[2020] EWHC 394(Ch)

Claim No: PT-2019-001010

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES

PROPERTY TRUSTS AND PROBATE LIST (Ch D)

THE ANDREW PAGE FAMILY TRUST AND MARY ANN PAGE FAMILY TRUST

Before:

DEPUTY MASTER NURSE

Between :

(1) ANDREW PAGE **(2) MARY ANN PAGE**	**Claimants**
- and -	
OLIVER PAGE	**Defendant**

Ruth Hughes (instructed by **IDR Law**) for the **Claimants**

Hearing date: 3 February 2020

JUDGMENT

[handed down on 24 February 2020]

Deputy Master Nurse:

Introduction

1. This is my judgment following a hearing before me on Monday 3 February 2020. This was a disposal hearing, the Claim Form under CPR Part 8 having been issued on 5 December 2019.
2. The Claim is concerned with two 'Family Trusts' entered into on 12 September 2012: the Andrew Page Family Trust, the Settlor being the First Claimant, Mr Page; and the Mary Ann Page Family Trust, the Settlor being the Second Claimant, Mr Page's wife, Mrs Page. The two Family Trusts are in identical form save that Mr Page has a life interest under his Trust, and Mrs Page has a life interest under her Trust. Subject to the life interests there is a discretionary trust, the primary beneficiary stated to be Mr and Mrs Page's son, Oliver, the Defendant.
3. The Claim is also concerned with Mr and Mrs Page's matrimonial home, 258 Dobcroft Road, Sheffield, S11 9LJ ('the Property') which is registered at HM Land Registry with Title No: YWE41231 under their joint names. They each own a half share of the beneficial interest in the Property. On 20 September 2012 Mr and Mrs Page executed a Legal Charge ('the Charge') over the Property in the following terms:

   "THIS CHARGE ……..

   BETWEEN

   ANDREW PAGE and MAY ANN PAGE ……. (… 'the Chargors') of the first part

   and

   STEVEN PETER LONG and MELANIE ANN LONG acting as partners in UNIVERSAL TRUSTEES LLP of Oakwood Manor, East Harling, Norwich NR16 2 SQ as Trustees of the ANDREW PAGE Family Trust and the MARY ANN PAGE Family trust (….. 'the Chargees')

   WHEREAS

   The Chargors are the legal owners of ……. 'the Property' ….held by them as joint tenants at law and as tenants in common in equity and subject as hereinafter mentioned.

   The Chargors are the Settlors and principal Beneficiaries of …. [the two Family Trusts]… and are now desirous of charging their interest both legal and equitable in the said property in favour of the Chargees as Trustees of the Trusts.

   NOW THIS DEED WITNESSETH as follows:

   1. In this Deed the sum owing shall mean the value as at the date of sale of the property of the Chargors' share and interest in the property.

2. *The Chargors with full Title Guarantee hereby Charge the said property with the payment to the Chargees of the sum owing and the Chargees accept that their only recourse in respect of the sum owing is against the charged property.*
3. *The Chargors hereby consent to the entry of a restriction in Form P in favour of the Chargees being registered at HM Land Registry to acknowledge their interest in the property"*

The Charge was registered at HM Land Registry on 20 September 2020.

4. The relief sought in the Claim Form is expressed as follows:

"The Court is asked to:
a. make a representation order so that the Defendant can represent all the beneficiaries (other than the Claimants) of the Trusts;
b. set aside the Charge;
c. alter and/or rectify the register in respect of the title to the Property to remove the charge;
d. provide for the costs of this claim."

The evidence in the Claim

5. Both Claimants produced Witness Statements with copies of the relevant documents attached. There was no further evidence. The Defendant, Oliver, acknowledged service stating that he did not intend to defend the Claim. Indeed, he consents to the relief sought.
6. It appears that the motivation for what occurred in 2012 was that Mr Page's mother had suffered from Alzheimer's disease for several years and had to leave her own home to move into a care home. Her home then had to be sold to meet the care home fees. Mr and Mrs Page wished to avoid this if either of them suffered in a similar way, and Oliver would be deprived of the benefit of their main asset, their home.
7. Mr Page states that he became aware of the possibility of creating an asset preservation trust (what is subsequently referred to as an 'Asset Protection Family Trust' ('an APFT')) after receiving an unsolicited invitation from one of a group of companies carrying on business under the name of 'Universal Wealth', of which a Mr Steven Long and his wife Melanie were Directors. On 17 April 2012 Mr and Mrs Page attended a seminar where they were provided with a glossy A4 brochure headed 'Universal Asset Protection presents 'Keep it in 'The Family' Seminar'. Mr Long was the speaker. In his Witness Statement Mr Page describes what he remembers about the Seminar. This includes:

"The topic that caught my eye was the protection against care home fees. Mr Long explained that if it was suggested that your property must be sold to pay

for care home fees, the trust worked to ensure that your property was excluded from your estate and that meant that you would not have to sell it to pay for care home fees."

"As for how to set the trust up, Mr Long confirmed that a fee of £10 would be placed into the trust. It all seemed very straightforward when Mr Long discussed this"

"There was very little information provided at the seminar about any adverse tax consequences of setting up the trust or the effect of registering a legal charge against your property if this was sold. I recall that there was a mention of Inheritance Tax ('IHT') but nothing suggested there would be any adverse effect to the trust arrangements."

"There was a brief mention of capital gains tax ('CGT') during the seminar. Mr Long confirmed during his discussions that if money was placed into trust, this was treated for CGT purposes as an investment. I noted this down as I thought this was important and should be remembered when considering assets to place into trust, although realistically at the time we did not have the cash assets to place into trust. Mary and I had anticipated therefore that it would be our respective shares in the Property that would be placed into trust. I cannot recall Mr Long making any reference to property and any CGT consequences of placing property into a trust or on sale. I did not believe therefore that there were any CGT consequences to the arrangements being explained by Mr Long…."

"I do not recall Mr Long mentioning the process of setting up a charge at this point in the seminar should property be placed in trust. The terminology he used throughout the seminar when referring to the process was simply that of the 'property being placed into trust.' I did not think to question this terminology and what this meant at the time."

8. At the end of the seminar, those interested were able to make an appointment with their local area representative. Mr and Mrs Page arranged for their local representative, a Mr Bernie Drury, to visit them at home on 30 May 2012. In the meantime, under cover of a letter dated 25 May 2012, Mr and Mrs Page received a booklet headed 'The Universal Asset Protection Trust – Protecting your home and assets'. That booklet (24 pages) contains advice on a range of subjects, including the nature of the APT and tax. It also had a section about protection from care home fees, including:

   "The APT offers effective protection from care fees provided that at the time the assets were protected it was not reasonably foreseeable that you would need to go into care ….."

   As for tax, the booklet included the following general statement:

   "It is important to remember that the APT is not a tax planning tool during your lifetime, and assets protected by it will not fall outside your estate for

inheritance tax purposes. This is because you are named as the principal beneficiary of the Trust during your lifetime and therefore have what is known as a 'reservation of benefit' in the assets held within it."

The booklet does not contain any express advice about possible consequences so far as CGT is concerned. As Mr Page states:

".....we were not intending to use the trusts to mitigate our tax liability...."

Mr Page refers to further parts of the booklet, including where the consequences of selling their property are referred to as part of set 'Questions and Answers'. Mr Page comments:

"There is nothing in this question and answer section that indicates that should we wish to sell the property there would be any adverse tax consequences to us."

9. Mr and Mrs Page had their first meeting with Mr Drury on 30 May 2012. Both Mr and Mrs Page describe what occurred at this meeting, although Mr Page's Witness Statement has more detail. At the meeting, Mr Drury asked, among other things, about the value of the Property and Mr and Mrs Page's intentions so far as their son Oliver was concerned. Mr Page's Witness Statement includes the following:

"In respect of the trusts, Mr Drury advised us that the trusts would prevent any issues with IHT that may arise on our joint estate as the assets placed into trust would be ringfenced from our estate. Our property at the time was valued at around £400,000 and we had some cash assets, but the combined value of our joint estate did not exceed £650,000."

"In addition, Mr Drury also suggested that having trusts would prevent our house being sold to pay for our care home fees. Mary and I wanted to make sure that our son Oliver ...., who is our only child, would have the security of having an asset that he could use if he wished in the future....."

"I cannot recall that there were any discussions about any other tax, such as CGT or income tax during the meeting....."

"I do not recall any discussions relating to the charge to be placed against the property at this time. We were advised that we would have to arrange to have the joint tenancy to be severed and for the ownership to be changed to tenants in common to ensure that our half shares could be placed into trust....."

10. During the meeting, Mr and Mrs Page completed their instructions to proceed and signed an Instruction Form.

11. On 14 June 2012, Mr and Mrs Page received a letter (11 pages) which acknowledged receipt of their instructions and contained more information about the APFTs. In particular it was stated, concerning Mr and Mrs Page's continuing rights in the Property:

> *"This includes the absolute right of occupation during your lifetime, or if you choose to sell the property, the right to benefit from the proceeds of sale."*

As for the Trustees of an APFT, it was recommended that the Settlor should appoint a 'professional' Trustee to act with him/her. There was also a small section headed 'Capital Gains Tax' in the following terms:

> *"A main residence is normally exempt from CGT……. A main residence held in the APT enjoys the same exemption if occupied by the person who has the right to the trust assets during his or her lifetime. If the trust property is subsequently sold there will be no CGT liability on the asset…."*

Mr Page then states:

> *"Based on the information in the letter, it was not apparent to Mary and me that any charge to CGT would arise if the Property was ever sold in the future. Had we known that selling the Property would create this tax issue, this would have been a deal-breaker and we would not have proceeded with these trusts."*

12. On 15 July 2012 Mr and Mrs Page provided a list of the discretionary beneficiaries to be included in the APFTs as possible beneficiaries (including Oliver). At about the same time, Mr and Mrs Page paid a fee of £3,594 for the work being carried out on their behalf. This sum was invoiced by 'Universal Asset Protection'. On 22 August 2012, Mr and Mrs Page received copies of all the documents that they would be required to execute. These included a copy of a Legal Charge and a Deed of Appointment of Trustees. An appointment was arranged with Mr Drury for 12 September 2012.
13. Mr Page describes what happened at the meeting with Mr Drury on 12 September 2012 as follows:

> *"I read through the trust documents that had been prepared in Mr Drury's presence to check the documents through. It was then I noticed the reference to a charge and that this was to be placed against the property. It was at this stage that I questioned this as this differed from the simple notion that the property was placed into trust. I was told by Mr Drury that taking out a charge was how you placed property into trust. Mr Drury advised that trustees needed to be appointed to look after the assets placed into trust. His advice was that in addition to appointing each other as trustees of our respective trusts, we should also appoint Mr Long and his wife Melanie Long as professional trustees through their separate company Universal Trustees. Mary and I felt that Mr Drury was best placed to advise on who was appropriate and as such we followed Mr Drury's advice."*

14. Mr and Mr Page were left with the documents to sign, which they did on 19 September 2012. They each paid £10 as the initial trust fund of the two APFTs. The Deeds of Appointment appointed Mr and Mrs Long as New Trustees (described as partners in Universal Trustees LLP) of the APFTs. The Charge is as set out in paragraph 3 of this Judgment. Included with the documents, Mr and Mrs Page each signed a 'Letter of Wishes'.

15. The Charge was registered at HM Land Registry on 20 September 2012. Mr Page states:

> *"As Mr Drury had advised us that this was the mechanism used, we thought the wording of the charge would present no issues. We did not think to question the wording of the charge and its legal consequences as Mr Drury assured us that [Universal] used this charge frequently and that this was needed to ensure that our respective shares in the property were placed into trust. Having conducted due diligence on the company and found that Mr Long was a member of STEP (the recognised authority on these matters) we relied on his and Mr Drury's expertise and proceeded as advised."*

16. Mr Page goes on to say that, when scrolling through Ceefax in early 2018, he saw that an inheritance company had been closed for fraud. He discovered that the company was part of the Universal Group. Mr Page exhibits newspaper articles reporting that Mr Long and his companies were facing numerous allegations of fraud. Part of Mr Page's exhibit is also a report from STEP headed 'Universal Wealth Preservation' which states that, in 2017, STEP had received a number of complaints about Mr Long and, following a review, had suspended his membership on 1 November 2017.

17. Mr and Mrs Page took legal advice concerning their APFTs and the Charge, and the possible tax consequences. On 29 October 2018, Mr and Mrs Page executed Deeds removing Mr and Mrs Long as Trustees of their APFTs. They then decided to take steps to have the Charge set aside. Before commencing proceedings, Mr and Mrs Page's solicitors wrote to HMRC in the following terms:

> *"Mr and Mrs Page have instructed us regarding a claim they have to set aside a charge dated 20 September ("the Charge") which is registered on their home 258 Dobcroft Road, Sheffield S11 9LJ ('the Property'). The Charge benefits the trustees of two trusts settled by Mr and Mrs Page respectively on 19 September 2012.*
>
> *Mr and Mrs Page are the present trustees of those two trusts and the only living beneficiaries are them and their son, Oliver Page.*
>
> *If the property is sold, then the Charge requires a payment to the trustees in the sum value of the Property at the date of sale.*

We have taken legal advice from Counsel …… who has advised that such a payment would incur a charge to Capital Gains Tax under section 22 of the Taxation of Chargeable Gains Act 1992 because the payment obligation is not a debt within the meaning of section 25(1) of the Act: see Marren v Ingles [1980] 1 WLR 983. Plainly the disposal could not benefit from principal residence relief under section 225 of the 1992 Act.

Mr and Mrs Page entered into the transaction in order to mitigate future care home fees. They had no tax avoidance motive. They believed the transactions were tax neutral and that they would be able to sell the Property and protect a future property from care home fees in the same way. That understanding was mistaken. If they had known the true position they would not have entered into the Charge. The Charge is therefore liable to be set aside under Pitt v Holt [2013] UKSC 26.

We have provided herewith draft proceedings and draft witness statements of both Mr and Mrs Page together with exhibits which include both trust documents and the Charge.
Please let us know:

1. *Whether you agree with the tax analysis adumbrated above;*
2. *Whether you wish to be joined as a party to the claim;*
3. *If you intend to resist the claim, what the basis of your defence will be;*
4. *Alternatively, whether you would like the Court's attention brought to any authorities when the Court considers the matter substantively."*

On 6 November 2019, HMRC responded:

"In the circumstances here HMRC do not wish to be joined in the application being made to set aside the trusts on the grounds of mistake.

Please bring to the Court's attention to the Supreme Court decision in Futter and another (Appellants) v The Commissioners for her Majesty's Revenue and Customs (Respondent) and Pitt and another (Appellants) v The Commissioners for Her Majesty's Revenue and Customs (Respondent) [2013] UKSC 26.

If the Court sets aside the trusts please send a copy of the court order and any judgment issued in due course to the address above."

18. Following receipt of the above letter from HMRC, the present Claim was issued. I note that the HMRC letter refers to setting aside 'the trusts', rather than the Charge. However, the letter to HMRC expressly refers to setting aside the Charge, and the draft Claim Form and supporting evidence that was sent to HMRC is clear. In the circumstances I do not think that the Claimants' solicitors were obliged to seek further clarification from HMRC about the HMRC's attitude to the Claim.

Representation

19. CPR 19.7 provides, among other things, that where there is a claim about property subject to a trust (19.7 (1)(b)):

> *"19.7(2) The court may make an order appointing a person to represent any other person or persons in the claim where the person or persons to be represented –*
> *(a) are unknown;*
> *(b) cannot be found;*
> *(c) cannot easily be ascertained; or*
> *(d) are a class of persons who have the same interest in the claim and:*
> *(i) one or more members of that class are within sub-paragraphs (a), (b), or (c); or*
> *(ii) to appoint a representative would further the overriding objective."*

20. In the present Claim a representation order is sought so that the Defendant (Oliver) can represent all the beneficiaries (other than the Claimants) of the Trusts (the two APFTs).
21. Without setting out the detail of the two lengthy APFT documents, it is sufficient to say that the Settlors have a life interest under their respective APFTs and are referred to as the 'Principal Beneficiary'. In each 'the Beneficiaries' are named solely as Oliver. Oliver is also named as 'the Protector' in both Trusts. There is a long list of what are called 'Potential Beneficiaries', which not only includes relatives of the Settlor but a number of Charities. Both the Beneficiaries and the Potential Beneficiaries are interested as discretionary beneficiaries, subject to the Settlor's life interest and his/her powers of appointment. The Settlor/Principal Beneficiary is given the power to make appointments. The Protector is given, in the event of the Settlor/Principal Beneficiary losing mental capacity during his/her lifetime, the powers of appointment given to the Settlor.
22. As is made clear by both Mr and Mrs Page, the whole purpose of setting up the APFTs was to preserve their assets for Oliver, and also to speed up the Probate process following their death. It is therefore an extremely remote possibility that any of the 'Potential Beneficiaries' (other than Oliver) will ever become entitled to any part of the funds that might be the subject of the APFTs. Nevertheless, if the Charge is set aside, the only substantial asset subject to the APFTs will be removed. In all the circumstances, the person who, in practice, is most likely to be affected by the removal of the Charge is Oliver.
23. Oliver is therefore the primary discretionary beneficiary. He has been joined as the Defendant. In my view, for the purposes of CPR 19.7(2), not only is there a large class,

or which Oliver is in theory a member, with the same discretionary interest, and some members of that class are not easily ascertainable, but to appoint Oliver as representative would further the overriding objective.

24. Accordingly, I will make an Order that Oliver is appointed to represent all the beneficiaries under the two APFTs save for the Claimants.

Should the Charge be set aside?

25. On behalf of all the beneficiaries, save for Mr and Mrs Page, Oliver has consented to the relief that is sought in this Claim. However, I still have to be satisfied that the Charge can, as a matter of Law, be set aside; and, in particular, HMRC is entitled to know that the facts and circumstances have been fully considered by the Court, and that the potential liability for Capital Gains Tax ('CGT') on the sale of the Property can, applying well established legal principles, be removed. The evidence is that the Property is holding a 'pregnant gain' which, if the Property were now to be sold, could result in a charge to CGT of as much as £120,000. The requirement to make such a payment would clearly impair Mr and Mrs Page's ability to rehouse themselves.

26. In circumstances such as these, where no opposing argument is presented to the Court, a greater duty falls on counsel representing only one party to put relevant arguments, both for and against the granting of the relief sought, before the Court. In this respect, I am grateful to Mr and Mrs Page's counsel, Miss Ruth Hughes, for taking me helpfully and succinctly through the relevant arguments. In particular, as requested by HMRC, Ms Hughes has referred me to the conjoined Appeals to the Supreme Court in *Futter and another (Appellants) v The Commissioners for Her Majesty's Revenue and Customs (Respondent) and Pitt and another (Appellants) v The Commissioners for Her Majesty's Revenue and Customs (Respondent)* [2013] UKSC 26. As a shorthand I shall refer to this case as reported in the Supreme Court as "*Pitt v Holt"*.

27. The general principle to be applied is summarised in part of the headnote to *Pitt v Holt* (as reported at [2013] 2 AC 108), as follows:

> *"the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable whenever there was a causative mistake which was so grave that it would be unconscionable to refuse relief; that the test would normally be satisfied only when there was a mistake either as to the legal character or nature of the transaction, or as to some matter of fact or law which was basic to the transaction; that a causative mistake differed from inadvertence, misprediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not as such a mistake, could lead to a*

false belief or assumption which the law would recognise as a mistake; that the gravity of the mistake had to be assessed by a close examination of the facts, including the circumstances of the mistake, its centrality to the transaction in question and the seriousness of its consequences, including tax consequences, for the disponor, and the court then had to make an objective evaluative judgment as to whether it would be unconscionable, or unjust, to leave the mistake uncorrected; that the court was entitled on the evidence to find that, in the first case, the first claimant had made a grave mistake through her conscious belief or tacit assumption that the trust would have no adverse tax consequences; that the maxim "equity does nothing in vain" did not bar the granting of relief which would serve no practical purpose other than saving inheritance tax;"

28. Ms Hughes submitted that the following principles, as set out by Lord Walker, are to be applied:

(1) The jurisdiction to set aside a transaction will be engaged in cases where the donor or settlor was under a mistake. Either an incorrect conscious belief or a tacit assumption will amount to a mistake, but mere ignorance or inadvertence is not sufficient and neither is misprediction. However, the courts should be ready to infer a conscious belief or a tacit assumption where there is evidence to support such an inference.

(2) The court will only exercise its power if there has been "a causative mistake of sufficient gravity". This test "will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction". Before *Pitt v Holt* the mistake had to concern the "effects" of the transaction rather than its "consequences". This requirement, which generally precluded setting aside gifts or settlements simply on the basis that the donor or settlor was mistaken as to the tax implications, no longer applies.

(3) The mistake must be such that it would be unconscionable for the recipient of the property transferred to retain it. In order to decide whether this is so the court "may and must form a judgment about the justice of the case".

(4) In a claim for mistake there must be an issue between the parties which is capable of being contested. But this does not mean that the recipients of the property transferred must actually oppose the claim, merely that the parties' property rights would be affected by the order sought.

(5) There is no bar to granting relief on the basis that it would confer a tax advantage, though in cases of artificial tax avoidance the court might refuse to exercise its discretion on the grounds of public policy.

29. I have set out the relevant facts and circumstances in this case at some length in order to show how clearly, in my view, the granting of the relief sought can be justified as being within the principles to be applied as set out in *Pitt v Holt.* It is clear that the whole transaction that took place in 2013 was undertaken on the basis of the false premise that it was tax neutral, and that there would be no adverse CGT consequences if Mr and Mrs Page, during their lifetimes, should wish to sell their home and buy another property.

30. Indeed, it seems to me that this is not a case where Mr and Mrs Page can be said only to have been mistaken as to the consequences of the transaction they were entering into. On the evidence, it is clear that the element of the transaction that required the execution of the Charge was something that was fundamentally different to what they had understood and intended. That is, that they thought they were transferring their respective beneficial interests in the Property into the APFTs, whereas they actually executed a charge over their respective beneficial interests the benefit of which became an asset subject to the trusts of the APFTs.

31. As for whether, having found this degree of 'mistake', I should now set aside the Charge, I bear in mind in particular the following passages from Lord Walker's speech in *Pitt v Holt:*

> *"126. The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion…….The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus …… on the facts of the particular case.*
> *128. ……The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case."*

32. I am satisfied in the present case that the mistake is so serious, and in particular the potential prejudice to Mr and Mrs Page so far as their ability to rehome themselves in the future is concerned, that it would be unconscionable to allow the Charge to stand.

Conclusion

33. The Court has power under Schedule 4 of the Land Registration Act to make an order under paragraph 2(1)(a) to correct a mistake or (b) bring the register up to date. The present case is clearly one where the register should be altered by removing the registration of the Charge as soon as the Court has ordered that the Charge is set aside.
34. I shall therefore order that the Charge be set aside and the registered title of the Property be rectified by the removal of the registration of the Charge.

Deputy Master Nurse
24 February 2020