Neutral Citation Number: [2009] EWHC 1040 (Ch)

Case No: HC06C04397

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th May 2009

Before :

MR STEPHEN SMITH QC

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Between :

(1) ISAAC BRUCE HAYIM
(2) IAN JAMES PRINGLE
(3) JILL MARY ROSS — **Claimants**

- and -

JEANNE REGINA COUCH — **Defendant**

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Adam Smith (instructed by Muscatt Walker Hayim) for the First and Second Claimants
Daniel Margolin (instructed by Cowells) for the Third Claimant
Hugh Norbury (instructed by Gordon Dadds) for the Defendant

Hearing date: 8th May 2009

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APPROVED JUDGMENT

Stephen Smith QC sitting as a Deputy Judge of the Chancery Division:

1. In this matter I have decided to accede to applications that I should make declarations of right without there having been a trial, or indeed any hearing on the merits of the Claimants' claims. The grant of declaratory relief without a trial is relatively unusual, and I shall therefore briefly explain my reasons for taking this step.

2. The proceedings were commenced in 2006 by Delilah Gerda Pratt against Jeanne Regina Couch, the niece of Mrs. Pratt's late husband, Sydney Leonard Pratt. Mrs. Pratt claimed to set aside two transfers of shares in the company SL & DG Pratt (Properties) Ltd ("the Company"). The first transfer, dated 6th December 2004, concerned a holding of 60 shares in the Company. The second transfer, dated 31st March 2005, concerned the holding of the remaining 40 shares in the Company.

3. The holding of 60 shares was owned by Mr. Pratt at his death on 30th October 2003. Mrs. Pratt was the administratrix of her late husband's estate. Although a shareholder in the company herself (viz. of the other 40 shares), Mrs. Pratt had never had a role in the running of the Company, which owned several properties in the vicinity of Leigh-on-Sea in Essex. At the date of the transfers Mrs. Pratt was 79 years old. Mrs. Pratt and Mrs Couch were not the only statutory beneficiaries of Mr. Pratt's estate: Rosamund Neal (Mr. Pratt's sister) and Jill Ross (Mrs. Couch's sister) were also beneficiaries.

4. Mrs. Pratt claimed that the two transfers should be set aside on the grounds of Mrs. Couch's undue influence. In the alternative, in the Particulars of Claim Mrs. Pratt claimed that the transfers should be set aside because she did not have the required mental capacity to execute the transfers when they were executed. The original Particulars of Claim contained a statement of truth signed by Mrs. Pratt. In paragraph 10 of the Particulars it was asserted that when she signed the two transfers Mrs. Pratt was suffering acutely from grief "and undergoing a lengthy period of severe bereavement following the loss of her husband".

5. Prior to Mr. Pratt's death, Mrs. Couch had not been involved in running the Company; she was a hairdresser in two nursing homes in Kent, and a tourist board clerk for Sevenoaks Town Council. In her Defence, Mrs. Couch denied the allegations of undue influence and lack of capacity, though she made no admission of whether Mrs. Pratt retained the ability to manage her own affairs. She asserted that she had been very close to Mr. and Mrs. Pratt prior to Mr. Pratt's death; that Mr. Pratt had repeatedly made clear that he wanted the company to be

owned and run by her; and that apart from Mrs. Pratt, Mr. Pratt considered Mrs. Couch to be his only family.

6. Mrs. Couch appended to her Defence a copy of a letter which she wrote to Mrs. Pratt dated 23rd July 2005. The key parts of that document read as follows:

"Dear Auntie

As you never called me I am concerned that you are ok. I cannot believe that you have been goaded into believing this black picture that has been painted of me and I am sure that deep down in your heart you must know that I haven't betrayed your trust in me.

If I write this for you, you can slowly try to understand the white picture.

Since Uncle's passing I have taken control of running the property company when you made me a director. He had explained a lot about the company to me and about the way he operated so taking up the reins was although very sad, an honour and a privilege. There were also pressing matters awaiting attention... As time went on it became clear to me that you really wouldn't be able to deal with anything much to do with the running of the company. You and I both know that Uncle wanted me to take over the company one day as we discussed it many times (in his words "It'll [be] your property company one day, not yet!! But one day").

After taking legal financial advice it became obvious that if all the shares of the company remained in your name if anything happened to you 40% of each property would go to the government in taxes. That is nearly half of each property. Half the property company would have to be sold to pay the taxman. This would have been ludicrous and I am certain that Uncle would agree with me. So, this was presented to you at a meeting with Derek last year to explain how a simple measure could protect the company a little with absolutely no detrimental effect to you. I would be a non-profit taking director all the income that I made for the company would remain in the account to pay you. This has of course remained the case.

This seemed to [be] working quite satisfactorily until January this year when I was advised that perhaps the remaining shares in the company should be made secure in my name for the complete control of running it. I would still be a non-profit making director, all proceeds going into the high interest account to pay your dividends and the taxes of which I have shown you the statement repeatedly. At the end of the day I would have [the] satisfaction of knowing that all my hard work for the company would be for the benefit of the family, now for you, and later for the girls. So that is what happened. An honest and sound business move that in no way affected you financially.

..."

Mrs Couch's reference in her letter to "the girls" is a reference to her daughters.

7. Mrs. Pratt died on 7th November 2007. The (substituted) First and Second Claimants are her executors, and the Third Claimant the administratrix *de bonis non* of Mr. Pratt.

8. On 13th November 2008 the Third Claimant made an additional claim in the proceedings. This was to the effect that the transfer of the 60 shares by Mrs Pratt to Mrs Couch was void or should be set aside because the prior appropriation of those shares by Mrs. Pratt to herself was made in breach of the self-dealing rule or in breach of trust.

9. The case was fixed for a mention before me on 8th May 2009. Just before it was called on, I was handed a draft Order which I was to be asked by the Claimants to make. A schedule to the draft Order contained an agreement signed by the parties and on behalf of the Company. I was also provided with a bundle of authorities and two skeleton arguments prepared on behalf of the Claimants. After hearing argument I adjourned the case to enable me to digest all the last minute material and to consider my ruling. I have subsequently received a Note and a further bundle of authorities filed on behalf of the First and Second Claimants.

10. The material terms of the agreement scheduled to the draft Order (which runs to more than 20 pages) are as follows:

    (a) it is recited that both share transfers were void and of no effect, alternatively they would have been voidable and avoided and therefore of no effect;
    (b) a further recital records that Mrs. Couch has been wrongly registered as holder of both shareholdings;
    (c) it is also recited that a resolution signed by Mrs Couch subdividing the shares in the Company was void and of no effect;
    (d) the parties agreed to ask the Court to make an order in terms of the draft Order to which the agreement was appended;
    (e) it was agreed that for the purpose of the distribution of the estate of Mr. Pratt, the value of the 60 shares owned by Mr. Pratt at his death was £726,486;

(f) it was agreed that the entitlement of Mrs. Couch in the estate of Mr. Pratt would be satisfied by an appropriation of 7 ½ shares in the Company to Mrs. Couch;
(g) Mrs. Couch agreed to purchase the remaining 92 ½ shares in the Company from the Claimants for £1.12m;
(h) Mrs Couch agreed to indemnify the Claimants in respect of any additional tax payable in respect of the subdivision of the shares.

11. The material terms of the draft Order are a series of declarations regarding the invalidity of the share transfers, the appropriation of the 60 shares and the resolution to subdivide the shares; a series of orders concerning the rectification of the Company's register of members; a variety of consequential provisions; and an order directing Mrs. Couch to pay all the Claimants' costs on the indemnity basis (save the costs of the Company, which I am asked to join to the proceedings for the purpose of granting against it relief regarding the rectification of the register and the subdivision of the shares).

12. Counsel have very properly drawn my attention to authorities which direct that the Court must proceed with caution when asked to grant declarations of right in cases where there has not been a trial.

13. In ***Wallersteiner v. Moir*** *[1974] 1 WLR 991*, Buckley LJ said at p. 1029 A-C:

> *It has always been my experience and I believe it to be a practice of very long standing, that the court does not make declarations of right either on admissions or in default of pleading. A statement on this subject of respectable antiquity is to be found in* ***Williams v. Powell*** *[1894] WN 141, where Kekewich J, whose views on the practice of the Chancery Division have always been regarded with much respect, said that a declaration by the court was a judicial act, and ought not to be made on admissions of the parties or on consent, but only if the court was satisfied by evidence."*

Scarman LJ was, however, more permissive. He said at p. 1030D-G:

> *"...it is, I believe, the duty of the court to exercise caution before committing itself to sweeping declarations: to look specifically at each claim, and to refrain from making declarations, unless justice to the claimant can only be met by so doing. Generally speaking, the court should leave until after trial the decision whether or not to grant declaratory relief, and if so, in what terms: see* ***Williams v. Powell*** *...*
>
> *... when what is sought is a declaration, there is the risk of irremediable injustice: the court has spoken and words cannot be recalled, even though later they be negatived;*

"nescit vox missa reverti", Horace, Ars Poetica, line 390. The power of the court to give declaratory relief upon a default of pleading, of course, exists, but, for the reason crystallised by Horace in those four words of his, should be exercised only in cases in which to deny it would be to impose injustice upon the claimant."

14. It is the approach of Scarman LJ which has been subsequently followed. Like ***Wallersteiner, Patten v. Burke Publishing Ltd*** *[1991] 1 WLR 541* was an application for judgment consequent upon a default by the defendant. Millett J, after referring to the judgments of Buckley LJ and Scarman LJ in ***Wallersteiner,*** said (at p. 544A-B):

"... in the absence of a judgment reached after hearing evidence a declaration can be based only on unproved allegations. The court ought not to declare as fact that which might not have proved to be such had the facts been investigated. Quite apart from this, however, it is clear from ***Wallersteiner v. Moir*** *that the rule is a rule of practice only. It is not a rule of law. It is a salutary rule and should normally be followed, but it should be followed only where the claimant can obtain the fullest justice to which he is entitled without such a declaration."*

15. In ***Lever Faberge Ltd v. Colgate-Palmolive Company*** *[2006] FSR 19*, Lewison J pointed out that ***Patten v. Burke*** was a decision which pre-dated the Civil Procedure Rules. He continued at para. 4:

"Under the Civil Procedure Rules it is no longer sufficient simply to allege facts. The claim form and, in the present case, the grounds of invalidity [sc of a patent] must each be supported by a statement of truth. In my judgment, the reluctance of the court to grant declarations without full investigation of the facts is less strong now that allegations have to be verified by a statement of truth than was formerly the case."

In that case the defendant was not represented but the Judge did have the advantage of written evidence in addition to the statements of truth. He decided to grant a declaration, albeit in more restricted terms than the terms sought by the claimant.

16. The case which has the closest similarity to the present case is the recent decision of the Court of Appeal in ***Animatrix Ltd v. O'Kelly*** *[2008] EWCA Civ 1415*. In that case application was made to enforce a compromise agreement by the grant of declaratory relief, which the appellant had agreed in the compromise he would not oppose. After referring to the ***Patten*** and ***Lever Faberge*** decisions, and paras. 6.02 and 7.27 of ***Zamir and Woolf, The Declaratory Judgment****, 3rd*

edition (2002) (which I have also consulted), the Court of Appeal said this (at paras. 53 and 54):

"53. ...It is clear that the rule that declarations should not be granted by consent is one of practice and that it is not an immutable rule. Declarations can be granted by consent where that is necessary to do justice in the case.

54. While we agree with [counsel] that the court should not grant the declarations in the form asked simply because the parties consent, that is not the full picture in this case. Clause 8 of the compromise agreement provides that, if no offer was made for Mr. O'Kelly's rights ..., the claimants were to be at liberty to enter judgment in the terms sought in recital 3 to the compromise agreement. The declarations which the judge made went no further than those recitals. In view of the provisions of clause 8, it was not open to Mr. O'Kelly to raise any of his defences to the making by the court of the declarations. Mr. O'Kelly had entered into a commercial bargain with the respondents that in certain circumstances, which occurred, he would not oppose their seeking an order containing declarations. ... In effect the submission made by [counsel] amounts to a contention that the respondents must still establish that they were the rightful owners of the relevant rights ... That is completely inconsistent with the terms of the parties' agreement. The judge was correct to conclude that this was one of those rare cases where it is necessary to grant the declarations in order to do justice between the parties."

17. From these four authorities I derive the following propositions:

(1) That the rule that a court should not grant a declaration except after a trial was only ever a rule of practice.
(2) That the rule should not be followed if following it would deny the claimant the fullest justice to which he is entitled.
(3) That the rule is less strong since the coming into force of the Civil Procedure Rules than it was when the Rules of the Supreme Court held sway.
(4) That where the parties' consent to (or agree not to oppose) the grant of declaratory relief and that consent forms part of a bona fide commercial bargain entered into between them to avoid the need for a trial, the Court is likely to consider it necessary to grant the declarations sought in order to do justice between them.

18. Proposition (4) plainly accords with one of the underlying philosophies of the Civil Procedure Rules, viz. to encourage the parties to compromise their disputes rather than to litigate them through to the end of a trial. It does not mean, however, that the Court will inevitably accede to an application for a declaration to be made other than at trial just because the parties have reached a binding

commercial agreement before they enter court that that is what should be done. In such a case the Court will first want to be satisfied (i) that the claim which has been compromised was seriously arguable, (ii) that if that claim had succeeded at a trial, the Court would have been likely to have considered that the declarations sought were necessary to afford justice to the claimant, and (iii) that the grant of the declarations is not likely to have any adverse repercussions for third parties.

19. Against that background I would have had little hesitation in granting appropriately worded declarations that the transfers of shares by Mrs. Pratt were voidable for undue influence and had been avoided. But I am not asked to make declarations in those terms. The declarations I am asked to make are that the transfers are (and always were) void, on the ground that Mrs. Pratt at the relevant times lacked the necessary capacity to make them. And I am asked to make those declarations even though the only evidence available to me of Mrs. Pratt's lack of capacity in 2004 and early 2005 is a statement of truth signed by Mrs Pratt herself in 2006, which, it is said, she did possess sufficient capacity to make.

20. Without the guidance of the Court of Appeal in the ***Animatrix*** decision, I might have harboured a serious doubt as to whether I should accede to the parties' application. But it seems to me that having regard to the ruling in that case and the terms of the parties' agreement in this one (which are in the material respects the same as the terms of the agreement in that case), it would be wrong not to accede to the Claimants' application (which whilst not consented to, was not opposed by Mr. Norbury on behalf of Mrs. Couch).

21. I am satisfied that the claim that Mrs. Pratt lacked capacity to effect the transfers at the relevant times was at least seriously arguable. In addition to the allegations made in the Particulars of Claim, the statement of truth, the high value of the assets which were the subject of the transactions, the lack of independent legal advice, Mrs. Pratt's advanced age, her lack of involvement in the business and her continuing state of grief at the loss of her husband, it strikes me that the terms of Mrs. Couch's own letter to Mrs. Pratt, written before proceedings were issued, suggest that Mrs Couch herself was unsure whether Mrs. Pratt had understood what she had done and why she had done it.

22. I am also satisfied that if the claim of lack of capacity had succeeded at trial, the Court would have been very likely to have granted the declaratory relief now sought from me. Indeed, it is difficult to see another type of relief that would have been more appropriate. And it is not apparent from the papers I have read

or the submissions made to me that the grant of the declarations will have any adverse consequence for any third party.

23. For all these reasons I am prepared to grant the declarations sought at paragraphs 1-4 of the draft Order produced to me on 8th May 2009.

24. As regards the remainder of the draft Order, it seems to me that the relief prayed in paragraphs 1-9 on pages 3 and 4 is consequential on the grant of the declarations I am prepared to grant, and that paragraphs 10-12, which concern enforcement and costs, are matters where the Court is entitled to give effect to the parties' agreement without further investigation.