Neutral Citation Number: [2020] EWHC 3400 (Ch)

Appeal No CH-2020-000141 Case No: BL-2019-001417

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
Before Mr Justice Meade
On appeal from Deputy Master Henderson (decision of 18 May 2020)

Rolls Building
Fetter Lane
London, EC4A 1NL
14 December 2020

Before :

MR JUSTICE MEADE

- -

Between :

Nicola Suzanne MacKay	**Claimant/ Appellant**
- and -	
David Stuart Wesley	**Defendant**

- -
- -

Nicholas Le Poidevin QC and Thomas Chacko (instructed by Charles Russell Speechlys LLP) for the **Claimant/Appellant**
The Defendant did not appear and was not represented

Hearing date: 4 December 2020

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid 19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be 14th December, 2020.

Mr Justice Meade:

INTRODUCTION

1. This is my judgment on the appeal by the Appellant (the Claimant) against the decision of Deputy Master Henderson ("***the Master***") of 18 May 2020 ("***the Decision***"). References in this judgment to paragraph numbers in square brackets are references to those paragraphs in the Decision unless the context otherwise indicates.

2. The Master also refused permission to appeal, with detailed reasons which appear as an addendum to the Decision.

3. Trower J gave permission to appeal by his Order of 20 July 2020. He also gave the Appellant permission to amend her pleadings, as I will further describe below.

4. On 19 March 2003 the Appellant signed a deed of appointment and retirement ("***the DORA***") in relation to the Ellen Morris 1990 Settlement (***"the Settlement"***). By these proceedings she seeks to have her appointment as trustee under the DORA set aside. The reason she seeks to have it set aside is that it is said by HMRC to have triggered a liability to tax on her part now totalling over £1.6m, even though at the date of the DORA the assets in the Settlement had dwindled to only about £61,000.

5. The Defendant is the Claimant's father. He is aware of this appeal and has said that he does not oppose the relief sought. He was not represented at the hearing.

6. HMRC is aware of this appeal but did not seek to be represented. It provided detailed observations to the Master by a letter of 3 December 2019 but did not apply to be joined.

7. Before the Master, the grounds relied on were:

   i) *Non est factum*.

   ii) Lack of capacity.

   iii) Mistake.

iv) Undue influence exerted by the Defendant over the Claimant.

8. The Master rejected all four grounds, and also said that even if the requirements for rescission had been established, he would not have ordered it because he was not satisfied that such an order would operate justly and fairly. However, he said that if that had been the only ground for refusal then he would have considered granting an adjournment for further evidence to be submitted.

9. Before me, the Appellant did not persist with the arguments of *non et factum* or lack of capacity.

10. Accordingly, the issues on which I was addressed were:

i) Mistake.

ii) Undue influence.

iii) Whether an order for rescission would operate justly and fairly.

11. Certain points were common to the issues of mistake and undue influence.

12. The Appellant was represented at the hearing before me, which was conducted remotely, by Mr Nicholas Le Poidevin QC and Mr Thomas Chacko (the latter of whom appeared before the Master and the former of whom did not). I am grateful for their assistance and in particular their very concise and well-directed skeleton argument.

13. Mr Le Poidevin submitted at the hearing that the result would be the same if the Appellant succeeded on mistake, undue influence, or both. I agree. Since, for reasons given below, I accept the Appellant's submissions on undue influence and will allow the appeal and make an order for rescission, I am not going to decide the points which arose only on mistake. They are complex and potentially important; they would be better decided in a context where both sides are fully argued; and writing a judgment on them would slow down the provision of my decision to the Appellant.

FURTHER BACKGROUND

14. The Decision contains a very full treatment of the factual background, and detailed findings of fact, and so has made my task much easier. There is no appeal on any issue of fact.

15. The Decision sets out the facts from [15]-[106]. An outline summary is as follows:

i) In 2002, a decision was taken (not by the Appellant) to embark on a "Round the World" CGT tax avoidance scheme in relation to the Settlement ([19]).

ii) This involved appointing Mauritian trustees, realising gains in Mauritius where there was no CGT, distributing the proceeds, and then appointing UK resident trustees in the same UK tax year of assessment ([21]-[22]).

iii) The above steps were taken, with the result that the remaining value of the Settlement dwindled from about £3.6m to about £61,000 ([24]-[27]).

iv) The appointment of the UK resident trustees was by way of the DORA, which appointed "New Trustees" including the Appellant, as well as containing indemnities in favour of the outgoing Mauritian trustees and other provisions ([29]-[32]).

v) The other UK resident trustees were the Defendant and Browne Jacobson Trustees Limited ("BJTL").

vi) The Appellant signed the DORA acting under undue influence exerted by the Defendant. The circumstances giving rise to the undue influence included the Defendant's strong and controlling personality and the Appellant's extremely traumatic health issues at the time arising from her child being stillborn. It is unnecessary to set out the details. See ([44]-[69] and [169]-[172]). The Appellant did not understand the effect of what she was signing, but in the light of the fact that I am not going to decide the mistake issue, the details of her state of mind do not matter.

vii) HMRC challenged the Round the World arrangement beginning with an inquiry in 2005. This led eventually to a First-tier Tax Tribunal ("***FTT***") hearing in January 2020, from which there has not yet been a decision. As I have mentioned above, the tax sought is of the order of £1.6m, and is sought on the basis that although the disposal triggering the CGT was prior to the Appellant's appointment, the effect of s65 of the Taxation of Chargeable Gains Act 1992 is that the Appellant is liable.

viii) BJTL went into liquidation ([40]) in 2016 and has now been dissolved (the latter fact was not before the Master).

ix) The Defendant is impecunious (also [40]).

THE DECISION

16. The Master held that rescission for mistake could not be relied on since the jurisdiction did not arise in this case because (summary at [136]):

i) Her appointment as trustee was not a transaction effected by her but was effected unilaterally by the outgoing Mauritian trustees alone, her acceptance being unnecessary to constitute her a trustee [137]-[138]. I will call this the "unilateral act" point; and

ii) An appointment as trustee was not a disposition of property [139)]-[142]); and

iii) The appointment was not voluntary, because the Appellant gave consideration in the form of an indemnity in favour of the outgoing trustees ([143]-[154]).

17. The Master further held that even if the jurisdiction to allow rescission for mistake arose then:

    i) The Appellant did not act under a relevant mistake ([144]-[145]); and

    ii) Partial rescission was not possible, in circumstances where the Appellant sought to set aside only her appointment and not the whole of the DORA [156]-[166].

18. The Master held that undue influence could not be relied upon because of the unilateral act point and the partial rescission point, which he elaborated a little in [174]. In other words, the Master held that two of the five points relevant to mistake also prevented successful reliance on undue influence, and the detail of the reasoning is, therefore and quite sensibly, essentially all set out in the section dealing with mistake.

19. It was the unilateral act point that led the Master to refuse permission to appeal; he thought the other points had a reasonable prospect of success.

THE UNILATERAL ACT POINT

20. It is here that the Appellant's amendments to her pleadings are relevant. The amendments are sought in order to make clear that what is sought to be set aside is the Appellant's *acceptance* of her appointment under the DORA. Prior to the amendment what was sought to be set aside was the *appointment*, although Mr Le Poidevin makes clear that the Appellant's primary case was and is that her acceptance was so integral to her appointment that if the former goes, so must the latter.

21. I respectfully agree with Trower J's reasons for allowing the amendments, where he said that the essential substance of the argument was the same, even if the new perspective was conceptually distinct. I think, too, that the amended formulation brings greater precision and clarity to bear, and avoids any connotation that an act of the Mauritian trustees, not the result of any undue influence, can itself be set aside.

22. The Master held at [137] that the acceptance of an appointment by a trustee is not a necessary element of the process by which a person becomes a trustee, pointing to the terms of s.36 of the Trustee Act 1925 (England and Wales), to ***Mallott v. Wilson*** [1903] 2 Ch 494, and to an analogy with a transfer of property. He noted that a trustee may disclaim appointment but until then, he reasoned, their appointment is effective.

23. For reasons that I will give shortly, I disagree with elements of this analysis but even if it were correct I do not see in principle how it could stand in the way of the Appellant asking the Court to set aside her acceptance, a unilateral act *by her*, which *was* the result of undue influence, so that she would be able to disclaim the appointment, which was the position she was in just before she signed the DORA.

24. Mr Le Poidevin makes clear that I am not asked to declare that such a disclaimer would necessarily be effective since, for example, there could be other later matters which would prevent it. By allowing the acceptance to be set aside, I would only (though it might be very important) be putting the Appellant in a position to disclaim.

25. The reasons why I disagree with the analysis in [137] are:

    i) The wording of s.36 just refers to the appointor's ability to "appoint" a new trustee. It is neutral as to the effect that has prior to the intended appointee accepting;

    ii) While the word "disclaimer" may have some connotation of undoing something that has happened, that is too weak an indication to rely on in itself;

    iii) ***Mallott v. Wilson*** is, as Mr Le Poidevin submitted, primarily about whether a settlement binds the settled property, or alternatively must fail, when the trustee disclaims. It is not about the precise status of the intended trustee prior to disclaimer, and in any event it has been doubted in ***Re Abacus (CI) Ltd (trustee of the Esteem Settlement)*** 6 ITELR 368 (Jers. R.C.).

    iv) The analogy to a transfer or gift of property is not a good one, since:

        a) Acceptance of appointment as a trustee is effective immediately and not dependent on transfer of the trust property (***Ong v. Ping*** [2015] EWHC 1742 (Ch) at [98], point not considered on appeal). They are separate things;

        b) In relation to gifts, HHJ Paul Matthews sitting as a Judge of the High Court in ***Scott v. Bridge*** [2020] EWHC 3116 (Ch) at [120]-[122] concluded that each party has to consent (his judgment had not been given at the time of the Decision).

    v) As a matter of principle, central to being a trustee are the duties that it brings with it, to get in and safeguard the trust property. An intended trustee cannot have those duties imposed on them, even provisionally, without knowledge and consent. By way of example Mr Le Poidevin cited ***Evans v. John*** (1841) 4 Beav. 35, where trust money was misapplied but one of the trustees was held not liable, even though aware of the trust, because he had not accepted appointment.

THE PARTIAL RESCISSION POINT

26. As I have explained above, the Master's analysis in the Decision on partial rescission was in two parts: [156]-[166] in the context of mistake and [174] in the context of undue influence.

27. The Appellant seeks to have set aside only her own acceptance of the trusteeship under the DORA. She does not seek to have the whole of the DORA set aside. The Master said at [157] that he was not told why, and he inferred that the reason

might be that the complete setting aside would land the CGT liability on the Defendant and then indirectly back on the Appellant. Mr Le Poidevin offered the explanation that the decision to seek the setting aside only of the Appellant's trusteeship was a pragmatic one because setting aside the whole of the DORA would involve making the Mauritian trustees parties, and serving them out of the jurisdiction, which would have been a lot more expensive and time consuming. Neither theory is founded in direct evidence but so far as it matters I find the latter more likely.

28. In the context of rescission for mistake the Master held at [158], on the authority of ***Kennedy v. Kennedy*** [2014] EWHC 4129 (Ch), Sir Terence Etherton C, that there cannot be partial rescission of a contract because the Court cannot impose a new deal on the parties which they themselves never made.

29. Insofar as the Master, when he dealt with rescission for undue influence at [174], held that the principle against partial rescission of contracts in and of itself prevented rescission of the Appellant's trusteeship under the DORA (as Mr Le Poidevin submitted) then I would hold that he was wrong, because the Chancellor had said at [46], to which the Master referred:

> *"That limitation* [no partial rescission of a contract] *makes sense in a contractual context and as preventing the court in effect imposing a different contract to the one the parties actually made. I see no reason, however, why that limitation should apply to a self-contained and severable part of a non-contractual voluntary transaction."*

30. But I do not think that is what the Master was saying at [174], and at least not only that.

31. Rather, I think the Master clearly had in mind a different part of ***Kennedy v. Kennedy***, which he quoted in the earlier section of the Decision on partial rescission (on which Mr Le Poidevin also made submissions) namely the Chancellor's reference in [42] to "*a mismatch between the unrectified wording of clause 2.1(c) and the legal effect of partial rescission …*". The full quotation appears earlier in the Decision at [159].

32. To address this it is necessary to look in more detail at ***Kennedy v. Kennedy***, where the context was rather complex.

33. What had been desired was to appoint the remainder of a trust fund but excluding certain shares, because it had been identified that inclusion of the shares would trigger a large CGT liability. In error, the relevant clause, 2.1(c), appointed all the remainder, without mentioning the shares.

34. The picture was further complicated by the fact that the different trustees had different intentions: the settlor and original trustee, Mr Kennedy, knew of the CGT liability and wanted the shares excluded, while the professional trustee at Addleshaw Goddard knew what clause 2.1(c) said, and that it would catch the shares, but mistakenly thought the CGT liability would not arise because of a capital loss elsewhere.

35. What the Claimant wanted in the proceedings was to have the shares excluded from appointment pursuant to clause 2.1(c) but the rest of the appointment to stay in place.

36. Various heads of relief were sought:

    i) The first (see [41]) was a declaration that the shares were not appointed. It was dismissed in short order since on no basis was the transfer void *ab initio*.

    ii) The second ([42]) was setting aside of the transfer of the relevant shares under 2.1(c), but, as the Chancellor said, that faced the fundamental difficulty that the clause did not separately identify the relevant shares. Setting aside the share transfer and the leaving the appointment of all the rest could only be achieved by rectification by adding words to exclude the shares. It was this that the Chancellor said would give rise to a mismatch, as quoted above.

    iii) The third ([43]-[45]) was rectification which failed on the facts because of the trustees' different intentions.

    iv) At [46] the Chancellor was "returning to rescission" and it was in that context that he held that while there could not be partial rescission of a contract, there could be of a self-contained and severable voluntary transaction. So he granted rescission of the whole of clause 2.1(c).

37. I did not find the reference to "mismatch" in [42] easy to understand and Mr Le Poidevin agreed. It is possible to read too much into it, and on reflection I think the key point is that the Chancellor was not intending to state or create any separate principle, let alone a new one. He was simply explaining his reasoning and the difficulty that faced Mr Kennedy.

38. I consider [42] and [46] must be read together because they both refer to rescission and the latter contains the analysis of partial rescission, first mentioned in the former.

39. With that in mind, I think that "mismatch" simply refers to the fact that the scope of the unrectified wording of clause 2.1(c) would be the whole of the remainder, while following partial rescission, if that were to be allowed, the scope would be the remainder minus the shares, for which there was a lack of any textual basis in the unrectified clause 2.1(c) – a mismatch.

40. I am confident that the Chancellor did not intend that rescission should be refused purely because the original wording on the document signed by the parties would be different in legal effect from that following rescission. That would have precluded rescission to remove all of clause 2.1(c) (which was allowed) and would prevent partial rescission in essentially any case. I do not read the judgment as posing any additional difficulty where rescission is sought by the setting aside of a self-contained, severable part of a voluntary transaction. That is what the judgment positively says is possible, at [46].

41. At [161] the Master reasoned that the appointment of the Claimant was not self-contained and severable, while at [174] he said that "*The DORA was a single composite document which effected a number of transactions."* I am not sure if he was deciding that the transactions were not self-contained, or were not severable.

42. The Master's analysis at [161] was that the DORA appoints "New Trustees" and that rescission of the Appellant's appointment alone would create the mismatch to which I have referred. He drew an analogy between rescission of the appellant's appointment alone and rescission of only the shares in ***Kennedy v. Kennedy*** (which of course was refused). However, the "New Trustees" is a term defined at (2) in the DORA and individually identifies the Appellant, the Defendant and BJTL. It is therefore quite different from ***Kennedy v. Kennedy*** where the whole problem was that the shares were nowhere identified separately. There is no equivalent "mismatch" in the present case.

43. If the Appellant were no longer to be a trustee of the Settlement, nothing else in the DORA needs adjustment, or does not work, or ceases to make sense. So there is both verbal and substantive severability.

44. I therefore conclude that the Appellant's appointment (or strictly, given my analysis above, her acceptance of it as signified by her signature) was a self-contained and severable part of the DORA and liable to be rescinded for undue influence if the other requirements of that are satisfied, as they are in this case.

FAIRNESS OF RESCISSION

45. The Master dealt with this at [179] – [180]. It is short enough that I can quote it in full:

> *179. What the setting aside of the Claimant's appointment alone would do would be to remove the availability of the Claimant as a person from whom her co-trustees might seek a contribution for their liabilities to HMRC. So far as the Defendant was concerned, that would not be unfair or unjust because it was his undue influence on the Claimant which gave rise to the Claimant's potential liability in the first place. So far as Browne Jacobson Trustees Ltd is concerned: it is in liquidation. There is no evidence before me as to what, if any assets or creditors it has, save that on the footing that the Round the World scheme fails, HMRC must be a creditor. There is no evidence before me that Browne Jacobson Trustees Ltd has made a claim for contribution against the Claimant, and the question of whether any such claim would now be time-barred was not discussed before me. The correspondence indicates that Browne Jacobson denies responsibility for the Claimant having become a trustee. In these circumstances I would not be prepared to hold that an order setting aside just the appointment of the Claimant as a trustee would not operate unjustly or unfairly on Browne Jacobson Trustees Ltd and its creditors.*

> *180. If the possible impact of rescission on Browne Jacobson Trustees Ltd and its creditors had been the only reason why I refused relief in this case I would have seriously considered adjourning the matter before making my final order, so as to give the Claimant the opportunity of putting in evidence on the point. But that is not the only reason for my refusing relief. For the reasons given above, in my judgment this case does not get as far as raising the rescission jurisdiction under any of the heads relied upon, so even if the point went in favour of the Claimant, I would still not grant any relief. Accordingly, it would be a waste of time and costs to grant such an adjournment and I do not do so.*

46. So the Master, quite rightly in my opinion, thought that there would be no unfairness or injustice to the Defendant. I do not read him as holding that there *would* be unfairness to BJTL, merely that he had not (quite) been satisfied that there would not. The fact that he said that he would have given the Appellant the opportunity to put in more evidence had the other issues gone her way suggests that he thought it was a close call, and the brevity of his reasons was pragmatic given that he had found against her on all the logically prior points.

47. Before me, the Appellant relied on the following in support of the contention that the possibility of a claim from BJTL for contribution is illusory:

    i) BJTL was fully aware from at least 2013 that HMRC had amended the trustees' self-assessment returns for 2002/03 to impose a tax liability of nearly £1 million and it joined in a notice of appeal to the FTT in January 2014.

    ii) BJTL went into liquidation in February 2016.

    iii) Shortly thereafter BJTL by its liquidators withdrew from the appeal to the FTT against HMRC's amendment.

    iv) No evidence suggested that BJTL had ever pursued or asserted a right to contribution, whether before or after it went into liquidation.

    v) BJTL has now been dissolved.

48. Point v) was not before the Master. I believe it would have tipped the balance for him had he needed to decide fairness as a conclusive issue, and anyway I find that the points relied on in their totality make clear that rescission is fair. Since my attention has been drawn to new material I believe I am entitled to approach the matter afresh.

49. Finally, I should make it clear that I do not consider the fact that HMRC may lose a potentially valid claim for tax against the Appellant makes rescission unfair and I do not think that entered into the Master's reasoning.

CONCLUSION

50. Rescission for undue influence of the Appellant's acceptance of her appointment as trustee of the Settlement under the DORA is permitted and I will allow the appeal and make an appropriate Order, which I will ask the Appellant's Counsel to submit.

51. This judgment is much shorter than that of the Master, which is essentially because he did the hard work, for which I express my gratitude, of identifying and setting out the long and complex facts and making evaluative findings on the evidence, in particular as to undue influence. He also had to decide very significant issues that I have not (*non est factum*, incapacity, three aspects of the argument on mistake).