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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY APPEALS
[2018] EWHC 3728 (Ch)



No. CH-2016-000262

Rolls Building
Fetter Lane
London EC4A 1NL

Monday, 10 December 2018

Before:

MR JUSTICE MORGAN

B E T W E E N :

GEORGE HENRY JOHN HILTON

Appellant/Claimant

- and -

JACQUELINE CLARE COSNIER

Respondent/Defendant

MR J. COUSINS QC (instructed by Direct Access) appeared on behalf of the Claimant.

MR M DUBBERY (instructed by Direct Access) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE MORGAN:

1 This is an appeal from an order dated 6 October 2016 made by District Judge Lightman sitting in the County Court at Central London. By his order the district judge dismissed the claim of the claimant, George Hilton, and dealt with the costs of the action.

2 The claim in question was for a declaration, which I will take from the claim form, in these terms,

"That by an *inter vivos* settlement, created on 27 May 1994, the defendant holds property on trust for the four grandchildren beneficiaries who became absolutely entitled to the property upon the death of the life tenant on 7 December 2014".

The property which is said to have been the subject of that Trust is a residential property at 12 Johnson Drive, Mansfield, Nottingham.

3 Before dealing with the substance of the appeal, I ought to refer to certain procedural matters. In this case, the claim would ordinarily have been tried by a circuit judge but the case was formally released for trial to District Judge Lightman. That meant that the Appeal Court, for an appeal against his order, was the High Court and not the county court. The destination of an appeal in a case of that kind was decided by Kerr J in *Topping v Ralph Trustees Limited* [2017] EWHC 1954 QB. Before it was realised that the appeal in this case should be dealt with by the High Court, Judge Dight, sitting in the county court, was asked to deal with an application for permission to appeal. Judge Dight granted permission to appeal.

4 On the face of it, Judge Dight's order was made without jurisdiction. The question of jurisdiction in relation to Judge Dight's order was not specifically raised before me. I asked Mr Cousins QC, who appears for the appellant, to comment on this point. He suggested that the right analysis was that this was a case where Judge Dight had *de facto* jurisdiction. That suggestion was not further investigated, as I indicated that if permission to appeal still needed to be given by the High Court, I would grant such permission. Accordingly, the order to be made following this judgment should include a direction that permission to appeal is given, to the extent that that is necessary.

5 The principal question which arises on this appeal is whether an oral statement made by a Mr Walker in May 1994 created the Trust alleged by the claim. If that question were to be decided in favour of the claimant, some other issues might then need to be addressed. One question would be whether the district judge decided against the claimant on other grounds, and whether the appellant had to appeal those other grounds, or whether those other matters were only relevant if they had been raised by a respondent's notice, which has not been served. Further, if the appellant had to appeal the district judge's findings in relation to other matters, the question might be whether such an appeal involved, or included, a challenge to the district judge's findings of fact and whether it was open to the Appeal Court, on the material before it, to reverse those findings of fact.

6 In these circumstances, with the agreement of the parties, I have heard argument on the principal question only, which, as I have explained, relates to the effect of an oral statement made by Mr Walker in 1994. Between 1991 and May 1994, Mr Walker had been living with a Miss Janet Overton in a property which is not the property the subject of this dispute. In May 1994, Mr Walker wished to separate from Miss Overton as he had begun a

relationship with another woman whom he later married. The other woman was known as "Vicky", later "Vicky Walker".

- 7 In order to provide for Miss Overton after their intended separation, Mr Walker bought the property the subject of this dispute. On 27 May 1994 he completed the purchase of the property. This is the date given in the claim form as the date of the alleged *inter vivos* settlement.
- 8 On 31 May 1994, Mr Walker made an oral statement to Miss Overton, and it is that statement which is at the heart of the issue on this appeal. The evidence of the statement comes from Miss Overton, who swore an affidavit on 10 July 2003, which was after Mr Walker had himself died on 13 January 2002. The affidavit was prepared, as I understand it, to assist the executors of the estate of Mr Walker with discussions they were having with the Inland Revenue as to how the property should be treated for the purposes of Inheritance Tax.
- 9 The affidavit runs to five or six pages. The main focus of the affidavit is on the relationship between Mr Walker and Miss Overton, with the point being made that Mr Walker had given to Miss Overton a life interest in the property. The existence of such a life interest would have been highly relevant to the Inheritance Tax treatment of the property. At the hearing before me, it was not strictly necessary to go into the question of whether Miss Overton had a life interest in the property, but I will proceed on the basis that she did have such an interest, and I will further proceed on the basis that that interest was created by the oral statement made to her by Mr Walker in May 1994.
- 10 The parts of the affidavit which are relevant for present purposes are paras.13 and 16. The paragraphs refer to "he", and that is a reference to Mr Walker. Paragraph 13 reads,
- "He made a decision to buy 12 Johnson Drive and decided that I should live there, and he said, 'I have bought it for you to live in for the rest of your life but I am not giving it to you - it is to go to my grandchildren'. I have lived there continuously from 31 May 1994".
- 11 That is the end of para.13. Paragraph 16 reads,
- "He told me that my occupation of the house, and the monthly payments, were for my lifetime, and that is why he also made arrangements for a pension for me after his death. In a telephone call at Christmastime 2000, he spoke to me about the arrangement about the house, when his daughter Jackie was there. He said, 'I have left the house safe for you. No-one is going to go short or be destitute, and then it is going to the grandchildren'."
- The reference to Mr Walker's daughter Jackie is a reference to Jacqueline Cosnier, who is the respondent in this appeal. I was not asked to make any finding, and the district judge had made no finding, as to whether Mme Cosnier was in a position to have heard what Mr Walker said to Miss Overton as recorded in para.16 of the affidavit.
- 12 Mr Cousins, who appears on behalf of the appellant, submits that Mr Walker's oral statement on 31 May 1994 created a Trust under which Miss Overton had an interest for life and after her death, the grandchildren were beneficially entitled to the property. The district judge did not agree as to the alleged effect of the oral statement. On this appeal, Mr Cousins submits that the district judge simply came to the wrong interpretation of the undisputed oral statement. In the course of his submissions, Mr Cousins accepted that the context of the

statement is important, and he further accepted that because the court is asked to construe an oral statement, as distinct from a complete written document, evidence as to events which took place after the statement was made is admissible evidence for the purpose of assisting the court to arrive at the correct interpretation of the statement. I will therefore describe something more of the context in which the oral statement was made.

- 13 In May 1994, Mr Walker was 73 years old and Miss Overton was 53 years old. Mr Walker had two daughters by his first wife. The two daughters were Jane (now Jane Hilton) and Jacqueline (that is Mme Cosnier). It is Mme Cosnier who is the respondent to this appeal, as I have said. Jane was born in 1950 and was about 44 years old in May 1994. Jacqueline was born in 1953 and was about 41 years old at that time. I was not given the months of the years in which the daughters were born, so my calculations are approximate. In May 1994, Jane Hilton had two children, namely the claimant, George Hilton, born in 1986, and Thomas, born in 1992. In May 1994, Jacqueline had one daughter, Alice, born in 1991. Jacqueline had a second daughter, Joanna, born later, that is in 1996. So in May 1994 there were three grandchildren, and there are now four.
- 14 The oral statement which is now relied upon was made to Miss Overton alone. There was no witness present at the time. It is clear from later documents that Mr Walker did not tell his daughter Jane that he had declared a Trust in favour of his grandchildren. He did not tell her that in May 1994 or at any time prior to his death in 2002.
- 15 I now need to refer to an event which occurred in 2001. In August 2001, Mr Walker decided to give the property to his daughter, Mme Cosnier. He executed a transfer of the property to her on 24 August 2001. Mme Cosnier did not give any consideration for the transfer to her. On the assumption that Miss Overton had a life interest in the property at that time, then Mme Cosnier was taking the property subject to that life interest. On the other assumption, that the property was subject to the Trust contended for by the appellant, then the transfer to Miss Overton did not give her anything of any value. Instead, it made her the trustee of the property in place of her father.
- 16 I do not have any findings made by the district judge as to what led Mr Walker to transfer the property to Mme Cosnier. However, I do have a letter written by Mr Walker to her on 14 October 2001. The terms of that letter have been scrutinised at the hearing of this appeal. Although Mr Cousins maintained otherwise, I read that letter as involving a clear indication that Mr Walker believed when he wrote the letter, and when he gave the property to Mme Cosnier, that he was giving something of value to her. I also find that she was entitled to read the letter in the same way. That reading is inconsistent with everyone understanding at the date of the letter that there was no transfer of value to Mme Cosnier; what instead was happening was that she was becoming a trustee, with no beneficial interest of her own and with obligations under the Trust.
- 17 On 24 October 2001, Mr Walker made his last Will. There was no evidence as to what he had done, in terms of making a Will, at any time before October 2001. There was no evidence of the existence of a Will in May 1994 and no evidence as to whether anything happened to the Will between May 1994 and October 2001. I was not shown the Will of October 2001. I understand that it did not mention the property, but that would be readily explained by the fact that Mr Walker had transferred the property to Mme Cosnier in August 2001. I am told the Will did not mention the grandchildren, but after providing for Vicky Walker (the widow), the estate was divided between the two daughters: Mrs Hilton and Mme Cosnier.

- 18 I was shown a number of documents concerning the Inheritance Tax treatment of the property. Some of the statements in those documents are confused. They do, however, indicate to me that Mr Walker's solicitor, who had acted for him more than once in the past, was, following Mr Walker's death, not immediately aware of any declaration of trust in favour of the grandchildren. If he subsequently became aware of that possibility, that there was a Trust in favour of the grandchildren, it would have been around the time of a letter he wrote to the Inland Revenue on 26 July 2002.
- 19 So that indicates the state of Mr Walker's solicitor's knowledge of any declaration of trust before Mr Walker's death. I have already held that Jane Hilton was not aware of such a Trust before his death. The district judge also held that Mme Cosnier was not aware of such a Trust before she took the property in 2001. Mr Cousins was minded to submit that the district judge's finding as to Mme Cosnier's knowledge was not reliable, but it is the finding he made, and, in any event, the transfer of the property to Mme Cosnier in August 2001, and the letter to her of October 2001, would indicate to her that she was to take a beneficial interest in the property and she could not have taken a beneficial interest in the property if she was taking merely as trustee for Miss Overton and the grandchildren.
- 20 Miss Overton died on 7 December 2014, and thereafter this litigation began. As I have explained, the positions taken up in the litigation are as follows. Mr Hilton, the claimant, says that after Miss Overton's death, the property is held by Mme Cosnier on trust for the four grandchildren. Mme Cosnier says that there is no such Trust. The question before me, therefore, is whether the oral statement made by Mr Walker in May 1994 amounted to a declaration of trust for Miss Overton for life and, after her death, for the grandchildren. Happily, the parties are agreed as to the legal test which I should apply when determining whether the oral statement amounted to a declaration of trust.
- 21 I was taken to the way matters were put by Scarman LJ in the Court of Appeal in *Paul v Constance* [1977] 1 WLR 527 at [531 F to H]. Lord Justice Scarman referred to the submissions of counsel in that case and to two authorities relied upon in those submissions. Lord Justice Scarman then said,
- "He was able to extract from them this principle: that there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust".
- 22 Mr Cousins also showed me that that passage which I have read was relied upon by Rimer LJ in the more recent decision of the Court of Appeal in *Ong v Ping* [2017] EWCA Civ 2069 (I refer to the passage at para.58). Accordingly, I must ask myself whether the oral statement amounted to a clear declaration of trust and whether that statement is clear evidence from what was said of an intention to create a Trust.
- 23 The rival contentions as to the meaning of the statement are as follows. Mr Cousins says that the words constituted an oral declaration of an immediate binding Trust whereby Mr Walker disposed of the entire beneficial interest in the property. It is submitted that the disposal took place in two stages or in two respects. The first stage was to give the property to Miss Overton for life. The second stage was to give the beneficial interest in the property to the grandchildren after her death. Mr Dubbery, who appears for the respondent, submits that the statement as to the grandchildren was at most a statement of intention on the part of Mr Walker as to what would happen to the property after Miss Overton's death. That intention would need to be implemented in some way at some time. It could be implemented by an *inter vivos* arrangement or by Will but until something of that kind

happened, Mr Walker had not disposed of the property, apart from the creation of a life interest in favour of Miss Overton.

- 24 I prefer the submissions of Mr Dubbery and I agree with the district judge that the oral statement did not create a Trust in favour of the grandchildren. The relevant considerations are:
1. Apart from the suggested meaning of this statement made to Miss Overton, Mr Walker never told anyone that he had created a Trust. He did not tell his solicitor and he did not tell his daughters. He did not tell his grandchildren, although I accept they were fairly young at all material times.
 2. Mr Walker acted inconsistently with the existence of the alleged Trust when he gave a beneficial interest in the property to Mme Cosnier.
 3. Mr Walker had no reason to create a Trust in favour of his grandchildren in 1994.
 4. The purpose of the oral statement was to explain to Miss Overton that she was not going to own the property but she would instead be able to live there.
 5. Mr Walker explained to Miss Overton why she was not going to own the property. For the purpose of giving that explanation, he referred to the position of his grandchildren. Perhaps he wanted Miss Overton to know that he was not giving the property to Vicky Walker, as she became.
 6. A statement which meant that Mr Walker intended that his grandchildren would own the property after Miss Overton's death made perfect sense. He would expect to die before Miss Overton, his daughters may or may not survive Miss Overton, so that by the time of Miss Overton's death, which would be the relevant time, the property would stay in the Walker family and would pass to the generation expected to be relevant at that time, namely the generation of his grandchildren.
- 25 Mr Cousins stressed that the oral statement did create some sort of Trust under which Miss Overton had a life interest, so, he said, the question is not, "Was there any Trust?" but rather, "What were the terms of the admitted Trust?". I do not think that is the right approach in this case. Assuming that Mr Walker did make a commitment in relation to Miss Overton, it does not follow that he made a commitment to anyone else. I do not read his words as involving any further commitment.
- 26 I considered with Mr Cousins in the course of argument whether the words in question could be effective to create a Trust in favour of the grandchildren in other circumstances, for example, if Mr Walker had used the same or similar words at a time when he transferred the property to someone who was obviously going to be a trustee of the property, such as a Trust corporation or a solicitor or a trusted friend, then the words might produce the effect that the transferee was not to acquire any interest of his own but was to hold the property on Trust for the grandchildren. Indeed, if Mr Walker had transferred the property to Miss Overton, using words of that kind, then the words might have imposed such trust on her, but I find that the words operate in an altogether different way when Mr Walker was retaining title to the property.
- 27 In the circumstances of this case, I consider it is completely unreal to think that Mr Walker was giving an imperative direction to himself, binding himself with immediate effect as to what was to happen after Miss Overton's death. A much more realistic reading of the words used is that Mr Walker was saying to Miss Overton that she would not own the property

outright as he intended to give the property to his grandchildren. Such a reading does not involve a declaration of trust by Mr Walker.

- 28 It follows that the appeal will be dismissed. It also follows that the further questions I identified earlier as potentially arising do not arise. The questions which now need consideration are the costs in the county court and the costs of this appeal.
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CERTIFICATE

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5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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