Neutral Citation Number: [2018] EWHC 673 (Ch)

Case No: HC-2017-001677

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
PROPERTY TRUSTS AND PROBATE LIST

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28/03/2018

Before :

HIS HONOUR JUDGE HACON
(sitting as a High Court Judge)

- -

Between :

(1) SARAH ELIZABETH ENGLISH **(2) SIMON MARCUS THUNDER** **(3) ANNABEL JANE LOHMEYER**	**Claimants**
- and -	
(1) TERENCE IVOR KEATS **(2) PAUL DOUGLAS SANSOM** **(3) JOHN JAMES BUCHANAN** **(4) ISABELLA MARY ENGLISH**	**Defendants**

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Marcus Flavin (instructed by **Gardner Leader LLP**) for the **Claimants**
Josh Lewison (instructed by **Preston Redman LLP**) for the **First to Third Defendants**
Justin Holmes (instructed by **Preston Redman LLP**) for the **Fourth Defendant**

Hearing dates: 7 March 2018

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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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HIS HONOUR JUDGE HACON

Judge Hacon :

Introduction

1. This action raises two points of law concerning defectively executed Deeds of Appointment. The facts were not in dispute.

Background facts

2. Before his death, Alan Thunder ran a newspaper distributor in southern England called Thunder & Clayden Limited. He had inherited the company from his father, the founder of the business. Alan and his wife June owned shares in another company, Thunder Investments Limited ("Thunder Investments"). They decided to settle shares in that company on their children, Sarah, Simon and Annabel. The three children are the claimants in these proceedings.

3. Simon's full name now consists of the single name Sanghasiha, but he was called Simon in the evidence and in submissions, so I will do likewise.

4. On 30 April 1997 Alan and June each made three settlements of shares in Thunder Investments. Those made by Alan, referred to at the trial as Settlements 1, 2 and 3, played only a peripheral role. This action concerns the three made by June, referred to as Settlements 4, 5 and 6.

5. There were four trustees of June's Settlements, including June herself and Alan. The third trustee was Terence Keats. He is a partner in the firm Preston Redman LLP and a longstanding friend of the Thunder family. The fourth trustee was Stephen Hall.

6. The beneficiaries under the Settlements were the same: Sarah, Simon and Annabel, their children and remoter issue, and in addition the Salvation Army, the NSPCC, Help the Aged and Age Concern. Clause 4 of each of the Settlements provided that the trustees were to hold the capital and income of the trust fund for the benefit of such of the beneficiaries in such manner as the trustees appointed in their discretion.

7. The only significant difference between the Settlements appeared in their clause 7. This clause provided for what should happen if, after any appointment under clause 4, anything remained of the trust fund at the end of the trust period. Clause 7 of Settlement 4 stated that in such a case the capital and income should be held on trust absolutely for Simon, or if he had died his children or remoter issue. In Settlement 5 the assets were to be held for Annabel, her children and issue. In Settlement 6 it was Sarah or her children and issue. In other words, each of the Settlements made one of June's children a prime beneficiary.

8. Around the beginning of 1999 the Thunder family was advised that it would be advantageous from a tax point of view to give Sarah, Simon and Annabel an interest in possession under the Settlement of which he or she was prime beneficiary. The effect would be that the prime beneficiary would personally pay tax on income generated by the trust fund as opposed to tax being paid by the fund itself. This required Deeds of Appointment to be executed pursuant to clause 4 of each of the Settlements. The same was to be done for Alan's three.

9. Six Deeds of Appointment were prepared and each was signed on 8 March 1999. Unfortunately, in each case the Deed was drafted identifying only three of the four trustees as appointers and providing for the signature of only those three trustees. It is likely that the drafter failed to recognise the distinction between a settlor and a trustee. In the case of Settlements 4, 5 and 6, June was a trustee as well as the settlor. In any event, Alan did not sign Settlements 1 to 3 and June did not sign Settlements 4 to 6. Thus, the Deeds of Appointment were all ineffective because only three out of four trustees had signed. The reasons for the mistake included a car crash, a young trainee solicitor and possibly inadequate supervision, although I certainly make no finding in this regard.

10. By good fortune the error with regard to Settlements 1 to 3 was noticed during the course of a further transaction and was rectified by Alan before he died. Settlements 4 to 6 were not re-checked and the corresponding error in those Settlements was not discovered until it was too late, after June's death.

11. In the present proceedings, the claimants seek to remedy the position in respect of the Deeds of Appointment under Settlements 4 to 6 (hereafter "the Deeds").

The claim

12. The first three defendants are the current trustees. Terence Keats, the first defendant, was an original trustee. The successors to Alan and June as trustees are the second and the third defendants respectively. Mr Hall retired as a trustee in November 2006 and was replaced by Grant Thornton Trust Company Limited. That company retired in November 2014 and has not been replaced, leaving three trustees.

13. The claim form seeks two substantive heads of relief. The first is an order rectifying the Deeds so as to treat them as having been executed by June as well as the other trustees as of 8 March 1999. The claim form alternatively seeks an order that the Deeds be treated as having been executed by June pursuant to the principle that equity will remedy the defective exercise of a power of appointment.

14. Rectification was not pursued at trial. There was instead an application notice seeking to amend the claim form to replace that head of relief with a claim for a declaration that there is a proprietary estoppel binding the trustees to act consistently with the effective execution of the Deeds. The application to amend was not opposed and at the start of the trial I gave the claimants permission to substitute the argument on estoppel for that of rectification.

The fourth defendant

15. The fourth defendant ("Ms English") is Sarah's daughter. She was appointed by an order of Deputy Master Cousins dated 25 October 2017, pursuant to CPR 19.6, to represent all persons and charities who are beneficiaries under Settlements 4 to 6. By implication, the Order meant all beneficiaries excluding the claimants.

16. Mr Holmes, who appeared for Ms English, realistically accepted that the chance of the trustees ever directing the transfer of any of the trusts' assets to anyone other than the claimants is small. There is consequently no real likelihood that the relief sought in the action would make any difference to them. Indeed, Mr Holmes did not have

instructions from Ms. English to oppose the relief sought. Mr Holmes said that his role was to put before the court such arguments as there may be against those advanced by the claimants. I found it very helpful to have the benefit of the opposing arguments.

The trustees

17. Mr Lewison, who appeared for the trustees, supported the claimants' arguments with some useful additional points.

Estoppel

18. Mr Flavin, who appeared for the claimants, advanced his argument on estoppel in summary as follows. Although proprietary estoppel usually concerns land, its effect can extend further and in law could apply to a representation made by trustees to beneficiaries under the trust. In the present case the trustees had both proceeded and allowed the claimants to proceed on the basis that the Deeds had been properly executed. That amounted to a representation to the claimants. The claimants had paid taxes on the basis that they had an interest in possession under their respective settlements and thus acted to their detriment. Accordingly there was an estoppel binding the trustees from acting inconsistently with the intended amendment to the trusts.

19. Alternatively, there had been a state of mutual consent between the trustees and the claimants that the Deeds had been executed. This gave rise to an estoppel by convention.

20. Mr Holmes did not dispute the proposition that proprietary estoppel could apply in the context of trust. But he said that there were three reasons why it did not apply in the present case.

21. First, the failure of one of the trustees to sign the Deeds was a breach of s.1(3) of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act"). Estoppel could not be relied to circumvent that subsection. He referred to the judgment of Newey J in *Briggs v Gleeds* [2014] EWHC 1178 (Ch); [2015] Ch 212, at [43]-[44].

22. Secondly, the claimants had suffered no detriment. It was not in dispute that before the Deeds were purportedly executed the income received by the trusts was paid out, after tax, to the prime beneficiary, one of the claimants. The sole or main purpose of the intended new arrangement was to switch the responsibility to pay tax from the fund to the claimants, to the financial benefit of the claimants. It was to be inferred that the claimants had benefitted from the representation by the trustees, not suffered any detriment. Alternatively, an evidential burden rested on the claimants to show that they had suffered detriment since March 1999 and the burden had not been satisfied.

23. Thirdly, if an estoppel existed, it could only operate between the representors and representees (and the same parties if it operated as an estoppel by convention). The trustees could therefore not be bound in relation to the non-claimant beneficiaries under the trusts.

Estoppel cannot operate to circumvent a statute

24. Section 1(3) of the 1989 Act, as amended, reads:

> *(3) An instrument is validly executed as a deed by an individual if, and only if –*
>
> *(a) it is signed –*
>
> *(i) by him in the presence of a witness who attests the signature; or*
>
> *(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and*
>
> *(b) it is delivered as a deed.*

25. Mr Lewison and Mr Flavin both submitted that the problem associated with the Deeds was not a breach of s.1(3), but a failure to comply with the rule requiring trustees to act unanimously (unless otherwise provided in the trust instrument), see for example *Lewin on Trusts*, 19th ed., at 29-067 to 29-069. It was common ground that the Deeds had to be signed by all the trustees. Mr Lewison and Mr Flavin argued that the Deeds were defective because that had not been done, not because of a breach of s.1(3). I agree. An estoppel in the present case would not suffer from the difficulty contemplated by Newey J in *Briggs*.

26. Nonetheless, there remains the potential objection that an estoppel could not operate to circumvent the rule on unanimity. This is liable to depend on whether there is a sufficient third party interest, whether the protection afforded by the unanimity rule is paternalistic and related matters, see *Spencer-Bower: Reliance-Based Estoppel*, 5th ed., para. 7.2 *et seq*. I was not addressed on this and because of matters considered below I will not pursue it.

Detriment

27. Mr Flavin argued that the position on detriment was simple: without the Deeds the claimants would not have paid tax on their income from the trusts. They did and in so doing acted to their detriment.

28. He also made a second point. It was not clear what the position of HMRC would be in relation to Settlements 4 to 6 since 1999. The trusts had not been taxed because of what might turn out to be a false premise. The claimants were entitled to rely on a contingent detriment which was not consciously incurred. This took the form of what has turned out to be the dual possibility that HMRC may require back payment of tax from the trusts and that money may have to be paid by the claimants to advisors to sort the matter out. The contingent detriment had arisen because the claimants had relied on the trustees' representation that the Deeds had been validly executed.

29. I do not accept that the claimants are entitled to isolate one tax consequence of their reliance on the Deeds having been properly executed. Plainly, treating the income from the trusts as personal income and paying tax on it was acting to their detriment. But I must be satisfied that overall they acted to their financial detriment.

30. So far as past consequences are concerned, it is reasonable to infer that overall, so far, the claimants are now better off. That was the point of the proposed amendments to the Settlements.

31. With regard to the second alleged detriment, I asked Mr Flavin whether he was aware of any authority in support of his proposition that a party seeking to establish an estoppel can rely on either unconscious or contingent detriment, or both. He said not.

32. Whether or not an unconscious and contingent detriment must, as a matter of principle, be ruled out as the basis for an estoppel, the claimant's difficulty is an evidential one. I was shown a letter dated 3 March 2016 from HMRC, which had been informed of the mistake made in relation to the deeds. The letter said that HMRC could not treat the deeds as having been validly executed. They would have to charge tax on the basis that the trust funds were still held on discretionary trust unless the court were to approve the retrospective effect of the Deeds. The letter added that HMRC would await any application to rectify the Deeds.

33. There is no suggestion in HMRC's letter that if the execution of the Deeds were not retrospectively validated the claimants would have to pay more tax than would have been paid had the Deeds never been drawn up. There was no evidence about the need to obtain expert help regarding any liability for tax or how much this might cost.

34. The claimants have suffered no detriment so far due to their reliance on the valid execution of the Deeds. I am not able to conclude that there is any likelihood of a significant contingent detriment.

Whether an estoppel could bind the trustees in relation to the non-claimant beneficiaries

35. There is a conceptual difficulty with the claimants' case on estoppel. As Mr Holmes argued, it would have the effect of binding the trustee's actions in relation to parties to whom no representation was made, in a way that could only be to their detriment. (It was common ground that they knew nothing about the Deeds). I think it goes further. The claimants also want the estoppel to bind the way in which HMRC has taxed and will tax the trust fund and the claimants. In effect, the claimants want the estoppel to have the effect of rectifying the trust. Alternatively, one could look on it as a claim to an estoppel acting *in rem*.

36. Mr Flavin relied on *Fielden v Christie-Miller* (cited above). This was an application by defendants to a Part 20 Claim to strike it out or to grant the defendants summary judgment. The Part 20 claimant alleged that he was entitled to hold the freehold interest in a property which was an asset of a settlement. Alternatively, he and his wife each had the right to live there rent free until he or she died. He claimed an estoppel arising from representations made by one of the trustees. In their application to strike out or obtain summary judgment, one of the trustees' arguments was that an estoppel could not operate to fetter the future exercise of their dispositive powers. Sir William Blackburne rejected the argument:

> "[38] The difficulty I feel about the submission is that it leaves without apparent remedy a person who in all good faith has conducted his affairs, for example by making personal or financial sacrifices, on the faith of a representation that he would one day inherit or acquire some interest in an

> estate or area of land, simply because the persons with whom he has dealt are trustees of that land, holding the land for the benefit of others, and are not themselves the outright beneficial owners. In the latter case (assuming the other estoppel requirements are present) he would be able to establish the estoppel and, let it be assumed, establish his right to an interest in the land equivalent to what he was given to understand would be given to him, whereas in the former case, if Mr Wilson is correct, he would not. This strikes me as unfair, not least when the claimant might have no idea, and no means of knowing, that the persons he has dealt with are trustees holding for the benefit of others and are not themselves the beneficial owners. The fact that he might have some kind of personal remedy against the persons who made the representation in question – Mr Wilson raised the possibility but made no concession and the matter was not in any event explored in argument – or might have a right to recover any payments made in reliance upon the representation would at best be poor recompense for the disappointed claimant and might well provide no real recompense at all.
>
> [39] I have come to the view that, as baldly stated by Mr Wilson, the non-fettering principle does not operate to defeat Stephen's equity if the ingredients of the estoppel which he asserts are otherwise established. As *Lewin* points out in the passage at 29-205 to which my attention was drawn, the principle is confined to invalidating what would otherwise be a commitment on the part of the donee to exercise (or not to exercise) the power in question in a given way in the future. I do not see why this should prevent the court from granting relief to a person claiming an estoppel (if he has otherwise established the necessary ingredients). The relief in such a case might either be to accord to him an interest in the land in question commensurate with the expectation which the representation made to him has engendered or, as a minimum, be such as to ensure that he suffers no detriment as a consequence of having reasonably relied on the representation. The effect of so doing will not be (or need not be) to compel the trustees to exercise their power in some given way in the future but merely to disable them from exercising their power in respect of the asset in question and then only to the extent that the court has declared that the asset is to be applied in satisfaction of the equity which the claimant has established."

37. Mr Flavin argued that the present case is similar: the fact that an estoppel would fetter the trustees in relation to their dispositive powers with regard to beneficiaries other than the claimants, such a fetter provided no bar to the estoppel.

38. I was also referred to *Catchpole v The Trustees of the Alitalia Airlines Pension Scheme* [2010] EWHC 1809 (Ch); [2010] Pens. L.R. 387. A member of a pension scheme was informed by letter that her partner, Mr Catchpole, would be treated as a spouse under the scheme and would therefore benefit if she died. This turned out to be incorrect according to the rules of the scheme. It was argued that the letter had created an estoppel. Warren J ruled that the case for an estoppel by representation was made out and the trustees under the scheme were required to provide Mr Catchpole with benefits.

39. Warren J noted the difficulties facing estoppel claims in the context of pension schemes and reviewed some of the authorities which had considered the matter. He continued:

> "[51] Another approach, however, is to view the estoppel (assuming that one arises at all) as directly binding not only on the Trustees but on any successor trustee just as the trusts of the Scheme itself are binding. This, I think, must be the right approach. If there is an estoppel at all, it ought to put Mr Catchpole in the same position as if he actually had been married to Ms Brahja. This has been, implicitly, the approach of the courts when considering group estoppels and any other approach in that sort of case could only led to chaos.
>
> [52] There is, in principle, no difficulty in giving effect to an estoppel in this way. The trust itself is a creature of equity and estoppels are but another aspect of the intervention of equity in the legal relationships between persons. It is conceptually perfectly straightforward to see a misrepresentation by a trustee of a pension scheme as to the existence or level of a benefit at a particular time as becoming institutionalised, as it were, within the trust. Thus in the present case, the beneficiaries and future beneficiaries of the Scheme can no more deny that Mr Catchpole is a beneficiary than can the Trustees; and the same goes for their successors."

40. Mr Flavin submitted that in the present case the estoppel should likewise be considered to bind the trust itself as a creature of equity, as opposed to binding the individual trustees. The trust could not be treated, for any purpose, as having acted inconsistently with the representation to the claimants that they each had an interest in possession under one of the settlements. It did not matter that beneficiaries other than the claimants would potentially lose out.

41. Both *Fielden* and *Catchpole* can be explained on the basis that the representor was the trust itself, as Warren J expressly suggested, thus binding trustees, including successor trustees, to act consistently with the representation in relation to all beneficiaries and not just the representee. If there were any tax consequences in either instance, they were not discussed. Such a rationalisation would not address the problem with the claimants' argument in the present case that the estoppel should bind strangers to the trust, specifically HMRC, thus having the effect of rectifying the trust even though the Deeds remain ineffective.

42. In addition, I do not believe that Sir William Blackburne intended to rule in *Fielden* that the dispositive powers of trustees will invariably be fettered by an estoppel shown to subsist. He implied that the equity in each case will be fact sensitive.

43. Mr Holmes referred me to authority opposing the idea that an estoppel could operate to favour only some beneficiaries, at the expense of others. In *Steria Ltd v Hutchison* [2006] EWCA Civ 1551; [2006] Pens. L.R. 291 Neuberger LJ said:

> "[109] An additional reason why the court should lean against an estoppel in favour of one, or only some, of the members of a pension scheme, is that it involves favouring only one or some of the members of the scheme over the other members of the scheme. As was pointed out by Lewison J in paragraph 51 of the *Trustees Solution* case, this could in some cases put the trustees of

> the scheme in a position where they might be in breach of their statutory duties (in that case, which would not apply in this case, the duty in question would have been that contained in section 62 of the Pensions Act 1995). However, if it is argued that the estoppel extends to all members of the scheme, then the problems identified by Sir Andrew Morritt V-C in paragraph 60 of *Redrow Plc -v- Pedley* [2002] PLR 339 would arise."

44. I think that Neuberger LJ in fact had in mind paragraphs 62-64 of *Redrow,* which I will put into context by quoting preceding paragraphs:

> "[59] The principle on which Redrow relies is that formulated by Lord Denning MR in *Amalgamated Investment & Property Co Ltd v Texas-Commerce International Bank Ltd* [1982] 1 QB 84, 121, namely:
>
> > 'If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it - on the faith of which each of them - to the knowledge of the other - acts and conducts their mutual affairs - they are bound by that interpretation just as much as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not - or whether they were mistaken or not - or whether they had in mind the original terms or not. Suffice it that they have, by their course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.'
>
> [60] Eveleigh and Brandon LJJ adopted the statement of principle contained in Spencer Bower and Turner, *Estoppel by Representation* 3rd ed. p157 that:
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> > 'When the parties have acted in their transaction upon the agreed assumption that a given state of facts is to be accepted between them as true, then as regards that transaction each will be estopped against the other from questioning the truth of the statement of facts so assumed.'
>
> [61] These principles have been considered in the context of a pension scheme by Aldous J in *Icarus (Hertford) Ltd v Driscoll* [1990] PLR 1, Laddie J in *ITN v Ward* [1997] PLR 131 and Rimer J in *Lansing Linde v Alber* [2000] PLR 15. I do not doubt that the principle is capable of applying to dealings between the trustees of a pension scheme and a member in relation to the contract between them. But, I suggest, the principle must be applied with caution when seeking to establish an estoppel between the trustees and the general body of members so as to bind them all to an interpretation of the trust deed which it does not bear.
>
> [62] First, the pension scheme embodies not only the terms of a contract between individual members and the trustees but also a trust applicable to the fund comprising the contributions of members and surpluses derived from the past in which present and future members may be interested. Such trusts cannot be altered by estoppel because there can be no such estoppel binding future members.

> [63] Second, it is necessary to show that the principle is applicable to all existing members. I agree with Laddie J in ITN v Ward that it is not necessary for that purpose to call evidence relating to each and every member's intention. But that will not absolve a claimant from adducing evidence to show that the principle must be applicable to the general body of members as such.
>
> [64] Third, as the formulation of the principle shows, what must be proved is that each and every member has by his 'course of dealing put a particular interpretation on the terms of' the rules or 'acted upon the agreed assumption that a given state of facts is to be accepted between them as true'. This involves more than merely passive acceptance. The administration of a pension scheme on a particular assumption as to the yardstick by which contributions or benefits are to be calculated may well give rise to a relevant assumption on the part of the trustees. I suggest that it requires clear evidence of intention or positive conduct to bind the general body of members to such an assumption. I doubt whether receipt of the benefit or payment of the contribution, without more, can be enough. It must not be overlooked that if the principle is applicable it may be used to increase the liability or reduce the benefit of a member as well as, in this case, the opposite."

45. The trust in this case is not a pension scheme. However it is difficult to see why the problems identified in *Redrow* and endorsed in *Steria* do not apply in a similar way. Furthermore, *Catchpole* was a pension scheme case. I think that Mr Flavin's reliance on *Catchpole* is open to doubt.

Conclusion on estoppel

46. In my judgment, because of a lack of evidence of detriment and because the claimants are claiming an estoppel which would bind all parties, including strangers to the trust, their claim to an estoppel fails.

Remedying the defective execution of a power

47. The Claimants' alternative argument is that the trustees, all four of them, had the power to execute the Deeds and intended to but the execution was defective. Pursuant to a longstanding doctrine of equity, the court may remedy the defective execution.

48. The doctrine dates back at least to *Tollet v Tollet* (1728) 2 Peere Williams 489. A husband was tenant of land for life by virtue of a settlement made on him by an ancestor. He bequeathed his interest to his wife. This should have been done by deed but the husband's will was no more than a voluntary conveyance. The Master of the Rolls, Sir Joseph Jekyll, said:

> "… where there is a defective execution of the power, be it either for payment of debts or provision for a wife, or children unprovided for, I shall equally supply any defect of this nature: the difference is betwixt a *non-execution* and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child. But this Court will not help the non-execution of a power, since it is against the nature of a power, which is left to the free will and election of the party whether to

> execute or not, for which reason equity will not say he shall execute it, or do that for him which he does not think fit to do himself."

49. The distinction drawn was between the non-execution of a power, which equity will not aid, and defective execution, which it will. In *Tollet* the trustees of the settlement, who held the legal interest in the land, were decreed to have conveyed a life interest to the wife.

50. Mr Holmes submitted that the equitable jurisdiction identified in *Tollet* is now greatly confined. He referred me to an obiter observation of Park J in *Breadner v Granville-Grossman* [2001] Ch 523, at 548:

> "A doctrine which was last applied in 1908 is falling into disuse. I believe that it was developed when family settlements, and powers exercisable in relation to trust funds, took very different forms from those which they take today. Most modern settlements are drafted in much detail and give to trustees, who are often professional trustees who charge for their services, extensive powers of many kinds. Where trustees have failed to exercise a power I do not feel an inclination to expand the circumstances where the court may intervene and hold that the trust should be administered as if they had exercised it, thereby taking away from beneficiaries property rights which had apparently vested indefeasibly."

51. Despite Park J's indication that the doctrine is falling into disuse, I do not believe that the body of law comprising *Tollet* and subsequent judgments is now a corpse better left in peace, or that this is what Park J meant. In fact, Mr Holmes did not quite go that far. The questions I must attempt to resolve are the extent to which the doctrine is confined according to modern law and whether that makes it too narrow to be relied on by the Claimants.

Two groups of authorities

52. *Lewin* divides the authorities into two lines, at 29-203:

> "There are two groups of authorities. One group, mostly elderly, establishes a jurisdiction in equity to aid a defective execution of a power in favour of classes of persons for whose benefit the power has purportedly exercised. The other group, much smaller and more recent, asserts an entitlement in the beneficiaries of a trust to require a due execution in certain cases; the boundaries of the principle are not yet certain."

53. Counsel referred to judgments from both groups. It is convenient to look initially at the second group, all members of which were concerned with trusts operating a pension fund.

Pension fund cases

54. Mr Flavin relied in particular on *HR Trustees Ltd v Wembley plc* [2011] EWHC 2974 (Ch). The five trustees of a pension scheme had agreed to amend it. The rules of the scheme required that an amendment should be made by a declaration signed by all the trustees. Vos J found (at [52]) that all five trustees intended to make a valid

declaration, following the valid exercise of their discretion. But only four of them signed the declaration. Vos J described this as "an entirely formal omission which was on the evidence simply an administrative error". He ruled that this was an instance in which the doctrine that equity looks on as done that which ought to be done applied:

> "[66] Here it seems clear to me that the trustees exercised their discretion to amend the rule in the way contained in the amendment. They were obliged, having done so under clause 16, to make an appropriate declaration in a particular form. They could have been compelled on behalf of the members, who are not volunteers, to specifically perform their exercise of the power. Not to make a valid declaration was a breach of the terms of the definitive deed. Thus, in my judgment, this is a classic case in which the maxim of equity can and should properly be applied. Mr Moeran is wrong, in my judgment, to submit that this is an extension of the doctrine. It may be that there has never been before a case on all fours with the present, but law and equity would be made to look ridiculous if it were powerless to correct what has been an obvious administrative error like the one made in this case. Moreover, none of the members of the scheme in any category have any reason to feel aggrieved. The members, apart from those in former scheme B, were told about the change at the time in July 2000. They never expected to continue to accrue rights on the previous basis. If they did so, they would be receiving a windfall which they had no right to expect. They cannot have known until much later that the amendment had been defectively executed.
>
> [67] In my judgment, therefore, this is not the exercise of an exorbitant or unpredictable or even unorthodox jurisdiction. It is the stuff of equity, refined and clarified over many years. It is, in short, the proper application of equitable principles to an unfortunate situation. I have considered whether by applying the maxim I might be falling into a trap, deciding a case according to its obvious merits with the risk that hard cases make bad law, but I do not think so. I have considered also why a document that was invalidly executed according to the proper construction of a definitive deed should, by an equitable maxim, suddenly be declared validly executed. But as it seems to me, that is the necessary result of the proper application of, as I have said, a well established equitable principle. It is not arbitrary or unreasonable. It is what would have been expected."

55. Mr Holmes pointed out that Vos J's judgment depended on two reasons: (a) the beneficiaries, members of the scheme, were not volunteers and (b) they could have compelled the trustees specifically to perform the amendment in accordance with the relevant deed, those trustees having properly exercised their discretion to make the amendment. Neither applied to the present case.

56. Mr Holmes also pointed to alternative views which have been expressed, in particular by Newey J in *Briggs v Gleeds* (cited above), at [75] – [78]. In the view of Newey J there was no reason to distinguish volunteers from non-volunteers (a view on which Mr Flavin actively relied). Also, while Newey J agreed that a trustee should be treated as having done what he ought to have done only in favour of someone who would have been in a position to enforce the obligation, he doubted that this could

apply where the beneficiaries under a pension scheme would not in practice have enforced the obligation because it would make them worse off (at [80]).

The earlier line of authority

57. Mr Holmes, in my view rightly, submitted that the claimants in the present case were not assisted by the recent pension cases. In relation to the requirement that an act must be specific enforceable before equity will remedy its defective performance, endorsed by both Vos J and Newey J (as each then was), I do not believe that this applies to the older, and I think distinct, line of authority beginning with *Tollet*. No restriction of that nature emerges from such cases; nor is there any qualification regarding beneficiaries who are volunteers. I was referred to *Sneed v Sneed* (1747) Ambler 64; 27 E.R. 37, *Bruce v Bruce* (1870-1871) LR 11 Eq 371, *Kennard v Kennard* (1872) 8 Ch App 227 and *In Re Walker* [1908] 1 Ch 560.

58. The sequence of cases following *Tollet* was considered by the Royal Court (Samedi) of Jersey in *Bas Trust Corporation Ltd v MF* [2012] JRC 081 (also known as *Re Shinorvic Trust*). Before the turning to Jersey law, the court considered the position in England, having quoted summaries of the relevant equitable principle set out in *Halsbury's Laws of England* 4th ed., vol. 36(2), para. 359-362, *Snell's Equity* 32nd ed., para. 11-006, *Lewin on Trusts* 18th ed., para. 29-181-9 and *Thomas on Powers*, 1st ed., paras. 1003-1041. The court said:

> "[43] The text books and counsel are agreed that the necessary conditions for the principle to apply are:-
>
> (i) an intention by the person with the power to exercise it;
>
> (ii) there must have been an attempted execution of the power – there is no jurisdiction to remedy a failure to exercise the power at all or to exercise it in time;
>
> (iii) the defect must be formal rather than going to the substance of the power;
>
> (iv) the purported exercise must have been a proper exercise of the power – the court will not assist where there would be a fraud on the power or a breach of trust;
>
> (v) the doctrine will only operate in favour of certain categories of persons. These are summarised in *Halsbury* Vol 36(2) para 362 as follows:-
>
> '362. Persons who may claim relief
>
> Equity aids the defective execution of a power only in favour of persons who stand in a particular relationship to the done, and not the creator, of the power. … Relief will be granted where the following persons claim:-
>
> (i) Purchasers for value …
>
> (ii) Creditors …

(iii) Charities

(iv) Persons for whom the appointor is under a natural or moral obligation to provide. Relief may be granted in favour of persons under this head unless the appointor is under an equal obligation to provide for the persons entitled in default of appointment who are unprovided for. Under this head, relief may be granted for the defective exercise of a power intended as a provision for a wife and child, even in favour of volunteer, and the court will not enquire into the quantum of the provision for the wife or child. However, equity will not grant relief in favour of persons for whom the appointor is under no obligation to provide, such as a husband, grandchild, natural child or cousin, nephew or niece or mere volunteer, even if he is the creator of the power.'

59. Counsel in the present case did not disagree with the Royal Court's summary of the law, subject to the important qualification that it was the law as stated in textbooks published in April 2012.

60. Mr Holmes focussed on principle (ii), which he said had been reinforced by Park J in *Breadner*: there must have been an attempted execution of the power. June Thunder had not signed the Deed and therefore this was not a defective exercise of the trustees' power, they had not exercised it at all.

61. I disagree. All four trustees intended to exercise a power they were entitled to exercise to amend the Settlements. All four purported to do so by the signatures of three of them. That, in my view, qualified as an attempted exercise by the trustees of their power. The failure of June Thunder to sign rendered the trustees' attempt defective.

62. A potential difficulty for the Claimants arises from the Royal Court's principle (v). The exercise of the power to amend the Settlements was intended as a provision for children of Alan and June Thunder, two of the appointors. But they were not the children of either Terence Keats or Stephen Hall. However, I think this makes no difference. Two of the trustees were the claimants' parents and the defect was associated June's failure to sign. She was the claimants' mother.

63. I would add that in *Bas Trust Corporation* the Royal Court was of the view that the principle regarding the categories of persons in favour of which the doctrine may be invoked was now out of date. The court doubted that even under English law the principle would exclude from its scope beneficiaries such as husbands and illegitimate children (at [54]). The court held:

> "… under Jersey law the principle may operate in favour of any person for whom the donee of the power is under a natural or moral obligation to provide; and that will be a matter of fact to be decided in each case."

64. The law in England and Wales may now be similar but there is no need for me to take that further.

Conclusion

65. In my judgment the Claimants are not entitled to rely on an estoppel. However, the Deeds were effective to give Sarah, Simon and Annabel an interest in possession under the Settlement of which he or she was the prime beneficiary.