (as actually turned out) Mrs Griffiths survived her husband. In the course of argument Mr Grierson preferred the suggestion that Mr Griffiths would have made lifetime gifts to his wife leaving it to her to enter into the transactions recommended by the tax consultants. The difficulty with this suggestion was that there was no evidence to support it. But it shows that there were at least two possibilities available to Mr Griffiths had he not entered into the transactions into which he did in fact enter.

[28] I turn at last to the three transactions themselves. The first two took place in April 2003 at a time when Mr Griffiths did not have lung cancer. It is true that he had rheumatoid arthritis which was being controlled by drugs, but he knew that. So he made no mistake about his state of health. It is said that he made a mistake about his life expectancy, not being aware that the drugs had reduced his life expectancy by three to five years. However, there is no evidence to support that at all, and he must have known that although his parents lived into their 90s, his sister had died of rheumatoid arthritis in her 60s. Even if he had been aware of a reduced life expectancy he might well have taken the view that there was a reasonable chance that he would survive for seven years, or at least that he would survive long enough for the reduced rates of inheritance tax to be available. I am not satisfied that it has been shown either that Mr Griffiths made any relevant mistake in April 2003 or that, if he did, it has been shown that he would have acted differently.

[29] In the case of the deferred lease there is another problem. The deferred lease was a joint grant by Mr and Mrs Griffiths. Mrs Griffiths has not applied for the grant to be set aside. Mr Grierson said that she would be happy to make such an application. But the fact is that she has not; and even if she had it would have been necessary to show that she too made a relevant mistake. There is no evidence to that effect. I decline therefore to set aside either of the transactions entered into in April 2003.

[30] The assignment of the reversionary interest in February 2004 is a different matter. By that time Mr Griffiths was suffering from lung cancer about which he was unaware. He did therefore make a mistake about his state of health. Had he known in February 2004 that he was suffering from lung cancer he would also have known that his chance of surviving for three years, let alone for seven years, was remote. In those circumstances I am persuaded that he would not have acted as he did by transferring his reversionary interest in the shares to trustees. He would either have transferred them to his wife in his remaining lifetime or he would have allowed her to inherit under his will. I do not need to decide which of these courses of action he would have adopted.

[31] I am therefore satisfied that the conditions allowing the equitable jurisdiction to be exercised have been established in relation to the assignment of the reversionary interest in the shares. I need also to consider whether the satisfaction of these conditions means that the assignment of that interest is void or merely voidable. It makes a difference in this case because the executors have paid inheritance tax on a provisional basis. If the assignment is void they are entitled to interest on the overpaid tax as from the date on which they made the payments (*Inheritance Tax Act 1984, s235*), whereas if it is voidable then interest is only payable from the date when a claim to repayment is made (*Inheritance Tax Act 1984, ss150 and 236(3)*). This equitable jurisdiction has always been described as a jurisdiction to relieve against the consequence of a mistake or as a jurisdiction to set aside unilateral transactions entered into under a mistake. This description of the jurisdiction suggests strongly that unless and until the transaction is set aside (or relief is given) it did have some legal effect. In other words the transaction is voidable rather than void *ab initio*. In this respect the position differs from the effect of mistake at common

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A law on what appears to be a contract. But that is not surprising since the equitable jurisdiction is wider than the common law principle. In *Re Barr's Settlement Trusts* [2003] WTLR 149 Lightman J considered the question whether an exercise of discretion by trustees, which was vitiated by the *Hastings-Bass* principle, was void or voidable. He described resolution of that issue as of 'critical significance' in the case before him. He decided that the exercise was voidable rather than void. The question was discussed by Lloyd LJ in *Sieff v Fox*, but as he recognised, nothing turned on the distinction in that case. He said that Lightman J's view was 'open to doubt' although he also expressed the view that to hold that an appointment was voidable rather than void was attractive. He was of course discussing the *Hastings-Bass* principle rather than the wider equitable jurisdiction to relieve against the consequences of a mistake.

[32] In *Barrow v Isaacs* [1891] 1 QB 417 the tenant of a warehouse in the City of London sublet it. The head lease contained a covenant against subletting without the landlord's consent such consent not to be unreasonably withheld. However, the tenant forgot to ask the landlord for consent and the landlord claimed to forfeit the lease. The majority judgment of the Court of Appeal was delivered by Kay LJ. He held that forgetting to ask for consent could properly be described as making a mistake. It was this part of the judgment that Eve J relied on in *Lady Hood of Avalon v Mackinnon*. However, although a relevant mistake was made, the Court nevertheless refused relief. In describing the issues Kay LJ said:

E 'But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise, or mistake. At present the only one of these we have to deal with is mistake; and the questions are, (1.) whether the facts I have described amount to mistake; and, if so, (2.) whether in its discretion the Court will relieve.'

[33] Having held that there was a relevant mistake Kay LJ went on to say:

G 'It is an entirely different question whether on the ground of such a mistake equity, in the exercise of its discretionary jurisdiction, would relieve a man from a forfeiture incurred by his own gross carelessness.'

[34] Relief was refused. If the exercise of the jurisdiction is discretionary (as Kay LJ undoubtedly said it was) it must follow that if as a matter of discretion relief is refused the impugned transaction will stand. If it stands it will have the effect it purports to have. I do not see how such a result is possible unless the impugned transaction is voidable rather than void *ab initio*.

[35] I hold therefore that the assignment of the reversionary interest in the shares made on 3 February 2004 is voidable. It is unjust for the donees to retain the gift in circumstances which impose upon the donor an unintended liability to a very substantial amount of inheritance tax. There is no reason why I should refrain from exercising my discretion to set it aside; and I do so.

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