Neutral Citation Number: [2019] EWHC 2347 (Ch)

Case No: PT-2019-000121

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

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

Date: 12/9/2019

Before:

MASTER CLARK

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Between:

(1) NICHOLAS HENRY PAYNE
(2) JAMES MICHAEL ROWLAND ALSTON
(in their capacity as trustees of the P G Mallett Will Trust (the "Trust")) **Claimants**

- and -

(1) SARAH TYLER
(2) HEATHER ALSTON
(in their capacities as executors of the estate of the late Sally Elizabeth Alston (the "Estate") and as beneficiaries of the Trust) **Defendants**

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Harriet Brown (instructed by **Womble Bond Dickinson (UK) LLP**) for the **Claimants**

Hearing date: 23 August 2019

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Approved Judgment

This is the judgment of the Court.

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Master Clark:

1. This is a part 8 claim seeking to rescind, on the grounds of mistake, a deed of appointment dated 6 April 2012 ("the DoA") in favour of Sally Elizabeth Alston, who died on 8 November 2016.

Parties and the background

2. The claimants are the trustees of a discretionary settlement created on 25 August 2011 ("the Trust"), created in conjunction with a deed of variation dated 25 August 2011 ("the DoV") in respect of the estate of Peter Graham Mallett.

3. The first claimant, Nicholas Payne, is a solicitor, employed by a firm called Dickinson Dees LLP at the relevant time (now Womble Bond Dickinson), who were advising Mrs Alston about her testamentary arrangements and tax affairs. The second claimant, James Alston, is Mrs Alston's son.

4. The defendants, Sarah Tyler and Heather Alston, are Mrs Alston's daughters. They are her executors and beneficiaries under the Trust. They have filed acknowledgements of service stating that they do not intend to defend the claim.

5. Mr Mallett died on 20 November 2010, leaving a will dated 15 October 2004 ("the Will"). Mrs Alston was a beneficiary under the Will entitled to one half of his residuary estate (then thought to be worth about £250,000). On Dickinson Dees' advice, she made arrangements to remove this fund from her ownership, so that inheritance tax would not arise in respect of it on her death. She did so by executing the DoV, pursuant to s.142 of the Inheritance Tax Act 1984 ("IHTA"). Its effect was that the Will took effect as giving her half share in the residuary estate to the Trust. The trustees of the Trust at its inception were the claimants and Mrs Alston. The beneficiaries of the Trust were Mrs Alston and, in the events that have happened, her children and remoter issue. The Trust included provision for the trustees to exercise a power of appointment in favour of the beneficiaries.

6. Mrs Alston was in need of additional income, and, following execution of the DoV, the trustees paid £4,000 to her, initially as a loan. On 5 February 2012, Mr Payne prepared a note proposing that the trustees make an appointment to Mrs Alston giving her irrevocable life interest in the Trust, so that the income of the trust fund would be mandated to her with effect from 6 April 2012.

7. Mr Payne sought advice as to the tax consequences of such an appointment from his firm's tax department. He explained why he did so in paragraph 16 of his witness statement dated 11 February 2019:

> "I thought that following the DoV, we were dealing with a Relevant Property trust, and that the creation of a life interest for Sally under the DoA would be irrelevant for Inheritance Tax purposes. As the contemporaneous documents show, because I held the view that we were dealing with Relevant Property I therefore thought IHTA, section 144 was irrelevant. Notwithstanding that I was convinced it was Relevant Property I still had a concern and did not want to upset the planning implemented by the DoV so decided to consult tax colleagues. The purpose behind the DoV establishing the PGM Will Trust was to ensure that the trust fund of the Trust would not be treated as forming

part of Sally's estate for Inheritance Tax purposes on her death. I wanted to make sure that the appointment of income being considered would not be read back to the date of PGM's death, in which case it could be treated as an immediate post death interest (IPDI), subject to Inheritance Tax on Sally's death."

8. Mr Payne's reference to "Relevant Property trust" appears to be to a trust subject to the provisions of Part 3, Chapter 3 of the IHTA (ss.58-85): "Settlements without interests in possession …". "Relevant property" is defined in s.58 of the IHTA, defined as "settled property in which no qualifying interest in possession subsists", subject to certain exceptions, none of which apply here. In broad terms, relevant property trusts are subject to their own IHT regime and the property in them does not form part of the taxable estate of the beneficiaries on their death.

9. On 6 February 2012 Mr Payne sent an email to Anne O'Neil, copying in Alexander Dickinson, the partner responsible for the matter, and Marcella Shone, the head of the Dickinson Dees' specialist tax team:

> "1. P G Mallet died on 20 November 2010 and under his Will Mrs Alston received an absolute interest in half the residue.
>
> 2. By virtue of a Deed of Variation dated 25 August 2011 Mrs Alston varied her share such that it is now held on discretionary trusts for the benefit of her, her children and her remoter issue.
>
> 3. The Trustees of the Will Trust are considering making an appointment to give Mrs Alston irrevocable life interest in the whole of the Trust Fund, but do not wish to jeopardise the IHT planning that was undertaken by virtue of the DoV (i.e. the assumption that the Trust Fund is Relevant Property not forming part of Mrs Alston's estate for IHT purposes).
>
> Could the Trustees make an appointment as envisaged in 3 to take effect from 6 April 2012 without jeopardising Mrs Alston's IHT position? If not, can you confirm whether the trustees could make an appointment at a later date and if so when that would be. I think the question is whether making the appointment within 2 years of Mr Mallet's death carries a risk that the appointment is read back into the Will, the result being an IPDI for Mrs Alston which we would want to avoid in that it would negate the IHT planning."

10. Ms O'Neil replied in the following terms on 7 February 2012:

> "S.142(2) IHTA 1984 states that "Subsection (1) shall not apply to a variation unless the instrument contains a statement, made by all the relevant persons, to the effect that they intend the subsection to apply to the variation."
>
> Therefore, if the appointment does not contain a statement it will not be read back to the will."

11. On 23 February 2012, the Trustees resolved to exercise their discretion to make an appointment under the terms of the Trust to give Mrs Alston an irrevocable life interest in the Trust fund such that she would become entitled to the income of the Trust fund with effect from 6 April 2012

12. As noted above, the DoA was executed on 6 April 2012.

13. It was only following Mrs Alston's death that it became apparent, in correspondence with the Revenue, that Ms O'Neil's advice was incorrect, for the following reasons.

14. Under s.49 of IHTA, property subject to an interest in possession to which a person became beneficially entitled after 22 March 2006 is not treated as forming part of their estate on death, unless certain conditions are met. One such condition is that the interest in possession is an "immediate post-death interest" ("IPDI") in IHTA, section 49A. This provides, so far as relevant:

> "(1) Where a person ("L") is beneficially entitled to an interest in possession in settled property, for the purposes of this Chapter that interest is an "immediate post-death interest" only if the following conditions are satisfied.
> (2) Condition 1 is that the settlement was effected by will or under the law relating to intestacy.
> (3) Condition 2 is that L became beneficially entitled to the interest in possession on the death of the testator or intestate."

15. The interest created for Mrs Alston under the DoA was not, on its face an IPDI because it did not meet either Condition 1 or Condition 2. However, contrary to the advice given by Ms O'Neil it was an IPDI. This was because of the effect of s.144 IHTA. This provides (so far as is relevant):

> "…
> (3) Subsection (4) below applies where—
> (*a*) a person dies on or after 22nd March 2006,
> (*b*) property comprised in the person's estate immediately before his death is settled by his will, and
> (*c*) within the period of two years after his death, but before an immediate post-death interest … has subsisted in the property, there occurs an event that involves causing the property to be held on trusts that would, if they had in fact been established by the testator's will, have resulted in—
> (i) an immediate post-death interest subsisting in the property, or
> (ii) section 71A or 71D above applying to the property.
> (4) Where this subsection applies by virtue of an event—
> (*a*) this Act shall have effect as if the will had provided that on the testator's death the property should be held as it is held after the event, but
> (*b*) tax shall not be charged on that event under any provision of Chapter 3 of Part 3 of this Act.

…"

16. The claimants have accepted in their correspondence with HMRC that, as a consequence of s.144 IHTA, the property subject to the DoA was, for inheritance tax purposes, treated as if the life interest for the Deceased had arisen under the Will. It is therefore treated as an IPDI, so that the property subject to the life interest is treated as forming part of the estate of Mrs Alston.

17. If, therefore, the DoA remains in place, the estate of the Deceased is likely to be subject to additional inheritance tax of £112,000.

18. HMRC were notified of the claim. On 10 September 2018 they wrote to the claimants' solicitors stating that they would not wish to be joined as a defendant. They asked that the claimants should put the decision of the Supreme Court in *Pitt v Holt* [2013] UKSC 26, [2103] 2 AC 108 before the Court.

Legal principles

19. *Pitt v Holt* is the leading decision as to rescission of a voluntary disposition on the grounds of a mistake. The leading judgment is that of Lord Walker, with whom the other 6 judges agreed.

20. At para 103, Lord Walker adopted as a "convenient framework" that articulated by Lloyd LJ in the Court of Appeal decision in the case as the conditions necessary for the exercise of the equitable jurisdiction to set aside a voluntary disposition:
    (1) a mistake;
    (2) of the relevant type;
    (3) sufficient serious to satisfy the test in *Ogilvie v Littleboy* 13 TLR 399 at 400: "of so serious a character as to render it unjust on the part of the done to retain the property given to him.";

    adding as a qualification that there is obviously some overlap between the three heads; and that

    > "In general, a mistake as to the essential nature of the transaction is likely to be more serious than a mistake as to its consequences."

21. A mistake is to be distinguished from mere ignorance or inadvertence, and also from what scholars in the field refer to as misprediction: [104]. As Lord Walker observes ([104]), these distinctions are reasonably clear in a general sort of way, but they tend to get blurred when it comes to facts of particular cases.

22. As to the type of mistake, it does not matter if the mistake is due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong: [114]

23. Lord Walker rejects the strict application of the distinction formulated by Millett J in *Gibbon v Mitchell* [1990] 1 WLR 1304 (at 1309) between the "effect" and "consequences" of a disposition, as approved by Lloyd LJ (at [210]) in the Court of Appeal decision in *Pitt v Holt*. Lord Walker continues:

> "I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the 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."

24. The gravity or seriousness of the mistake is assessed in terms of injustice or unconscionability: [124]. This must be evaluated objectively, with an intense focus on the facts of the particular case: [125], [126].

25. Lord Walker summarised the applicable principles at [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."

26. Finally, I note that the Court rejected two submissions made by HMRC. The first rejected submission was that a mistake that relates exclusively to tax cannot in any circumstances be relieved. Lord Walker held that consequences (including tax consequences) are relevant to the gravity of a mistake, whether or not they are basic to the transaction.

27. The second rejected related submission was that relief should be refused where the granting of relief would serve no practical purpose other than saving inheritance tax. Lord Walker held that, as in *Racal Group Services v Ashmore* [1995] STC 1151, it was sufficient that there was a genuine issue between the parties *capable* of being contested.

Discussion

28. I accept that Mr Payne and, consequentially, the trustees made a mistake. Mr Payne turned his mind to the question set out in his email of 6 February 2012 to Ms O'Neil. He did not know the answer to it, and sought her specialist advice on it. She also made a mistake, although that is not the relevant mistake for the purposes of rescission. However, her mistake in answering Mr Payne's question resulted in the trustees proceeding to exercise their power of appointment on a mistaken basis. This was clearly not, in my judgment, ignorance or inadvertence. Although as noted, it does not matter if the mistake was careless, Mr Payne was not careless: he asked the right question of the right person, and got the wrong answer.

29. As for the type of mistake, the claimants' counsel submitted that it was a mistake as to the legal character of the transaction: which she characterised as the effect of the DoA within the framework of the relevant provisions of the IHTA, namely, whether the DoA resulted in an IPDI. I do not accept that submission. If it were correct, then a similar analysis could be applied to every transaction that had unintended tax consequences, by reference to the provisions or case law which categorised the

transaction as having those consequences. However, as noted above, this does not of itself prevent the mistake from being of the relevant type.

30. The mistake was in my judgment one that went to the core of the DoA. The Trust existed solely to cause the property derived from Mr Mallett's estate to fall outside Mrs Alston's estate. Mr Payne's (and the trustees') primary concern was not to disturb that position. Had Ms O'Neil answered Mr Payne's question correctly, the trustees would not have entered into the DoA, or would have waited until after 20 November 2012, when the 2 year period after Mr Mallett's death expired.

31. I also consider that the mistake is properly characterised as serious for two reasons. First, the amount of tax payable as the result of the mistake, £112,000, is significant in real terms, and particularly as a proportion of the trust fund of which it comprises 40%. Secondly, the effect of the mistake was completely to negate the effect of the DoV, which was an unexceptionable step of tax mitigation. In this respect, this case is analogous to *Pitt v Holt* - the mistake there deprived the trust in question of the special tax advantage under s.89 IHTA, when it could have complied with s.89 without any artificiality or abuse of statutory relief: [132]- [134].

32. Similarly, the fact that the rescission sought will save tax is not a reason for not granting it. Granting the relief will restore the parties to the position which s.142 permits them to be in. I also accept that there is in this case a genuine issue capable of determination between the parties, as the effect of granting rescission will be to render Mrs Alston's estate liable to repay to the Trust the sums paid to her pursuant to the DoA.

33. For these reasons, it would, in my judgment, be unconscionable to leave the mistake uncorrected, and I will, therefore, grant rescission of the DoA.