IN THE HIGH COURT OF JUSTICE Case No. HC 1999 02406

CHANCERY DIVISION

Royal Courts of Justice

Tuesday 14th December 1999

Before:

MR. JUSTICE JACOB

HOWELL and another

Claimants

v.

ROZENBROEK and others

Defendants

MR. ROBERT VENABLES QC and MR. LEON SARTIN appeared for the Claimants.
MR. JAMES KESSLER appeared for the First Defendant.
MR. TIMOTHY LYONS appeared for the Second and Third Defendants.
MS. AMANDA HARDY appeared for the Fourth Defendant.

J U D G M E N T
(Approved)

MR. JUSTICE JACOB: This is an application by the trustees of a number of trusts. They want the court to determine whether one or other or neither of two deeds of appointment entered into on 29th June 1999 and 30th June 1999 are valid. These deeds came about because the

trustees were trustees under a deed of appointment of 23rd March 1976. The trusts in general were for the Healey family. The key provision in the 1976 deed of appointment, clause 4, reads as follows:

"Notwithstanding the trusts hereinbefore declared the trustees may raise the whole or any part or parts of the capital for the vested contingent or presumptive settled share for the grandchildren's funds" – that was a fund identified in the trust – "of any of the beneficiaries and pay or apply the same or transfer the same in specie to or for the advancement, education or benefit of such beneficiary prior to the end of the special trust period in such a manner as the trustees may think fit freed and discharged from the trusts hereof.

Provided always that the advancement of any part of the capital hereunder to any beneficiary under the age of 18 years shall be on such terms as such beneficiary shall acquire an interest in possession in such parts on or prior to attaining the age of 18 years."

The proviso thus limits the power given by clause 4 otherwise.

If one looks at the language, the power given before the proviso is in relation to the "advancement, education or benefit of a beneficiary". The proviso limiting that power requiring that there should be an interest in possession prior to or attaining the age of 18 is, on its face, limited to advancement only.

Now the property the subject of the 1999 deeds were purportedly provided by the power contained in clause 4 of the 1976 deed. The question is whether the proviso to clause 4 prevented that. The first 1999 deed was entered into for good and sensible tax reasons, the details of which do not matter. Nor is it necessary to go into the details of this deed, save to say that in no way does it attempt to achieve an advancement in the classical trust law sense of the word. Of course, all words have fuzzy edges and the word "advancement" must also have fuzzy edges, but the general import of the word in trust law has had a long settled meaning. It

was described by Viscount Radcliffe in *Pilkington's Will Trusts* [1964] AC 612 at page 634:

"The word 'advancement' itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment. Thus it was found in such phrases as 'preferment or advancement' (*Lowther v. Bentinck*), 'business, profession, or employment or advancement or preferment in the world' (*Roper-Curzon v. Roper-Curzon*), and 'placing out or advancement in life' (*In re Breeds' Will*). Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship or the purchase of a commission in the army or of an interest in business. In the case of a girl there could be an advancement on marriage (*Lloyd v. Cocker*). Advancement had, however, to some extent a limited range of meaning, since it was thought to convey the idea of some step in life of permanent significance, and accordingly, to prevent uncertainties about the permitted range of objects for which moneys could be raised and made available, such words as 'or otherwise for his or her benefit' were often added to the word 'advancement'. It was always recognised that these added words were 'large words' (see Jessel MR in *In re Broeds' Will*) and indeed in another case (*Lowther v. Bentinck*) the same judge spoke of preferment and advancement as being 'both large words', but of 'benefit' as being the 'largest of all'."

There is no doubt that the first 1999 deed is for the benefit of the two beneficiaries concerned. There was a third beneficiary I shall have to come to in due course. It avoids a very large tax on the fund itself. The mechanism by which it was achieved is that the beneficiary is given, without any ties, income from the fund for a short period. That apparently is effective under the tax regime. But it is not an "advancement" in the classical sense of the word.

Therefore, if clause 4 takes its meaning from the classical use of the word, then the first trust of 1999 is impeccable.

In times past a black letter law approach to the construction of documents would have made the point completely unarguable. In times past, if you found a draughtsman using "advancement, educational benefit" in one place and just "advancement" in another place, you would take him to mean what he said exactly. You would have even more reason to take him as meaning what he said if the word he was using had a technical meaning, as "advancement" does.

It is suggested on behalf of the fourth defendant, who is a little girl born in May this year, that that approach to the construction of this trust deed should give way to a more modern approach to the construction of documents as indicated by the House of Lords in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, following its own decision in *Mannai Investments Co. Ltd v, Eagle Star Life Assurance Co. Ltd* [1997] AC 749.

Both of those cases were concerned with construction of commercial documents. One was an inter partes document, a contract (*Investment Compensation*) and the other was a unilateral document, a letter by a tenant or a landlord, I forget which, exercising an option under a lease. What is said is that the approach there should also apply to deeds.

I think there is a lot to be said for that, but there are differences in relation to deeds, particularly a deed of this character. The principal difference is that these documents are drafted with the utmost care and precision by experienced lawyers so, for the court simply to say "well, there is a bit of sloppy drafting here, you know what he really meant" is much more difficult.

What is argued here is that the proviso was there for a tax purpose. Apparently at the time of the document there had been a new tax statute, and there was a school of thought saying that you needed a proviso of this general sort because otherwise there would be adverse Inheritance Act tax consequences. It turned out later that you did not. The Court of Appeal made it plain that that

was so in a case called *Inglewood*, a case that in retrospect is not that surprising, because otherwise the provision of the tax statute concerned would have had no effect on virtually any trust in the country, which can hardly have been intended.

What is said here is that it would not have been good enough to have a proviso which applied only to an advancement stricto sensu. It would have to have applied to a benefit for it to work. It is said that that must be the matrix of the circumstances against which this document must be construed, that the tax purpose must have been the draughtsman's intention, and accordingly the word "advancement" is being used in the proviso as a shorthand for "advancement, education or benefit".

I think that is a powerful argument, but in the end I reject it. I reject it because, for the reasons I have already mentioned, any competent draughtsman in 1976 must have been aware of the then fairly recent decision of the House of Lords in *Pilkington*, setting out the tremendous exactitude what "advancement" was. It not only set out what "advancement" was, but it discussed the difference between "advancement" and "benefit" because the case was about what the trustees could do under the power conferred by section 32 of the Trustee Act.

So construing this document involves holding that the draughtsman was sloppy in using the word "advancement" when he would have known that it had a precise meaning. It also involves speculating that he had the tax point in mind in the form in which I have indicated, but I do not know that that is so. He may have thought that it was sufficient if there was an "advancement" to get the tax consequences he desired. If he really was thinking about the tax point and that is what he really had in mind, it would have been the most foolish thing in the world to use "advancement" when there was a real risk that it would be construed as meaning what it said. This is not one of those cases where you can say "never mind what the words were, you know what they meant". If you are not sure of the position, then you are driven back to what they actually say, and I think I am driven back to that position here.

Mr. Kessler, to be fair, without great enthusiasm because he did not want the result particularly, also suggested in support of his argument on behalf of the fourth defendant that it might be possible to construe the proviso as reading that "the advancement of any part of the capital hereunder to any beneficiary under the age of 18 years shall be on such terms that any beneficiary …". He suggested this because he accepted that nobody at any time could have wanted to stop the trustees doing what they are doing here. That, to my mind, is just too strained a construction to be workable.

I therefore come to the conclusion that the deed of appointment of 29th June 1999 is valid.

I turn to the deed of appointment in favour of the fourth defendant, a baby who was born this year. This is the deed of the 29th day of June 1999. The only provisions of this document which are operative are administrative. In brief, the document provides that any dividends from companies whose shares are held by the trust which are received shall be treated as income, but that the issue of any additional shares shall be treated as addition to capital.

I am told there is no case which says that, even where it is for the benefit of the beneficiary, such a purely administrative change is permissible. Well, there is now. Sir George Jessel said that "benefit" is the word "largest of all". If administrative changes are for the benefit of the beneficiary, then they are for the benefit of the beneficiary and that is that.

Accordingly, this deed is also valid.

Here is information on how to order *Drafting Trusts and Will Trusts* and other books by James Kessler QC.

Home