IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)
[2021] EWHC 471 (Ch)

PT-2020-000897

The Rolls Building
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Fetter Lane
Holborn
London EC4A 1NL

Thursday, 28 January 2021

Before:

MASTER PESTER

B E T W E E N :

SHAMSUNNISA BASHEY — Claimant

- and -

(1) GHAZALA BASHEY
(2) SAMEENA BASHEY
(AS THE TRUSTEES OF THE SHAMSUNNISA BASHEY TRUST 2015)
Defendants

MR O. CONOLLY (instructed by Ward Hadaway Solicitors) appeared on behalf of the Claimant.

J U D G M E N T

MASTER PESTER:

1 I have before me a claim for the rescission of a voluntary disposition on the grounds of mistake. The claimant is an eighty-three-year-old widow, and she is the settlor of the Shamsunnisa Bashey Trust 2015 ("the Trust"), and the mother of four adult children. The Trust was created on 19 March 2015. The defendants are two of her adult children, who are trustees of the Trust, and they do not contest the claim.

2 Until 19 March 2015 the claimant was the sole owner of her residence, 4 Westfield Park, Gosforth, Newcastle upon Tyne NE3 4XX ("the Property"). In 2014 the claimant approached McKeag & Co, a firm of solicitors, with regard specifically to inheritance tax mitigation advice, and the claimant was advised by Ms Johal, a solicitor who was at the time apparently less than one year qualified. The terms of the Trust as set up are that the claimant has an interest in possession in the trust fund during her lifetime subject to overriding powers of appointment in favour of the beneficiaries, who are her four adult children. On the settlor's death, her four children will become entitled to the trust fund in equal shares.

3 The tax consequences of what was done are set out at paragraph 22 of the Particulars of Claim, as follows:

> *"22.1 there was an immediate IHT charge ("the entry charge") on the transfer of the Property to the Trust, chargeable at 20% of the value of the Property, pursuant to s 7(2) Inheritance Tax Act 1984 ("IHTA") and due and payable to HMRC by 31 September 2015;*
> *22.2 if the entry charge is discharged by the First Claimant it is grossed up, giving rise to an IHT charge of £118,750;*
> *22.3 if it is discharged by the Trustees, it is not so grossed up and is £95,000;*
> *22.4 statutory interest would be charged on those amounts of approximately £17,812 and £14,250 respectively;*
> *22.5 the Trust property was "relevant property" for the purposes of Chapter III Part III of IHTA, giving rise to 10-yearly charges at a maximum of 6% of the value of the trust property (under section 64 IHTA), and proportionate exit charges should the trust property be distributed in whole or part (under section 65 IHTA) (the "relevant property charges");*
> *22.6 pursuant to the "gift with reservation of benefit" ("GWR") provisions (section 102, Schedule 20, Finance Act 1986), the fact that the First Claimant remained a beneficiary of the Trust following the Transfer entails that she has "reserved a benefit" in the Property, with the effect that it is deemed to remain in her estate for IHT purposes, giving rise to a potential IHT liability on her death ("the GWR charge");*
> *22.7 the 20% entry charge can be set off against the GWR charge only if she dies within seven years of the gift (i.e. by 19 March 2022) but not thereafter."*

4 The tax consequences are quite different from what the settlor claimant understood that she was obtaining. She has filed a witness statement where she explains that her view is while she was seeking to obtain advice limiting inheritance tax liabilities, she understood that if she lived for a period of seven years after making the Trust, the Property would "fall outside of her estate for the purposes of the calculation of inheritance tax". And she also explains in her witness statement at paragraph 18 that her understanding was this would mean that the

value of the Property would not be taken into account when calculating the inheritance tax payable on her estate.

5 In addition, a little more detail is given as to her understanding as pleaded at paragraph 29 of the particulars of claim, where it is said that the claimant believed:

> *"1.The transfer would have the effect for inheritance tax purposes of removing the value of the Property from her estate after seven years.*
> *2. The transfer would not itself give rise to any immediate inheritance tax charges, either on herself or the trustees.*
> *3. The transfer would not give rise to ten-yearly and exit charges within the Trust, the relevant property charges of which she was ignorant.*
> *4. That she would not be deemed for inheritance tax purposes to continue to own the beneficial interest in the Property pursuant to the GWR Rules, of which she was ignorant."*

6 What is said, briefly, is that had the settlor understood the true tax position with regard to the transfer of the Property, she would have not made the transfer as the detrimental consequences far outweighed any possible benefit that she might have got there.

7 Now, importantly, as it seems to me, a pre-action professional negligence protocol letter has been sent to the solicitors RPC, who are representing McKeag & Co, and RPC's letter, dated 8 April 2020, clearly admits that the advice given by McKeag & Co was as pleaded by the claimant now. So, there is no dispute as to the advice that was actually given. It is also accepted that such advice was (a) negligent and (b) in breach of the contractual and tortious duties which McKeag & Co owed the claimant.

8 HMRC have been notified of this claim, and it has indicated that it does not wish to be joined to the proceedings. That is set out in a letter dated 23 November 2020, which is before me.

9 I turn now to considering the legal principles that I must apply in deciding whether to give the relief claimed. I start with the well-known decision in *Pitt v Holt* [2013] UKSC 26, which is the leading authority of the test to be applied for rescission of voluntary dispositions on the grounds of mistake, and the point made there in Lord Walker's judgment is that it is exercisable where there is a causative mistake which was so grave that it would be unconscionable to refuse relief.

10 That obviously is a rather high level test, but further guidance has been given fleshing out that statement in the judgment of the Master of the Rolls, Sir Terence Etherton, in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch), where he sets out five principles at para. 36 of his judgment, and also at para. 39. The five principles I would summarise as follows, although they are set out in more detail in the judgment itself. The first is there must be a distinct mistake as distinguished from mere ignorance or inadvertence, or what unjust enrichment scholars call a "misprediction" relating to a possible future event. So, there must be a distinct mistake. A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.

11 Causative mistake must be sufficiently grave as to make it unconscionable on the part of the done to retain the property. And that test will normally be satisfied only where there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact

or law which is basic to the transaction; and the gravity of the mistake must be assessed by close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. The injustice or unfairness or unconscionableness of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of the distinct mistake, and its degree of centrality to the transaction, and then make an evaluative judgment whether it would be unconscionable or unjust to leave the mistake uncorrected. And finally, Sir Terence Etherton pointed out that Lord Walker in *Pitt v Holt* said that in some cases, at least of artificial tax avoidance, the court might think it right to refuse relief, either on the grounds that the claimants acting on supposedly expert advice must be taken to have accepted the risk the scheme would prove ineffective, or on the ground that a discretion should be exercised to refuse relief on the grounds of public policy. So, those are the five factors to be considered in a case of this sort.

12 I have been taken helpfully by counsel for the claimant to some further authorities. I am not going to dwell on them very long because they all involve their own facts. *Hartogs v Sequent (Schweiz) AG* [2019] EWHC 1915 (Ch) ultimately is perhaps of the most relevance to the case that I am now dealing with, even though the tax liabilities mistakenly created in that case were of a much different order of magnitude from the case that I am dealing with. But what *Hartogs v Sequent* shows me in particular is that in that case there was a positive belief on the part of the claimant settlor that he was creating a PET, and the key legal characteristic underlying the transaction was its tax character, giving rise to a very grave mistake in terms of the consequences. And the court in that case also stressed the injustice of leaving the mistaken disposition uncorrected even where it was done for tax mitigation purposes.

13 Of course if a rescission of a transaction can be done in *Hartogs v Sequent*, it seems to me that the present case before me is a much stronger case, but one sees some of the many similar characteristics in that in the case before me. Thus, the entire legal characteristic of the transaction was its tax character, there was no need in this case to have carried out the transaction, it was done solely because of the mistaken belief on the basis of erroneous advice, and that was the whole purpose of entering into the transaction.

14 I have also been referred to the case of *Van der Merwe v Goldman and another* [2016] EWHC 790 (Ch) [2016] 4 W.L.R. 71. Again, that case too is one where the claimants entered into transactions designed to mitigate IHT, which had the effect of giving rise to an unexpected 20 per cent inheritance tax charge. Again, in that case there was no pressing need for the claimant to take the steps that he had done. It was held in that case that one could not describe the claimants as being careless. They acted on professional tax advice. And importantly, the point was made in that case that what was being done was not, in the words of Lord Walker in *Pitt v Holt*, "Any element of artificial tax avoidance", rather it was vanilla tax planning, but in that case it was ultimately held that the consequences were sufficiently grave that it was right in the exercise of a discretion to set aside the transfer.

15 I have also been cited a further case, *Freedman v Freedman* [2015] EWHC 1457 (Ch). That was a case where solicitors gave wrong advice because they had simply overlooked a recent change in the law, but we are moving, as it seems to me, further away from a situation analogous to what is before me.

16 I have already referred to some extent to the evidence before me. I have witness statements both from the settlor and from the two trustees. The witness statements corroborate what is said by the claimant. The claimant makes the point at paragraph 28 that Ms Johal had indicated the Property could be placed in a trust, and that if the claimant survived for a

period of seven years from the date of execution of the trust, "The Property would potentially be exempt from IHT as it would fall outside my estate", and that was the limit of the advice that was given.

17 Following the advice given, ultimately I also note that at the time there was a mortgage on the Property, the mortgage was owed to Halifax, Halifax indicated that it would not consent to the transfer as long as the mortgage was in existence. So, what happened in this case is the four children of the claimant agreed to pay off the mortgage, which I believe was in the sum of about £64,000.

18 I have already set out what the very unfortunate events that happened in this case in terms of the consequences as a result of the admittedly negligent advice given by the solicitors. In summary, there is an inheritance tax charge if the value of the property was in excess of a nil rate band on the transfer. The tax rate on the excess in this case is 20 per cent. If the trustees were to discharge that liability, it would be £95,000. If the claimant, as opposed to the trustees, were to discharge that tax charge, it would be grossed up, it would come to £118,750. As that sum has not been paid, there might also be interest and penalties incurred. There will also in any event be an inheritance tax charge on the settlor's debt due to the Gift With Reservation of benefit rules.

19 And the point is there are no liquid assets within the Trust to deal with any of this, nor is the settlor able to deal with it. She gives evidence at paragraph 72 of her witness statement that had she been advised of any of these matters prior to making the transfer of the Property into the Trust on 19 March 2015, she would not have proceeded with the Trust.

20 So, ultimately, on the material before me, I am persuaded that in this case, having looked carefully at all the circumstances of the case, as I am directed to by the guidance given in *Kennedy v Kennedy*, there is indeed an operative mistake for which the court ought to give relief.

21 I say this, in summary, for the following reasons. Here, the claimant made a distinct mistake. She positively believed there would be no IHT on the transfer, and that any such IHT would only arise should she die within seven years. She was also mistaken in not believing the relevant property regime would apply, and also the GWR Rules. The authority of *Pitt v Holt* shows me that if a mistake is caused by carelessness, that would not be automatically fatal to the rescission claim unless the transferor took a conscious risk of being wrong. This is partly a matter of public policy, but the facts before me are very far from that situation. The claimant was obtaining what really might be described as simple vanilla tax planning advice. She was not in any sense taking a conscious risk of being wrong. The claimant made the transfer after obtaining erroneous advice from McKeag & Co. It might be described as perfectly sensible attempted tax planning. It is not aggressive tax avoidance, and there is no conscious taking of risk. The mistake here was sufficiently grave to trigger the intervention of equity. The consequences are serious. It creates various liabilities, unbeknownst to the settlor, which the Trust has absolutely no means of discharging. The mistake in this case was indeed central to the transaction. There was, as in some of the authorities as I have been shown such as *Sequent*, absolutely no need for the claimant here to enter into this transaction. She only did it because she believed she was engaging in sensible tax planning. Without the advice, which triggered the mistake, she would never have made the disposition. Finally, it seems to me that there would be a real injustice in this case of leaving the mistake uncorrected.

22 All those factors, taken together, and having regard to all the circumstances of this case, mean that it is appropriate to set aside this transfer.

CERTIFICATE

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