Neutral Citation Number: [2019] EWHC 2259 (Ch)

Case No: E31BS377

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 23 August 2019

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

Catherine Armstrong	**Claimant**
- and -	
(1) Catherine Armstrong	**Defendants**
(2) Elaine Sutherland	

- -
- -

Nicholas Pointon (instructed by **Clarke Willmott LLP**) for the **Claimant, First and Second Defendants**

Hearing dates: 2 August 2019

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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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HHJ Paul Matthews :

Introduction

1. This is my judgment on a claim brought under Part 8 of the CPR, the claim form having been issued on 27 December 2018. The details of claim accompanying the claim form and incorporated within it show that the claimant seeks declaratory relief (in effect, the determination of questions of construction) or alternatively rectification, in relation to written documents constituting trusts of two different life assurance policies, made in 2005 and 2007 respectively. I call these the "2005 trust" and the "2007 trust" respectively. The claimant is the surviving trustee of one of the trusts, and a trustee with her sister, the second defendant, of the other. They are also the default beneficiaries of the 2005 trust, and claim to be the default beneficiaries of the 2007 trust. Their parents, Leonard and Mary White, created the 2005 trust, and Mrs White alone created the 2007 trust. They are both now dead.

2. Curiously, the claimant is also the first defendant to this claim, thus appearing on both sides of the record. I was told that this was done because she has two capacities, both trustee and beneficiary. (This is odd because, as I say later, it appears that the second defendant is a trustee of one of the trusts.) However that may be, the claimant in her capacity as first defendant has not filed an acknowledgement of service, although the second defendant has (via the same solicitors as the claimant). That acknowledgement indicates that the second defendant does not intend to contest the claim. Although the second defendant was present in person at the hearing, in practice the claimant's counsel was representing both sides. This is undoubtedly friendly litigation. I record that, before the claim was issued, HMRC were invited to say whether they wished to be named or joined as parties or to be heard on the claim. They replied to say that they did not wish to take part in the proceedings but wished the court to be referred to various decisions concerned with rectification. I was so referred. I will return below to the question of the irregular constitution of these proceedings.

Evidence

3. The claim was originally supported by (i) a witness statement dated 23 July 2018 with exhibits, by the claimant, and (ii) a witness statement dated 11 April 2018 by Andreas Pretorius, who advised Mr and Mrs White at the time of the making of the second trust in question. Unfortunately, neither witness statement complied with the rules governing the form of such statements, and in particular CPR Practice Direction 32, paragraph 18.1. An odd feature of the witness statement of Mr Pretorius was that he said he had read the claimant's witness statement and agreed with it, even though it was made some three months after his own. This was explained to me as an intended reference to a *draft* of the claimant's witness statement.

4. When I considered the papers in this claim at an earlier stage, I formed the view that there were some difficulties with the evidence. The claimant's witness statement is quite full, but she was not involved in any way with the creation of either trust, and can give no significant evidence about what happened at that time. Mr Pretorius in his statement (which was very short, running to 5 paragraphs in total) gave only very general and limited evidence about the circumstances of the creation of the 2007 trust, and in particular about the intentions of Mrs White at that time. He was not involved as a financial adviser to Mr and Mrs White in 2005, and could give no evidence as to

the creation of the earlier trust. The person who *did* advise Mr and Mrs White at that time has since retired and been lost sight of. Moreover, the company of financial advisers for which both of them worked was taken over in 2009 and the business subsequently moved back to the United States. That means that it has not been possible to find any files relating to these transactions.

5. Essentially, the only evidence available consists of the documents which Mr and Mrs White themselves had and which had been passed on to the claimant, and what Mr Pretorius can remember. It is for this reason that I directed that Mr Pretorius attend at the hearing of the claim to be examined on his witness statement. He also amplified some of the matters referred to in his statement, and added some new material. I record here that he was a clear and straightforward witness, and did not try to say any more than he could remember of events now more than ten years ago. I am satisfied he was telling the truth and trying to assist the court, and I accept what he says.

6. Other potentially relevant matters, which might have been covered in the evidence originally filed, were not in fact so covered. This includes evidence about the members of the family (in particular if there were any other siblings), whether Mr and Mrs White had any responsibility towards other family members or friends, and whether either or both of Mr and Mrs White made wills, if so who benefited under them, and, if they did not make any, who would be entitled on their intestacy. At the hearing, this lack of evidence was resolved by a direction that a further witness statement addressing these issues be filed, as indeed it was.

7. The claimant's second witness statement is dated 14 August 2019, and was filed at court the same day. It gives details of family members, the testamentary provision made by both Mr and Mrs White, and also exhibits a further letter from Clarke Willmott to Mrs White dated 10 January 2014. I have taken account of this further evidence, and will refer to it in due course.

Constitution of the claim

8. At the hearing I also raised the question of the constitution of the claim, as mentioned above. It is clear on the authorities that a person who has more than one capacity, such as trustee and beneficiary, should be joined as a party to litigation once only, and on a single side of the record. Thus, in *Neale v Turton* (1827) 4 Bing 149, where one member of a partnership drew a bill of exchange on that partnership (including himself), which was accepted, and then sought to sue the whole partnership (including himself) on it, Best CJ said (at 151):

> "There is no principle by which a man can be at the same time Plaintiff and Defendant."

And, in *Hardie & Lane Ltd v Chiltern* [1928] 1 KB 663, CA, a claim was brought against members of an association, three of whom were mentioned twice over, being sued first on their own behalf and second on behalf of all the other members of the association. Sargant LJ said (at 699):

> "I desire to add, though the matter is perhaps one of form rather than substance, that it is incorrect to make any individual the defendant twice over because he happens to fill two capacities or has two different interests. The case often arises

in actions in relation to trusts and the practice to the contrary is, in my experience, invariable."

9. At the hearing of this claim I therefore ordered that the claimant be removed as first defendant, so the position was regularised, as was done by Rimer J in *Allnutt v Wilding* [2006] EWHC 1905 (Ch), [4]. If a trusteeship had needed to be transferred to a third party to resolve the difficulty, then that could have been ordered too, as Maugham J did in *Re Phillips* [1931] WN 131; and see also *Public Trustee v Guaranty Trust* [1980] 2 SCR 931, 115 DLR (3d) 513, SCC. The double appearance of the claimant did not cause any particular difficulty in this case, but in other cases practical questions may arise, such as, for example, double legal representation, set-off and enforcement, and so it is well to avoid the problem in the first place.

The terms of the trusts

10. I turn now to the terms of the 2005 and 2007 trusts, and the issues which have been raised in this claim. Each of the trusts involved a life insurance policy granted by Legal and General Assurance Society Ltd. It appears that each policy was granted on the joint lives of Mr and Mrs White. However, in the case of the 2005 trust, the policy appears to have been applied for by, and granted to, Mr and Mrs White together, whereas in the case of the 2007 trust, it appears to have been applied for by, and granted to, Mrs White alone. The first trust document operated as a declaration of trust, so Mr and Mrs White were the first trustees. However, on 6 January 2006 their two daughters (the claimant and the second defendant) were appointed as additional trustees. In the case of the 2007 trust, it appears that Mr White and the claimant were appointed as additional trustees at the time that the declaration of trust was signed by Mrs White.

The 2005 trust

11. The original trust provisions for the 2005 trust are contained in what was evidently a booklet of four pages, of which the first is simply a cover page. It bears the title "Trust Schedule Including Trust Provisions For With Profit Bonds and Investment Bonds". The second page (which faces the third page in the booklet) contains at the top some "Important Notes for the Customer". These are not part of the trusts. On the rest of the page is text headed "Trust Provisions – Non-Statutory Flexible Trust".

12. The first (unnumbered) paragraph of this section is as follows:

> "I/We desire that the policies named in Part 1 opposite (hereinafter called 'the Policy') be issued to me/us as Grantee(s) and expressed to be upon an irrevocable trust for the benefit of all or such one or more exclusively of the others or other of those named in Part 3 opposite in such shares and in such manner as the Trustees (being at least three in number or a trust corporation) shall in their absolute discretion appoint by deed or deeds revocable or irrevocable and executed at any time or times not later than twenty-four months after the date of death of the life assured (the date of death of the first/last to die in the case of joint lives assured) and in default of appointment or so far as no appointment shall extend for the benefit of those named in Part 2 opposite in equal shares absolutely (unless otherwise stated)."

13. Immediately following the words "first/last" there is a superscribed 'dagger' with a corresponding note at the bottom of the page reading "Delete as appropriate". However, although the rest of the schedule has been completed, neither the word "first" nor the word "last" has been deleted. It is therefore unclear on the face of the document from which point the period of 24 months of the exercise of the power of appointment should run.

14. The third page (opposite the second page) contains parts 1 to 4 of the Trust Schedule. In Part 1, the heading is "Declaration of Trust". The first space to be filled in immediately follows words which read "Policies in which Trust Schedule is to be incorporated: Policy Name". Here the words "Distribution Bond" have been written by hand. Underneath that are the names and addresses of the persons declaring the trust. In this case they are Mr and Mrs White. Then follow these words:

> "In submitting the application for the above policy(ies), I/we wish to make myself/ourselves, and any person(s) named in question 4 below, Trustee(s) of the policy(ies) for the beneficiaries given in questions 2 and 3 below. I/We have read and agree with the Trust Provisions shown to the left."

There follow the signatures of the settlors, Mr and Mrs White, and the signature, name and address of their witness (their previous financial adviser).

15. Part 2 has only one space to be completed, with the heading "Who do you want as the Current Beneficiaries?" Looking back at the first paragraph of the trust provisions, set out above, it is clear that the persons named here are those intended to take in default of appointment under the overriding power of appointment which that paragraph confers. Here are written the words "Catherine Armstrong (daughter) 50%" and directly underneath them the words "Elaine Smith (daughter) 50%".

16. Part 3 has the heading "Who are the potential Future Beneficiaries?" According to the trust provision already referred to, these are the objects of the overriding power of appointment. This has been completed with the word "Grandchildren". I can pass over Part 4.

17. The fourth page (the back page of the booklet) contains Part 5 of the Trust Schedule, which is headed "Deed of Assignment/Assignation". The use of the alternative Scottish term "Assignation" is strange, because the terms of the trusts are not in the Scottish form at all, and indeed refer to the Trustee Act 1925 (which applies to England and Wales) and the Trustee Act (Northern Ireland) 1958 (which applies to Northern Ireland). But nothing turns on this. It simply serves to confirm that this form is a "one size fits all", "tick box" exercise. At the bottom of that page is a box with an instruction to the left saying "To be completed by HEAD OFFICE ONLY". It contains details of the issuer of the life assurance policy, the date and the policy numbers.

The 2007 trust

18. The 2007 trust is contained in a seven-page document, of which the first page is a cover page, with the title "Trust Schedule Including Trust Provisions for use with single premium investment bonds". The second page contains what are stated to be "important notes for the customer", just as in the 2005 trust. In the same way, the

third page is headed "Trust Provisions – Non-Statutory Flexible Trust". The first paragraph following is exactly the same as the first paragraph of the corresponding page in the 2005 trust. Just as in the 2005 trust, unfortunately neither the word "first" nor the word "last" has been deleted.

19. The fourth page contains Part 1, headed "Declaration of Trust". Once again, the first space to be filled in immediately follows words which read "Policies in which Trust Schedule is to be incorporated: Policy Name". But, unlike the 2005 trust, here nothing has been written. There instead is a blank. On the fifth page appear Parts 2, 3, and 4. Part 2 is headed "Who do you want as the Current Beneficiary(ies)?" Again, unlike the 2005 trust, there is a blank. Part 3 ("Who are the potential Future Beneficiaries?") has been filled with the words "My children" and underneath that "My grandchildren". Again, I can pass over Part 4. The sixth page contains Part 5, which I can also pass over. The seventh and last page contains the signature of the settlor and that of the witness together with his name and address. As with the 2005 trust, at the bottom of that page is the box with the instruction saying "To be completed by HEAD OFFICE ONLY". It contains details of the date and (it is argued, crucially) a policy number.

The problems summarised

20. The problems with these two trusts are of three types. The first (which affects both trusts) is the failure to delete either of the words "first" and "last" in relation to the time of the exercise of the overriding power of appointment. The second (which affects only the 2007 trust) is the failure to complete the box following the words "Policies in which Trust Schedule is to be incorporated". The third (which also affects only the 2007 trust) is the failure to complete the box in Part 2 ("Who do you want as the Current Beneficiary(ies)?"). What the claimant seeks is either declaratory relief making sense of these problems or rectification of these provisions to complete that which has not been completed.

Law

Construction

21. I should say something about the legal principles involved in this claim. First there is the question of construction. There can be no doubt that the principles of interpretation for commercial documents set out in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896, 912-3, and developed in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, also apply to trusts and wills: see for example *Staden v Jones* [2009] EWCA Civ 936 (construction of agreement alleged to create a trust for the daughter of a divorcing couple); *Marley v Rawlings* [2015] AC 129 (construction of a will); *Millar v Millar* [2018] EWHC 1926 (Ch) (construction of a family trust).

22. As Lord Neuberger put it in *Marley*,

> "23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents."

That means that, again in the words of Lord Neuberger,

> "19 … the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document, (iii) any other provisions of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions."

Rectification

23. Turning to rectification, it is clear law that a voluntary settlement such as a family trust may be rectified if the necessary conditions are satisfied, and in such a case it is the intention of the settlor that matters: *Re Butlin's ST* [1976] Ch 251. In that case Brightman J rectified a voluntary settlement where a power for the majority of trustees to bind the minority was included, but in a form which was more limited than, as it later appeared, the settlor had intended. The judge said (at p 260):

> "rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention."

24. The standard of proof for rectification was discussed by Barling J in *Giles v Royal National Institute for the Blind* [2014] EWHC 1373, as follows:

> "25. … (1) While equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. One aspect of that caution is that the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument, there must be convincing proof to counteract the evidence of a different intention represented by the document itself…"

25. In the same case, Barling J identified a further requirement for a successful rectification application, as follows:

> "25. … (4) There must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent. This criterion has been much criticised: the purpose of it, and its actual content and scope, are by no means clear. In *Racal* Peter Gibson LJ expressly approved the following summary of the principle by Vinelott J in the same case. Vinelott J stated that the court must be satisfied:
>
> > 'that there is an issue capable of being contested, between the parties or between a covenantor or a grantor and the person he intended to benefit, it being irrelevant first that rectification of the document is sought or

> consented to by them all, and second that rectification is desired because it has beneficial fiscal consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal benefit'."

26. I have already referred to the fact that HMRC declined the claimant's solicitors' invitation to be joined into the proceedings, but (as is their practice) they asked that the court be referred to certain decisions concerning rectification. These were *Racal Group Services Ltd v Ashmore* [1995] STC 1151 (and the authorities discussed in that case), and *Alnutt v Wilding* [2007] EWCA Civ 412. I have therefore considered these decisions.

27. In *Racal Group Services Ltd v Ashmore*, the claimant covenanted to pay an annual sum to a charity on four occasions, the first on the execution of the deed of covenant (in July 1988), and the others on 1 April in each of the following three years, with the last payment on 1 April 1991. The intention had been to make covenanted payments which would fall within the definition of 'a covenanted payment to charity' in the tax legislation, thus attracting a tax benefit for the claimant. That definition required that the covenant be capable of lasting more than 3 years, and so the covenant was expressed to be "for a period of FOUR years from the date hereof". But in fact, on the true construction of the deed, the covenant obligation would come to an end with the last payment, on 1 April 1991, which was only thirty-three months after being made. So the payments under the covenant did not qualify. The claimant sought rectification of the covenant. The defendant charity trustees did not appear. The Inland Revenue also declined to take part.

28. At first instance the judge dismissed the claim, and on appeal the Court of Appeal affirmed that decision. The problem was that although the evidence showed that a mistake had been made, it did not sufficiently show what was the intention of the maker of the covenant so that the deed could be rectified to accord with that intention. Peter Gibson LJ, with whom Kennedy and Glidewell LJJ agreed, said (at p 1160):

> "I accept that there was an error in the carrying out of Mr Keeley's intentions in that the words of the deed referring to the duration of the covenant as four years are inconsistent with the dates of payment, providing as they do that the payments should all take place in a period of less than three years. But I am not able to say that the evidence establishes with the requisite clarity what was Mr Keeley's and hence RGSL's intention as to when the covenanted payments should be made. In my judgment therefore the judge was justified in concluding that RGSL had failed to establish to the required standard that the covenant did not give effect to its intention, and in refusing to order rectification."

29. *Alnutt v Wilding* was a case where the settlor executed a settlement in a written form drafted by his professional advisers which created a discretionary trust, although in order to achieve his object of saving tax he needed to make an interest in possession trust. Both the High Court and the Court of Appeal refused rectification. I have already mentioned the first instance decision in connection with the constitution of the claim (see [9] above).

30. On rectification, Rimer J (with whom the Court of Appeal agreed) said ([2006] EWHC 1905 (Ch):

> "[24] … Since, for reasons given, [the settlor] must be assumed to have understood the meaning of the fact of the substantive trust the powers of the settlement he executed and to have intended to execute a settlement in that form and having the legal effect it did, there is no error in the drafting of the settlement or in his understanding of it that calls for correction. [The settlor]'s only mistake was in relying in [the lawyer]'s implicit advice that the payment of money to that settlement would be a potentially exempt transfer. That was wrong and apparently negligent advice, but in the circumstances of the case the remedy of rectification is not available to cure the damage it has caused."

31. In the Court of Appeal, Mummery LJ (with whom Carnwath and Hooper LJJ agreed) said:

> "[19] … The position is that the settlor intended to execute the settlement which he in fact executed … The mistake of the settlor and his advisors was in believing that the nature of the trusts declared in the settlement for the three children created a situation in which the subsequent transfer of funds by him to the trustees would qualify as a PET and could, if he survived long enough, result in the saving of inheritance tax."

32. Carnwath LJ added:

> "[26] … The claimant's difficulty was not simply to establish a mistake such as would justify the intervention of the court, but also to show how the document should be corrected. The judge … examined the alternative draft that had been put in front of him with the invitation that this should be the rectified form of the document. He concluded that, even if [the settlor] did not intend to establish a settlement in the form executed, the evidence fell short of proving that he intended the settlement to incorporate the various trust powers and provisions set out in the alternative draft."

33. So Rimer J and Mummery LJ were saying that the settlor made no relevant mistake. He meant to execute and did execute the settlement placed before him. The further point made by Carnwath LJ was that, even if the settlor had made a mistake, it was impossible to rectify the deed because interest in possession settlements come in all shapes and sizes, and the court could not know (indeed, the settlor himself would not know) what form his particular intended settlement should take. The first point goes to what the settlor's mistake was (if he made one). The second goes to what the settlor really intended (as in the *Racal* case).

34. I may add that the test for rectification of a voluntary instrument is unaffected by the so-called *Chartbrook* problem (see *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101), recently resolved by the Court of Appeal in *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2019] EWCA Civ 1361. That was concerned with the correct test for the rectification of a written contract on the basis of a mistake common to both parties, and how far that test was purely objective.

Facts found

35. The evidence in the present case establishes that, prior to the 2005 and 2007 trusts, Mr and Mrs White had created a number of other trusts of life assurance policies. These were:

1. The White Family Trust, settled 18 January 1985 over two Phoenix life policies, one Aviva policy and one Skandia policy. The benefits of the policies are held upon trust for such of the two daughters as shall be living at the death of the survivor of Mr and Mrs White in equal shares, but with a substitutionary gift for the issue of a predeceasing daughter, subject to a power of appointment in favour of daughters exercisable prior to the death of the survivor of Mr and Mrs White.

2. The Scottish Equitable Life Policy Trust, settled 18 October 1985 over two Aegon policies, upon trusts materially identical to those of the White Family Trust.

3. The Scottish Widows Trust, settled 23 July 1990 over a Scottish Widows policy. The trusts are for the benefit of Mr and Mrs White's children living at the death of the survivor of them in equal shares, with a substitutionary gift for the issue of a predeceasing child, subject to a power of appointment in favour of the settlors' children or remoter issue or any registered charity jointly nominated by both settlors, exercisable at any time within two years of the death of the survivor.

4. The Axa Sun Life Trust, settled 19 November 1999, over an Axa Sun Life policy. The trusts are materially identical to the Scottish Widows Trust, except that the power of appointment was exercisable also in favour of Mr White and would lapse upon the second anniversary of the death of Mrs White. In this case, the trust is combined with a loan agreement, and Mrs White is defined as "the Lender" for the purposes of the agreement.

5. The Aviva Trust, settled 22 December 1999, over an Aviva policy, on trusts materially identical to the White Family Trust, except that the power of appointment was exercisable in favour of any parent, brother, sister, child or grandchild of the settlors.

36. In all of these cases, the beneficiaries in default of exercise of the power of appointment were the children of Mr and Mrs White. In all of these cases except one, the power of appointment lapses on, or two years after, the death of the *survivor* of the settlors. The exception is the Axa Sun Life Trust, where the power lapses upon the second anniversary of the death of Mrs White. But, as I have pointed out, that the financial product being sold to Mr and Mrs White in that case was not an ordinary policy in trust, but a policy in trust coupled with a loan agreement. To judge from the wording of the agreement, it appears to be a standard form document, designed to make it possible to divert funds otherwise intended for children to a surviving spouse, if need be, on or within two years of the death of the first to die. I do not think I should treat this difference as significant. The pattern established by Mr and Mrs White before the 2005 and 2007 trusts is clear.

37. The evidence also establishes that Mr and Mrs White had only two children, namely the claimant and the second defendant, and that they had no other dependents for whom they felt morally obliged to provide. Mrs White was an only child herself, and Mr White had only one sibling, who in turn had only one child. Mr White's will, subject to a legacy to his grandchild contingent on attaining the age of 18 years, and

also to small legacies in favour of non-family members, in the events that happened essentially left the residue of his estate to Mrs White. Mr White died in 2009. Mrs White died in 2017. Her will also gave small legacies, including one for her husband's only nephew (she having none of her own). In addition, it created a life interest trust of a flat for her grandchild, and finally left the residue of her estate on discretionary trusts for her daughters and remoter issue, charities and others who might be added to the class of objects. That means that, if any part of either of the 2005 and 2007 trusts should fail, there will be a resulting trust for those discretionary will trusts, of which the most important objects are the daughters themselves.

38. In giving evidence, Mr Pretorius said he met Mr and Mrs White six or seven times a year. However he was unable to remember the specific meeting in 2007 at which Mrs White signed the relevant documents. He explained however that his usual practice was first to determine what course of action to recommend to the clients, then to look for the best product in the marketplace for their needs, and to use the standard forms for that product. He would present the form therefore to the client at the meeting and go through it with the client. He did not know why the forms required an election between the death of the first and the last of joint lives assured for the purposes of the power of appointment. He said the standard assumption was to pick the last life assured. He was clear that this was what Mrs White absolutely wanted. Nor could he explain why the names of the claimant and the second defendant were not put in Part 2 of the 2007 Trust Schedule. Again his evidence was that they were the only two people who were expected to benefit from the policy, and that that was what Mrs White wanted. Next, he explained that the box describing the policy which was left blank should have been filled with the words "investment bond", as the name of the underlying investment. Lastly, he told me that the policy numbers entered at the end of the Trust Schedule would have been entered by his company's head office, once the policy had been issued. As I have already said, I accept the evidence of Mr Pretorius.

39. Lastly, there is the letter dated 10 January 2014 exhibited to the claimant's second witness statement, from Clarke Willmott to Mrs White, giving her advice on wills and estate planning. On the second page of this letter, the writer says this:

> "Andreas provided me with a copy of his schedule of assets and trust funds and I understand that he is still working on obtaining copies of the various trusts that have been set up over the years. The most important trust is the trust you established in August 2008 which is valued at some £345,000. I understand that this is a discretionary trust for the benefit of your daughters and their descendants and that you and Catherine are the trustees."

40. Although the letter refers to a trust "established in August 2008", the evidence otherwise shows that there was no trust created by Mr or Mrs White at that time. But the other details given fit the 2007 trust, and, indeed, the writer of the letter refers on page 3 to "a discretionary trust on 1 August 2007. This is the L & G Trust". I consider it more likely than not that the reference to "August 2008" was made in error for "August 2007". On that basis, the writer has understood that the 2007 trust was a trust for "your daughters and their descendants". This is consistent with the evidence of Mr Pretorius.

Submissions

41. Mr Pointon, on behalf of the claimant, submitted that the pattern established by the earlier life assurance trusts demonstrated that Mrs White's intention in creating the 2007 trust was for the power of appointment to last as long as possible, and that therefore she must have intended it to lapse only on the death of the survivor of the lives assured. Similarly, that same pattern established that the missing default beneficiaries must have been her daughters, the claimant and the second defendant. Lastly, he argued that the number of the policy, written at the end of the trust schedule, meant that as a matter of construction it was clear which policy was the subject of this trust. But if that was not so, then the extrinsic evidence established that the intention had been to create a trust of this policy, and that the document should be rectified to insert its details.

Discussion

Identifying the trust property

42. I deal with the last point first. The apparent problem is one of certainty of subject matter of the trust: what asset is being held on trust for the beneficiaries? The claimant suggests that a policy number needs to be written in the blank space in Part 1 of the schedule, after the words "Policies in which Trust Schedule is to be incorporated". She can point to the fact that a policy number has been written subsequently at the end of the Schedule, apparently by somebody at the Head Office once the policy applied for was issued. Yet the equivalent space in the Schedule for the 2005 trust is not filled with a policy number either. Instead it contains the words "Distribution bond", which is simply a description of the investment, and, again, policy numbers have been written at the end of the Schedule by Head Office. Although there may be a mistake in failing to fill in the blank space in the 2007 trust, it does not seem to me to be a mistake in identifying the particular policy so much as in failing to describe the nature of the product. So in any event, on this evidence I do not think this is a case for rectification by inserting the policy number.

43. On the other hand, to my mind it is a question simply of identifying the trust property, and in an appropriate case that can be done by construction. But that means construing Mrs White's own document. I do not think I am at liberty to construe the document made and signed by Mrs White by reference to a policy number written on it some months later by someone else at Head Office. In my opinion, however, the answer to this problem is altogether simpler. This Trust Schedule formed part of an application by Mrs White to the life assurance company for the issue of a policy on the lives of Mr and Mrs White. Assuming that the application was successful (as indeed it was) and the policy was issued to Mrs White, *that* is the policy which is held on trust. She will have received and retained the policy document, and the relevant policy can therefore be identified. If a settlor hands over banknotes to a trustee to hold on trust for others, the terms of the trust, taken in their context, must identify the trust property (for example, "You will hold these notes on trust for…"), but it is not necessary to state the serial numbers of the notes. It is true that the company has also written a number on the Trust Schedule. But that was for its purposes, rather than Mrs White's. Even if there were no policy number at all, it would still be obvious which policy was concerned. I will make a suitable declaration.

Identifying the "Current Beneficiaries"

44. I turn now to the blank space in Part 2 of the Trust Schedule. First of all, there is the question whether I am satisfied that a mistake has been made at all, by leaving the space blank. The choice is simple. Either Mrs White intended to name beneficiaries in default of appointment, and omitted to do so through inadvertence, or she deliberately decided to omit default beneficiaries, so that there would be a resulting trust for her estate, subject only to the exercise of the power of appointment. I accept that, given the terms of Mrs White's will, a resulting trust for her estate would be likely to benefit her daughters. Nevertheless, taken as a whole, in this case the evidence (including the pattern of previous behaviour with other life assurance trusts, the oral evidence of Mr Pretorius, and the letter from Clarke Willmott) amply satisfies me that she intended the former.

45. The second question then is whether I am satisfied as to what she intended to write in the blank space. Again, that same evidence (but including also the evidence that there were no other children, and that there was no one else for whom Mrs White felt morally obliged to provide) completely satisfies me that her intention was to name her daughters, the claimant and the second defendant, in equal shares. The issue between the parties capable of being litigated is whether the daughters take as direct beneficiaries of the trust or only indirectly as residuary beneficiaries of Mrs White's estate, and therefore subject to her debts, taxes and so on. I will accordingly order rectification of the 2007 trust.

The limit of the power of appointment

46. Lastly there is the failure to delete either the word "first" or the word "last" in relation to the power of appointment. The issue between the parties capable of being litigated is as to whether the power is valid or void, and if valid when it comes to an end. Again the first question is whether I am satisfied that a mistake has been made at all, by failing to delete one or other of the words. Here the two words are mutually inconsistent, and the power of appointment is probably void for uncertainty as a result. So it is easy to conclude (as I do) that Mrs White has made a mistake in not making a choice. The second question then is whether I am satisfied as to which of the two words she intended to delete. The practice of Mr and Mrs White on earlier occasions in settling similar financial products on trust for the benefit of their daughters, coupled with the evidence of Mr Pretorius, satisfies me that in the case of the 2005 and 2007 trusts she intended to make the power exercisable for the longer period rather than the shorter, and that the word "first" should have been deleted in both the 2005 and the 2007 trusts. I will therefore order that both trusts be so rectified.

Conclusion

47. As a result, I will:

(1) make a suitable declaration concerning the policy held on the terms of the 2007 trust;

(2) order that the 2007 trust be rectified so that the words "Catherine Armstrong 50% and Elaine Smith 50%" appear in the blank space in Part 2 of the Trust Schedule;

(3) order rectification of both the 2005 and the 2007 trusts to delete the word "first" in the dichotomy "first/last" in the first paragraph of the trust provisions for each trust.

I ask counsel to draw up a minute of order to reflect this judgment and submit it for my approval.