IN THE HIGH COURT OF JUSTICE No.03159 of 1998

CHANCERY DIVISION

Royal Courts of Justice

Monday, 25th October 1999

Before:

MR. JUSTICE PARK

B E T W E E N

PAPPADAKIS Claimant

and

PAPPADAKIS & Ors. Defendants

_____

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MR. D. AINGER (instructed by Messrs. Landau & Scanlan) appeared on behalf of the Claimant.

MR. C. TURNBULL (instructed by Messrs. Bircham & Co.) appeared on behalf of the Second Defendant.

MISS C. NICHALOS (instructed by the Abbey Life Legal Department) appeared on behalf of the Third Defendant.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE PARK: This is my judgment:

Abbreviations

I use the following abbreviations. The husband: Mr. Georges Pappadakis, who died on 7th June 1992. The widow Mrs. Sisko Pappadakis. The daughter: Miss Virginia Pappadakis. The son: Antoine Pappadakis. Abbey Life: Abbey Life Assurance Company Ltd. The policy: a whole life policy issued in 1982 by Abbey Life on the life of the husband.

Overview

The husband died of cancer in 1992, aged 53. The policy matured and El million became payable by Abbey Life. The question is: who is entitled to the ,1 million? There are two possibilities: (1) The widow is entitled to it all; (2) the widow, the daughter and the son are entitled to it in equal shares. In my judgment possibility (1) is correct and the widow is entitled to the ,1 million. The question depends on whether or not a document headed

"Declaration of Trust" and dated 25th November 1987 was valid. If it had been possibility (2) would have been correct. However, in my view the Declaration of Trust was not valid. That means that possibility (1) was correct so the widow is entitled to the entire proceeds of the policy.

The widow is the claimant in these proceedings. Mr. Ainger appears for her and contends - successfully in my view - that the Declaration of Trust was not valid. The daughter is a defendant but she has not appeared and does not wish to dispute her mother's claim. Nevertheless if I had concluded that the Declaration of Trust was valid, I would have made a declaration the effect of which would have been that the daughter had a one third interest in the policy moneys. It would, of course, have been open to her in those circumstances to transfer her interest to her mother.

The son is also a defendant. He is an infant (being presently 16 years old) and in the circumstances the family have teen advised that whatever his personal inclinations might be, he ought to be represented and argument should be presented on his behalf seeking to uphold the Declaration of Trust. Mr. Turnbull has appeared for him and, although I have concluded that Mr. Turnbull's submissions are not correct, he has argued the case for the son excellently.

Abbey Life is the third defendant. It was represented by Miss Nichalos, but adopted a neutral role. It has paid to the widow the

one third of the policy proceeds which go to her in any event, but it is still holding the other two thirds, the destination of which was uncertain. I am sure that it is as anxious as everyone for the uncertainty to be resolved in order that it can pay the other two-thirds to whoever is entitled to receive it.

The facts

1. The husband applied for the policy on 21st August 1982. The representative of Abbey Life with whom he dealt was a Mr. Drummond. The proposal form was a printed standard Abbey Life form headed "Flexible Trust Application Form". It provided for the policy to be issued to the husband on discretionary trust for himself, his wife (who is now the widow) and the daughter. The son had not been born at the time, so he was not a beneficiary. Future born children of the husband were not included among the beneficiaries. The policy was formally issued by Abbey Life on 12th October 1982. It was held on the discretionary trusts set out in the proposal form. At that time it was held by the husband as sole trustee, but the trusts provided that an appointment of the policy or the policy moneys to any of the three beneficiaries (the husband, the widow and the daughter) had to be made by two trustees or a Trust Corporation. So another trustee would have to be appointed before any appointment of the benefit of the policy or of the policy monies could be made.

2. The son was born in February 1983 but at that time he was not a possible beneficiary of the policy.

3. In 1987 three documents were entered into. All of them are dated 25th November 1987. I describe them in paras.4, 5, 5 and 7 below. There is no direct evidence of the purpose which lay behind them, but everyone (including myself) assumes that the husband wanted to make the son a possible beneficiary of the policy. It is clear that the husband had gone back to Mr. Drummond of Abbey Life, and that Mr. Drummond was responsible for the documentation. Mr. Drummond left Abbey Life some years ago, and there was no evidence from him. I was told by counsel that it is thought that he might have died.

4. The first document was certainly valid. It was executed on a standard Abbey Life printed form and by it the husband, as trustee of the policy, appointed a Mr. Sheridan an additional trustee to act together with the husband himself. The widow's affidavit states that Mr. Sheridan was a friend of her husband. She believes that he was also an employee of Abbey Life.

5. The second document was also valid. It too was executed on a standard Abbey Life printed form. It was headed "Deed of Appointment of Benefits". The husband and Mr. Sheridan, being the trustees of the policy, irrevocably appointed it and all benefits payable under it for the absolute benefit of the husband. They also assigned the policy to the husband freed and discharged from the trusts of the policy. Immediately after this document, the husband was the absolute legal and beneficial owner of the policy.

6. The third document is where things went wrong. Again it was a standard Abbey Life printed form, with spaces for names and other details to be filled in in manuscript. It was headed "Declaration of trust" but that was inaccurate. The uncompleted form said that it was "a deed made between [blank], hereinafter called the Settlor of the one part and [blank of blank] and [blank of blank] hereinafter called the Trustee of the other part." It recited that the Settlor wished to assign the policy (details of which were to be written in) to the trustee upon the trusts thereinafter expressed. The form of deed witnessed that "the Settlor hereby assigns the Policy to the Trustee upon trust to hold the Policy upon Trust for the benefit ..." Lines were then left blank for the names of the beneficiaries to be written in. Various standard trust provisions were incorporated, and there was space for the deed to be executed by three persons. The blank form was accompanied by guidance notes on how to complete it but in view of what I am about to describe, I think it is obvious that Mr. Drummond either did not read them or, if he did, did not understand them.

7. I now describe what ought to have happened and (not always the same thing) what actually happened.

(1) The husband's ought to have been written in the space for the name of the settlor. This did happen. The handwriting looks like that of Mr. Drummond.

(2) The names and addresses of two persons ought to have been written into the two spaces left for the insertion of the names of the trustees. I imagine, but I am not sure (see reservations on this which I express later), that the husband should have been one of the trustees, and I think it quite Likely that Mr. Sheridan should have been the other. None of this happened. The spaces for the names of the trustees were left completely blank.

(3) The details of the policy ought to have been written into the appropriate space on the form. This was properly done.

(4) After the printed words that the Settlor assigned the policy to the Trustees "for the benefit of" there should have been written "of" and the names of the intended beneficiaries. This was done. Mr. Drummond wrote in "His Wife", "His Daughter", "His Son", in each case setting out the full name, "in equal shares".

(5) The spaces for execution of the deed ought to have been completed by the signatures of three persons: the husband as settlor and two persons as trustees. If the husband was himself to be one of the trustees he ought to have signed the deed twice. This was not done. The husband signed the deed once. No other person signed it at all.

8. That completed the formal steps taken on 25th November 1987. Mr. Drummond wrote an office memorandum which has been produced from Abbey Life's files. It attached the three deeds for them to be recorded in the files, and added this sentence:

"A further Deed of Appointment of a new Trustee for the new Trust will be forwarded in due course."

9. I pause at this point to note the following. If the Declaration of Trust was invalid the husband was still the absolute legal and beneficial owner of the policy. If the declaration was valid, then someone, who I think can only have been the husband, held the policy as trustee for the widow, the daughter and the son in equal shares.

10. On 5th May 1992, which was just a month before the husband died, he and the widow executed a deed of gift. It recited that there were doubts about the validity of the 1987 Declaration of Trust (which it called "the Doubtful Assignment") and that it was believed that the husband was absolutely entitled at law and in equity to the policy. On that assumption the husband assigned the policy to the widow absolutely.

Analysis and Discussion

My conclusion is that the 1987 Declaration of Trust was invalid. It achieved nothing, and left the policy in the absolute ownership of the husband, where it had been placed by the first two (valid) documents executed on 25th November 1987. My conclusion is based on four propositions.

The first proposition is that the document, though inaccurately headed "Declaration of Trust", purported to be an assignment of the policy, not a declaration of trust of it. It recited that the Settlor wished to assign the policy to the Trustees, and the first operative provision stated "the Settlor hereby assigns the Policy to the Trustee[s]." But the document plainly could not take effect as an assignment of the policy. There were no trustees and it is impossible to assign a policy (or indeed anything) to nobody.

My second proposition is that a transaction which purports to be a voluntary and gratuitous assignment but which fails to take effect as an assignment will not be saved from invalidity by equity holding it to be a declaration of trust by the unsuccessful assignor. He did not intend it to be a declaration of trust, and in a case where the possible beneficiaries were volunteers who gave no consideration, equity will not hold the transaction to have been something which it was not intended to be. This is the principle established by the celebrated 19th Century case of Milroy v. Lord [1862) 4 De G. P. & J., 263, which has been followed on a number of occasions since, starting with Richards v. Delbridge (1874) L.R.

18 Eq. 11. In Milroy v. Lord Turner L.J. pointed out that a voluntary settlement could be made in either of two ways: by transfer of the property to trustees, or by the settlor declaring himself a trustee of the property. He went on:

"... if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

In Richards v. Delbridge Sir George Jessel M.R., said of the last sentence that it "contains the whole law on the subject."

So, applying my second proposition to the facts of this case, the court cannot find a trust to have been created by saying something like this. "The husband tried to create a trust of the policy by saying that he was assigning it to trustees. He failed to assign it to trustees so he is still the legal owner of the policy. But he wanted to create a trust, so the law will create one by imposing on him a trust to hold the policy on the same trusts as those which he ineffectively tried to create by assignment."

I do not think that the court can say something to that effect after all by adding that, on the facts of the present case, the husband did intend that he should himself be one of two trustees of a trust to be created by assignment. I question whether, even if that was certainly true, it would be enough to eliminate the principle of Milroy v. Lord, but in any event it is in my opinion far from certain whether husband did intend to be a trustee himself. I think that the only thing that is certain is that Mr. Drummond, the Abbey Life representative who was responsible for the documents, was out of his depth and did not know what he was doing. He may have intended the husband to be a trustee, but equally he may have assumed (wrongly) that Mr. Sheridan, the husband's friend, should be or even was a trustee (with another one to be added later). After all, in the case of a whole life policy the trustees were unlikely to have to do anything until after the husband's death, and there was not a great deal of point in the husband being a trustee.

My third proposition is that the transaction embodied in the 1987 document was not, as a matter of construction of the document, a declaration of trust. This is not the same as the second proposition. The second proposition rejects this argument: as a matter of construction the document was not a declaration of trust by the settlers but the law will impose a trust on the settlor nevertheless. The argument which the third proposition rejects is this: as a matter of construction the document was a declaration of trust by the settlor.

The argument that the document was, as a matter of construction, a declaration of trust was the first argument presented by Mr. Turnbull in seeking to uphold the validity of the "Declaration of Trust". As he said in his skeleton argument,

"On the true construction of the 1987 Declaration of Trust, Mr. Pappadakis was not purporting to assign the policy to unspecified persons as trustees, but rather was declaring himself as a trustee of the policy for his wife and children in equal shares."

Mr. Turnbull argued the point with skill and tenacity, but I cannot see how it can be right. The document actually reads, "The Settlor hereby assigns the Policy to the Trustee." "The Trustee" has already been defined as two persons. Who they are, however, is not specified. How can it be said that as a matter of construction the husband was not purporting to assign the policy to unspecified persons as trustees? As a matter of construction that is exactly what he was purporting to do.

I do not think that 1 can reject the words of the document simply on the ground that they were printed. Possibly it might have been different if the printed words were expressly and directly contradicted by manuscript words written on the same document. However, I do not think that the printed words can be, as it were, impliedly contradicted and overruled by a suggested inference to

be drawn from the absence of certain manuscript words added to the document.

Mr. Turnbull prays in aid principles of construction expounded by the House of Lords in the recent cases of Mannai Investment Co. Ltd. v. Eagle Star [1997] A.C. 749 and Investors Compensation Scheme v. West Bromwich Building Society [1988] 1 All E.R. 98. At the risk of over-condensing a sophisticated submission, I believe that in essence he says this: as a matter of words, the husband did not manage to say that he declared himself a trustee of the policy, but that is what he meant to say (or, perhaps, that is what Mr. Drummond meant that the husband should say); therefore, his words should be construed as having that meaning. I question whether, even on the widest reading of the recent House of Lords cases, so drastic an exercise in surgery on the language could be justified as a matter of construction. But in any case I am not prepared to find that the husband's intention, or Mr. Drummond's intention on his behalf, was that he should make a declaration of trust. 1 repeat that Mr. Drummond did not know what he was doing. Even if evidence as to what he intended would be admissible on the question of construction, there is no such evidence anyway. It is possible that Mr. Drummond did indeed intend that there should be a unilateral Declaration of Trust by the husband, but that is only one of a number of possibilities, and I am not prepared to approach the construction of the document on the basis of an assumed intention, inferred from the document itself, that it was meant to be a declaration of trust.

My fourth proposition is that, given that the document, taken according to what it actually says, is invalid, it cannot be saved by having its terms rectified so as to cause it to say something else. A document will only be rectified if there is clear and convincing evidence that, although it has said one thing, the party or parties to it intended it to say something else. Further, the clear and convincing evidence must indicate what the something else was intended to be. There is no such evidence in this case.

Conclusion

For the foregoing reasons the 1987 Declaration of Trust was invalid. It follows that the 1992 deed of gift by the husband to the widow was valid, and that the widow is entitled to all the policy proceeds. There are a number of detailed questions raised in the originating summons. I believe that, in the light of this judgment, counsel will be able to agree a minute setting out the answer to them.

MR. AINGER: As a result of your Lordship's note I was able to submit to Mr. Turnbull

a draft of the minute of order on Friday and he has had his input into it, hence this is entitled "the second draft". So far as Abbey Life is concerned, I did not submit it to Miss Nichalos for the reason that she was attending in a watching capacity.

MR. JUSTICE PARK: Yes.

MR. AINGER: So, my Lord, this is in a form agreed by Mr. Turnbull. The only doubt

about the order is so far as costs is concerned, and I am awaiting instructions from those instructing me, but I think we might as well deal with the more important part first, although costs are never unimportant. So, your Lordship will see the conventional opening on p.1. Then,

"UPON HEARING COUNSEL for the plaintiff and for the second defendant the above named Antoine Georges Pappadakis ..."

- no-one appearing for the first defendant -

"... the above-named Virginia. She, by her acknowledgement of service having stated that she did not intend to contest any part of the plaintiff's claim, and the third defendant, Abbey Life Assurance (hereinafter called 'Abbey Life') appearing by counsel in a watching capacity..."

My Lord, I could add, if your Lordship would like that Abbey Life had also put in an acknowledgement of service saying that they did not intend to contest that. Then the next sentence is ----

MR. JUSTICE PARK: In standard form.

MR. AINGER: Yes. Then:

"It was ordered (1) that the matter do stand over for judgment and the said matter coming on for judgment this day..."

Then there is a series of declarations which follow the form of the originating summons. The first declaration is that upon the true construction of the Covermaster policy - and I set out its date and its number,

"... and the trusts affecting the same the said policy was until the 25th of November 1987"

- which of course the date on the three documents -

“ ... held upon trust by the late Georges Antoine Pappadakis.”

Then I set out his date of death and that he is hereinafter called “the assured”.

“... for the benefit of the plaintiff and the first defendant being the persons named in default of appointment in the Flexible Trust application form.”

Then I give the date.

MR. JUSTICE PARK: Was it not “himself, the plaintiff and the first defendant”?

MR. AINGER: The policy is ----

MR. JUSTICE PARK: Shall we just check? We go to p.30, do we not?

MR. AINGER: Page 30.

MR. JUSTICE PARK: No, you are right.

MR. AINGER: It seems to me to be right.

MR. JUSTICE PARK: Yes, you are right.

MR. AINGER: Then,

"(2) The deed of appointment of trustees dated 25th November 1987 made by the assured vested the policy in the assured and Robert William Sheridan (hereinafter called 'Mr. Sheridan') as trustees upon the trust declared in respect of the policy by the said Flexible Trust application form. (3) The legal and beneficial interest in the policy was vested in the assured absolutely by deed of appointment of benefits, (hereinafter called 'the 1987 Deed of Appointment of Benefits') also dated 25th November 1987 executed by the assured and Mr. Sheridan. (4) ..."

- and this is the key declaration -

"... The document entitled 'Declaration of Trust' (hereinafter called 'the 1987 Declaration of Trust' also dated 25th November 1987 made by the assured was not an effective and did not take effect as an assignment of the policy..."

- and then the words Mr. Turnbull wanted added and I have added -

"... or as a declaration of trust thereof, and accordingly the assured remained immediately after executing the same beneficially and absolutely entitled to the policy by rea son of the 1987 deed of appointment of benefits. (5) There is insufficient evidence to enable the 1987 declaration of trust to be rectified. (6) The legal and beneficial interest in the policy was assigned to the plaintiff by the deed of gift dated 5th May 1992 and made between the assured and the plaintiff."

Following on from those declarations,

"It is ordered that Abbey Life pay the balance of the proceeds of the policy and all interest earned thereby or transfer of the securities now held by Abbey Life representing the said proceeds and interest to the plaintiff pursuant to declaration (6) above."

Then the position as to costs: May I take instructions as to this, my Lord?

MR. JUSTICE PARK: Yes. My Lord, I am instructed that I have done it correctly.

What has happened here is this: My Lord, the son has no money of his own. It is clearly inappropriate that he should only get costs on the standard basis, but there must be some method of the plaintiff capping the costs. So, in the absence of agreement by the plaintiff, "... there be assessed on the indemnity basis the costs of and incidental to the application of the second defendant and the said costs be raised and paid out of the said balance of the proceeds of the policy and/or interest earned thereby or the securities representing the said proceeds and interest ..."

MR. JUSTICE PARK: Yes. That is the order you would like me to make, is it?

MR. AINGER: My Lord, that was agreed in that form by Mr. Turnbull.

MR. JUSTICE PARK: Any other comments. All right. I will make an order in those

terms accordingly. I think that concludes the proceedings altogether.

MR. AINGER: My Lord, it should. I am much obliged.

 Home