



Neutral Citation Number: [2022] EWHC 2033 (Ch)

Case No: CH-2021-0000268

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

**On appeal from the orders of Deputy Master Francis
Dated 15 October 2021 and 2 December 2021**

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 July 2022

Before :

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court

Between :

(1) DELVIN SINGH	<u>Appellants</u>
(2) DERRILE SINGH LOHIA	
- and -	
GURMESH SINGH LOHIA	<u>Respondent</u>
(Personal representative of DABARA SINGH LOHIA (Deceased))	

Ms Araba Taylor (instructed by **Premier Solicitors**) for the **appellants**
Mr George Woodhead (instructed by **Vanderpump & Sykes Solicitors**) for the **respondent**

Hearing dates: 19 July 2022

Judgment Approved by the court

HH JUDGE JARMAN QC:

Introduction

1. This appeal concerns a sad family dispute between the appellant brothers and the respondent who is the widow and personal representative of a third brother, Dalbara Singh Lohia, who tragically died during these proceedings. The dispute concerns the beneficial ownership of property at 34 Wilberforce Road, Finsbury Park, in which their parents brought up the brothers and their four sisters. It was vested in the name of their father, Joginder Singh Lohia, who died intestate in 1988. The following year, his widow and her late son took out letters of administration to his estate, the net value of which was declared to be £94,515.
2. In 1992 these two as personal representatives, executed an assent in that capacity vesting the property in their names. The property, the value of which was then declared to be £100,000, was then registered in their names. At about the same time, the adult daughters entered a deed of variation vesting their interests in the estate in their mother. The then infant daughter, Narinder Kaur Singh, was not a party to that deed. By a transfer executed in October 2014 in form TR1, the mother and her late son transferred the property into the joint names of the three brothers. The form at section 10 included options as to the beneficial interests, and the option indicating that the property was to be held on trust for the three brothers in equal shares was ticked.
3. In their particulars of claim, the appellants pleaded that the transfer was pursuant to an agreement between the brothers, their mother, and their youngest sister, by then an adult, that the appellants would convert the

property into flats, allow their mother to occupy the ground floor flat, and that their late brother would have no beneficial interest in the property because he had received £15,000 from the estate, which represented his father's work pension. It was further pleaded that the transfer did not represent the intentions of the parties and did not take into account the beneficial interest of their youngest sister in the estate of her father. The appellants sought declarations that the property is subject to that beneficial interest, their mother's right to occupy the ground floor flat for life and that their late brother had no beneficial interest in the property.

The hearing below and grounds of appeal

4. The hearing took place before Deputy Master Francis over three days in September 2021. In a detailed judgment handed down some five weeks later ([2021] EWHC 2752 (Ch)), he dismissed the claim for rectification of the transfer and declared that the property was held by the appellants and their late brother's estate in equal shares, but subject to the youngest daughter's interest under the statutory trusts arising upon her father's intestacy, if that interest had not previously been satisfied. There is still a dispute about whether it has, but that is not an issue on this appeal. The deputy master found the evidence as to the pleaded agreement which the transfer was intended to put into effect to be unsatisfactory and did not accept it.
5. With the permission of Marcus Smith J, the appeal proceeds on three grounds. First, it is alleged that the deputy master approached the case as a breach of trust case, when that was not pleaded and Ms Taylor who appeared for the appellants before him, as she did on the appeal, made clear in submissions that

she was not advancing such a case. She submits that the deputy master should have approached the appellant's case as to the true trusts of the transfer, namely subject to the statutory interests on intestacy, and should have granted consequential rectification. Second, the deputy master failed to make a finding on such rights of the mother, and by implication found that there were no such rights. Third, he erred by applying the principles of rectification which are applicable to commercial contracts instead of a transfer made in the context of an intestate estate.

6. Each of those grounds is contested by the respondent. On her behalf it is contended that the deputy master was correct to find that the evidence relating to the transfer was incomplete and inconsistent, and that in the absence of convincing proof that the declaration in the transfer as to how the property was to be held beneficially did not give effect to what was intended, then the declaration must prevail as between the parties to it. At paragraph 31 of his judgment, the deputy master accepted the submission by Mr Woodhead, who appeared for the respondent, as he has on this appeal, that as between the parties to the transfer the declaration was conclusive, following *Pink v Lawrence* (1978) 36 P&CR 98 and *Goodman v Gallant* [1986] Fam 106. At paragraph 71 the deputy master referred to the transfer as having been signed by the mother and the appellants. It was also signed by the late son as one of the two transferors.

The estate

7. Several propositions of law relating to the intestate estate were not in dispute before me:

- i) As a result of section 46(1) of the Administration of Estates Act 1925 (the 1925 Act), and the intestacy rules in force at the time of the father's death, the mother was entitled to a statutory legacy of £75,000 from the estate of her late husband plus a life interest in half the remainder. Section 46 (2)(B) provides that where there are issue, the residuary estate (other than the personal chattels) "shall stand charged with the payment of a fixed net sum, free of death duties and costs, to the surviving spouse or civil partner, together with simple interest on it from the date of the death at the rate provided for by subsection (1A) until paid or appropriated."
- ii) Section 46 (2)(C) provides that subject to providing for the sum and interest referred to in paragraph (B), the residuary estate (other than the personal chattels) shall be held—"(a) as to one half, in trust for the surviving spouse or civil partner absolutely, and (b) as to the other half, on the statutory trusts for the issue of the intestate."
- iii) The children were entitled to a seventh share each of the other half of the estate.
- iv) Until the estate has been administered, such interests do not amount to beneficial interests in any particular asset of the estate but merely allow those entitled to call upon the administrators to administer the estate. In *Commissioners of Stamp Duties (Queensland) v. Livingston* [1964] 3 WLR 963, the Privy Council dealt with the rights of a residuary legatee in an unadministered estate. Lord Radcliffe, giving the judgment of the Board, said at paragraph 969 that it had long been established that

freehold property in the estate became fully owned by the executors without distinction between legal and beneficial ownership. Equity did not recognise a beneficial interest in favour of the legatee in the assets in the executor's hands during the course of administration. These observations were applied by Plowman J to interests in respect of an unadministered intestate estate in *Eastbourne BS V Hastings Corporation* [1965] 1 WLR 861 at 867.

v) Administrators have all the powers of an absolute owner in relation to the estate and every contract is enforceable against them as if executed by the deceased: Section 39(1)(iii) of the 1925 Act and section 6(1) of the Trusts of Land and Appointment of Trustees Act 1996.

8. At paragraph 7 of his judgment, the deputy master observed that under the rules of intestate succession, subject to the mother's entitlement, the residuary estate would be held on the statutory trusts arising under section 46 of the 1925, that is as to the remainder for the children in equal one-seventh shares. He added that as personal representatives, the mother and her late son would have held the property "and any other assets within the estate as fiduciaries pending the due administration of the estate and thereafter on those statutory trusts."

9. It is not easy to ascertain the progress of the administration of the father's estate at any particular time. No estate accounts have been prepared. The estate included the property and the work pension already referred to. It also comprised some £275,000, being the proceeds of litigation in which the father was involved but which was not paid into the estate until 2002. The mother

distributed substantial sums of money to her children at various times, and that is why there remains a dispute as to whether her youngest daughter has received what is due to her as a result of her father's intestacy. The property remains unsold. It was converted into three flats by the appellants. The mother claims to live in the ground floor flat. Another one is occupied by the second appellant and the third is rented out.

10. In the respondent's defence, it was pleaded that the 1992 assent had the effect of vesting the beneficial interests in the property in the names of the mother and her late son. In the hearing before the deputy master, Mr Woodhead accepted that the 1992 assent did not affect the beneficial interests in the property. The deputy master referred to that concession in paragraph 30 of his judgment, and indicated that it was rightly made. Ms Taylor relies heavily upon that concession. She submits that as a result, there was no longer a defence concerning the beneficial interest of the mother and her youngest daughter, and that the deputy master should have found that the mother and her late son did not execute the transfer as beneficial owners but were acting as trustees.

Ground 1

11. At paragraph 41, the deputy master referred to the submissions of Ms Taylor that the court had power to rectify the transfer in order "to remedy a breach of trust." He went on to say that there were a number of insuperable difficulties to that argument, including that no claim based on breach of trust was pleaded. However it is clear from the transcript that it was he and Mr Woodhead who raised the issue of breach of trust, and Ms Taylor made clear to them, as she

did to me, that she was not advancing a case of breach of trust. Rather, her case was and is put on the basis that the transfer must be considered in the context of the rights of the mother and her children on the father's intestacy.

12. That is the context in which ground one of the appeal is put forward. The statutory rights were not in dispute once the concession was made that the 1992 assent was made by the mother and her late son as trustees. Ms Taylor submits that having wrongly identified the appellant's arguments as to breach of trust, the deputy master went on to consider rectification in the context of breach of trust, whereas he should have considered the remedy in the context of the rights of members of the family on the father's intestacy.
13. Mr Woodhead submits that the mother and her late son as administrators were capable of transferring the legal and beneficial title in the property to the appellants and their late brother under the statutory provisions referred to in paragraph 6(v) above. Following *Goodman v Gallant*, the declaration as to the beneficial interests is conclusive, and the parties, including the mother, are estopped by their deed from asserting otherwise. As there was no claim for rescission, the appellant could only succeed if their pleaded claim for rectification satisfied the test for such a remedy.
14. He also submits that the case for rectification of the transfer on the basis of such statutory rights was not pleaded. Paragraph 10a of the particulars of claim refers to such rights (albeit "in the property") of the youngest daughter, and in my judgment her rights are sufficiently pleaded. Paragraph 10b refers to the mother's right to occupy the ground floor flat, but I accept that the latter

was pleaded on the basis of an express agreement, which the deputy master rejected.

15. Apart from the pleading point however, I am not satisfied that ground 1 is made out. Although the deputy master appears to have misunderstood a part of the appellant's case, that error did not in my judgment impact upon his rejection of the pleaded agreement. He was entitled to reject the evidence as to such an agreement as incomplete and inconsistent. Once he had done that, he was entitled to find that the declaration in the transfer was conclusive, applying *Goodman v Gallant*. The mother and her late son were able to deal with the legal title and the beneficial interest in the property.
16. The deputy master found at paragraph 2 that the estate had not been fully administered or properly concluded, as he was entitled to find on the evidence. That being so, although some of the language used by the deputy master refers to beneficial interests in the property, as a result of the statutory rights, the true position in my judgment is that such rights did not give rise to an beneficial interest in the property, but rather to rights to call upon the administrators to administer the estate.

Ground 2

17. There is some degree of overlap between ground 1 and ground 2. The latter is that the deputy master erred in failing to make a finding that the mother continued to have intestacy rights, now limited to a right to reside in the property. It is clear that no such finding was made. However, in my judgment, that is not surprising given that the appellants' case was pleaded on the basis that their mother's right arose because of an express agreement, which the

deputy master rejected. In respect of the youngest sister, it was pleaded that she had a beneficial interest in the property, and the judgment and the consequent order made an allowance for her statutory rights.

18. This does not alter the fact that the mother's case was put on a different basis which was rejected. It is clear that the deputy master had regard to the statutory trusts in respect of the estate. In paragraph 65, the deputy master stated that he found the issue of the mother's intention "as regards the transfer of her beneficial interest" in the property to be the most difficult question to resolve. Ultimately, he concluded "with some diffidence" that he could not be satisfied on the balance of probabilities that the mother intended only to benefit the appellants and to exclude her late son. In my judgment, he was entitled to find on the evidence that by executing the transfer, the mother intended that the beneficial interest in the property should be vested in her three sons. That was not a finding that otherwise disturbed the mother's statutory rights in respect of the estate. I am not satisfied that ground 2 is made out.

Ground 3

19. Ground 3 is that the deputy master erred by applying the principles of rectification which apply to commercial contracts, which are not apposite to the rectification of the transfer.
20. Those principles are set out in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, which were also discussed in *Ralph v Ralph* [2021] EWCA Civ 1106. The deputy master cited these authorities. At paragraph 34, he cited paragraph 176 of the former authority as follows:

"We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."

21. The latter case concerned a transfer of property with a similar declaration as to beneficial interest as in the present case. A claim for rectification of that declaration was rejected by the Court of Appeal on the basis that no positive prior common intention between the parties, as to how the property was to be held beneficially, had been established. The parties in that case did not submit that the *FSHC* principles were not apposite in determining whether such a declaration should be rectified. However, Sir Geoffrey Vos MR considered whether they were, and set out four reasons why they might not be.

22. The deputy master set these out in full in paragraph 36 of his judgment as follows:

"27. First, the rules relating to rectification of a commercial contract assume that the parties have, in some sense, negotiated that contract. This point is made good in the passages that I have cited from *Butlin's*. Negotiation may take many forms, but the rationale of the authorities is that there will have been exchanges or discussions that lead to the written agreement in question. In this case, there were, on the trial judge's findings, no such exchanges or discussions, and more importantly there could not have been. Had the single solicitor acting for David and Dean known that they disagreed about how the beneficial interest in the property was to be divided, he would have been required by best professional practice to advise that separate representation was sought.

28. Secondly, and by way of a related but more general point, it must be relatively common for family members buying property jointly not to discuss openly how the beneficial interest is to be held. Plainly if the

TR1 is signed by the transferees, such a discussion is more likely, but still not inevitable.

29. Thirdly, whilst the situation in this case is not at all the same as the situation in the pension scheme cases, which Leggatt LJ singled out for special treatment, it has features that distinguish it from a commercial context. *Butlin's* makes clear that different considerations will apply to settlements and declarations of trust. It may be that declarations of trust of the kind in issue in this case would also demonstrate special features.

30. Fourthly, the joint purchasers of properties hold the legal estate as trustees. *Butlin's* makes clear, at least, that the trustees' intentions may be relevant to rectification if they have themselves made a bargain. The bargain could mean that the beneficial interests would be held by persons other than or in addition to the trustees. In this case, for example, on one analysis David intended the property to be held for "his family".

23. The Master of the Rolls in the following paragraph observed that despite those distinctions, the parties did not suggest what adjustments to the *FSHC* approach might be made in a case of that kind and that it would be undesirable for him to speculate on what arguments might have been advanced.
24. The deputy master at paragraph 37 said that one exception to the *FSHC* approach was established in the case referred to by the Master of the Rolls, *Re Butlin's Settlement Trusts* [1976] Ch 251, namely voluntary settlement or gifts. At paragraph 39, the deputy master said this:

“On the face of the claim as it is brought by [the appellants] in this case, the transaction which is sought to be rectified was not simply a unilateral gift by [the mother] of her existing beneficial share in the Property since they claim that as part of the intended transaction [their late brother] was also to relinquish his existing share in the Property and they seek to give effect to this bargain by the rectification of the transfer. However, if they are unable to establish any common intention on the part of [their late brother] that he should relinquish his existing beneficial interest in the Property, that does not in my judgment preclude them from the lesser alternative claim for rectification of the transfer simply in relation to the disposal by Harbhajan of her beneficial interest in the Property if on the evidence there is convincing proof that [the mother] as donor of that interest intended to dispose of it to [the appellants] alone. In such a case it

would not be necessary to show that [their late brother] or indeed [the appellants], shared in any common intention relating to the disposal of [the mother's] interest, the claim instead depending upon what her subjective intention was and whether by a mistake that was not given effect to in the transfer.”

25. Ms Taylor submits that the deputy master did not deal with whether there were “special features” which made an adjustment to the *FSC* approach apposite. At paragraph 64, he reminded himself that a party seeking rectification must satisfy the court with convincing proof that the impugned instrument did not reflect the common intention of the parties. He went on to say that however the mother may have intended to dispose of her share in the property, he could not be satisfied that there was any common intention that the late son agreed that he would relinquish his existing share, or that there was any common intention between the parties to the transfer that it should have that effect.
26. Ms Taylor submits that in applying the observations of the Master of the Rolls to the fact of the present case, the terms of the trust were not negotiated but imposed by statute, it was a family situation which did not involve buying property, and that there are special features, namely that it related to pre-existing trusts prescribed by statute.
27. As part of this ground, Ms Taylor also submits that the deputy master was also wrong to find, as he did, that he was not satisfied that the late son had already received his share on the balance of probabilities in the 1990s through monies received to purchase properties. It was accepted that he had received £15,000 as indicated above, but the deputy master did not find it to be established that he received further sums. Ms Taylor submits that this sum very substantially exceed his entitlement to his father's estate as comprising the property and the

works pension, which entitlement amounted to only a few hundred pounds. She submits that the money expected from the litigation should not be taken into account for this purposes as it amounted to a chose in action with an unascertained value which the parties were not then thinking about.

28. I do not accept this latter point. In determining whether the late son's rights on intestacy have been satisfied, in my judgment it is proper to take into account all assets of the estate and a valuation could have been put on the chose in action. I see no basis to interfere with the finding that his rights had not been satisfied.
29. As to the broader point, although the deputy master refers to convincing proof in rectification cases, the substance of his finding was that there was little reliable evidence as to what was intended by the parties to the transfer. The solicitor's file relating to the transfer is missing. At paragraph 18 the deputy master referred to emails from the appellants to the solicitor at the time, which do not really assist. In paragraphs 52 to 59 he set out his impression of the witnesses. For the reasons set out therein, he treated the evidence of each of the appellants with caution. He was left with little confidence in the mother's ability to recall key events or more generally in the reliability of her evidence. He was unable to place any reliance on one of her daughters called to give evidence or on the statement of another daughter. Other witnesses took the matter no further. The respondent gave evidence, but accepted that she knew little about the ownership of the property or the events leading up to the transfer. What evidence she did give about it the deputy master found to be unconvincing.

30. He was plainly entitled to treat the oral evidence in this way. It is not entirely clear from his judgment to what extent if any he adjusted the *FSHC* principles to be applied appropriately to the facts before him. However, even if an adjustment is appropriate, in my judgment on the facts as found, there was no proper basis on which rectification could be granted. The mere existence of statutory rights in respect of the father's estate, being rights to call for the estate to be administered rather than beneficial interests in particular assets of the estate, does not in my judgment provide such a basis.

Conclusion

31. It follows that all three grounds fail and the appeal must be dismissed. I am grateful to counsel for their focussed submissions. I invite them to submit a draft order, agreed as far as possible, within 14 days of hand down of this judgment, together with written submissions on any matters which cannot be agreed.