



## The Correction of Mistakes in Trusts

COMMENTARY BY [PAUL NEWMAN QC](#), 3<sup>RD</sup> FEBRUARY 2022

We all make mistakes; and we are often judged, not by the mistake itself, but by how we respond to it. In my new book, *A Practitioner's Guide to Correcting Mistakes in Pension Schemes*, I summarise and explore the methods for the correction of mistakes in the operation of pension scheme trusts and suggest ways in which the need to apply to Court to correct mistakes occurring in the future may be avoided or mitigated. Whilst the book's focus is on trust-based pension schemes, the vast majority of the book is relevant to mistakes occurring in the administration of all trusts. What follows is an introduction to the book for the general trust practitioner.

I start with a taxonomy of mistakes and I identify three principal types of error which may occur. The first involves mistakes made in the documents establishing or making changes to the terms of the trust (**'document errors'**); the second involves administrative mistakes leading to overpayments or underpayments made to beneficiaries (**'administration errors'**); and the third involves mistakes in the decision-making process which do not result in document or administration errors (**'decision errors'**).

### Document errors

Document errors may, of course, take several forms. The document may, for example, fail to comply with the requisite formalities. For example, the trust instrument may not comply with the statutory requirements for the making of a deed, contained in the Law of Property (Miscellaneous Provisions) Act 1989 and the Companies Act 2006; or a document purporting to contain the exercise of a power of appointment or advancement may not comply with the requisite formalities contained in that power,

such as the requirement for the prior consent of a third party such as a Protector. Another type of error is a document which purports to exercise an existing power, but which exceeds that power, or is otherwise beyond or ulterior to its purpose. A further, and relatively common, form of document error is where the document fails to reflect the intentions of the parties to it.

As is demonstrated in the private trust context by *Breadner v Granville-Grossman*,<sup>1</sup> there is often limited scope for the correction of the first type of document error (i.e. formal defect) by the use of equitable principles: all that can be done then is to ascertain the consequences of the error on the validity of the document, which may give rise to issues of construction of the relevant legislation or trust provision. Occasionally, the question of compliance with formalities may be a matter of evidence; and there are techniques, discussed in the book, which may be used to assist in persuading a Court that such compliance can be inferred or presumed. As to an error which leads to the purported exercise of a power which is beyond its scope, it may be possible to salvage the part which is authorised by the power, using the doctrine of severance: this too is discussed in the book. In the case of a mistake as to the parties' intentions, there are a range of corrective methods which may be employed: and substantial sections of the book consider these methods, such as corrective construction, rectification and setting aside for mistake.

The book also recognises that trustees, settlors and beneficiaries will, if at all possible, wish to avoid a remedy that involves an application to Court, given the costs, delays and attendant publicity that this would involve. The book accordingly includes practical suggestions for self-help remedies to increase the prospects of managing the risks on the discovery of document errors.

### **Administration errors**

Mistakes in the general administration of the trust can lead to the underpayment or overpayment of sums to beneficiaries without the occurrence of any document error or decision error.

In cases of underpayment, the trustees will be under an obligation to make good any underpaid sums, subject to any valid defences they may have, such as limitation; and

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<sup>1</sup> [2001] Ch 523.

that obligation may require interest to be paid, an issue recently considered in the recent *Hazlett* case, which highlighted what has been described as the anomalous principle of general trust law that arrears of an annuity do not carry interest.<sup>2</sup>

Overpayments of benefits may raise practical issues of how to handle their recovery fairly and sensitively, and beneficiaries may be able to prevent recovery by asserting change of position or estoppel defences. Issues of time limits for recovery also arise. Whilst not formally binding, a series of determinations by the Pensions Ombudsman, discussed in the book, provide helpful practical illustrations of what may or may not suffice for a successful change of position defence.

The book also considers the important practical issue of the steps that trustees will be expected to take in order to make good underpayments, as well as the pros and cons of recovering overpayments of regular income by way of the trustees' equitable right of recoupment rather than by common law restitution.

### **Decision errors**

Decision errors, unlike the other two types of error, focus not on mistakes in the implementation of the decision, but on mistakes in the decision-making process which led to the exercise of the power. Whilst a number of the methods of correcting errors identified elsewhere in the book are also relevant to decision errors – most notably setting aside for mistake – the particular characteristics of decision errors merit and receive separate treatment in the book. Practical tips are also offered on the way in which donees can avoid decision mistakes in the exercise of their powers.

### **Recent caselaw**

The book provides an up-to-date commentary on these fast-moving areas of the law, in which pensions cases feature prominently because of the profound effect that such mistakes can have on the viability of schemes and their sponsoring employers. These cases, and the principles they discuss, will be of relevance to trust lawyers who may not have come across such cases in the course of their day-to-day practices. Examples include the *Mitchell & Butlers* case on rectification,<sup>3</sup> the *Lloyds Bank* cases

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<sup>2</sup> *Punter Southall Governance Services Ltd v Hazlett* [2021] EWHC 1652 (Ch) at [314]-[326].

<sup>3</sup> *Mitchell & Butlers Pensions Ltd v Mitchells & Butlers plc* [2021] EWHC 3017 (Ch).

on dealing with underpayments,<sup>4</sup> the *Britvic* case on corrective construction<sup>5</sup> and the *Bhaur and Dukeries Healthcare* cases on equitable rescission.<sup>6</sup>

## Conclusion

Whilst there are other books on specific methods of correction (such as rectification) and whilst general trust law books will cover some of the same ground, no other book on the market focuses exclusively on errors specifically in a trust context, on how to deal with them when they arise and on how they might be avoided in the future. As Asplin LJ says in her foreword to the book, it '*provides the practitioner with a clear guide to the essential law and practice in an area which is often a morass of detail and which is fraught with complexity and uncertainty*' and it '*also maintains a careful balance between the legal and the practical which will be welcome to all.*' It is hoped that this book will be a useful aid to trust practitioners seeking to assist their clients in what may well be particularly stressful and delicate situations.

***A Practitioner's Guide to Correcting Mistakes in Pension Schemes* will be published by Bloomsbury Professional on 10<sup>th</sup> March 2022, priced at £115 in paperback and £93.15 for the eBook. It is available to [pre-order here](#).**

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<sup>4</sup> *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Bank* [2018] EWHC 2839 (Ch), [2020] EWHC 3135 (Ch).

<sup>5</sup> *Britvic plc v Britvic Pensions Ltd* [2021] EWCA Civ 867.

<sup>6</sup> *Bhaur v Equity First Trustees (Nevis) Ltd* [2021] EWHC 2581 (Ch); *Dukeries Healthcare Ltd v Bay Trust International Ltd* [2021] EWHC 2086 (Ch).