



Neutral Citation Number: [2021] EWHC 694 (Ch)

Case No: PT-2020-000692

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/3/2021

Before:

MASTER CLARK

Between:

MR NICHOLAS JOHN WARE

Claimant

- and -

MRS CONSTANCE WILTSHIRE WARE

Defendant

Susannah Meadway (instructed by **Penningtons Manches Cooper LLP**) for the
Claimant

James Poole (instructed by **Penningtons Manches Cooper LLP**) for the **Defendant**

Hearing dates: 11 January 2021

Approved Judgment

I direct that this approved judgment, sent to the parties by email on 29 March 2021, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

1. This is an application by Pt 8 claim dated 8 September 2020 seeking rectification, alternatively rescission, of two deeds of appointment dated 1 July 2013 (“the 2013 Deeds”) made by the claimant and the defendant as trustees of two will trusts (“the Trusts”) created by a deed of variation dated 4 October 2005 (“the Deed of Variation”).
2. The claimant, Nicholas Ware, is a trustee and beneficiary of the Trusts. He is unmarried and has no children.
3. The defendant, Constance Ware, is the claimant’s co-trustee and beneficiary of the Trusts. She is the claimant’s mother, and he is her only child.
4. In summary, each of the 2013 Deeds is said to have mistakenly (and unnecessarily) included provisions which terminated the claimant’s existing interests in possession and appointed new ones in their place, when they were only intended to add certain persons as additional default beneficiaries.
5. At the hearing I made a representation order under CPR 19.7(2)(d)(i) for the defendant to represent all living, unborn and unascertained persons (other than the claimant) who are or who may become interested under the Trusts on the grounds that they are a class of persons who have the same interest in the claim. These persons include 5 cousins of the claimant, Janet Parkes, Angela Ryan, Christopher Gray, Andrew Gray and David Gray (“the cousins”).
6. In fact, as will be seen, all the beneficiaries have the same interest in the claim, which, if successful, will prevent the funds of the Trusts from being depleted by the tax liabilities consequent upon the termination of the existing life interests and creation of the new ones.
7. The defendant therefore supports the claim, but has instructed counsel to put forward arguments against the claim on behalf of her and the remainder beneficiaries, so that the Court has the benefit of full adversarial argument.
8. HMRC are the only persons who will be prejudiced by the grant of the relief sought. They have been notified of the proceedings, and have stated that they do not wish to be joined as a party, but wish for *Racal Group Services v Ashmore* [1995] STC 1151 (and the authorities discussed by the Court of Appeal) and *Allnutt v Wilding* [2007] EWCA Civ 412, [2007] WTLR 941 to be drawn to the Court’s attention.

Evidence

9. The claim is supported by the following evidence:
 - (1) the claimant’s witness statement dated 1 February 2020;
 - (2) the witness statement dated 10 June 2020 of Victoria Timothy (formerly Wood) of Penningtons Solicitors LLP, the solicitor who advised the trustees and prepared the 2013 Deeds;
 - (3) the defendant’s witness statement dated 1 February 2020.

Factual background

10. On 21 October 2003, the claimant's father, John Ware ("the testator"), died. His will dated 1 July 1999 left his half share in the matrimonial home, the Coach House, 4 Cooks Folly Road, Bristol S9 1PL ("the Coach House") and his residuary estate to his wife (the defendant) absolutely.
11. On 4 October 2005, the defendant varied these dispositions by the Deed of Variation, the effect of which was that the varied dispositions were read back to the testator's death for inheritance tax ("IHT") purposes.
12. The Deed of Variation created the Trusts, identified respectively as the Property Trust and the Will Trust.
13. Under the Property Trust, the testator's half share in the Coach House ("the Property") was held on trust for the defendant for life, remainder to the claimant or his issue by substitution. It included an overriding power of appointment exercisable in favour of the "Property Beneficiaries": the defendant, the claimant, the testator's remoter issue, spouses of the defendant and such remoter issue, and such persons as the Property Trustees should appoint.
14. Under the Will Trust, the testator's residuary estate ("the Trust Fund") was held for the defendant for life, remainder to the claimant, or to his issue by substitution with overriding power of appointment exercisable in favour of a class of Discretionary Beneficiaries similar to the Property Beneficiaries. As matters then stood, the claimant and the defendant were the only living member of each class.
15. Shortly thereafter, the trustees executed two deeds of appointment in respect of the two trusts.
16. The first deed of appointment dated 21 October 2005 ("the 2005 Deed") included the following provisions:
 - 3. Trusts of the Appointed Fund**
 - 3.1 Subject to any further exercise of the power of appointment contained in clause 2.3 of the Property Trust, the Property Trustees shall pay the income of the Appointed Fund to Nicholas during his lifetime."
17. The "Appointed Fund" was defined as 45% of the Coach House i.e. 90% of the Property.
18. Subject to the claimant's life interest, the Appointed Fund was held on trust for his children, or in default of children, to the Property Beneficiaries in equal shares per stirpes. The deed included (at clause 3.2) a power to pay or apply capital for the claimant's benefit.
19. The second deed of appointment dated 24 October 2005 was in effectively identical terms. Its effect was that the Trust Fund was held on trust for the claimant during his life, with remainder to his children, or in default of children, to the Discretionary Beneficiaries in equal shares per stirpes.

20. In 2013, the claimant asked Ms Timothy to review the above arrangements, his concern being to ensure that his mother could continue to live in the Coach House if he died before her. Ms Timothy advised by her letter dated 22nd April 2013 that if the claimant died before his mother, without leaving a widow or issue, the Property and the Trust Fund (which would be liable to IHT on the claimant's death) would revert absolutely to the defendant, and so be part of her estate for IHT purposes on her death. She therefore advised as follows:

“It might be sensible to add beneficiaries to the potential class at this stage so that the assets would not automatically pass back to Mrs Ware as this could result in double taxation. It may also be sensible for the Trustees to agree that on the claimant's death, Mrs Ware is given a life interest in the property [i.e. the Property] rather than it passing to other beneficiaries.”

(After 22 March 2006 and the changes to IHT then made, a life interest could be appointed to the defendant following the claimant's death without the underlying property forming part of her estate for IHT purposes, and at the same time securing her continued occupation of the Coach House).

21. The letter suggested as next steps:

- “1. ...
2. Deed of Appointment for the Property Fund. Please could you let me know who you would like to add as potential beneficiaries i.e. who would you like to benefit in the event that you both died together. I will then be able to amend the terms of the Trust at present. Of course it would be important to ensure that Mrs Ware is able to continue to live in the Coach House for the rest of her life.
3. Deed of Appointment for the Residuary Fund. Again, please could you let me know who you would like to benefit. It may be that the beneficiaries will be different and that your wishes in relation to each fund will be different.”

22. The claimant replied to the letter by email dated 15th May 2013:

“I was in Bristol last weekend and went through this with my mother. We would like to proceed as you suggest. The additional potential beneficiaries for both trusts are to be
Janet Parkes
Angela Ryan
Christopher Gray
Andrew Gray
David Gray
You should have details for all of them as they are in my will/list of wishes. We would only expect them to benefit following both my death and that of my mother
...
Please prepare the necessary documents for us to sign” .

23. Documents were accordingly prepared, and sent to the claimant and the defendant under cover of Ms Timothy's letter dated 12 June 2013:

“Thank you for your confirmation that you would like to amend the terms of the Trusts under Mr Ware's Will Trust.

I therefore enclose the following documents:

1. Deed of Appointment in relation to the Property Trust

In this Trust we confirm that on Nicholas' death, the fund will be held on discretionary trusts so that the Trustees (Mrs Ware at present or Nick's Executors in the event that Mrs Ware predeceases Nick) will be able to decide who should benefit from the Trust. The beneficiaries will be Mrs Ware, Janet Parkes, Angela Ryan, Christopher Gray, Andrew Gray and David Gray.

If Nick has children, his children will also be part of the class of beneficiaries. In the event that the trustees do not make a decision, Nick's children and remoter issue will receive the fund in equal shares. If Nick does not have children the capital will be distributed equally between those beneficiaries I have mentioned.

This takes effect over the 45% share of the Coach House which is owned by the Settlement.

2. Deed of Appointment in relation to the Will Trust.

The terms of this Will Trust will be exactly the same as above but the funds represent a loan of £217,000 which is currently loaned to Mrs Ware.”

24. The 2013 Deeds (in effectively identical terms) were accordingly executed by the trustees. The 2013 Deed in respect of the Property Trust contained the following provisions.
25. First, the cousins were added to the class of Property Beneficiaries.
26. Secondly, by clause 3 the trustees appointed the Appointed Fund (again defined as 45% of the Coach House) to be held by them from the date of the deed on the trusts of the deed.
27. Clause 4.1 of the 2013 Deed was in the following terms:

“Subject to any further exercise of the power of appointment contained in sub-clause 2.3 of the Property Trust, the Property Trustees shall pay the income of the Appointed Fund to Nicholas during his lifetime”.

28. This sub-clause is in exactly the same terms as Clause 3.1 of the 2005 Deed, under which the claimant was given a life interest in the Appointed Fund.
29. Clause 4.2 then repeats, again in exactly the same terms as in the 2005 Deed, the power to pay or apply capital for the benefit of the claimant.
30. Clause 4.3 contains a power of appointment taking effect subject to the claimant's life interest and any exercise of the power to pay or apply capital to him or for his benefit. It is exercisable in favour of the Property Beneficiaries (who now include

the cousins). This power replicates, however, the power of appointment (arising under clause 2.3 of the Will as varied by the Deed of Variation) which is preserved by clause 4.1 of the 2013 Deed and adds nothing.

31. Clause 4.4 then provides that subject thereto, the Appointed Fund is held upon trust for the claimant's children. Clause 4.5 provides that subject thereto, the Appointed Fund is held upon trust for the Property Beneficiaries in equal shares. These provisions replicate those of the 2005 Deed.
32. The 2013 Deed in relation to the Will Trust makes exactly the same provision in relation to the Trust Fund and the Discretionary Beneficiaries, adding the same persons to the class of Discretionary Beneficiaries, and making the same appointment of new trusts.

Effect of the 2013 Deeds

33. The effect of the 2013 Deeds was, in addition to adding additional beneficiaries as intended, to terminate the claimant's interests in possession in the Appointed Fund and the Trust Fund (together "the Funds"), appointing new ones in their place.
34. The significance of this is explained by Rose J (as she was) in *RBC Trustees (CI) Ltd v Stubbs* [2017] EWHC 180 (Ch), [2017] W.T.L.R. 1399 at [13]:

"In March 2006 some important changes were made to way inheritance tax applies to interests in possession in settled property. The changes largely abolished the interests in possession regime in respect of interests in possession created on or after 22 March 2006 by the interposition of new subsections in section 49 of the IHTA and new sections added after section 49. The effect of these changes is that, subject to limited exceptions, interests in possession created on or after 22 March 2006 do not result in the beneficiaries entitled to them being treated as the beneficial owner of the settled property. That in turn means that the termination of a post-2006 interest in possession followed by the creation of a new interest in possession would, subject to limited exceptions, result in an immediate charge to inheritance tax. However, where an individual continues to have a qualifying interest in possession created prior to 22 March 2006, he or she continues to be treated as beneficially entitled to the property."

35. In this case, the significant adverse tax consequences of terminating the claimant's interests in possession in the Funds are helpfully summarised by his counsel as being:
 - (1) The claimant will be deemed to have made a chargeable transfer for IHT purposes under IHTA 1984 ss. 2(1), 52(1), resulting in an IHT charge of 20% of the value of the underlying property over and above the claimant's available nil-rate band. The value of the underlying property was approximately £745,600 (i.e. £526,500 for the Appointed Fund and £220,000 for the Trust Fund, so the possible IHT charge is £84,120.
 - (2) The Funds are now in the IHT relevant property regime meaning that they are subject to 10 yearly charges and exit charges of up to 6%. A first 10 year

charge will have arisen on 21st October 2013 (see IHTA 1984 ss. 61(1), (2), 80(1)), albeit that it will have been very small, given that the Funds will only have been relevant property for a short time.

- (3) The claimant will be treated as having made a gift with reservation of the underlying property of the Funds so that for so long as he remains interested in them (e.g. by reason of his life interest, as the object of powers vested in the trustees, and under the final default trusts) the underlying property is still liable to be taxed in his estate on death at the rate of 40% (with though a credit for any 20% lifetime charge) (see FA 1986 ss. 102ZA, 102(1), 102(3) and the IHT (Double Charges) Regulations 1987/1130, para 5).
 - (4) Even though the underlying property of the Funds are liable to be subject to IHT on the death of the claimant under the gift with reservation rules, there will be no capital gains tax free base cost uplift in the value of the underlying property on his death as there usually is where there is an IHT death charge.
36. There would have been no possibility of these consequences if the 2013 Deeds had preserved the claimant's life interests under the terms of the 2005 Deeds, and had only appointed new trusts to take effect after his death and subject to those life interests. If this had been done, then the Funds would still be liable to tax at 40% on the claimant's death, but
- (1) there would have been no 20% charge in 2013, on which interest will now be payable, possibly with a penalty;
 - (2) no IHT relevant property charges;
 - (3) no gift with reservation; and
 - (4) there will be a capital gains tax free base cost uplift in the value of the underlying property on the claimant's death with his pre-22nd March 2006 interests in possession intact.

Rectification

37. The purpose of rectification is described by Mummery LJ in *Allnutt v Wilding* [2007] EWCA Civ 412, [2007] WTLR 941, at [11]:

“... rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor's true intentions. The mistake may, for example, consist of leaving out words that were intended to be put into the document, or putting in words that were not intended to be in the document; or through a misunderstanding by those involved about the meanings of the words or expressions that were used in the document. Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions.”

38. The principles to be applied when considering rectification of a unilateral document such as a deed of revocation and appointment are found in the Court

of Appeal decision of *Racal Group Services Ltd v Ashmore* [1995] STC 1151, and were summarised by Barling J in *Giles v Royal National Institute of Blind People* [2014] STC 1631. They are restated in *RBC Trustees v Stubbs* at [38] to [42]:

- “38. ...Barling J noted that 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. He set out the criteria, which he described as closely related, for the grant of rectification.
39. First, because the remedy must be treated with caution, 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 which is ordinarily regarded as the only manifestation of the party’s intent, there must be convincing proof to counteract the evidence of a different intention represented by the document itself.
40. Secondly, 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.
41. Thirdly, 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.
42. Fourthly, there must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent to the rectification of the document.”

Analysis and conclusions

True intention

39. The relevant intention is that of the trustees as makers of the 2013 Deeds. The evidence of that intention consists of
- (1) the evidence of both trustees as to what they intended to do; and
 - (2) the contemporaneous evidence consisting of the correspondence passing between the claimant and Ms Timothy in relation to and immediately before the making of the 2013 Deeds.
40. This evidence clearly shows that the trustees’ intention was limited to adding the cousins as additional beneficiaries to the classes in whose favour the powers of appointment might be exercised. This was done to make provision for what should happen on the claimant’s death if he died without issue. In order to achieve this result, it was not necessary to terminate or replace the claimant’s life interests, and there is no evidence that the trustees intended to do so.

41. Ms Timothy has no recollection of her thought processes when drafting the 2013 Deeds. However, she states (and it is an obvious inference from the evidence as to the limited scope of her instructions) that it was a matter of drafting style, without understanding that the effect of her drafting would be to end the claimant's then interest in possession and create a new one.

Flaw in the written document

42. Having identified the true intention and the fact that it did not include an intention to change the claimant's life interests, it follows that, in so far as the written document did so, it was flawed. The 2013 Deeds are flawed because, as Rose J put it in *RBC Trustees v Stubbs*, they make changes to the arrangements that were not intended, and not wanted or needed.
43. As to nature of the flaw, as in *RBC Trustees v Stubbs*, the mistake is not just about the fiscal consequences of what the 2013 Deeds effected, but about the scope of the changes to the 2005 Deeds that would be made. This is not a case where the claimant's life interests were re-appointed because it was thought that that would have some particular tax effect which did not, because of the drafting, in fact arise. Rather, it was not intended or thought that the 2013 Deeds would affect his interests in any way, only that beneficiaries would be added, and the default trusts thereby changed.

Need for specific intention

44. It is clear that the trustees' specific intention was that beneficiaries would be added, and the default trusts thereby changed. The fact that there may be a number of different ways of achieving this intention without making the mistake that was made does not prevent this criterion from being satisfied. It might be argued that in order to make good a claim for rectification here the trustees must demonstrate that they had a positive intention not to revoke and reappoint the claimant's life interests. But as Rose J said in *RBC Trustees v Stubbs* at [61]:

“I do not read the authorities as requiring the applicant in a rectification claim to go that far and such a requirement would lead to a counterintuitive result. If a mistake is made in giving effect to the trustees' intentions that mistake can create all sorts of unexpected results. It cannot be right that the trustees have to show that they turned their mind to that unexpected result and formed a specific intention not to do that. That would mean that the more bizarre the result of the mistake, the less likely it would be that the trustees could say that they thought about that possibility and deliberately decided not to bring about that result.”

Issue capable of being contested between the parties

45. As to this issue, it was explained in *Racal Group Services Ltd v Ashmore* at 1157d-f 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.”

46. This criterion has been much criticised, and as Barling J noted in *Giles v Royal National Institute of Blind People*, its purpose, content and scope are by no means clear. There is no need for an *actual* dispute to exist, and it is irrelevant that rectification is sought or consented to by all interested parties: *Giles v RNIB*, at [38].
47. In *RBC Trustees v Stubbs*, Rose J accepted that a non-fiscal issue arose, namely whether the interests of the life tenants and their children and remoter issue arose under earlier or later deeds. The fiscal consequences arose not from a change in the law in relation to interests under the earliest deed,

“but only because the nature of the interests has changed so that they are now post-2006 interests rather than pre-2006 interests. That in my judgment is a sufficient contestable issue to satisfy this criterion.” [65]
48. In this case, the same non-fiscal issue arises, namely whether the interests of the claimant, and his future children, arise under the 2005 Deeds or the 2013 Deeds.
49. In *RBC Trustees v Stubbs*, a practical consequence of this issue was identified, namely that if the life tenants’ interests arose under the later deeds rather than the earlier deeds, the provisions of the Trusts (Capital and Income Act) 2013 abolishing the statutory rules of apportionment might have some effect as the later deeds were made after the date it came into force on 1st October 2013.
50. In this case, the 2013 Deeds were made before 1 October 2013, so the same consideration does not apply. However, this consequence was not crucial to Rose J’s decision that there was an issue capable of being contested, as the extract from [65] of her judgment set out above shows. At [67], she held that “a change to the date of the governing document is a material change that creates a contestable issue of the kind that was being referred to by the *Racal* judgment.”
51. I turn to the cases which HMRC have asked to be drawn to the Court’s attention. As the trustees’ counsel submitted, this case is clearly distinguishable from them.
52. The application in *Racal* was to rectify a deed of covenant whereby *Racal* covenanted to make 4 payments to a charitable trust on specified dates over a period of just under 3 years, when the tax relief which it had hoped would be obtained would only be available if the covenanted payments were made over a period in excess of 3 years. The rectification sought was to provide for the last payment to be made on the 3rd anniversary of the first payment. The Court of Appeal refused rectification as it could not be shown that it was intended that the payments would be made on dates other than those on which the covenant provided they should be made. The only mistake made was as to the fiscal effect of the covenant, i.e. that it would enable *Racal* to deduct tax, and there was no mistake as to its legal effect.

53. In *Allnutt*, a settlor intended to make a potentially exempt transfer by making a settlement for the benefit of his adult children, but the trusts of the settlement were discretionary trusts, and as such his transfer into settlement was chargeable. The trustees sought to rectify its provisions so that it would be an interest in possession settlement. Such rectification was refused because there was no evidence as to type of trusts which the settlor intended, only evidence that he intended a potentially exempt transfer, and a “mistake about the potential fiscal effects of a payment following the execution of the settlement does not ... satisfy the necessary conditions for grant of rectification” (paras [19]-[20] per Mummery LJ).
54. In contrast to these two cases, in this case, it is clear what legal effect was intended by trustees in making the 2013 Deeds, i.e. that the classes of beneficiaries would be added to, thereby altering the trusts which might take effect subject to the claimant’s life interests. In going beyond this and terminating and re-appointing his life interests, the 2013 Deeds had an unintended legal effect. The mistake is not merely as to fiscal consequences. Accordingly, they may be rectified.
55. For these reasons, I will grant the order for rectification sought, and it is not necessary to consider whether to order rescission.
56. I record my gratitude to the trustees’ counsel, Ms Meadway, for her clear and persuasive analysis in both her skeleton argument and oral submissions, which were of great assistance in preparing this judgment.