



Neutral Citation Number: [2022] EWHC 1865 (Ch)

Case No: PT-2022-000029

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: 26/7/2022

Before:

MASTER CLARK

Between:

CLARE ALISON LAIRD
(as executor and trustee of the estate of Robert John
Simcock)

Claimant

- and -

- (1) **CATHERINE ANNE LOWDER SIMCOCK**
(as executor, trustee and beneficiary of the estate of
Robert John Simcock)
(2) **CHARLOTTE REBECCA SIMCOCK**
(3) **ELIZABETH JUNE SIMCOCK**
(4) **GEMMA LOUISE SIMCOCK**

Defendants

Paul Burton (instructed by **Shakespeare Martineau LLP**) for the **Claimant**
Michael O’Sullivan (instructed by **RWK Goodman**) for the **First Defendant**
Rupert Coe (instructed by **Blythe Liggins LLP**) for the **Second, Third and Fourth**
Defendants

Hearing date: 29 April 2022

Approved Judgment

I direct that this approved judgment, sent to the parties by email at 2pm on 26 July 2022, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

.....

Master Clark:

Introduction

1. This is my judgment on a Part 8 claim dated 8 September 2020 seeking rectification of a deed of appointment dated 31 December 2019 (“the Deed”) made by the claimant and the first defendant (together “the trustees”), as executors and trustees of a will trust (“the Trust”) created by the will dated 6 May 2009 (“the Will”) of Robert John Simcock (“the deceased”), who died on 26 December 2018.

Parties

2. The claimant, Clare Laird, is a solicitor and was, at the relevant times, a partner in the Birmingham Office of Shakespeare Martineau.
3. The first defendant, Catherine Simcock, is the deceased’s widow. The second, third and fourth defendants, Charlotte, Elizabeth and Gemma Simcock, are the adult children of Catherine and the deceased. (I refer, without intending any disrespect, to the family members by their first names, and to Charlotte, Elizabeth and Gemma collectively as “the daughters”.) Catherine and the daughters are estranged for reasons which are hotly disputed, and unnecessary to determine in this application.
4. In summary, the Deed is said to have mistakenly (as the result of a “clerical error” by the solicitor who drafted it) provided that the income of the entire fund subject to the Trust (defined in the Will as “the Trust Fund”) should be paid to Catherine during her lifetime. The trustees’ intention is said to have been not to refer to the “Trust Fund”, but to

“all that part of the Trust Fund which does not attract any relief from Inheritance Tax given by the provisions of Chapter I or Chapter II of Part V of the Inheritance Tax Act 1984, or any modification or re-enactment of them”

This expression refers to property in the estate that was not eligible for agricultural property relief (“APR”) or business property relief (“BPR”) for inheritance tax purposes (referred to by the Claimant and Catherine as “the tax-bearing assets”). The effect of appointing a life interest in those assets to Catherine would be that spousal relief would apply to them, and no inheritance tax would be payable in respect of them.

5. The substantive relief sought by the claimant is unopposed by all the defendants, although the daughters have raised issues as to the appropriate costs order to be made on granting the relief.
6. The relief sought is tax neutral, so it was not necessary for the claimant to notify HMRC of the claim.

Factual background

7. The deceased was a farmer and had carried on a farming partnership (“the Partnership”)¹ with his parents (Joseph and Margaret Simcock) and his brothers: Charles, Jonathan and Martin Simcock (“the brothers”). The Partnership owned

¹ pursuant to an agreement made on 27 February 1987

farmland and associated residential and agricultural buildings. The deceased owned a 16.6% share in the Partnership and had a 25% interest in its working capital.

8. The Will established two trusts.
9. The first trust (“the life interest trust”) was established by clause 4 of the Will, which provided:

“4 Gift for my Wife

4.1 I give TWO HUNDRED THOUSAND POUNDS (£200,000), free of inheritance tax, to the Trustees to hold upon the following trusts.

4.2 The income of the Fund shall be paid to my Wife during her lifetime.

4.3 Subject as above, the Trustees shall hold the capital and income of the Fund upon the trusts contained in clauses 7 to 10 in relation to the Trust Fund, as if references to the “Trust Fund” were references to the Fund.”

10. The “Fund” is defined in clause 18.7 as:

“18.7.1 the legacy of £200,000 in clause 4;

18.7.2 all accumulations (if any) of income added to the Fund; and

18.7.3 the money, investments and property from time to time representing the above.”

11. The second trust (“the discretionary trust”) was established by clause 7, which provided:

“7 Residuary gift - discretionary trusts

7.1 The Trustees shall hold the capital and income of the Trust Fund upon trust for or for the benefit of such of the Discretionary Beneficiaries, at such ages or times, in such shares, upon such trusts (which may include discretionary or protective powers or trusts) and in such manner generally as the Trustees shall in their discretion appoint....”

12. The “Trust Fund” is defined in clause 18.4 as:

“18.4.1 my Estate, after the payment of my debts, funeral, testamentary and administration expenses and legacies;

18.4.2 all money, investments or other property paid or transferred by any person to, or so as to be under the control of, and, in either case, accepted by the Trustees as additions;

18.4.3 all accumulations (if any) of income added to the Trust Fund; and

18.4.4 the money, investments and property from time to time representing the above.”

13. The objects of the discretionary trust include Catherine, and the deceased’s children and remoter issue.

14. The Will was accompanied by a Memorandum of Wishes dated 5 May 2009 (“the letter of wishes”) in respect of the discretionary trust. This set out that the deceased wished his residuary estate to be divided into three equal shares, one for each of his children. At para 2.1, it continued:

“Priority amongst beneficiaries should be given to my children, as indicated above, my wife is included as a potential beneficiary only should it transpire that there is inheritance tax to pay on my death which could be mitigated by part of the estate being appointed on a life interest trust for her. In any event I wish all capital ultimately to pass to my three daughters in equal shares.”

15. Margaret died 5 January 2014, and Joseph died on 22 May 2017. Lidders were instructed in respect of his estate, and a deed of variation of Joseph’s will was proposed. This gave rise to uncertainty as to the extent of the deceased’s interest in the Partnership.
16. Following the deceased’s death (on 26 December 2018), the family instructed Ben Sharp, an associate solicitor at Shakespeare Martineau, whom the deceased had instructed in February 2018 to review and advise upon the Will and the letter of wishes.
17. Mr Sharp met Catherine, Charlotte and Elizabeth on 22 January 2019 at a meeting also attended by a partner, Peter Snodgrass. Mr Sharp’s evidence (in his first witness statement) is that they sought advice on the distribution of the deceased’s estate and the deed of variation being prepared by Lidders. He does not refer to any discussion about an appointment. However, his handwritten notes include:

“*Variation – Appt from Will Trust? Use Catherine as conduit”

18. In his third witness statement dated 17 June 2022 (filed after the hearing – see paras 40 and 41 below), Mr Sharp explains that note:

“9. ... It became quickly obvious to me that the nature of the deceased’s Will, with the entire estate falling on a discretionary trust, meant an immediate charge to Inheritance Tax would apply if the First Defendant’s spousal exemption was not used by way of an appointment of some sort out of the trust. ...

11. I did not suggest that the whole estate should simply be appointed to the First Defendant, either absolutely or on a life interest trust. Since this was an initial appointment and we were in the process of gathering asset and liability information, the discussion on this topic did not proceed further than these initial comments.”

19. Mr Sharp then corresponded both with Lidders and with Elizabeth concerning the deed of variation, and the issues arising between the deceased’s immediate family on the one hand, and the brothers on the other. He also corresponded with Elizabeth as to how Catherine’s life interest would be funded from the estate.

20. On 4 November 2019, Elizabeth wrote to Mr Sharp asking for an update on the application for probate of the deceased's estate, and this was followed by correspondence expressing concern at the progress of the probate application.
21. On 20 December 2019 (the Friday before Christmas), Mr Sharp sent by email a letter addressed to Catherine enclosing "the Inheritance Tax paperwork and Deed of Appointment in Robert's estate". This is the first occasion in the correspondence or any document in evidence in which the Deed is mentioned.
22. The letter continued:

"I should advise from the outset that these forms are not straight-forward, but I do think it is important that you understand the principles of we are setting out to achieve, which I shall endeavour to do as simply as possible below.

Firstly, there will be no Inheritance Tax due on Robert's estate. As I worked through the figures which Alistair and Peter provided me with based on Brown & Co's valuation, and in particular taking note that only a certain proportion of the farm assets would attract agricultural property relief (APR) from Inheritance Tax, I have drafted a Deed of Appointment on life interest terms in your favour, as I suggested at our initial meeting this year. **In essence, what this does is to pay whatever assets not attracting Inheritance Tax from the discretionary trust onto a different kind of trust in your favour, which attracts spousal exemption from the tax. As such, I am not too concerned with any enquiries which the Revenue may raise in respect of value of the farm assets or their APR value, because anything which does not attract the relief will, by default, attract spousal exemption instead.** The other point is of course that the farm figures are not fixed; it appears quite possible that they will be subject to assessment and possible litigation between the Trustees and Robert's brothers, and this is something that I will make clear to the Revenue when I correspond with them, to notify them that the figures are provisional."
(emphasis added)

23. It would seem that, in order for Mr Sharp's explanation to make sense, the reference to "Inheritance Tax" should have been to "Inheritance Tax relief". The draft Deed sent was not in evidence. I assume, however, that it was in the same terms as the executed version with one amendment, discussed at paragraph 30 below.
24. The draft Deed adopted the definitions in the Will. Clause 2 then provided:

"2 Appointment

The Appointors, in exercise of the power of appointment conferred by clauses 8 and 9 of the Will and of all other relevant powers, hereby irrevocably appoint and declare that

- 2.1 The income of the Trust Fund shall be paid to Catherine during her lifetime.
- 2.2 The Trustees may, at any time during the Trust Period, pay or apply the whole or any part of the Trust Fund in which Catherine is then entitled to an interest in possession to her or for her advancement or otherwise for her benefit in such manner as the Trustees shall in their discretion think fit or to any of the Discretionary Beneficiaries set out in 18.8 of the Will. In

exercising the powers conferred by this sub-clause, the Trustees shall be entitled to have regard solely to the interests of Catherine and to disregard all other interests or potential interests in the Trust Fund.

2.3 Subject as above, the capital and income of the Trust Fund shall be held upon trust for Catherine's children as survive her and if more than one in equal shares ...”

25. Catherine phoned Mr Sharp on the day she received his letter of 20 December 2019. He told her “not to worry, sign it, put it in the post today and I will sort it”. He told her that they were very close to the deadline to submit it. He explained that it was for tax purposes to help the deceased’s estate and that there was no time to explain it in more detail.
26. On 26 December 2019, Elizabeth emailed Mr Sharp (stating that she was doing so on behalf of Catherine and Charlotte) asking for clarification as the assets making up the £483,685 shown on the IHT400 form as “spousal exemption on life interest of residuary estate, appointed from residuary discretionary will trust”. She also asked Mr Sharp to clarify the position with regard to the deceased’s nil rate band and residence nil rate band.
27. On 30 December 2019, Mr Sharp replied to Elizabeth providing a breakdown of the assets making up the £483,685. That figure, he wrote, represented the Deceased’s assets which did not attract relief from IHT, plus the remaining residual estate over and above the £200,000 “legacy” (as he referred to it) passing to Catherine.
28. Following that email, on the same day, he spoke to Elizabeth by phone. He followed that call up with another email that afternoon. That set out the various options for using the deceased’s nil rate band and the residential nil rate band, and the consequences of those options.
29. Elizabeth replied on the morning of 31 December 2019. She told Mr Sharp that she, Charlotte and Catherine did not have time to consider those options but wanted him to submit the IHT forms as they were i.e. with the additional life interest trust in favour of Catherine. However, they wanted, if possible, to be able to alter the position so as to create a £125,000 disabled person’s trust (in favour of Gemma) within the 2 year time frame. By this point, Catherine had signed the Deed and sent it back to Mr Sharp.
30. Mr Sharp then spoke by phone to Catherine. He has no recollection of the conversation. Catherine’s recollection is he told her he would add “revocable” to the Deed. He did not explain to her what “revocable” meant. Her understanding was that it meant the Deed could be amended at a later date if there were any problems. It is unclear from her evidence whether she agreed to this course, or only omitted to raise any objection to it. Mr Sharp’s email to Elizabeth following his conversation with Catherine refers to amending the Deed to remove the word “irrevocably”, then removing the original page and substituting the amended page. In fact, the amendment seems to have consisted of substituting “revocably” in place of “irrevocably” in clause 2.

31. Probate was granted to Catherine and Ms Laird on 26 February 2020, the net value of the deceased's estate being shown as £1,591,167. His interest in the Partnership was valued for probate at £1,048,668.
32. On 21 April 2020, Catherine's sister, Jennifer Stutley, wrote on her behalf to Mr Sharp asking him to clarify the provision made for Catherine in the Will, and stating that "Catherine is concerned that she has received no information whatsoever about this."
33. Mr Sharp's reply on 21 April 2020, after setting out Catherine's interest under the life interest trust, continued:

"The remainder of the estate passes into a general discretionary trust, out of which Catherine and other family members may benefit. This was effectively varied by transforming this trust into a second albeit revocable life interest trust in Catherine's favour. This was done in order to ensure that the estate was exempt from Inheritance Tax. If left as it was, there would have been IHT to pay at the end of December. This newer trust is flexible, and again controlled by Catherine and Clare. I would reiterate that Catherine and Clare are in legal control here, not Catherine's children. Ultimately, whatever the true eventual value of the estate, Catherine will be treated as the "prime" beneficiary and she has a key say in this."
34. This was reiterated in his email of 4 May 2020 to Dr Stutley, in which he said that the Deed converted the discretionary trust into a life interest trust.
35. In July 2020, Elizabeth and Charlotte instructed solicitors, Blythe Liggins, who wrote to Mr Sharp seeking clarification and information in relation to the administration of the deceased's estate. This included seeking an explanation as to why, as the Deed provided, the discretionary trust was appointed out to a life interest trust in Catherine's favour. Shakespeare Martineau's response (from Andrew Wilkinson) in their letter dated 7 August 2020 confirmed that the Deed put the entire estate on life interest for Catherine.
36. This was also the view taken by Royds Withy King, who were instructed by Catherine, in their email of 6 April 2021.
37. However, on 24 May 2021, Mr Wilkinson wrote to say that, having reviewed the correspondence, Shakespeare Martineau had concluded that "an error had been made in the drafting of the deed, such that it appointed the entire estate on life interest when, in fact, it should have only appointed the tax-bearing assets onto the trust".
38. The claim was issued on 12 January 2022.
39. The initial evidence in support of the claim consisted of witness statements by Mr Sharp and Mr Wilkinson, the latter having had no involvement until after the Deed had been executed. When Elizabeth highlighted in her evidence the fact that no evidence had been filed from the trustees as to their intentions when executing the Deed, Ms Laird and Catherine filed witness statements dated 22 and 23 February 2022.
40. Following the hearing on 29 April 2022, I formed the preliminary view that the claim would fail on the evidence before the court. However, since the claim was unopposed,

I offered the parties an opportunity to file further evidence as to the state of knowledge and the intention of each of the trustees when executing the Deed.

41. The claimant did file further evidence. It comprised:
 - (1) the third witness statement of Catherine dated 16 June 2022;
 - (2) the second witness statement of Ms Laird dated 17 June 2022;
 - (3) the third witness statement of Mr Sharp dated 17 June 2022.

Rectification – legal principles

42. The purpose of rectification is described by Mummery LJ in *Allnutt v Wilding* [2007] EWCA Civ 412, [2007] WTLR 941, at [11]:

“... rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor's true intentions. The mistake may, for example, consist of leaving out words that were intended to be put into the document, or putting in words that were not intended to be in the document; or through a misunderstanding by those involved about the meanings of the words or expressions that were used in the document. Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions.”

43. The principles to be applied when considering rectification of a unilateral document such as a deed of revocation and appointment are found in the Court of Appeal decision of *Racal Group Services Ltd v Ashmore* [1995] STC 115, and were summarised by Barling J in *Giles v Royal National Institute of Blind People* [2014] STC 1631. They are helpfully set out in *RBC Trustees (CI) Ltd v Stubbs* at [38] to [42]:

“38. ...Barling J noted that while equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. He set out the criteria, which he described as closely related, for the grant of rectification.

39. First, because the remedy must be treated with caution, the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument which is ordinarily regarded as the only manifestation of the party's intent, there must be convincing proof to counteract the evidence of a different intention represented by the document itself.

40. Secondly, there must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended. For example, it is not sufficient merely that the document fails to achieve the desired fiscal objective.

41. Thirdly, the specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did not intend what was recorded; they also have to show what they did intend, with some degree of precision.
 42. Fourthly, there must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent to the rectification of the document.”
44. As to intention, the relevant intention is the subjective intention of the maker of the deed: *Day v Day* [2014] Ch 114 at [22]. It is not, in my judgment, the intention of the person drafting the deed, or even (as in *Day v Day*) the intention of a person executing the deed on behalf of the maker. It follows that Mr Sharp’s intentions in drafting the Deed are relevant only insofar as they reflected his instructions from the trustees as to their intentions.

Analysis and conclusions

True intention

Ms Laird’s intention

45. Ms Laird’s first witness statement sets out her intention in paragraph 6, where she confirms that she has read Mr Sharp’s first witness statement, and continues:

“I confirm that my intention in executing the Deed was as explained in his statement in that the Deed should only have appointed the tax-bearing assets onto the life interest trust, however, there was a clerical error which meant that all of the Deceased’s estate was appointed on the life interest trust.”

46. Neither this statement nor Mr Sharp’s first statement contains any evidence as to:
- (1) the information and advice (oral or written) provided by Mr Sharp to Ms Laird in relation to the Deed;
 - (2) Ms Laird’s instructions to Mr Sharp in respect of the Deed.
47. Furthermore, the documents in evidence do not include any correspondence of any form (including internal notes) to or from Ms Laird, nor any attendance notes recording conversations between her and Mr Sharp.
48. Ms Laird’s second witness statement sets out her knowledge and intentions in paragraphs 5 to 8:

- “5. I was Mr Sharp’s supervising partner so I knew him well, and we had worked together for many years. Mr Sharp was an experienced and long-standing associate solicitor, so it was entirely normal for him to prepare documents without me specifically checking them.
6. I cannot recall precisely what Mr Sharp said to me at the time I signed the deed. I frequently acted as executor and trustee, so was signing and discussing documents with staff, on a daily basis.
7. I think I would have read the document, as I read most of the documents that crossed my desk. However, in this case, I would not have known, just reading and signing the document, whether or not it had been drafted

correctly, without seeing the will and discussing the matter at length with Mr Sharp, which I do not recall doing.

8. I would have been reliant upon Mr Sharp to draft the document in such a way so as to appoint the correct portion of the estate, and to advise me as to the effect of the document, not least because I was not dealing with the administration of the estate on a daily basis so would not have had the information at my fingertips.”
49. The effect of Ms Laird’s evidence is that, when executing the Deed, she had no knowledge of what was intended to be achieved by it. Although she says that she relied on Mr Sharp to advise her, she does not state that he did. I am not therefore satisfied that she had any intention as to what she was achieving by executing the Deed. Her only intention was to sign the document which Mr Sharp put before her to sign.
50. Her evidence in her second statement is also, in my judgment, inconsistent with that in her first witness statement, such that it is difficult to understand how she could have signed the statement of truth in the first witness statement.
51. Ms Laird’s second witness statement also sets out her understanding of the expression “tax bearing assets” as being, unsurprisingly, assets in respect of which inheritance tax would be paid. There is no reference by her to its meaning in the context of the deceased’s estate i.e. assets in respect of which APR or BPR was not available, or indeed any indication that she knew that the estate included assets in respect of which these reliefs could be claimed. Indeed, if she had understood what Mr Sharp says he was intending to achieve by the Deed, it is difficult to see how having read the Deed, she could have signed it.
52. I have taken into account that Mr Sharp in his third witness statement (at para 14) says that he recalls telling Ms Laird that the intention of the Deed was to appoint the tax-bearing assets only to Catherine on a life interest trust, and that this did not constitute an appointment of the whole estate to her. No details are given, and there are, as noted, no file notes or any other records of any conversations between Ms Laird and Mr Sharp. In my judgment, the inference to be drawn from the evidence as a whole is that Ms Laird delegated matters in their entirety to Mr Sharp, and lacked any relevant intention when executing the Deed.

Catherine’s evidence

53. Catherine’s first witness statement deals with her intention when executing the Deed as follows:
 - “4. My understanding of SM’s correspondence and advice at that time was that the purpose of and intention behind the Deed was to reduce the inheritance tax payable in my late husband’s estate. This was possible as I was his spouse.
 5. I am a lay Executor and Trustee rather than a legal professional or expert and was happy to sign and return the Deed as requested, and to rely upon SM’s advice and guidance. I had no reason to question the advice I was given or the way in which the Deed had been drafted.”

54. This in my judgment falls short of showing the specific intention that the trustees are said to have had, namely that only the tax-bearing assets would be appointed to Catherine. The general intention referred to by her was of course achieved by the Deed as executed, because the entirety of the residuary estate thereby became subject to spousal relief.
55. Catherine's second witness statement confirms that she did not give any instructions to Mr Sharp as to the contents of the Deed. The only written information she received from him was his letter dated 20 December 2019, enclosing the draft Deed. The letter itself contains a confusing error (the omission of the word "relief") and it is clear from Catherine's evidence that she did not understand it. In my judgment it is not possible on this evidence to attribute to Catherine an intention, when she executed the Deed, that only assets which did not attract APR or BPR would be appointed from the discretionary trust to a life interest trust in her favour.

Conclusion

56. For these reasons, I am not therefore satisfied that the claimant, Ms Laird, has shown to the level required of "convincing proof" that the trustees had the true intention alleged as being that to which effect was not given in the Deed. The claim therefore fails.