Neutral Citation Number: [2022] EWHC 2770 (Ch)

Case No: PT-2021-000303

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: 9/11/2022

Before:

MASTER CLARK

- -

Between:

(1) RICHARD DAVID ERNEST HOPES
(2) GEORGE TREVOR CARNEY
(both as trustees of the Skandia Life Policy Trust) **Claimants**

- and –

(1) KATE BURTON
(2) PAUL ADAM BURTON
(3) LINDSEY MUNROE WHILLIANS-SAMSON
(4) AMANDA JANE WHILLIANS
(5) SYDNEY JOSEPHINE BURTON
(6) LEWIS JOSEPH BEAVEN
(a minor by his litigation friend Paula James)
(7) SAM BURTON
(8) MILLICENT JANE WHILLIANS SAMSON
(a minor) **Defendants**
(9) LOTTIE MATILDA WHILLIANS SAMSON
(a minor)

- -
- -

Richard Dew (instructed by **Thomson Snell & Passmore LLP**) for the **Claimants**
The Third Defendant in person
Ruth Hughes (instructed by **Irwin Mitchell LLP**) for the **Sixth Defendant**

Hearing date: 4 August 2022

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Approved Judgment

This judgment was handed down remotely at 10am on 9 November 2022 by circulation to the parties or their representatives by email and by release to The National Archives.

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Master Clark:

Introduction

1. This is a Part 8 claim seeking to set aside two deeds of appointment, dated 31 May 2013 ("the 2013 Appointment") and 22 July 2014 ("the 2014 Appointment") made by the trustees of a trust ("the Trust") created by a declaration of trust made by Hilary Marsden (formerly known as Hilary Burton – "the settlor") in respect of a policy held by her with Skandia Life with number TSP00532660801 ("the Skandia policy").

2. In summary, the grounds on which the Appointments are sought to be set aside are:
   (1) the trustees made an operative mistake as to their substance or effect; in particular, the 2013 Appointment is said to have mistakenly (and unnecessarily) included provisions which terminated existing interests in possession and appointed new ones in their place, when there was no intention to do so;
   (2) they are invalid or ineffective, as exceeding the powers available to the trustees;
   (3) they are invalid, or ineffective as being so uncertain as to be invalid;
   (4) they were exercised without a proper or sufficient consideration of the relevant issues.

Parties

3. The claimants, Richard Hopes and George Carney, are the current trustees of the Trust. Neither is a beneficiary.

4. The first and second defendants, Kate Burton and Paul ("Adam") Burton are the settlor's children of her first marriage. The fourth defendant, Amanda Whillians, is a former partner of the settlor. The third defendant, Lindsey ("Lillie") Whillians-Samson is Amanda's daughter, and was also treated by the settlor as her daughter. I refer, without intending any disrespect, to the family members by their first names.

5. The fifth and sixth defendants, Sydney Burton and Lewis Beaven are Kate's children. Lewis is a minor, and acts by his litigation friend, Paula James of Irwin Mitchell LLP. The seventh defendant, Sam Burton, is Adam's son. He was a minor when the claim was commenced but has now attained his majority. The eight and ninth defendants, Millicent Whillians-Samson and Lottie Whillians-Samson, are Lillie's daughters. They are also minors.

Procedural background

6. The claim was commenced on 7 April 2021.

7. Kate, Adam and Sydney have not responded to the claim at all.

8. Lillie filed an acknowledgement of service opposing the claim on 2 March 2022. She attended the hearing in person (by remote video), where ultimately she indicated she was not opposing the claim.

9. Amanda filed evidence on 7 July 2021 opposing the claim, and again on 1 August 2022 (out of time), under cover of a letter from solicitors acting on her behalf, Sterling Law. None of her evidence engages with the claimants' grounds for setting aside the Appointments. She did not attend the hearing, and her solicitors' letter states that she agrees to have the case "evaluated" by the Master on the basis of the evidence and written arguments.

10. By an order dated 14 February 2022, I appointed Lewis as the representative party for the "Discretionary Beneficiaries" (see para 26 below), and gave permission for the claim to continue without the appointment of a litigation friend for Millicent and Lottie.

11. Lewis and Sam filed and served an acknowledgment of service opposing the claim and evidence in opposition to it. On attaining his majority, Sam has not engaged with the claim at all. Lewis appeared by counsel at the disposal hearing.

12. HMRC have been notified of the proceedings, and have stated that they do not wish to be joined as a party, but wish for *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 (and the authorities mentioned in it) and *Allnutt v Wilding* [2007] EWCA Civ 412, [2007] WTLR 941 to be referred to the Court.

Evidence

13. The claim is supported by the following evidence:
    (1) The first claimant's witness statement dated 8 October 2020;
    (2) The second claimant's witness statement dated 14 October 2020;
    (3) The witness statement dated 20 October 2020 of Laura Arnold of Cripps Pemberton Greenish LLP ("Cripps"), the firm who advised the trustees and prepared the Appointments.

14. Lewis' evidence in opposition to the claim is Ms James' witness statement dated 7 March 2022. This does not set out any factual matters relevant to the issues in the claim. His opposition is based solely on the legal arguments set out in his counsel's skeleton argument and oral submissions.

Factual background

15. On 9 July 1992 the settlor executed the declaration of trust. This was a pre-printed form with various boxes to be filled in. She appointed as the trustees of the Trust, in addition to herself, Keith Peckett (her previous accountant) and Simon Ackworth (a solicitor).

16. Section 2 of the form provides for two types of beneficiary. Box A sets out (in pre-printed form) the "Possible Beneficiaries", which, so far as relevant, are

> "1. Any child or grandchild of the [settlor].
> 2. Any child or grandchild of any grandchild of any person at 6 below.
> 3. ...
> 4. Any beneficiary (including any object of a discretionary power whether or not that power is exercised) under the will (in respect of which Probate is granted) or intestacy of the [settlor] or of any person at 6 below but excluding the [settlor].

5. Any person shown in Box B below.
6. Any past present or future spouse of the [settlor]."

17. Box B sets out the "Immediate Beneficiaries": Kate, Adam, Lillie and Amanda.

18. The Trust Provisions are found in Section 5. These provide, so far as relevant

> "PART 1: TRUSTS AND DISPOSITIVE POWERS
>
> A. Subject to and in default of any appointment made under paragraph B of this Part 1 the Trustees shall hold the Trust Fund and the income thereof absolutely for the one or more Immediate Beneficiaries in the share or shares indicated in Box B hereof and Section 31 of the Trustee Act 1925 shall not apply to the trusts declared by this paragraph A of Part 1.
>
> B. During the Trust Period the Trustees (being at least two in number) shall have power by deed or deeds revocable during the Trust Period or irrevocable to appoint the Trust Fund and the income thereof for such one or more of the Possible Beneficiaries in such one or more shares and for such interests and subject to such trusts powers and provisions (including protective trusts discretionary trusts or powers operative or exercisable at the discretion of the Trustees or any other persons) as the Trustees shall in their absolute discretion think fit PROVIDED ALWAYS that:
>
> …
>
> (ii) no such appointment shall affect the entitlement of any person to any benefit previously conferred on him.
>
> C. During the Trust Period, the Trustees shall have power to pay transfer or apply the whole or any part or parts of a Beneficiary's presumptive share in the Trust Fund to or for the benefit of that Beneficiary.
>
> …
>
> PART 2: TRUSTEES' EXCLUSIONARY POWERS
>
> During the Trust Period the Trustees (being at least two in number and including an Independent Trustee) shall have power … to provide by deed or deeds revocable during the Trust Period or irrevocable executed during the Trust Period that any person persons or class of persons shall thenceforth
>
> (i) cease to be included in the class of Possible Beneficiaries and such person shall thenceforth so cease PROVIDED ALWAYS that any such deed or revocation thereof shall not affect the entitlement of any person so excluded from being a Possible Beneficiary to any benefit previously conferred on him;"

19. The settlor died on 25 August 2004. The executors of her will dated 12 August 2004 ("the Will") were the claimants and Christopher Marsden, the settlor's husband. The Will created a trust ("the Will Trust") of which the claimants were the trustees. The "Discretionary Beneficiaries" of the Will Trust are listed in clause 5.2, and are a large and varied group. They include the settlor's issue (defined for this purpose to include Lillie), Christopher's issue, various charities, the settlor's sisters, and 8 named individuals. They are all therefore Possible Beneficiaries under the Trust. I note that

the beneficiaries under Christopher's will are also Possible Beneficiaries, but that will was not in evidence before me.

20. Cripps acted in the administration of her estate. In 2011 the second claimant resigned as trustee of the Will Trust because of health issues, and Nicholas Austen, a partner at Cripps, replaced him as trustee.

21. The trustees did not become aware of the Skandia policy until late 2012, when the first claimant received a telephone call from Skandia. The value of the policy was about £2.15 million. The original trustees, Mr Peckett and Mr Ackworth agreed to stand down, and on 3 May 2013 the first claimant and Mr Austen were appointed trustees in their place.

22. On 22 April 2013, the trustees met with Anne Lewis of Cripps. The second claimant attended on behalf of Mr Austen. Ms Lewis' attendance note records:

> "It was generally thought that Amanda should not benefit.
>
> In Lillie's case there is an opportunity to assist her with securing her housing position. Since it is not envisaged that her family would continue to benefit on her death, it may also be worth looking at the option to take out life cover for her to provide funds for re-housing on her death.
>
> It was generally agreed that Kate and Adam should retain the interests in possession created by the original trust. This will also provide security for their children."

23. Following this meeting, Mary-Anne Gribbon, another partner at Cripps, drafted a deed of appointment and sent it to the first claimant and Mr Austen, attached to her email of 22 May 2013. This stated:

> "As you know the policy proceeds are currently held on life interest trusts for Adam, Kate, Lillie and Amanda Whillians in equal shares. However, it is a flexible life interest trust with a wider class of discretionary beneficiaries to include Hilary's grandchildren. The trustees have agreed on the following:
> - To leave the trusts for Adam and Kate as they are. Each of them will be entitled to receive their share of the income from the policy money and following their deaths, each of their funds will be held on trusts for the discretionary beneficiaries.
> - Part of Lillie's fund will be used to purchase the Royal Huts from Chris [Mr Marsden] for Lillie to live in. However, I gather that these arrangements have not yet been finalised so I have drafted the deed on the basis that Lillie will retain her life interest in the whole of her fund for the time being …
> - Amanda's interest in her one quarter share of the trust fund will be terminated so that her fund will be held on discretionary trusts. This is a deemed gift by her and, as there will be an IHT charge, I have provided in the deed that the IHT will be paid from Amanda's share of the fund."

24. On 28 May 2013, in response to a query by the first claimant, Ms Gribbon confirmed:

"Amanda will be excluded as a possible beneficiary and the new class of discretionary beneficiaries will consist of Kate and Adam and their respective children and grandchildren and Lillie."

25. At para 54 of his witness statement, the first claimant sets out his "clear independent recollection of what we were trying to achieve and what we understood the deeds to do." In the 2013 Appointment, this, he says, was

> "(a) We understood we were excluding Amanda from the class of beneficiaries and in respect of 'her' share creating a discretionary trust. We understood that this would cause a charge to IHT.
>
> (b) We understood we were leaving the interests of Kate and Adam as they were. There was never any suggestion that there would be a tax charge in respect of their interests or any real change to 'their' shares of the fund.
>
> (c) We understood that in the 2013 deed we were leaving Lillie's interests unaffected, as with those of Kate and Adam."

2013 Appointment

26. The 2013 Appointment included the following provisions:

> "1 **Definitions and construction**
> In this deed:
> 1.1 "KATE'S Fund" shall mean a ONE QUARTER share of the Trust Fund.
> 1.2 "ADAM'S Fund" shall mean a ONE QUARTER share of the Trust Fund:
> 1.3 "LILLIE'S Fund" shall mean a ONE QUARTER share of the Trust Fund;
> 1.4 "AMANDA'S Fund" shall mean a ONE QUARTER share of the Trust Fund:
> 1.5 The "Appointed Date' means 21 December 2012,
> 1.6 "Discretionary Beneficiaries" means
> 1.6.1 KATE and ADAM and their respective children and grandchildren
> 1.6.2 LILLIE
> 1.7 Words defined in the Settlement have the same meaning
>
> 2 **Exclusion**
> The Trustees in exercise of their Power of Exclusion declare that as from the Appointed Date AMANDA shall cease to be included in the class of Possible Beneficiaries as defined in the Settlement.
>
> 3 **Appointment relating to Kate's Fund**
> The Trustees in exercise of the Power of Appointment and of all other relevant powers revocably appoint and declare that from the Appointed Date KATE'S Fund shall be held on the following trusts:-
> 3.1 To pay the income of it to KATE during her life

3.2 On the death of KATE the Trustees shall hold both the capital and income of KATE'S Fund on the terms of the Settlement for the benefit of any one or more of the Discretionary Beneficiaries."

27. Clauses 4 and 5 make effectively identical provisions in respect of Adam and Lillie. Clause 6 provides:

> "6 **Appointment relating to Amanda's Fund**
> 6.1 The Trustees in exercise of the Power of Appointment and of all other relevant powers revocably appoint and declare that from the Appointed Date AMANDA'S Fund shall be held as to both capital and income on the terms of the Settlement for the benefit of any one or more of the Discretionary Beneficiaries
> 6.2 Any inheritance tax or capital gains tax and all other costs expenses and other liabilities occasioned by the appointment contained in sub-clause 6.1 above shall be borne by the AMANDA'S Fund"

28. It is to be noted that the Discretionary Beneficiaries are a far narrower class than the Possible Beneficiaries under the Trust.

29. In early 2014, the trustees revisited Lillie's share of the Trust Fund. The second claimant was reappointed a trustee on 17 February 2014, replacing Mr Austen who retired. At the meeting on 17 February 2014, the claimants decided to appoint £100,000 of Lillie's fund to a discretionary trust on the basis that that would give them greater flexibility for beneficiaries other than Lillie.

30. The 2014 Appointment includes the following provisions:

> "1 **Definitions and construction**
> In this deed:
> 1.1 "LILLIE'S Fund" shall mean the fund defined in sub-clause 1.3 of the May Appointment
> 1.2 The "Appointed Fund" shall mean £100,000 of LILLIE'S Fund
> 1.3 The "Appointed Date" means 17 February 2014
> 1 4 "Lillie 's Discretionary Beneficiaries" means KATE and ADAM and their respective children and grandchildren
> 1.5 Words defined in the Settlement have the same meaning
>
> 2 **Appointment relating to Lillie's Fund**
> 2.1 The Trustees in exercise of the Power of Appointment and of all other relevant powers revocably appoint and declare that from the Appointed Date the Appointed Fund has been held as to both capital and income on the terms of the Settlement for the benefit of any one or more of Lillie 's Discretionary Beneficiaries."

31. In 2017, the trustees attended a conference with specialist tax counsel, Emma Chamberlain. Her advice in summary was that
(1) the 2013 Appointment did not leave the interests of Kate, Adam and Lillie as they were, but instead revoked the previously qualifying interests in possession

("IIIPs") for all 4 funds, and, HMRC were likely to argue, created new non-qualifying interests in possession;

(2) because the appointments in the 2013 and 2014 Appointments were revocable, the Immediate Beneficiaries retained the possibility of benefitting from the Trust Fund, and the Appointments were likely to be treated as gifts with reservation of benefit.

32. As to the amount of tax payable in consequence of the Appointments, the trustees have been advised that there is an immediate charge of £365,000, plus interest of over £68,000. In addition, 10 yearly IHT charges would apply and appointments out of the Trust Fund would be subject to exit charges.

Mistake

Legal principles

33. *Pitt v Holt* is the leading decision as to rescission of a voluntary disposition on the grounds of a mistake. The principles established by it are summarised in *Kennedy v Kennedy* [2014] EWHC 4129, [2015] W.T.L.R. 837 (a decision of the Chancellor, Sir Terence Etherton) as follows:

> "(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a 'misprediction' relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.
>
> (2) 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.
>
> (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when 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. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.
>
> (4) 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 a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected."

Analysis
2013 appointment
Whether the trustees made an operative mistake as to the substance or effect of the 2013 Appointment

34. I find on the evidence that the trustees in making the 2013 Appointment did not intend to alter the interests of Kate, Adam or Lillie at all. Their intention was that those interests should remain as they were. Those interests were absolute defeasible interests, subject only to the exercise of the trustees' powers during the Trust Period, so at the end of the Trust Period, or on earlier release of the trustees' powers of appointment, they would have taken their share of the Trust fund absolutely.

35. The 2013 Appointment removes that absolute entitlement to capital. Instead, they are only entitled to the income from their share, and on their death, their share is held on the new discretionary trusts. This cannot in my judgment be described as leaving the trusts for them as they are.

36. Lewis' counsel made the following submissions.

37. First, she submitted that the trustees' intention was as set out in the second sentence of the first bullet point in Ms Gribbon's email of 22 May 2013 (set out at para 23 above) i.e. that Kate and Adam should be entitled to receive their share of the income from the policy money (during their lifetimes), and following their deaths, each of their funds will be held on trusts for the discretionary beneficiaries. This, she submitted, was achieved by the 2013 Appointment, so it in fact reflected the trustees' intentions.

38. I reject that submission. The sentence relied upon by Lewis' counsel is inconsistent with Ms Lewis' attendance note of 22 April 2013, and the first claimant's witness statement evidence as to the trustees' intentions. It is also inconsistent with the first sentence of the same bullet point, which states that Kate and Adam's interests are to be "left as they are". The fact that Ms Gribbon was mistaken (as she plainly was) as to the terms of the Trust does not, in my judgment, alter the fact that the trustees clearly did not intend to change those interests (or Lillie's interest at that stage).

39. Lewis' counsel's second and primary submission was that the 2013 Appointment in fact made no substantial change to the interests of Kate, Adam and Lillie under the Trust. Her submission focussed on what she referred to as the absence of any "economic difference" between the rights of the relevant Immediate Beneficiaries under the two deeds.

40. Lewis' counsel submitted that the economic difference between the positions of Kate, Adam and Lille under the Trust and under the 2013 Appointment was slight, if it existed at all. The rights of the Immediate Beneficiaries under the Trust were, she said, completely contingent on the exercise of the power of appointment, and could be taken away by the trustees' exercise of that power. On the other hand, the 2013 Appointment includes, she submitted, a power to pay or apply capital to all of the Discretionary Beneficiaries (as defined in it), including the Immediate Beneficiaries. Thus, she submitted, the right of Kate, Adam and Lillie to income was the same under both the Trust and the 2013 Appointment. She accepted that the 2013 Appointment affected their right to capital, in that they no longer have a presumptive one quarter share in the

fund, but submitted that this was not a material change - because of defeasibility of the right to capital under the Trust, and the power to appoint capital under the 2013 Appointment.

41. In support of this, she submitted that the trustees could decide under para 3.2 of the 2013 Appointment (and the equivalent provisions in relation to Adam) before the beneficiary's death that on their death, the trustees would hold capital for the beneficiary absolutely. The right to capital and the income interests would then merge, so that capital would be held on bare trust for the beneficiary and could be paid to them.

42. Thus, she said, the beneficiary had the same life interest under both. In the Trust, entitlement to capital could be defeated by an appointment; under the 2013 Appointment, capital could be appointed to the Discretionary Beneficiaries. This, she submitted, meant that there was no "economic difference" between their positions.

43. Alternatively, she submitted the trustees could revoke the appointments in the 2013 Appointment; and the trustees could then exercise their powers under Part 1 B or C of the Trust to advance capital to Kate or Adam.

44. I reject these arguments. First, I reject the submission that clause 3.2 of the 2013 appointment can be construed to entitle the trustees to appoint capital before Kate's death. Even assuming that the clause entitles the trustees to make appointments of capital, that power only arises on Kate's death, and could not, in my judgment be exercised before that event. Capital could not therefore be appointed to Kate during her lifetime.

45. In any event, the fact that the trustees could exercise their powers (if they chose to do so) under the 2013 Appointment to place the beneficiaries in the same position as they would be under the Trust (and vice versa) would not in my judgment be sufficient to prevent a change in the substance of their entitlement. It is a mere workaround; and, critically, depends on the trustees deciding to exercise their powers in a particular way, rather than a matter of entitlement. It is in my judgment self-evident that a right to capital which is absolute unless the trustees exercise their power of appointment is radically different from a life interest in that capital with the possibility of obtaining an absolute interest only if the trustees decide to exercise their power of appointment.

46. I am satisfied therefore that the 2013 Appointment created radically different interests held by Kate, Adam and Lillie, and that the trustees were mistaken in doing so. Their mistaken belief is apparent from their actions following the Appointments. In November 2013 they appointed capital to Kate to enable her to buy a horsebox; and in 2014 they appointed capital to Lillie to buy a property for her to live in. They were entitled to do so under the Trust, but not under the Appointments.

47. This mistaken belief was in judgment sufficiently serious as to make it unconscionable not to set aside both Appointments (the 2014 Appointment being predicated on the 2013 Appointment).

Whether the trustees made an operative mistake as to the tax consequences of the 2013 Appointment

48. It was common ground between the claimants and Lewis that

(1) under the Trust, the Immediate Beneficiaries had interests in possession in the Trust Fund;
(2) if the effect of the 2013 Deed was to terminate those interests in possession and to replace them with new interests in possession, there would be adverse tax consequences.

49. This is explained by Rose J (as she was) in *RBC Trustees (CI) Ltd v Stubbs* [2017] EWHC 180 (Ch), [2017] W.T.L.R. 1399 at [13]:

> "In March 2006 some important changes were made to way inheritance tax applies to interests in possession in settled property. The changes largely abolished the interests in possession regime in respect of interests in possession created on or after 22 March 2006 by the interposition of new subsections in section 49 of the IHTA and new sections added after section 49. The effect of these changes is that, subject to limited exceptions, interests in possession created on or after 22 March 2006 do not result in the beneficiaries entitled to them being treated as the beneficial owner of the settled property. That in turn means that the termination of a pre-2006[1] interest in possession followed by the creation of a new interest in possession would, subject to limited exceptions, result in an immediate charge to inheritance tax. However, where an individual continues to have a qualifying interest in possession created prior to 22 March 2006, he or she continues to be treated as beneficially entitled to the property."

50. As to the tax consequences, Lewis' counsel accepted that they would be as set out at [34] in *Stubbs*:

> "a. First, there is an immediate charge to inheritance tax of 20% of the value of the Fund on the creation of the Deed payable out of the settled property. This is because the Fund is governed now by what is called the "relevant property" regime in Part 3 of the IHTA .
> b. Once the property is in the relevant property regime, it is no longer treated as being beneficially owned by a beneficiary who has an interest in possession. Instead a charge to tax is imposed on its value every 10 years under s 64 of the IHTA .
> c. If property leaves the relevant property regime in between the 10 year anniversaries, a proportionate charge is imposed under s 65 of the IHTA"

51. These consequences result from the effect of section 52(1) of the Inheritance Tax Act 1984, which provides:

> "Where at any time during the life of a person beneficially entitled to an interest in possession in settled property his interest comes to an end, tax shall be charged, subject to section 53 below, as if at that time he had made a transfer of value and the value transferred had been equal to the value of the property in which his interest subsisted."

52. Lewis' counsel's submissions can be summarised as follows:
(1) Tax legislation and, in particular, s.52(1) is to be construed purposively and applied with regard to the substance rather than the form of the transaction;

[1] the judgment states "post-2006", but this must be a typographical error

(2) An interest in possession is "a present right to present enjoyment of property";
(3) The relevant interests in possession are the Immediate Beneficiaries' rights to income, and their rights to capital are irrelevant for this purpose;
(4) There was no material change in Kate, Adam and Lillie's interests in possession as a result of the 2013 Appointment:
    (i) under the Trust, Kate, Adam and Lillie had an interest in 25% of the income from the Trust fund;
    (ii) following the 2013 Appointment, it remained the case that, Kate, Adam and Lillie had an interest in 25% of the income from the Trust fund;
(5) Since their entitlement to an interest in possession had not materially changed as a result of the 2013 Appointment, then construing s.52(1) purposively, the 2013 Appointment did not terminate the interests in possession of Kate, Adam and Lillie or create new interests. Their interests continued unchanged.

Purposive interpretation of tax legislation

53. As to this, Lewis' counsel referred me the judgment of Lord Hodge in *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767 at [12] to [15]:

> "12. Another, more recent, judicial development in the interpretation of taxing statutes is the definitive move from a generally literalist interpretation to a more purposive approach. This can be traced to the speech which Lord Nicholls of Birkenhead delivered in the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 , in which he explained the true principle established in *W T Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300 and the cases which followed it. As he explained at para 28, the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose. In the past, the courts had interpreted taxing statutes in a literalist and formalistic way when applying the legislation to a composite scheme by treating every transaction which had an individual legal identity as having its own tax consequences. Lord Nicholls described this approach as "blinkered": para 29. Instead, he removed the interpretation of taxing statutes from its literalist enclave and incorporated it into the modern approach to statutory interpretation which the court otherwise adopts. He stated, at para 32:
>
> > "The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description … the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found. As Lord Nicholls of Birkenhead said in *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311 , 320, para 8: 'The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case'."

13. Lord Nicholls, at para 34, recognised two features which were characteristic of tax law. First, tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said (in *W T Ramsay* [1982] AC 300 , 326) "in the real world". In the Court of Appeal in *Barclays Mercantile* [2003] STC 66 , para 66, Carnwath LJ made the same point: taxing statutes generally "draw their life-blood from real world transactions with real world economic effects". Secondly, the prodigious intellectual effort in support of tax avoidance results in transactions being structured "in a form which will have the same or nearly the same economic effect as a taxable transaction but which it is hoped will fall outside the terms of the taxing statute". He continued: "It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge." The correct response of the courts was not to disregard elements of transactions which had no commercial value. That, he said, was going too far. Instead the court had, first, to decide, on a purposive construction, exactly what transaction would answer to the statutory description and secondly, to decide whether the transaction in question did so: para 36.

14. Lord Reed JSC in *UBS AG v Revenue and Customs Comrs* [2016] 1 WLR 1005 , para 62, has helpfully summarised the significance of the new approach, which *W T Ramsay* , as explained in *Barclays Mercantile* , has brought about, in these terms:

> "First, it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law. Secondly, and equally significantly, it established that the analysis of the facts depended on that purposive construction of the statute."

15. In summary, three aspects of statutory interpretation are important in determining this appeal. First, the tax code is not a seamless garment. As a result provisions imposing specific tax charges do not necessarily militate against the existence of a more general charge to tax which may have priority over and supersede or qualify the specific charge. I return to this point towards the end of this judgment: paras 68–72 below. Secondly, it is necessary to pay close attention to the statutory wording and not be distracted by judicial glosses which have enabled the courts properly to apply the statutory words in other factual contexts. Thirdly, the courts must now adopt a purposive approach to the interpretation of the taxing provisions and identify and analyse the relevant facts accordingly."

"Interest in possession"

54. The only authority to which Lewis' counsel referred me as to the meaning of "interest in possession" was HMRC's Inheritance Tax Manual, IHTM16062. This sets out that "interest in possession" is not defined in the IHT legislation in England, and that in *Pearson v IRC* [1981] A.C. 753 (which itself was not included in counsel's authorities), it was held that it bore its ordinary natural meaning of a present right to present enjoyment of property.

Only the income interest is an "interest in possession"

55. Lewis' counsel did not refer me to any authority in support of this proposition. It appears however to be supported by the advice of tax counsel, Ms Chamberlain, mentioned above, at para 2.10 of the note of her advice:

> "It may be possible to construe the deed of appointment as not altering the income interests and simply confirmatory in this respect and just altering the interests effective on death but Counsel was not optimistic that this is correct and it may be that this deed needs to be set aside for mistake."

56. Furthermore, the proposition that only the income interest is the "interest in possession" was not directly challenged by the claimants. I proceed, without deciding, on the basis this is correct.

No material change in interests in possession

57. Lewis' counsel submitted that if, contrary to her previous submissions (which I have rejected), Kate, Adam and Lillie's entitlements to capital were altered by the 2013 Appointment, their entitlement to income, and, therefore, their interests in possession remained the same before and after the 2013 Appointment.

Applying purposive interpretation to s.52(1), no termination of interest in possession

58. In my judgment, the general statements in *RFC 2012* fall far short of supporting the proposition that where an interest in possession is replaced by one with the same economic effect, that is sufficient to prevent a termination of the earlier interest within the meaning of s.52(1). Furthermore, the purposive construction mandated by that decision is focussed on "composite transactions" which "include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge." (see[13]) The 2013 Appointment is not such a composite transaction, nor does include any elements without any business or commercial purpose.

59. In my judgment, the proper analysis of the 2013 Appointment is that (in exercise of the power of appointment in the Trust deed) it created new quarter shares in the Trust fund in which each of the relevant beneficiaries had new interests. That resulted in a termination of those interests, followed by the creation of new interests: not a continuation of the pre-existing interests in possession.

60. I am fortified in this conclusion by *Stubbs*. In that case (and in my decision in *Ware v Ware* [2021] EWHC 694 (Ch), [2021] W.T.L.R. 725), interests in possession were inadvertently revoked, and re-appointed on effectively the same terms. In both claims, the parties were represented by highly experienced specialist counsel and solicitors; and the premise of the claims, namely that the transactions had the adverse tax consequences outlined above, were not challenged by the parties opposing the claim, or indeed the judges.

61. If I am wrong about this, then I consider that the position is, in any event, sufficiently unclear as to create a risk that the adverse tax consequences identified by the claimants will result. HMRC are not parties to this claim. Even if I were to decide in Lewis' favour that the Appointments did not terminate the relevant interests in possession,

HMRC would not be bound by the judgment and would no doubt seek to argue the contrary.

62. Lewis' counsel submitted that it was not sufficient for rescission that there was only a risk of adverse tax consequences. I disagree. It is clear that the trustees considered themselves to be entering into a "vanilla" transaction as to its tax consequences, not involving themselves in a complex and possibly litigious dispute with the Revenue.

63. The trustees were therefore mistaken in their belief when entering into the 2013 Appointment either that it had no adverse tax consequences, or, at the very least, that there was no risk of adverse consequences. Either of those mistaken beliefs would in my judgment be sufficiently serious to justify setting aside the 2013 Appointment (and for the reasons stated above, the 2014 Appointment).

Rescission on terms

64. Finally, Lewis' counsel submitted that if the court exercised its discretion to set aside the Appointments, it should only do so on terms that the trustees make a similar appointment, which they could have done on the advice given to them at the time. She referred me to *Pitt v Holt* at [92] in which it was said, in relation to relief granted under the so-called rule in *Hastings-Bass*:

> "as a matter of principle there must be a high degree of flexibility in the range of the court's possible responses. It is common ground that relief can be granted on terms. In some cases the court may wish to know what further disposition the trustees would be minded to make, if relief is granted, and to require an undertaking to that effect"

65. She submitted that this passage applied equally where the court is granting rescission on the grounds of mistake. The trustees made, she submitted, a perfectly sensible decision at the time to benefit the Discretionary Beneficiaries in the way that they did. It was, therefore, she said, just and fair only to grant rescission on the terms that the Discretionary Beneficiaries are entitled to similar interests to those given under the Appointments.

66. I accept that the court has power to impose terms on granting rescission. The question is whether I should exercise my discretion to do so. The Appointments were made over 8 and 9 years ago respectively, after the trustees had taken into account the relevant considerations at that time. Those considerations may well be different 8 or 9 years later. Neither the court nor the trustees are fully appraised of the considerations that apply now. In those circumstances, the court has no proper evidential basis on which to decide whether it would right to impose the terms Lewis' counsel contends for.

67. This is particularly so since this point was first raised in Lewis' counsel's skeleton argument for this hearing. The claimants have therefore had no opportunity properly to consider it as a possible way of resolving this claim, nor to put before the court the relevant considerations to the exercise of their discretion. In addition, their counsel informed me, the claimants, unsurprisingly, intend to retire as trustees, and allow the new trustees to make the decision.

68. Furthermore, the other defendants have not been given notice of the point. They are therefore unaware that the claim could be resolved by the trustees executing deeds with similar effects to the Appointments, but without the adverse tax consequences. In the absence of that point they had no interest in defending the claim, or indeed participating in it.

69. It would in my judgment be unfair to those beneficiaries to require the trustees to take the course proposed by Lewis' counsel, without giving them an opportunity to make submissions on it; and it is too late for this to occur – neither side suggested that I should adjourn the hearing for this purpose, and it would in my judgment be contrary to the overriding objective to do so.

Other grounds

70. In the light of the conclusions reached above, it is not necessary to consider the other grounds relied upon by the claimants.

Conclusions

71. For the reasons set out above, I will therefore set aside the 2013 and 2014 Appointments.