Neutral Citation Number: [2019] EWHC 496 (Ch)

Case No: C30BS640

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

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 7 March 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

Pauline Ann Price	**Claimant**
- and -	
(1) Valerie Ann Saundry	**Defendants**
(2) Geraldine Sanders (as executrix of Martin Gordon Sanders, deceased)	

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Alexander Learmonth (instructed by **Michelmores LLP**) for the **Claimant**
Ewan Paton (instructed by **PowellsLaw**) for the **First Defendant**

Hearing dates: 14-15 February 2019

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HHJ Paul Matthews :

Introduction

1. This is my judgment on an application for rectification which has arisen during the trial of this part 8 claim. On 12 February 2019 I gave permission to the first defendant (whom I shall refer to as "the defendant", because the second defendant is not concerned with this part of the claim) to amend her acknowledgement of service of the claim form so as to include on behalf of the defendant a claim for rectification of two trust deeds. I took this course rather than require the defendant to commence a fresh claim for rectification. On the afternoon of the 14 February 2019 and the morning of the next day, I heard argument from counsel for the defendant and counsel for the claimant.

2. The amendment consists of adding the following words to Section B (additional remedy sought) of the acknowledgement of service form:

> "Rectification of the Declarations of Trust dated 6 July 2009 and (to the extent necessary) 19 October 2006, made between Alan Saundry (deceased) as the "Legal Owner"/"First Owner" and declarant, and the Claimant (as the "Contributor", "Second Owner" and beneficiary) by the removal/striking through of the words: –
>
> i) in the Schedule to the 2009 deed, "37. 7 Linwell Close Cheltenham Semi detached house"
>
> ii) in the Schedule to the 2006 deed "CHELTENHAM PROPERTY 7 Lindwell [sic] Close"
>
> on the grounds that the inclusion of the said words was a unilateral and/or mutual mistake.
>
> The First Defendant therefore claims (in her capacity as executrix of the estate of Alan Saundry deceased) that the said property 7 Linwell Close is not a property held in the Trust of which she is now sole Trustee."

The amendment was permitted on the basis that it was based on facts already pleaded in the defendant's response, and that no further evidence was to be filed.

The litigation

3. This application for rectification arises in the context of litigation between the claimant, as beneficiary of two trust deeds executed by her and by the late Alan Saundry in 2006 and 2009, and the defendant, Alan Saundry's widow and the executrix and residuary beneficiary of his estate. Alan Saundry was named in the trust deeds as settlor and also as sole trustee. On his death in 2013 the defendant became trustee by virtue of her position as the sole trustee's personal representative. The litigation between the claimant and the defendant began as an application for the removal as trustees of the trusts of the defendant and her brother (who had been appointed a second trustee).

4. However, by the time the claim was approaching trial, in September 2017, most of the properties in the portfolio which constituted the trust fund had been sold, and the last remaining properties were about to be sold. It was recognised that removal of the trustees would not provide an effective remedy for the claimant's complaints. Accordingly an order was made by consent on 13 September 2017, by Mr Simon Monty QC sitting as a deputy judge of the High Court, for the litigation to proceed as an account to the claimant in common form by the defendant and her brother. Unfortunately, in late 2017 the defendant's brother died. That left the defendant as sole trustee, and the account has proceeded since then against her alone. However, the brother's widow and executrix was joined as a second defendant in order to be able to deal with certain costs issues. I am not concerned with those in this judgment.

The trusts

5. The trusts with which I am concerned arose out of the business partnership between Alan Saundry and the late David Price, the husband of the claimant. In summary, Mr Saundry and Mr Price had a business relationship in acquiring and renovating residential properties for letting purposes. The general scheme was that Mr Saundry, being a mortgage broker, had the specialist knowledge and access to finance to acquire suitable properties, whilst Mr Price would use his skills to renovate them so that they were in a fit state to be let to tenants. They would share in the profits of the lettings and occasional sales. Both of these gentlemen now being dead, most of the evidence about that business partnership has been provided by their respective widows.

6. On 19 October 2006 Alan Saundry created a trust by deed of certain properties then in his own name but which had apparently formed part of the business partnership with Mr Price. But, instead of declaring that he held the properties on trust for himself and *Mr Price* equally, the deed declared that Mr Saundry held them on trust for himself and *the claimant* equally. Various explanations have been suggested as to why the trust was created in this way, but for present purposes it is not necessary for me to make a decision about that.

7. In the deed, which appears to have been professionally drafted, Mr Saundry was referred to as "the Legal Owner", and the claimant was referred to as "the Contributor". Recitals (A) and (C) to the deed read as follows:

> "(A) By the Transfers the dates upon which they were registered at The Land Registry are given in the first column of the Schedule hereto Properties brief descriptions and title numbers of which are given in the second column of the said Schedule were transferred to the Legal Owner
>
> […]
>
> (C) In the case of each of the Properties the purchase money was provided by Legal Owner and the Contributor in equal shares and the Properties were conveyed to the Legal Owner who confirms that he holds the Properties UPON TRUST for himself and the Contributor".

8. Clause 1 of the deed then operated as a declaration of trust by Mr Saundry that he held the Properties and the net proceeds of sale and the net rents and profits until sale

> "UPON TRUST for the Legal Owner and the Contributor as tenants in common in equal shares".

The Schedule of Properties referred to was inserted between the testimonium clause and the signature of Mr Saundry. It lists 22 properties, divided into three parts, headed "BRISTOL PROPERTIES", "WESTON-SUPER-MARE PROPERTIES", and "CHELTENHAM PROPERTY". The final entry in the schedule, immediately above Mr Saundry's signature, under the heading "CHELTENHAM PROPERTY", reads "7 Lindwell Close".

9. The second trust deed is dated 6 July 2009. It too appears to have been professionally drafted, though not in exactly the same form as the deed of 2006. The parties to the deed are once more Mr Saundry and the claimant. But this time Mr Saundry is referred to as "the First Owner" and the claimant is referred to as "the Second Owner". Recitals (1) and (3) provide as follows:

> "1. This Declaration is supplemental to various Transfers of the properties (the Properties) set out in the Schedule hereto by which the Properties were transferred to the First Owner in consideration of various sums stated to have been paid by the First Owner to the Transferors of the various Properties.
>
> […]
>
> 3. The parties hereto have agreed that as from the date hereof the Properties subject to the Mortgages shall be held by them both jointly (notwithstanding that the Legal Estate is vested in the First Owner) by virtue of the capital contribution made by the Second Owner and the Properties shall be held by them on the terms hereafter appearing."

10. Clause 1 of the deed, so far as material, provides that:

> "The parties hereto will hold the Properties subject to the Mortgages upon trust to hold the same and to hold the net proceeds of sale and the net income until sale upon trust for the parties hereto as tenants in common in equal shares…"

In this deed, the Schedule is set out on the page following the signatures, and is not integrated directly into it. It contains a list of some 38 properties. Unlike the 2006 deed the properties are not divided up by location. Some (but by no means all) of the properties listed in the schedule to the 2006 deed also appear in the schedule to the 2009 deed. No 37 on the 2009 schedule is "7 Linwell Close Cheltenham".

11. To the extent that the 2009 deed declares trusts of properties which were not covered by the 2006 deed, there is no problem. The new properties are expressly subjected to the trusts of the 2009 deed. But to the extent that the

2009 deed purports to declare trusts of properties which were already covered by the 2006 deed, the difficulty at first sight is that the trustee, Mr Saundry, although legal owner *as to 100%*, was the beneficial owner only *as to 50%*.

12. However, since the other beneficial owner as to 50% is also a party and joins in the declaration of trust, there is nothing to prevent the court concluding that this is in effect a resettlement of the trust property. It is to be noted that, although Mr Saundry alone was the legal owner, clause 1 provides that "*The parties hereto* will hold the properties … on trust …" (emphasis supplied). So, if both deeds are valid and effective according to their terms, the properties which appear in both schedules (including 7 Linwell Close) were at first held subject to the trusts of the 2006 deed, and then from the date of the 2009 deed were held on the trusts of that deed.

13. There is a third deed which is to be taken into account, bearing the date 19 June 2013. This is shorter, and from its language and style almost certainly not professionally drafted. Unlike the earlier two deeds, it is made by Mr Saundry alone and the claimant is not a party. At this time Mr Saundry was already suffering from the illness which led to his death later in the year, and his handwriting on the deed (as proved by the defendant's oral evidence) is shaky. Clause 1 states in part:

> "This Trust supersedes Trusts declared 19 October 2006 and the Trust declared 6 July 2009."

14. As with the 2009 deed, the trust assets are properties listed in a schedule which is on the page following the signature page. In fact this schedule appears to be a photocopy of the schedule in the 2009 deed. However, on this copy, the properties at entries 1, 37 and 38 have been crossed out, and Mr Saundry has written his signature beside each crossing out. Assuming that the deeds of 2006 and 2009 were valid and effective to create trusts, the 2013 deed cannot "supersede" those trusts so far as they are different from those in the 2013 deed. In fact the defendant does not rely on this deed for that purpose. Instead she says that the signed alterations to the schedule of properties demonstrate that, at least in relation to 7 Linwell Close, Mr Saundry recognised that there had been a mistake in including that property as subject to that deed (and, by extension, in the earlier two deeds).

The arguments

15. The defendant argues that the deeds of 2006 and 2009 should be rectified to remove all reference to the property at 7 Linwell Close, on the basis that it was included in the deeds by mistake. It is important to notice that the issue before the court is not whether the evidence available sufficiently manifests an intention to create a trust of 7 Linwell Close at all. Instead it is whether the signed documents which already exist declaring such a trust of that property *should be rectified* so that in fact there is no trust of that property, which will accordingly pass as part of Mr Saundry's estate. The parties having gone to the trouble of formalising a trust arrangement in signed writing, the burden is squarely on the defendant to show that the trust arrangement was wrongly recorded, and did not extend to the Cheltenham property. For this purpose she

will need "strong, irrefragable evidence" (*Shelburne v Inchiquin* (1784) 1 Bro CC 338, 341) or "convincing proof" (*Joscelyne v Nissen* [1970] 2 QB 86). The standard of proof is still the balance of probabilities, of course, but such evidence is needed to attain that standard, in order to get over the presumption that, when persons enter into a formal arrangement in writing and sign it, especially one professionally drafted for them, they do indeed intend to be bound by its terms: see *eg Thomas Bates & Sons v Wyndhams Lingerie* [1981] 1 WLR 505, 521, per Brightman LJ.

16. In considering whether for the purposes of the doctrine of rectification the parties' intentions have been correctly recorded in a written document, the authorities distinguish between a voluntary instrument and one for consideration. In the former case, the only person whose intention is relevant is the person whose bounty brought it into existence. In the case of a voluntary settlement with a single settlor, the settlor would be that person, even though trustees may also be parties to the transaction: see *eg Re Butlin's ST* [1976] Ch 251; *Day v Day* [2014] Ch 114, [22], [50], [54], CA. In the case of an instrument for consideration, however, the relevant intentions are those of all those who provided consideration. In such a case, there has to be a continuing *common* intention, contained in an outward expression of accord, which continued to the time of the document in question: see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, [48], per Lord Hoffmann (with whom all their Lordships agreed).

17. The question in the present case is, are the deeds of 2006 and 2009 *voluntary instruments* by Mr Saundry, in which case it is only *his* intention which is relevant, or are they *instruments for consideration* provided by Mr Saundry and someone else, in which case it is the common intention of *Mr Saundry and that other person*, "as contained in the outward expression of accord", which is relevant? (There can also be rectification in multi-party cases where there is so-called "unilateral mistake plus sharp practice", which amounts to rectifying a form of consensus by estoppel: see *eg Thomas Bates & Sons v Wyndhams Lingerie* [1981] 1 WLR 505, 515-516, CA. But that was not the way that the defendant put her case here, no doubt because there was no evidence that Mr or Mrs Price was aware of any mistake by Mr Saundry in the 2006 and 2009 deeds at the time of execution, and I need not consider it further.)

18. The defendant says these are voluntary instruments, whereas the claimant says they are instruments for consideration. In my judgment, the claimant is right. The first point is that the recitals in each of the 2006 and 2009 deeds refer to the claimant as having made a capital contribution to the purchase of the properties concerned. Accordingly, the claimant says that it does not matter whether in fact she did or did not contribute: there is an estoppel by deed as against the defendant (representing Mr Saundry's estate). Hence it is not necessary to consider the commercial context (and in particular the purposes and effects of business partnership) in which these declarations of trust were made. The defendant, however, says that these recitals do not assist in showing whether the trusts were settlements for value rather than voluntary. The defendant says that, if the schedule in each deed is rectified as asked, this

would remove the property at 7 Linwell Close, and thus change the meaning and extent of any estoppel effected by the recitals.

19. In my view the recitals are operative (at least by way of estoppel) to show that the trusts were settlements for value. The burden is on the defendant to show which test for rectification (*ie* voluntary instrument or instrument for value) applies. And, in my judgment, the defendant cannot rely on the *effect* of the putative rectification which she seeks as a reason for showing that the test for rectification is that for *voluntary* instruments rather than those *for value*, because that would be to assume the conclusion before applying the test which might lead to it. Instead, we look at the unrectified document to see what kind of transaction it is.

20. In fact, however, it is not necessary for me to determine this point, because, even if the recitals were not conclusive, there would be a further point. As I have said, the context in which these deeds were entered into is that Mr Saundry and Mr Price were business partners. The properties which became subject to the trusts were business assets out of which profits were made. Mr Saundry bought the properties in his own name and Mr Price did them up so that they could be let. I am satisfied on the evidence that the arrangement between Mr Saundry and Mr Price was that Mr Price was to acquire an equal interest to Mr Saundry in the properties and in the profits to be made from them. Had there been no written trust documents, on the evidence I have seen Mr Price would have had a strong claim to benefit from a common intention constructive trust.

21. For some unstated reason, however, the express trusts which were declared by Mr Saundry were in favour of the claimant, Mr Price's wife. Mr Price was alive and active at that time, and there is no evidence that he was then estranged from the claimant. So it cannot be supposed that he would have allowed the trusts to be made in this way if it was not with his agreement. The suggestion was made in the evidence that the form of the trusts may have had something to do with a previous bankruptcy of Mr Price, or it may have been considered that there were good tax or estate planning reasons for structuring them in this way. For the purposes of the rectification claim, it does not matter, and I do not need to decide. In allowing the trusts to be created in this way, conferring a benefit on the claimant, Mr Price clearly gave consideration, in giving up his claim against Mr Saundry to a constructive trust in his own favour.

22. That of course may be thought to raise the question as to *how* Mr Price *can* have given up his beneficial interest in the properties without the signed writing required by section 53(1)(c) of the Law of Property Act 1925. But the 2006 and 2009 deeds were made as between Mr Saundry and the claimant only. *As against the claimant*, Mr Saundry could not, and the defendant who now claims through him cannot, say that the claimant has no interest. On the other hand, the claimant, who is both (i) the named beneficiary under the trusts contained in the deeds of 2006 and 2009 and (ii) the executrix and beneficiary of the estate of Mr Price, can hardly claim in *both* capacities. She has chosen to bring her claim in the former capacity, and I therefore need not consider further any claim she might have in the latter. This means that it is not

necessary to consider the need for formalities for the disposal of any beneficial interest that Mr Price may have had.

23. As a result, I am in no doubt that these deeds of trust constitute settlements for consideration rather than voluntary settlements. This in turn means that the relevant intention is the common intention, objectively ascertained by an outward expression of accord, of Mr Saundry and the claimant (if one looks at the deeds and their recitals), or perhaps Mr Price (if one looks at the underlying business arrangement).

The evidence

24. Both the claimant and the defendant made witness statements. Neither was cross-examined on them in relation to the rectification claim. The first defendant relies on the claimant's own witness statement evidence as to what Mr Saundry told her. At paragraph 109 of her witness statement, she said that:

> "Alan always told me that 7 Linwell Close Cheltenham was not a trust property at all and belonged to him personally. It is number 37 on the list of properties in the Trust Deed Schedule. He made me promise on his deathbed that I would not claim it. I trusted Alan and was happy to do that but I have since found out that the mortgage on Linwell Close was being paid from the Trust Fund."

25. In addition to this, the defendant also relies on (ii) the fact that the claimant gave up a restriction which had been entered by the solicitors on the title to 7 Linwell Close, though not on other properties, (iii) the defendant's solicitors' letter of objection to the restriction dated 15 August 2014, (iv) their email to the claimant's solicitor asserting that that property was not trust property, which was not challenged by the claimant, and (v) the deed of trust of 2013, in the schedule of properties to which Linwell Close had been crossed out.

26. On the other side, the claimant points to the proximity of Mr Saundry's signature in the deed of 2006 to the reference to 7 Linwell Close in the schedule. The reference to 7 Linwell Close is in the line immediately above Mr Saundry's signature. But the claimant also points to the fact that Mr Saundry was a mortgage broker, well used to dealing with lawyers and legal documents, and that he made no attempt to correct the mistake at all until the deed of 2013, made some three months before his death, when he was already ill. It can also fairly be said that both the 2006 and 2009 deeds appear to have been drawn by lawyers, and the defendant needs to show that *both* the 2006 and 2009 deeds should be rectified, and not just one of them. If the defendant is right, it is a mistake that Mr Saundry has managed to make not once, but twice.

27. My appreciation of the claimant's own evidence as to what Mr Saundry told her is that she is honestly reporting what she recalls he said, but of course everything depends upon the truth of what he said to her. And her evidence does not say anything about her own belief. Further, there is no evidence that she was involved in the drawing up of the deeds of 2006 and 2009. She simply signed them. At that time there was no reason for her to doubt the truth of

what she was signing. Her intention would have gone with the words in the document.

28. Secondly, since the claimant is not a businesswoman and not involved in the legal formalities, but left everything to her legal representatives, there is no reason to suppose that she understood the significance of her solicitors' giving up the restriction on 7 Linwell Close in 2014. A client is of course bound by her solicitor's authorised acts, but here those acts in 2014 do not shed much light, if any, on *her* intention (or that of her husband) in signing the deeds back in 2006 and 2009. And that is what counts.

29. Thirdly, there is the failure by the claimant to challenge Mr Saundry's solicitors' email in 2016 saying that Linwell Close "should never have appeared" on the list of properties. However, there is an inconsistency in the evidence for the defendant, which asserts that it was originally agreed that that property would be a trust property, but that it was subsequently agreed between Messrs Saundry and Price that it should belong to Mr Saundry in lieu of trust income. That agreement, if made, could not bind the claimant. So a failure to challenge the solicitors' email is of little relevance.

30. Next, I turn to the crossing out of Linwell Close in the 2013 trust deed. Obviously this had no effect in itself on either the 2006 and 2009 deeds. The 2013 deed is executed by Mr Saundry alone, and he reserved no power in the earlier trust deeds to vary either or both of them. It is said for the defendant that this crossing out shows that he did not want Linwell Close to be subjected to the trust. I agree that it shows this in 2013, when he was already dying. But it is of limited value in showing that *in 2006 or 2009* he did not want to put Linwell Close into trust. There could be other reasons for changing his mind. And the fact that he made the 2013 deed by himself at all, without having reserved any power to do so, strongly suggests that (at least at that stage) he thought in any event that he could change his mind when he liked.

31. To my mind, the most significant piece of evidence in this case is the physical proximity in the 2006 deed of Mr Saundry's signature to the reference to 7 Linwell Close in the schedule of properties. It is no more than a couple of centimetres away on the same page, with no intervening text. Unless he had his eyes closed whilst signing (a possibility I exclude as simply absurd, especially since his signature is very large and florid), Mr Saundry could not have failed to see it. I struggle to understand how he, as a professional mortgage broker well used to dealing with legal documents for conveyancing, can have signed this document, seeing the reference to Linwell Close, *without* having intended what it expressly said. I am simply unable to conclude that, at the time he signed the deed in 2006, he did not mean the property at Linwell Close to be included in the trust. I accept that he *may* have changed his mind later, but I do not need to decide that, as a later change of mind would be ineffective anyway.

32. Moreover, it is not just a question of the 2006 deed. In 2009 he signed *another* trust deed, purporting to subject the property at Linwell Close to a trust in favour of the claimant as to 50%. This deed is not in the same format as the first one, and the list of properties scheduled to it is not the same as the first

one. As a result, Mr Saundry cannot have simply relied on his execution of the earlier deed as justifying his execution of the later without reading it. On the contrary, I have no doubt that, as a man of his background, he did read it before he signed it.

33. Lastly, Mr Saundry left it until 2013 before providing any written evidence of his (then) view that Linwell Close was not covered by the trusts. And that evidence is simply a (signed) crossing out of the property from the 2013 deed, which purported unilaterally to "supersede" the earlier deeds. As I have already said, if anything, this demonstrates that Mr Saundry considered that he could alter the trusts in 2013 as he wished, which is quite different from showing what his intention was in 2006 and 2009.

34. As to the intention of the claimant (or Mr Price), I have already said that the claimant was not involved in drafting the deeds of 2006 and 2009, and had no reason to doubt the correctness of what she was signing. Her intention would have been that the trusts thereby created extended to all the listed properties. I have dealt already with the evidence relied on by the defendant in relation to the giving up of the restriction in relation to 7 Linwell Close and the failure to challenge the solicitors' email in 2016. As to Mr Price, we have no evidence of what he intended, beyond the business arrangements between him and Mr Saundry. They shed no light on whether there was a mistake in including 7 Linwell Close.

Conclusion on the evidence

35. In my judgment, whether I consider the "common intention" of Mr Saundry and the claimant (or Mr Price), or simply the sole intention of Mr Saundry, on the evidence placed before me I am simply not persuaded that the terms of the trusts created by the 2006 deed were wrongly recorded. So far as concerns the 2009 deed, I am similarly unpersuaded that it wrongly recorded *either* the common intention *or* Mr Saundry's sole intention. In particular, I am not persuaded that there was any intention, common or single, to exclude Linwell Close from the trusts of either deed. In the result therefore, there is no mistake proved which the court could rectify, assuming that as a matter of discretion it was prepared to do so.

Defences

36. The claimant urged on me that in any event she had defences to the rectification claim, in the form of laches and also affirmation of the trust deeds in question. In the circumstances, it is not necessary to deal with either in any detail. But I will say this.

37. As to laches, the claimant complains of the loss of evidence (through lapse of time) by which the claim might be resisted. The deeds were made in 2006 and 2009, and we are now more than 12 and 9 years further on. In the interim both Mr Saundry and Mr Price have unfortunately died, and therefore cannot give evidence or be cross-examined. In addition, memories of living witnesses will inevitably have dimmed. The latter are less important than the former in this case, but I accept that, taken all together, the matters I have referred to cause

substantial prejudice to the claimant, and, if I had decided that the defendant had shown a prima facie case for rectification I would have held that it was now too late to grant it.

38. As to affirmation, the claimant relied on the fact that mortgage instalments in relation to the Linwell Close property had been paid out of the trust funds, and not by Mr Saundry personally. If Linwell Close were not a trust property, this might well be a serious breach of trust (in using trust property for the benefit of the trustee personally) which would have to be corrected. But, whatever the position on breach of trust, in my judgment, on the evidence before me it does not amount to an affirmation of the trust deeds. That would depend on showing an act done which unequivocally demonstrates that the party doing the act means to affirm the deeds. Here, however, there are other possible explanations for the payments made which would not involve reliance on the deeds. Apart from using trust money to pay a personal debt (*ie* simple breach of trust), there is the evidence of Colin Smith that the use of trust funds to pay mortgage instalments was intended as compensation for payments from the trust fund to which Mr Saundry was or might have been entitled but did not receive. So the payment is not unequivocal. But in the result this does not matter, as the claim for rectification fails at the outset.

Conclusion

39. I therefore dismiss the application for rectification of the 2006 and 2009 trust deeds.