Neutral Citation Number: [2021] EWHC 117 (Ch)

Case No: PT-2020-BRS-000074

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: 29/01/2021

Before :

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

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Between :

(1) DAVID COLIN MORRELL	**Claimants**
(2) RAYMOND PHILIP MORRELL	
(3) HELEN MARY MORRELL	
- and -	
(1) HANNAH MORRELL	**Defendants**
(2) JACK MORRELL	
(3) INDIA MORRELL	

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John Dickinson (instructed by **Clarke Willmott LLP**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing dates: 21 January 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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 was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 10:30 am.

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim under CPR Part 8 for an order rectifying a deed of variation dated 31 October 2018, which varied the will of Gillian Morrell dated 17 April 2015. All three defendants (who are the three adult children of the second and third claimants) acknowledged service, none indicating any intention to contest the claim, and none adduced any evidence or took any other part in the proceedings, nor attended the trial. It was tried before me on 21 January 2021, mainly on written evidence, but with one witness (Mr Robert Stringer) appearing to answer questions from the court. The trial was held remotely during the coronavirus pandemic, using the MS Teams videoconferencing platform.

2. Gillian Morrell died on 11 April 2017. Her will left her estate between her two sons, to whom without disrespect I will refer as David and Philip, appointing them executors. Each half share was thought to be worth about £450,000. This case concerns the variation of the will that was to be carried out so as to cause part of Philip's half share to be settled in trust for members of his family, with Philip and his wife Helen as trustees. The claimants say that the variation effected by the deed of variation of 31 October 2018 does not properly record what was intended, and therefore should be rectified. As I say later, the critical intention is that of Philip, who was settling his half share. He made a witness statement, as did his wife Helen, his brother David and also his financial adviser Mr Stringer (who in fact made two statements). Tragically, however, since doing so Philip has become seriously, and indeed terminally, ill, and was unable to give any further evidence or participate in the trial. An additional problem is that there is no evidence at all from the solicitor involved, Rachel Stafford, although the bundle does contain a number of her letters and emails as well as attendance notes.

Facts found

First meeting

3. There was an initial meeting between Philip and his financial adviser Robert Stringer in the latter's office on 30 May 2017. Mr Stringer's manuscript notes show that there was a discussion between them about varying the will by diverting £300,000 from Philip's half share into a trust for Philip's three children, and retaining £150,000 for Philip and his wife. There is an early reference in these notes to "Jack's care not assessed with trust". This refers to the fact that the second defendant is disabled, and receives some state benefits, which it was said would not be affected by his being a beneficiary under a trust. The conclusions stated at the end of the note are "100,000 to each child, 150 Phil and Helen". There was no suggestion of any trust for Philip and Helen themselves.

Correspondence with the solicitor

4. Nothing happened for some time. Then there was an email from Philip to Rachel Stafford (solicitor acting on Mrs Morrell's estate) on 2 February 2018 instructing her that he wished to vary his mother's will "so the money goes into trust for my children". There was no suggestion at this stage that any money was to be retained by Philip for himself and his wife, or that they were to be beneficiaries of the trust. On 15 February 2018 Ms Stafford emailed Philip and David, updating them on the administration of their mother's estate, referring to the possibility of a deed of variation being made, and asking for details of the intended gifts "to your children". This was followed by a letter of 18 February 2018 from Ms Stafford to Mr Stringer in which she referred to assets owned by the estate. There is a manuscript note on this letter reading "16/5/18 Yes DoV can be done – April 2019 – email Rachel".

Instructions to the solicitor

5. On 1 August 2018 there was internal email correspondence between Mr Stringer and a "paraplanner" (assistant). The paraplanner said "the advice appears to be for £300,000 in trust for the three children and £150,000 for them (Philip and Helen)". Mr Stringer's response (within an hour) was that after speaking to "investment help" the suggestion was that "all the £450 goes … straight into the trust, therefore never landing in their estate". He referred to Philip and Helen as being "potential" beneficiaries. The paraplanner responded that he was not sure if Philip could enter into a deed of variation and still benefit from it, but that he would try to speak to "Tax and Technical". So now there was a suggestion of a trust for all five (with the use of the phrase "potential" beneficiaries suggesting that the trust would be discretionary).

6. On 15 August 2018 Ms Stafford made an attendance note of a telephone discussion with Mr Stringer, saying that the latter "advised that Phil would like to vary the estate so that a discretionary trust is set up for the sum of £450k for the benefit of his children". Mr Stringer's witness statement of 8 April 2020 gives a different account, saying (at [10]) that there would be "a total investment of £450,000 with £100,000 earmarked for each of the three children and £150,000 for Phil and Helen. The funds were to be put into a discretionary trust". He repeats this at [12], where he says "I have no doubt that I made it abundantly clear that of the £450,000, only £300,000 was intended to be for the children and the £150,000 was intended to be for Phil and Helen". This is a rather odd way to describe a *discretionary* trust, but in oral evidence Mr Stringer explained that clients would typically earmark sums out of the fund for particular beneficiaries on the basis that it would operate if there was no reason to change it or, as he put it, all other things being equal. In his view it did not negate the idea that the trustees would have complete discretion over who received what.

The draft deed

7. On 27 September 2018, Ms Stafford sent an email to Mr Stringer and his paraplanner, attaching a copy of the draft deed of variation for them to review. This provided that " 'my Beneficiaries' are (names to be inserted)". On 2 October 2018 Mr Stringer sent an email in reply making some minor comments and asking whether the next step was to ask Philip and David to sign. On 3 October 2018, Ms Stafford sent an email to Philip and to Mr Stringer saying that she had reviewed the trust document, and asked for confirmation that Philip was aware of the inheritance tax regime for discretionary trusts, before she sent out the deed of variation for signing. Three minutes later she sent a follow-up email asking for "the full names and the dates of birth of the

beneficiaries to be including [sic] in the Discretionary trust Fund". Half an hour later, Philip emailed Ms Stafford: "Help please advise what does this mean". Late in the evening of the same day, Ms Stafford emailed Philip asking if Mr Stringer had given him tax advice on the discretionary trust, because (as she understood it) that was not her role. I have not seen any response to this email.

8. On 15 October 2018 Mr Stringer sent two emails to Ms Stafford. They were sent by a secure email system, which after a certain period cannot be opened by the recipient. It appears from an email sent by Ms Stafford to Mr Stringer on 18 October 2018 that she had been unable to access either of two emails sent and therefore asked him to "resend the dates of birth of the children and their full names". Written on the (unopened) versions of the two printed emails in the documents before me are the words "email of dates of birth of children unable to open". There was also an attendance note made by Ms Stafford of a telephone conversation with Mr Stringer on 18 October 2018: "TC with R Stringer who gave me the dates of birth and names of the beneficiaries for the trust as unable to open secure emails".

9. Mr Stringer says in his first witness statement (at [14]) that he gave Ms Stafford the children's names and dates of birth over the telephone, as he had already given similar information to her for Philip and Helen. There is however nothing in the underlying documents that supports the second part of this statement, and the use of the phrase "the dates of birth and names of the beneficiaries for the trust" by Ms Stafford suggests the contrary. For some reason, there were no copies of the two secure emails as sent by Mr Stringer in the trial bundle, but after the hearing he found copies and they were passed to the court. One gives the dates of birth of the three children (the defendants) and the other asks whether it is necessary for Jack's name to appear in the trust. There is no reference to Philip or Helen in either.

The engrossed deed

10. On 18 October 2018 Ms Stafford sent the engrossed deed of variation for signing to Philip. This letter refers to "discussions" with Philip. Philip's own witness statement at [18] says that he had no conversations with Ms Stafford about this matter. It may be right that there were no telephone or in-person conversations. But there were certainly email communications between them, and I have no doubt that that is what Ms Stafford is referring to when she uses the word "discussions".

11. The letter of 18 October 2018 (or a copy) was sent on by Philip to his brother David endorsed with a manuscript note asking him to sign and return it to him "as my financial guy wants to check it before it goes back to" Ms Stafford. This sits awkwardly with Mr Stringer's own first witness statement at [15], where he says that *he* was waiting for a *final draft* for approval, which he would have sent on to his technical team, and he was unaware that Ms Stafford had sent an engrossed deed to Philip. There is no mention of this in the telephone attendance note (set out above) made by Ms Stafford of her conversation with Mr Stringer on the same day. I find it difficult to believe that Ms Stafford would not have told Mr Stringer what was going to happen next when she was speaking to him earlier on the same day. And I do not see where Philip could have got the impression that Mr Stringer wanted to check the *signed* document before it went back to Ms Strafford, unless Mr Stringer had told him this.

12. The witness statement evidence from Philip's wife, Helen, at [13] says that:

> "We read the document not realising that our names were missing. We believed that as our signatures were on the document, this automatically included us as beneficiaries of the trust."

Those two sentences are strange bedfellows. If you do not notice that your names are not included, then you do not need to think that because you have signed it you are a beneficiary. If on the other hand you believe that because you have signed it you are a beneficiary, it does not matter at all that your names are not mentioned. But I expect the explanation for this is that someone else drafted this statement for Helen and she simply signed it, accepting the drafter's reasoning. At all events I did not hear from Helen in person, and I do not think anything turns on this. It simply confirms that, one way or another, Philip and Helen mistook the effect of what they were signing. They thought they would be beneficiaries, but the effect of the document was otherwise.

13. It appears that the deed of variation was not sent to Mr Stringer, but instead directly back to Ms Stafford, who dated it 31 October 2018. But it is not clear from the evidence who sent it. On 17 January 2019, Mr Stringer emailed Ms Stafford to say that he seemed "to have two different Deeds of Variation – as attached. Would you kindly confirm which is the definitive one please." She responded by email just over an hour later, attaching the version she considered definitive. Subsequently, Mr Stringer sent an email to a colleague in "Technical Support", asking him to confirm "that this does the job as we need and discussed and there is nothing different or untoward in it". It was then that the colleague pointed out that it only included the children as potential beneficiaries and not Philip or Helen.

14. There was then an email correspondence between Mr Stringer and Ms Stafford in which he explored the possibility of amending the deed of variation in its signed form. On 18 January 2019 his email to Ms Stafford says "I apologise if I did not outline our intentions properly. I note that Phil and Helen are not beneficiaries and we intended that they could be potential beneficiaries. Is it possible to amend this?" Ms Stafford advised him in an email of 21 January 2019 that the deed of variation could not be cancelled or amended. Ms Stafford's attendance note of a telephone conversation of 22 January 2019 with Mr Stringer says: "he advised me that he had passed on the wrong instructions from his clients. He had only advised me that the trust was for the children but had not advised me that £150k was to be held upon disc trust for Philip and his Wife". Mr Stringer's evidence is that he *had* told Ms Stafford that Philip and Helen were to be beneficiaries, and it was therefore Ms Stafford's mistake that their names were not included. I will come back to this. But, whichever professional was responsible for the failure of the client's instructions to be correctly recorded, the fact remains that Philip's intentions were not in fact implemented. He and his wife were not beneficiaries, when he had so intended.

Requirements for rectification

15. Thereafter, consideration was given to the question of possible rectification of the deed of variation. As explained in the recent caselaw (see *eg Giles v Royal National Institute for the Blind* [2014] EWHC 1373 (Ch)), this requires four things:

(1) Convincing proof of the evidence of a different intention from that expressed in the document itself;

(2) Operative mistake in the wording of the written document, such that it does not give effect to the settlor's intention;

(3) But it is not enough to show that the settlor did not intend what was recorded: it must also be shown what he *did* intend;

(4) There must be an issue capable of being contested between the parties affected by the mistake, notwithstanding that all relevant parties consent.

16. There is no problem about the fourth of these matters. My focus is on the first three. In the present case, the deed of variation is effectively a voluntary act by Philip. His brother is a party, but as co-executor of the estate, and his wife is a party, but only as a trustee of the trust being created. He is the only one making a beneficial disposition. No one else is contributing anything. The disposition is one by Philip as the beneficiary under his mother's will, seeking to vary the will by settling part of his half share. Accordingly, it is *his* intention that matters in considering the operation of the doctrine of rectification: see *eg Re Butlin's ST* [1976] Ch 251; *Day v Day* [2014] Ch 114, [22], [50], [54], CA.

Proof of a different intention

17. Initially, the proposal is that there should be a trust for the three children of part of the inheritance, with the remainder being left in the hands of Philip. By August 2018, this has changed to a trust of £450,000 of the inheritance, for the benefit of the three children and also their parents, Philip and Helen. On Mr Stringer's evidence (supported by internal email documentation), this is to be a trust under which £100,000 is earmarked for each of the children, and the remaining £150,000 is earmarked for Philip and Helen themselves. Mr Stringer gives instructions to Ms Stafford to draft a discretionary trust.

18. Ms Stafford therefore drafts a discretionary trust, but says she does not have details of the beneficiaries. She asks for them, and is sent two emails, neither of which she can open. As recorded in Ms Stafford's attendance note of 18 October 2018, Mr Stringer then gives her over the telephone the names and dates of birth of the children alone. Mr Stringer said in oral evidence that he told Ms Stafford, also over the telephone, but on an earlier occasion, the names and dates of birth of Philip and Helen. He identified a telephone conversation on 15 August 2018 for this purpose. His manuscript note of this meeting is in the bundle. It says in part:

> "Trustee Investment Bond
> Total Investment
> £450,000
> £100k each for children
> £150k Phil, (Helen)
> […]
> (Absolute discretion)".

Strictly speaking, this does not show that Philip and Helen were to be beneficiaries at all. It certainly does not mention their dates of birth, or that this information has been given to Ms Stafford.

19. In contrast, Ms Stafford's typed attendance note of this conversation is the one that refers to setting up of a discretionary trust "for the sum of £450k for the benefit of his children". If on this occasion Mr Stringer had told Ms Stafford that Philip and Helen were to be beneficiaries, and also gave her their dates of birth, I find it impossible to believe that she would not have included that information in the attendance note. Mr Stringer in oral evidence suggested she might have written these details on another piece of paper, but that is not how solicitors work. The attendance note is the record and it is to the attendance note that the solicitor would have recourse when the information was needed. If Mr Stringer did indeed give information about Philip's and Helen's dates of birth, then he must have done it on some other occasion.

20. On the same day as being given the dates of birth of the children (18 October 2018), Ms Stafford included the children alone as beneficiaries of the discretionary trust, and sent the draft to Philip for signature. Philip apparently read it, as did Helen, but neither of them noticed that they were not included in the class of beneficiaries. They signed it and sent it on to Philip's brother David, who signed it and (presumably) sent it back to Philip, who in due course returned it to Ms Stafford, who dated it 30 October 2018. There is no explanation as to why it was not shown to Mr Stringer (as contemplated by Philip himself in sending it to David). Mr Stringer appeared not to see it until January 2019, when he referred it to his more technical colleague. It was the latter who noticed the omission of Philip and Helen as objects of the discretionary trust.

21. I have no doubt that, although initially Philip intended a trust of £300,000 for his children alone, this intention subsequently changed to a trust of £450,000 to include himself and his wife as well as his children as beneficiaries. Thus, the recording of an intention to create a trust for the three children alone in the actual trust deed, whether it was anyone's fault or not, did not accurately record Philip's subjective (but miscommunicated) intentions. The first requirement of the four is therefore satisfied.

Sufficient operative mistake

22. The next question (the second requirement) is whether this amounts to a sufficient operative mistake. In *Alnutt v Wilding* [2007] EWCA Civ 412, the settlor executed a settlement in a written form drafted by his professional advisers which created a discretionary trust, although in order to achieve his object of saving tax he needed to make an interest in possession trust. Both the High Court and the Court of Appeal refused rectification. Mummery LJ (with whom Carnwath and Hooper LJJ agreed) said:

> "[19] … The position is that the settlor intended to execute the settlement which he in fact executed … The mistake of the settlor and his advisors was in believing that the nature of the trusts declared in the settlement for the three children created a situation in which the subsequent transfer of funds by him to the trustees would qualify as a PET and could, if he survived long enough, result in the saving of inheritance tax."

23. This case is different. Philip intended to make a trust to benefit himself and his wife as well as his children. The mistake was not about the *consequences* of creating this or that trust. It was about who were the beneficiaries of the trust. It is a sufficient operative mistake.

Show what was intended

24. But there is a third point, also illustrated in *Alnutt v Wilding*. This is that, in the words of Carnwath LJ,

> "[26] … The claimant's difficulty was not simply to establish a mistake such as would justify the intervention of the court, but also to show how the document should be corrected. The judge … examined the alternative draft that had been put in front of him with the invitation that this should be the rectified form of the document. He concluded that, even if [the settlor] did not intend to establish a settlement in the form executed, the evidence fell short of proving that he intended the settlement to incorporate the various trust powers and provisions set out in the alternative draft."

25. There are two distinct aspects to what Philip actually wanted. One was what kind of trust he wanted, fixed interest or discretionary (and, if discretionary, what kind of discretionary trust). Although Philip made or acquiesced in a number of statements suggesting that specific amounts of money were to go to specific beneficiaries, thus suggesting a fixed interest trust, there is also evidence to show that he was thinking of a discretionary trust, in order for the trustees to be able to control the beneficiaries' access to funds, as well as safeguard Jack's state benefits. Philip saw, presumably approved and signed the form of discretionary trust which Ms Stafford had drafted, and no complaint is made in this claim that his intention in this respect was mis-recorded.

26. The other aspect is the question of the identity of the beneficiaries of the trust. I am satisfied on the evidence that, although originally his intention was to create a trust only for his children, he changed his mind and his final decision was that he and his wife should also be objects of the trust. In this respect he complains that his intention was mis-recorded, and seeks rectification to restore his and his wife's names to the class of objects. In my judgment the third requirement is satisfied.

Conclusion

27. Whether the court makes an order for the rectification of a written instrument is not a matter of right, but of discretion by the court. A number of factors may be relevant, such as delay, the interposition of third-party rights and so on. I am satisfied that there is no factor of that kind present in this case, and no other reason to refuse rectification. Accordingly, I will order that the deed of variation be rectified in the manner shown in the draft order submitted to the court.