

A Practitioner's Guide to Correcting Mistakes in Pension Schemes

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***P.C.B. 156** This book is graced with a foreword by Asplin LJ. She describes the book as "comprehensive, clear and authoritative." She is right.

As for it being comprehensive, even the table of cases runs to 18 pages, together with two more pages of determinations by the Pensions Ombudsman. And the vast majority of those cases were decided in the last 30 years. It is hard to think of a relevant authority that is not dealt with in one way or another.

Asplin LJ is right too that the book is clear. She could have added concise. No doubt a book written by a practitioner for the benefit of other practitioners has to be written quickly and therefore briefly. The reader will be able to gather the essence of any section of the book quickly and easily.

And authoritative? The author is one of the many leading counsel in practice at Wilberforce Chambers in Lincoln's Inn who have blazed a trail in pension-law litigation over the last 40 years, and who continue to do so.

The book is unashamedly focussed on mistakes made in the context of occupational pension schemes. This makes it less obviously useful for the private client professional who is not usually dealing with pension schemes of that kind. But useful it remains nonetheless. Mistakes happen in every field of the law, including private-client practice, and there are gems in this book to help any practitioner find a way, perhaps several potential ways, to a workable solution.

The structure of the book, surprisingly perhaps, is not based on remedies for mistake. Trust practitioners are used to thinking in terms of a choice of remedies. They identify a mistake in the trust documents or the trust administration and begin by considering whether an out-of-court exercise of available powers might be sufficient. The powers in question might include a power of appointment or advancement in a private trust, or typically a power of amendment in a pension trust. If that fails, they may examine whether a claim for rectification of one of the offending documents is feasible (if documents are the problem). They may then think whether rescission on the ground of equitable mistake can achieve a viable outcome. Or even they may wonder whether the so-called rule in *Hastings-Bass* might help, even in its attenuated form explained by the Supreme Court in *Pitt v Holt*.¹

But that is not the structure of this book. In fact, there is only one chapter on rectification, though it is a long one of 40 pages. And there is another one of 15 pages headed "Setting aside for mistake", and it covers both equitable mistake and *Hastings-Bass*. Instead, the structure of the book is based on the many types of mistake that occur in the pension context. These are subdivided broadly into document errors, administrative errors and decision errors. All these are capable of occurring in private trusts, though perhaps not as frequently as in occupational pension schemes.

Document errors are very common. The length and prolixity of pension-fund trust deeds and rules are legendary. The definitive trust deed is one thing, and then one can add a series of deeds of amendment and deeds of appointment. Deeds of amendment in particular can be hedged about with pre-conditions, limitations, the need for actuarial advice or approval and other requirements of formality. It is not surprising to find that pension documentation will be found to contain a daunting supply of errors in the category of so-called unexploded bombs.

Private client trust deeds are different in many ways. They are mostly less technical, often less prolix for some reason, usually shorter than goodness. But very often they are long and complex enough to be a headache, subtle enough to be confusing, and hedged about with other innate problems. Some of these problems are fiscal, as the drafter was probably doing his or her best to shield the trust property from some of the more common tax pitfalls. Others are statutory, including interference from such sources as the **P.C.B. 157* European Convention on Human Rights. Others are judge-made like the notorious rule against perpetuity, now made more complex and finally simpler by statute.

Even an apparently routine event like the replacement of one trustee with another, or a less routine event like the replacement of a whole team of trustees with a replacement team, can generate its own special nightmare, sometimes one from which it is almost impossible to wake up unscathed, seeing that relying on an invalid deed of retirement and appointment may have had the effect of invalidating every trust disposition since the mistake was made.

And now trustees have to worry about the effectiveness of their equitable liens for getting themselves reimbursed for trust expenses and liabilities.

So mistakes happen. And this book is a useful addition to any private-client practitioner's library, providing a quick and inexpensive steer to the equivalent, or near-equivalent, types of mistake that occur in the pensions field, and showing reasonable ways to search for solutions. Wildys have claimed that the book was flying off their shelves and, being a stone's throw from Wilberforce, they may indeed have that advantage. Readers of this journal might be more circumspect, but there is meat in this book for them too, and potatoes also.

Mark Herbert

Footnotes

1 *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108.