Neutral Citation Number: [2017] EWHC 3 (Ch)

Case No: HC-2016-002109

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 January 2017

Before :

MASTER MATTHEWS

- -

Between :

Patricia Marigold Bullard	**Claimant**
- and -	
(1) William Harry Bullard	**Defendant**
(2) Virginia Winifred Faire	

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Mathew Roper (instructed by **Birketts LLP**) for the **Claimant**
The Defendants were not present or represented

Hearing date: 14 October 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MASTER MATTHEWS

Master Matthews:

Introduction

1. This is my judgment on a claim made by claim form issued under CPR Part 8 on 19 July 2016, in substance for an order determining the true construction of clause 3 of a trust settled by the claimant on 3 September 2002, or alternatively rectification of the trust deed. The claimant is the settlor and one of the trustees of the trust. The defendants are two of the (adult) children of the settlor. They are also the other two trustees of the trust and two of the beneficiaries.

2. The claim is supported by a witness statement of the Claimant dated 12 July 2016, setting out the background and main facts, supplemented by a witness statement of Ian Cain, her former solicitor, dated 19 June 2016, setting out some additional facts. There are also a witness statement of Bernadette Catherine Baker, her present solicitor, dated 11 July 2016, dealing only with the position of HMRC, and two short, formal witness statements dated 12 September 2016, one from each of the two defendants, consenting to the relief sought.

3. As appears from the witness statement of Ms Baker, HMRC was asked if it wished to be joined as a party but before issue of the claim replied in the negative. On 5 September 2016, upon considering the letter from HMRC and the acknowledgments of service of the defendants, Deputy Master Hansen ordered that the matter be listed for disposal. The claim was argued before me on 14 October 2016, when Mathew Roper of counsel appeared for the claimant. The defendants did not appear and were not represented.

Facts

4. On the evidence placed before me, the following is established. In 2001 the claimant, who claims no expertise in trusts, tax or financial planning, sought advice from Eversheds LLP about mitigation of inheritance tax to be paid on her death. Unfortunately the file maintained by that firm at the time is no longer available, and the claimant had been obliged to rely on the copies of miscellaneous documents surviving on Eversheds' document management system, and such documents as she received and retained. Together with her present solicitors, and the assistance of Mr Cain, one of the team who advised her at Eversheds, she has attempted to reconstruct the advice she says she received from that firm.

5. Her evidence is that she was advised to enter into a so-called "double trust" arrangement in respect of her house. She understood this to mean (1) creating a life interest trust under which she reserved a life interest in the trust fund; (2) creating a second, interest in possession trust for others whom she wished to benefit; (3) sale of her house to the trustees of the first trust, leaving the purchase price outstanding; (4) assigning the resultant debt to the trustees of the second trust. She understood that if she did this there would be no charge to inheritance tax at the outset and, if she survived at least three years, inheritance tax on her death would be mitigated, and, after seven years, avoided altogether.

6. She makes clear that it was her intention that the second trust (referred to at step (2) above)) should be an interest in possession trust, relying on a number of the

documents now available to her. Although Mr Cain is unable to recall the specific advice given to the claimant by his then firm, having reviewed the miscellaneous documents available to the claimant, he has confirmed that his advice would have been that the second trust should be an interest in possession trust, under which each of the beneficiaries should have an interest in possession in the trust fund.

7. The claimant established the first trust (to be known as "the Bullard Property Trust") on 16 August 2002. On the same day she entered into an agreement to sell her home, a property called "Curlews" to the trustees of that trust. Transfer was to take place on 14 days' notice being given by either side, or 20 years later, whichever was the sooner. The sale price was left outstanding, represented by a Loan Note. As already mentioned, the claimant established the second trust (to be known as "the Bullard Family Trust") on 3 September 2002. On the same day she executed a deed of gift assigning the Loan Note to the Family Trust.

8. The trust deed for the Family Trust states its name on the front page, accompanied by the words "(an Interest-in-Possession Settlement)". The trust fund is divided into two parts, one for each of the two branches of the family represented by the two children of the claimant. The combined effect of clauses 1.2 and 3.1 of, and the Third Schedule to, the trust deed, but subject to an overriding power of appointment in clause 4, is that the first defendant, his wife and their two children are each a Primary Beneficiary of one quarter of one half of the trust fund, and the second defendant, her husband and their three children are each a Primary Beneficiary of one fifth of the other half of the trust fund. Clause 3.2 then requires the trustees to pay to each Primary Beneficiary the income of the relevant share for life, then to the children of the Primary Beneficiary for life, and finally the income and capital to the grandchildren of the Primary Beneficiary, contingently on attaining the age of 18 years, with cross-accruers to the other shares in default.

9. If all the grandchildren of the claimant had been adults at the time when the Family Trust was established in 2002 there would have been no problem. Unfortunately, it appears that none of them was. As is well known, section 31 of the Trustee Act 1925, except so far as modified or excluded, has the effect of divesting a vested interest of a minor in trust property and replacing it with a contingent interest in accumulations of income not paid to or applied for the benefit of the minor beneficiary, to be held for that beneficiary contingently upon attaining the age of majority. This is a case about trust law, rather than one about tax law, especially in the absence of HMRC as a party. But it appears that such a divesting in the present case would have a significant fiscal effect. This is that the Family Trust would not be to that extent an interest in possession trust for the purposes of avoiding an immediate charge to inheritance tax.

Construction of the trust deed

10. It is therefore necessary to consider whether section 31 does have this effect in the present case. This is a matter of construction. For this purpose I take into account the background to the trust deed, including the fiscal aspects: *cf Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912-913, per Lord Hoffmann. However, I must and do ignore all the evidence as to the settlor's intention adduced in the witness statements for the purposes of the alternative claim to rectification.

11. Section 69(2) of the Trustee Act 1925 provides that the powers conferred by the Act apply

> "if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument".

It has been held on numerous occasions that section 31 confers powers capable under section 69(2) of being modified or excluded by the terms of the trust instrument: see *eg Re Delamere* [1984] 1 WLR 813, CA.

12. Even more unfortunately, however, the draftsman of the Family Trust included a provision in paragraph 6 of the Second Schedule to the trust deed which *expressly applies* section 31, albeit in the standard enhanced form. This shows the intention of the draftsman, and, on the face of it, of the settlor, that section 31 *should* apply, notwithstanding (i) the description of the trust as an "interest in possession settlement" in the trust deed and elsewhere, (ii) the divesting effect on *minors'* interests under the trust. In relation to the interests of the Primary Beneficiaries who were *adults* at the time it was set up, it indeed appears to have been an interest in possession settlement.

13. It is nevertheless argued by Mr Roper, on behalf of the claimant, that as a matter of construction the trust deed can be interpreted so as to exclude section 31. He refers to clause 13.1, which reads:

> "The Trustees shall not exercise any of the powers contained in the Second Schedule so as to conflict with the beneficial provisions of this Settlement."

This is an example of a "no-conflict" clause often found in interest in possession trusts, intended to prevent accidental loss of the fiscal advantages of such a trust by an unlikely exercise of a power conferred.

14. The argument in the present case is that (1) the beneficial provisions of the trust provide for interests in possession for *all* the Primary Beneficiaries, and (2) the clause applying an enhanced version of section 31, in paragraph 6 of the Second Schedule, is one of "the powers contained in the Second Schedule". Hence (3) that provision cannot be used in any way that would prevent the interest in possession trusts for the minors from taking effect.

15. The main problem with this argument is that it entirely removes the point of inserting paragraph 6 into the Second Schedule at all. There is no other way that that paragraph can operate, even minimally, except by divesting the interests in possession conferred on the minor beneficiaries. So if that paragraph is to have any meaning, it cannot be construed in that way. A judge must begin by assuming that all the provisions inserted expressly into a deed are intended to have *some* meaning. But on this construction the clause would have none.

16. However, even if that problem were got over, there is a further problem. This is that section 31 is in substance not one of "the powers contained in the Second Schedule", and so the no-conflict clause cannot apply. Mr Roper says that the paragraph *incorporates* the statutory power into the trust deed. I do not agree. It is certainly a power *referred* to in that Schedule. It is even a power *modified* by that Schedule. But

its *source* is not the Schedule at all; it is the statute. The statutory power would apply even without any reference to it. The reference in the paragraph engages section 69(2) of the 1925 Act, by which *the statutory power* applies in a modified form.

17. Accordingly, I conclude that, as a matter of construction, the interests of the minor beneficiaries were divested by the operation of section 31. In that case, however, Mr Roper argues that the case is one for rectification of the trust deed.

Rectification of the trust deed

18. There is no doubt that a voluntary settlement such as the Family Trust may be rectified if the necessary conditions are satisfied, and in such a case it is the intention of the settlor that matters: *Re Butlin's ST* [1976] Ch 251. In that case Brightman J rectified a voluntary settlement where a power for the majority of trustees to bind the minority was included, but in a form which was more limited than, as it later appeared, the settlor had intended. The settlor sought rectification of the settlement so as to extend the power of the trustees to act by a majority in all cases.

19. The judge said (at p 260):

> "rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention."

20. The necessary conditions for the remedy of rectification to be available were expressed recently by Barling J in *Giles v Royal National Institute for the Blind* [2014] EWHC 1373, summarising the effect of the Court of Appeal's decision in *Racal Group Services Ltd v Ashmore* [1995] STC 1151, as follows:

> "(1) While equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. One aspect of that caution is that the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument, there must be convincing proof to counteract the evidence of a different intention represented by the document itself (1154h-1155b);
> (2) There must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended; for example it is not sufficient merely that the document fails to achieve the desired fiscal objective (1158f-g);
> (3) The specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did *not* intend what was

> recorded; they also have to show what they did intend, with some degree of precision (1158g-j);
> (4) There must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent. This criterion has been much criticised: the purpose of it, and its actual content and scope, are by no means clear. In *Racal* Peter Gibson LJ expressly approved the following summary of the principle by Vinelott J in the same case. Vinelott J stated that the court must be satisfied:
>
> > "that there is an issue capable of being contested, between the parties or between a covenantor or a grantor and the person he intended to benefit, it being irrelevant first that rectification of the document is sought or consented to by them all, and second that rectification is desired because it has beneficial fiscal consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal benefit." (1155c-1158b)."

I will refer hereafter to these four points made by Barling J in *Giles*, but summarising the decision in *Racal*, as *Racal/Giles* (1), *Racal/Giles* (2) *etc*.

21. In passing I note that the effects/consequences distinction referred to in (2) above at the date of that case featured also in the law of rescission for mistake: see *eg Gibbon v Mitchell* [1990] 1 WLR 1304, 1309-1310. But since then it has been revisited, and found wanting, for the law of rescission by the Supreme Court in *Pitt v Holt* [2013] 2 AC 108, [116]-[135]. Here I am concerned with rectification rather than rescission, and, although rectification was also mentioned in passing in *Pitt v Holt*, I was not addressed on its significance in this case. I will therefore leave the possible impact of *Pitt v Holt* on *Racal* for another occasion. (I note in passing, but without comment, the view of the judge in *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch), [15], which was cited to me.)

22. HMRC, in declining the claimant's solicitors' invitation to be joined into the proceedings, asked that the court be referred to *Racal Group Services Ltd v Ashmore* [1995] STC 1151 (and the authorities discussed in that case), *Alnutt v Wilding* [2007] EWCA Civ 412, and a part of the relevant HMRC guidance on specific tax-avoidance schemes relating to what it calls "pre-owned assets". I do not know why HMRC wanted its guidance to be referred to the court. As I have already said, the present is not a tax case, and I am not applying any tax law. I have of course looked at it, but in my opinion it is irrelevant to the issue I have to decide.

23. As for the two cases mentioned by HMRC, the former is referred to above, and I return to it below. The latter case was one where the settlor executed a settlement in a written form drafted by his professional advisers which created a discretionary trust, although in order to achieve his object of saving tax he needed to make an interest in possession trust. Both the High Court and the Court of Appeal refused rectification.

24. Rimer J (with whom the Court of Appeal agreed) said ([2006] EWHC 1905 (Ch):

> "[24] … Since, for reasons given, [the settlor] must be assumed to have understood the meaning of the fact of the substantive trust the powers of the settlement he executed and to have intended to execute a settlement in that form and having the legal effect it did, there is no error in the drafting of the settlement or in his understanding of it that calls for correction. [The settlor]'s only mistake was in relying in [the lawyer]'s implicit advice that the payment of money to that settlement would be a potentially exempt transfer. That was wrong and apparently negligent advice, but in the circumstances of the case the remedy of rectification is not available to cure the damage it has caused."

In the Court of Appeal, Mummery LJ (with whom Carnwath and Hooper LJJ agreed) said:

> "[19] … The position is that the settlor intended to execute the settlement which he in fact executed … The mistake of the settlor and his advisors was in believing that the nature of the trusts declared in the settlement for the tree children created a situation in which the subsequent transfer of funds by him to the trustees would qualify as a PET and could, if he survived long enough, result in the saving of inheritance tax."

25. Carnwath LJ added:

> "[26] … The claimant's difficulty was not simply to establish a mistake such as would justify the intervention of the court, but also to show how the document should be corrected. The judge … examined the alternative draft that had been put in front of him with the invitation that this should be the rectified form of the document. He concluded that, even if [the settlor] did not intend to establish a settlement in the form executed, the evidence fell short of proving that he intended the settlement to incorporate the various trust powers and provisions set out in the alternative draft."

26. As I see it, these are two separate points. The point made by Rimer J and Mummery LJ was that the settlor made no relevant mistake. He meant to execute and did execute the settlement placed before him. The point made by Carnworth LJ was the additional one that, even if the settlor had made a mistake, it was impossible to rectify the deed because interest in possession settlements come in all shapes and sizes, and the court could not know (indeed, the settlor himself would not know) what form his particular intended settlement should take. The first point goes to what the settlor's mistake was (*Racal/Giles* (2)). The second goes to what the settlor really intended (*Racal/Giles* (3)).

27. I turn to apply the law to the facts of this case. As to *Racal/Giles* (1), there is "convincing proof" that the claimant intended to create an interest in possession settlement, because the settlor understood that if she did that there would be no immediate charge to inheritance tax. This "convincing proof" consists of the claimant's own evidence, that of Mr Cain, the fiscal context in which the advice was sought and given, and indeed the description given to the trust on the front page of the deed (though I regard the last as the least important element, and on its own it would not suffice).

28. As to the second, what has gone wrong here is that the draftsman has placed before the claimant for execution a draft trust deed which he or she no doubt assured the claimant would create an interest in possession settlement and not result in an immediate tax charge. On that basis the claimant has executed it. Unfortunately the trust deed does not create an interest in possession settlement, at least so far as concerns the interests of the minor beneficiaries. The claimant was not an expert in the field, and had no way of knowing that the inclusion of the section 31 power would have the effect it did. She relied on her lawyers to draft a trust which would have the effect she desired.

29. Now this is not a case where the correct document is muddled with another (*cf Marley v Rawlings* [2015] 1 AC 129). Nor (despite a stray reference in the evidence to the possibility of the draftsman's having copied over from the Property Trust to the Family Trust) does it appear to be a case where a clause is slipped in or missed out through a clerical or typing error. Instead it is a case where the claimant made no mistake as to which document she intended to sign, or as to the words that she intended to be included in it. But in *Re Butlin's ST* Brightman J held that rectification *was* available for cases where there was a mistake as to the legal meaning of words. It is true that what the claimant (and her draftsman) was mistaken about here was not actually the *meaning* of any of the words that she used in paragraph 6 of the Second Schedule, or even of the words in section 31. Instead, she (and probably her draftsman too) was mistaken as to the legal *effect* of using those words. But it is argued that that is nonetheless a mistake in the document which she executed which is capable of being rectified.

30. Mr Roper cited to me the decision of the then Chancellor, Sir Andrew Morritt, in *Price v Williams-Wynn* [2006] EWHC 788 (Ch). There trustees executed a deed, intending to create interests in possession for six beneficiaries. Unfortunately two of them were minors, and section 31 was not excluded. So the minors did not obtain interests in possession. The Chancellor said:

> "42. … This was essential to the achievement of the ultimate purpose of setting up full discretionary trusts and had the incidental benefit of using the beneficiary's nil rate band for inheritance tax purposes. The failure to exclude the provisions of section 31 of the Trustee Act in the case of Nicholas and Harry frustrated or delayed the accomplishment of that end and was not in accordance with the evident intention of the trustees."

He went on to say:

> "43. … Although an order for rectification should not be made for the purpose of conferring on the claimants or their beneficiaries a fiscal advantage which the negligence of their solicitors had denied them, although that would be its effect, but should be made so as to confer on the beneficiaries the full interest to which it was evidently intended that they should be initially and immediately entitled."

31. That case was decided before the decisions both at first instance and on appeal in *Allnutt v Wilding*, to which HMRC wished the court to be referred. If the decisions in the two cases were inconsistent, I would of course be bound by the decision of the Court of Appeal. In each case the person executing the deed relied on the lawyers to draft the document so that it produced the desired effect. Then the person executed it,

believing that it would do so. In each case it did not. The difference between them however is this. In *Price* the trustees knew that they needed, and therefore intended, to create interests in possession, in order to save inheritance tax. In *Allnutt*, the settlor knew nothing other than that he wanted to make gifts but also save inheritance tax. He knew nothing of interests in possession. It was the adviser who decided on the form of the settlement to be used, and he got it wrong.

32. In the present case the evidence satisfies me that the claimant wanted and intended to create an interest in possession trust, whereby all the Primary Beneficiaries obtained interests in possession. By using language, the legal effect of which the claimant mistook, she has failed to do so. The court therefore has power to rectify the trust deed to create the interests in possession intended.

33. Having been satisfied that the claimant had made a mistake as to the legal effect of the words used, it is further clear that there was specific evidence as to what the claimant wanted. She wanted interests in possession for all. Section 31 must therefore be excluded. Next, I am satisfied that there was a real issue as to the beneficial interests in the case. The interests which were taken by the minors under the trust deed were contingent. The interests intended by the claimant were absolute. Accordingly, the conditions in *Racal/Giles* (3) and (4) are satisfied.

34. But that is not the end of the story. Rectification is an equitable discretionary remedy. It is some 14 years since the trust was created. So I must consider the effect of delay on the case. There is however no evidence before me that the claimant has sat on her hands once she discovered the problem. I will therefore assume, unless counsel tells me otherwise, that there was no undue delay beyond the time reasonably to be taken in considering the matter and deciding to take action. It does not appear that any third party (except HMRC) will be affected if rectification is granted, and HMRC has made no complaint of delay. Accordingly I see no objection to granting the remedy of rectification in the present case.

Representation order

35. I am also asked to make a representation order so that all the beneficiaries are represented by the defendants. As at present advised, I cannot see why that is necessary, since under CPR rule 19.7A(1) a claim may be brought against trustees without adding any beneficiaries as parties, and under rule 19.7A(2) any order made in the claim is binding on the beneficiaries unless the court otherwise orders. If counsel wishes to address me further in writing on the point, he may of course do so. Otherwise I should be grateful to have emailed to me a Word version of the appropriate draft order.

Conclusion

36. For the reasons given above, I will grant rectification of the deed of trust for the Bullard Family Trust.