

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

**PAUL FITZSIMONS
and
MARTIN MALLON
P/AS FITZSIMONS, KINNEY, MALLON
SOLICITORS**

-v-

**AIB GROUP UK PLC
FIRST TRUST INDEPENDENT FINANCIAL ADVISORS LTD**

DEENY I

[1] In this action Paul Fitzsimons and Martin Mallon practising as Fitzsimons, Kinney, Mallon solicitors of Newry, County Down sued AIB Group UK Plc and First Trust Independent Financial Advisors Limited. Mr Patrick Good QC appeared with Mr Patrick Lyttle QC for the plaintiffs. Mr William Gowdy appeared for the bank and the related second defendant with Mr Horner QC. He and his clients had joined as defendants to a counterclaim Scottish Equitable Plc and Simon Warke as executor of the estate of Orla Warke deceased. There is a related interpleader summons brought by Scottish Equitable Plc as to how they should dispose of the proceeds of a life and critical illness policy number X in the name of the late Orla Marie Warke. Those funds were put on deposit receipt some time ago on the direction of the court and Scottish Equitable was given leave not to further appear. They expressly said that they would abide by any order of the court. In the circumstances I propose to accede to an application by Mr Gowdy for the bank to join them as defendants to these proceedings as well as defendants to the counterclaim. With regard to Mr Simon Warke he was represented by Mr Brett Lockhart of counsel who commenced the proceedings by saying that he was instructed not to offer any submissions or evidence contrary to the submissions that were to be made by Mr Good and therefore sought leave to withdraw the affidavits earlier submitted. I granted that leave.

[2] The relief sought by the plaintiffs Mr Fitzsimons and Mr Mallon is for a declaration that the policy was written in trust although that is not so stated on the policy. It must be clearly understood that the parties to any proceedings cannot have a declaration from the court merely by agreeing that. The declaration is that of the court and therefore the court must have the material before it to justify making the declaration sought. In this case in one respect I was unhappy with the declaration sought here. There were earlier pleadings which I need not go into at any great length and then there was a draft provided to the court for an amended writ and amended statement of claim but at the commencement of this hearing this morning Mr Good of counsel sought this declaration:

“ to declare that a life and critical illness policy number X issued and incepted by the Scottish Equitable Plc on 5 February 2005 in the name of the late Orla Marie Warke, was as and from 13 October 2004 held in trust for the benefit of the plaintiffs then practising under the name of Fitzsimons, Kinney, Mallon solicitors.”

[3] I observe that the defendants in their counterclaim had worded the matter somewhat differently. In their counterclaim they sought a declaration that the life and critical illness policy taken out by the plaintiffs and Orla Warke with the first defendant to counterclaim that is Scottish Equitable are and always have been held in trust for the benefit of the partners for the time being of the firm known as Fitzsimons, Kinney Mallon. So the main thrust was the same but they had not committed themselves to a date. As the matter was unfolding before the court today I reached the conclusion that the plaintiffs clearly had established their case that this policy was indeed held in trust for the plaintiffs, but that the preferable date was not that of 13 October 2004, but that of 9 November 2004.

[4] Given that the declaration is that of the court I think it is my duty to set out the matter to some degree. Messrs Fitzsimons and Mallon had been in practice for some years with Mr Patrick Kinney as solicitors in the town or as it now is the city of Newry and Mrs Orla Warke formerly Orla Pritchard had been working with them as a solicitor. In and about 2004 there were extensive discussions between the parties with regard to her joining the partnership. A partnership agreement was entered into in January of that year and I note, because this comes first in chronological order, paragraph 19.3 of the Partnership Agreement to be found at page 332 of the very professionally prepared bundles in this case and that clause records:

“The partnership may effect and maintain for its own benefit such life assurance and/or critical illness policies in such terms on the lives of or in respect of such of the partners as may from time to time be determined and the partners shall co-operate in the obtaining of such policies and in particular but without limitation shall undergo such medical examinations as shall be reasonable.”

[5] It is interesting to note that the clause begins permissively and then goes on to say the partners shall co-operate in the obtaining of such policies and being medically examined if such. Now on foot of that there were further discussions and they led to the partners approaching representatives of the defendants herein and a Mr Peter Regan attended upon them for those purposes. Mr Regan records in a document entitled "Business Financial Review" on behalf of the second defendant First Trust Independent Financial Advisors Limited certain matters to which I will turn. First Trust, for those outside the jurisdiction, is the business name under which AIB trades in Northern Ireland. First of all he recorded, and this can be found at page 458 of the bundle, that he had had meetings with the four partners including Mrs Warke on 5 September and 21 September 2004 and also on 9 November 2004. He records that the business as it is called started on 2 March 2007. He records the turnover and pre-tax profits. He records that the parties were not interested in loan protection, key person protection, retirement planning nor savings and investments but they were interested at that time in shareholder partnership protection and I quote from his comment:

"The partners have asked that we focus on partnership protection at this meeting. Whilst they are aware that I recommend a full review of all areas their primary objective is partnership protection and some re-broking of existing policies. We therefore agree that you would keep in regular contact with me and review other areas on an on-going basis."

That is to be found at page 460 of the bundle. At page 461 we see again:

"The partners have asked that we focus in partnership protection at this meeting. Whilst they are aware that I recommend a full review of all areas their primary objective is partnership protection. From your accounts and from information provided by your lending banker I am aware that the partners have considerable structured borrowings which are secured by personal guarantees and personal assets of the main partners. Could I caution and urge you to review cover needed to protect these borrowings. In the event of untimely death it is possible that guarantor's personal assets could be liquidated to clear borrowings leaving their family short of much needed funds. There is clearly need for loan cover and I would urge you to address this as soon as possible."

The reference there to untimely death was fully applicable here because of the untimely death of Mrs Warke a few years later.

[6] At page 463 of the bundle we find material headed "Share Purchase/Partnership Protection"; it provides personal details about the four partners, three senior partners and Mrs Warke, including their earnings and their dates of birth and it repeats again: "The partners would like to arrange business protection for share transfer in the event of death or serious illness." One need not elaborate on the good sense of making such a provision and this the partners wished to do. The document goes on: "Are there any share protection insurance policies in force? Please give details." and that has been answered "YES" in capital letters and beneath that are further details of the four partners. It is important that the first of those described as partner or director, because this is obviously a standard printed form that Mr Regan was working with, reads P Kinney and records a share value used of £500,000 for life and £250,000 for critical illness. It has a start date of 2004, it is said to be with Legal and General though the amount of cover and the premium are not completed. Underneath it says "How will the share transfer compensation be made?" and the box marked "cross option" is ticked i.e. the share transfer compensation would be made out of that policy with his fellow partners providing similar policies. Consistent with that Mr Mallon was said to have a policy in the pipeline, he having perhaps had an earlier policy which had lapsed. On the next page Mr Fitzsimons and Mrs Warke are to enter into policies and all three of the policies of Mallon, Fitzsimons and Warke are to be in the sum of £500,000. Yet again at page 464 we find these words:

"To ensure that on the death of a partner the deceased partner's share of the business could pass to the surviving partners. That the deceased's estate should receive equitable compensation for their value of the partnership to take the necessary steps to protect business partnership relief for inheritance tax purposes and ensure that the arrangements are set up in a tax efficient way. Should a partner suffer critical illness that he or she is adequately compensated for their share of the partnership should the need to withdraw from the partnership on health grounds."

Presumably the word "arise" should be included there after need. Now again the relevance of this can now be seen; it is regrettable that the bank's employee or one of his colleagues later made a substantial error in not writing the policy in trust but at least at this stage he certainly was alert to the points. Mr Good of counsel informed me that his clients had reached an agreement with the estate of the deceased as to appropriate compensation.

[7] Now it is important to note that this document is not purely the document of Mr Regan. At page 472 we find the following:

“Declarations

Prior to signing please ensure that you have fully read this document. Do not sign this declaration unless you are entirely satisfied. If you have any questions or are not satisfied with any aspect ask your advisor for assistance before signing this or any other forms. I/we confirm that the information given on all parts of this business financial review is a correct reflection of my/our business’s current financial position. I/we have received a copy of this business financial review.”

Underneath we find the signatures of Patrick Kinney dated 9 November 2004 and Paul Fitzsimons dated 9 November 2004. It will be recalled that there was a meeting on that date and sure enough what I take to be the signature of Mr Regan is to be found below that as bearing the same date. For completeness I mention that the signatures of Mr Kinney and Mr Fitzsimons are to be found again for data protection purposes at page 474. So those are strong indications that the parties here had an intention that they would take out, if they had not already done so, policies of insurance in the sum of £500,000 to deal with eventualities in the unhappy event of their death or other withdrawal from the partnership. It also is recording the existence at that time of a policy in the name of Mr Kinney. There was therefore something of value, a contingent interest, which the plaintiffs submit could be bound by such a trust at that stage, a view to which as I have already indicated I am inclined. In fact at an earlier date another document had been completed. A different representative of the second defendant is named but this other document to be found commencing at page 507 of the bundle begins in manuscript :“Orla 500 life and CIC for 23 years at a cost of £94.83 pm”, presumably per month and the date of quotation is 22 September 2004. At page 509 in Section 1A we find again details of Mrs Warke her profession, her earnings. At 511 we find under Section 3D the words: “Trusts: will you require this policy to be written into trust?” and she has ticked the box “Yes”, or someone has done so and after that it says: “If yes please ensure that you have enclosed the correct trust form, and somebody has written in “trust documents to follows”. Again Section 4 mentions the amount consistent with Mr Kinney’s policies and that of her other partners.

[8] We come now to page 520 which seems to give the details of her doctors. Subsequently I see her medical history. At 526 we find that ‘O Warke’ has signed this on 13 October 2004. So it is clear that this lady on foot of the discussions was applying for or seeking a quotation initially for a life insurance policy in the sum of £500,000 and that the plaintiffs rely on that as evidence of her intention to put this in

trust and clearly it is good evidence of her intention that this should be put in trust. It is her signing of the document on that date that led them to submit that that was the inception of the trust. I expressed reservations about that because I was not sure that there was anything of value, any property or fund or contingent interest which could be the subject of "the trust" and in the absence of authority from counsel to suggest that the trust could come into commencement before there was something there I formed the view provisionally and now I form the view finally that it is not appropriate to incept the trust from that date but they are certainly able to point to that as showing the clear intention of this lady that the policy would be written in trust. Now this is reinforced by subsequent pages to be found at 528 and following of the bundle and the second defendant are named as the agent and there is a direct debit filled in and the direct debit is addressed to Scottish Equitable at an address in Lancashire, but significantly the account it is drawn on is not the personal account of Mrs Warke or that of, for example, her husband; the account that it is drawn on is that of Messrs Fitzsimons, Kinney and Mallon office account and the relevant sort code and account number are given with the address of the First Trust Hill Street Newry and as I mentioned First Trust is the trading format of AIB in Northern Ireland. That document is signed by O Pritchard 13 October 2004. I do not think I have the date of the lady's marriage but she may well have continued to practice under her maiden name. As a partner in the firm of course she was entitled to sign such a commitment prima facie and it is again significant that she did so on the office account.

[9] Now Mr Good on behalf of the plaintiffs relies on a further document and I accept that this also is of assistance to the plaintiffs in making their case here and in its letter from First Trust Independent Financial Advisors Limited at 92 Ann Street, Belfast, I have just noticed that address for the first time, but I do not think it impedes me from proceeding with this matter. It is addressed to Fitzsimons, Kinney and Mallon solicitors 6 John Mitchell Place, Newry and it reads "Dear Paddy, Paul, Martin & Orla" so the signatory of the letter is on first name terms with the partners in this firm of solicitors. I need not go through it in too much detail but at page 380 it discusses "Your Objectives. We discussed the current structure of the business and the addition of Orla to the partnership. We looked in depth at the possible effects and complications to the business and your families, on death, critical illness and long-term absence from work due to illness." I think I need not quote further from that but it is consistent with the other material I have quoted from. It goes on a little further down to a number of bullet points which again are supportive of the plaintiffs' case and which begin: "To ensure that on the death of either Paul or Orla [sic but clearly meant to be Paul or Orla] the deceased partners shares of the business could pass to the surviving partners". Paul and Orla were the two who had not made policies at that stage. Mr Kinney certainly had one and Mr Mallon seems to be further on than Mr Fitzsimons and Mrs Warke. I further quote: "That the deceased's estate should receive equitable compensation for their value of the partnership." Then he makes various recommendations. Mr Good drew my attention to trusts at page 381 where it expressly says: "Trusts were discussed and a

flexible business trust was recommended to ensure that the proceeds are paid direct to the surviving partners and not to the deceased's estate. Also to display the commercial nature of the arrangement and maintain tax efficiency". Later on it is repeated on the same page: "The policy will be written on a known life basis written in a flexible business trust for the remaining partners". On the following page it records that £500,000 had been the agreement and at page 382 of the bundle it also records that Mr Martin Mallon had a new Legal and General policy application to replace the application that recently lapsed and he was going to re-submit that. There is a further reference to trusts, a consistent reference at 383 and to the policies of Mr Mallon and Mr Kinney. There was a conclusion at page 385: "This report and the recommendations contained in it have been prepared to reflect your requirements on the basis of the information you have supplied. The Report however is specifically designed to form the basis for a further discussion when full explanations can be given and, if necessary, alternative measures discussed and should be regarded as such". Mr Good submits and I think persuasively in the context of the matter that that latter sentence is a reference to implementing the mechanics of the various steps. The letter is signed by Peter Regan, he is described here as an independent financial advisor, I am not sure that he was an independent financial advisor, but he was certainly some kind of financial advisor. Perhaps he was independent as he was going to Scottish Equitable, perhaps AIB does not have a life insurer. But in any event he signs it and significant again it is signed for the firm by Mr Kinney and Mr Fitzsimons on 9 November 2004. One might think therefore that by then there was overwhelming evidence of the intention of these parties and that the trust, as I now conclude, came into existence at that time. Mr Kinney was throwing his policy into the pot for the benefit of his partners, though it had originally been written otherwise it would appear. But he was doing so on the basis that his three partners would also take out equivalent policies. The parties at that point, who I remind myself were partners in law, took upon themselves equitable and/or legal obligations at that time which would have been enforceable in law.

[10] There was probably enough there, but in fact out of caution the plaintiffs have been able to address several other matters, one of which is certainly very important in support of their case that the policy was written in trust. This arises because unhappily whoever did complete the policy did not write it in trust for the surviving partners of this firm. This was apparently not noticed by Mrs Warke or anyone else at the time it was written. The contract came into existence as I have referred on 5 February 2005 and unfortunately that was not picked up at that time. Hence the need for these proceedings, no doubt expensive proceedings.

[11] The further confirmation which I think I can deal with fairly expeditiously consists of the following. Mr John McMahon, chartered accountant, has sworn in two affidavits that he attended hospital following the diagnosis of the disease of cancer being suffered by Orla Warke and on 19 April he was contacted by Paul Fitzsimons and perhaps for completeness I shall read from his affidavit from page 475 of the bundle where he says that he was requested to attend a meeting at

the Royal Victoria Hospital at Mr Fitzsimon's request and also of that of her solicitor and his attendance had been specifically requested by Orla:

"I attended the meeting arranged for 11.00 am on Tuesday 22 April 2008 at Orla's bedside in the RVH along with Mary Doherty solicitor of McShane and Company and Orla's husband Simon Warke. It was explained to me in advance of my attending that the main purpose of this meeting was for Orla Warke to prepare her Will and to discuss an issue concerning Orla's term with critical illness assurance policy. A copy of my handwritten attendance and typed engrossment of this meeting is exhibited hereto marked JMCM1."

To pause there it should be noted that the deceased's husband and her solicitor from a different firm of solicitors also in Newry were both present at this meeting.

"4. I arrived at the meeting slight late due to traffic congestion at approximately 11.35 am on 22 April 2008. Simon Warke and Mary Doherty were already in attendance. The meeting commenced at approximately 11.40. Orla was lucid and focused at all times throughout the meeting and indeed I was heartened by her strength given her very serious illness.

5. My role at this meeting was to give any tax advice requested by Orla or Simon but I took no part in the decision-making regarding the Will. Mary Doherty, solicitor wrote out the Will in longhand and it was witnessed by her and her assistant who Mary Doherty, solicitor, brought to the hospital for that purpose.

6. During the discussions about the term with critical illness policy, it was explained by me, that the intention of the policy and its intended application was to provide funds for the practice of Fitzsimons Kinney Mallon solicitors to assist in funding the practice while Orla Warke was ill, and probably to find a replacement to do her work in her absence, and potentially also to fund the purchase out of her interest in the practice. The policy was believed by all or it had been written in trust to achieve this end. But

it now appeared that there was a technical problem with the papers establishing the trust.

7. Orla confirmed 'it's supposed to be in trust and we should make it right'. Orla agreed to facilitate completion of whatever necessary documentation were needed to place the policy in trust for the practice. Again, I did not give her any advice but answered any queries she had about the policy. I clarified that the policy was for £500,000 not £250,000 as she had thought and I also explained that in my opinion the policy should be written in trust as this was logic behind taking out such a policy.

8. Mary Doherty solicitor reiterated my view and said that this was the way it was done in her practice. It was agreed that any fault lay with First Trust Financial Services Limited and Orla said it would be best to repair the omission.

9. Simon had very little input to the meeting. To the best of my recollection he remained present throughout the entirety of the meeting.

10. I confirm that the general tenor of the meeting with regard to the policy and its status as being regarded and confirmed by her as in trust was that Orla wanted to rectify the errors made by First Trust Financial Services Limited in their failing to set up the policy and trust. There was no indication or communication by her at any stage that she regarded the Scottish Equitable term with critical illness policy benefit as being personal to herself.

11. At the conclusion of the meeting I accompanied Orla and Simon to see their new baby and I left the hospital at 12.45 pm."

[12] I observe that this is not only strong support for the case being made by the plaintiffs, but strong evidence of the integrity of Mrs Warke who did not seek in the unhappy state in which she found herself to resile from her earlier agreement with her partners that the policy was to be written in trust for them even though she must have known at that stage there was a very serious risk or more that she would shortly be leaving a widower and a very young child.

[13] In further support of the plaintiffs' case they append an affidavit of Mr Neil Campbell Faris who appears as an expert witness in matters relating to the solicitors' profession and who has the utmost confidence of the court. I think I need not read his affidavit but he had occasion to consult with these partners on 25 April 2007 when again there was reference made to the insurance policies and to their being written in trust for the partnership. Likewise there was a draft Deed of Assignment prepared for Orla Pritchard Warke to sign assigning the policy to her partners following the error of the second defendant. There were e-mails about the precise drafting of that on 1 May but sadly she died on 5 May before this was signed. So it seems to me that the plaintiffs have a very strong case indeed in support of their case there on the facts.

[14] I think I need only briefly refer to the law. It is the passage in Snell and Equity at paragraph 22013:

"No particular form of expression is necessary for the creation of a trust if, on the whole, it can be gathered that a trust was intended. It is unnecessary for the settlor to use the word trust: the court construes the substance and effect of the words used against the background of any relevant surrounding circumstances."

I think I need not read the rest of that pretty well known passage. Of course the word trust was used here even though there was not any express trust deed. It would obviously have obviated the need for this hearing but there was no express trust deed but the documents and the intention of the parties seem clear to me. Counsel drew the court's attention to Paul v Constance 1977 1 Weekly Law Reports 527 where the court had to ascertain what trust, if any, existed with regard to certain bingo winnings. The Court of Appeal in England, per Scarman LJ sitting with Lord Justice Cairns and Lord Justice Bridge, is recorded in the headnote as dismissing the defendants appeal and finding:

"That to create a trust by an express declaration, the disponent's words and actions have to show a clear intention to dispose of property or funds so that someone else should acquire a beneficial interest; that taking into account all the facts, the deceased's words, 'The money is as much yours as mine', often repeated to the plaintiff, constituted a clear declaration of trust for the benefit of himself and the plaintiff; and that therefore the judge was right in awarding the plaintiff a half share of the fund."

There were four partners here and the trust was created between them I find with effect from 9 November 2004 when Mr Fitzsimons and Mr Kinney bound the firm and themselves to the transfer or creation in some cases of policies of insurance.

[15] The judgment of Lord Justice Scarman is of interest, but I think I need not read from it in extenso. The only passage that I shall cite is at page 531G:

“The facts of the two cases above do not therefore very much help the submission of Mr Blythe but he was able to extract from them this principle: that there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust – or as Mr Blythe put it ‘an intention to dispose of a property or fund so that somebody else to the exclusion of the disponent acquires the beneficial interest in it.”

That citation is clearly of assistance to the plaintiffs here who can point to a clear intention to create a trust.

[16] Finally Mr Gowdy of counsel drew attention to this decision in Dingrah v Dingrah [1999] 2 IT&ELR 262 at 265 and I note that is a decision of Mr Justice Lindsay who was sitting with Lord Justice Shiemann in the Civil Division of the Court of Appeal in England and the relevant passage at 265 reads:

“Before I turn in more detail to the grounds on which the father relies before this court today, it would be well to remind myself of some unquestionable propositions of law. Mr Dhingra, the appellant, has mentioned Snell's Equity (29th edn, 1990) which, of course, is a very standard work. There are five brief propositions that one ought to have in mind as stemming from that work. First of all, as far as concerns personality, which is what we are here concerned with, a declaration of trust may be by word of mouth or even inferred from conduct; second, no particular form of words is necessary; third, where the property in relation to which the trust is declared is already in the name of the declarer of the trust, the trust is, as it is put, 'completely constituted the moment that the trust is declared' (Snell's Equity p 121); fourthly, once the trust is completely constituted it can be enforced by a beneficiary even if he or she is a mere volunteer. The notion that equity will not assist a volunteer therefore has no application in this

case because this is a case where a trust was declared and therefore was completely constituted from its first moment of existence; fifthly and lastly, in general a completely constituted trust cannot be revoked by the settlor unless the settlor has reserved a power of revocation in the settlement itself. Those are elementary propositions which need to be borne in mind as the story unfolds.”

[17] Therefore that citation of authority is also supportive of the view that the Trust here was completely constituted because at least one of these policies was in existence on 9 November 2004 and that and any subsequent policies that came into existence, which one would include any successive policies to previous policies in existence, would be held in trust for the surviving partners in Fitzsimons, Kinney and Mallon on the terms by then expressed by the settlors. For all these reasons and the other reasons set out by the parties in the helpful papers I grant a declaration that the life and critical illness policy number X as issued and incepted by the Scottish Equitable Plc on 5 February 2005 in the name of the late Orla Marie Pritchard Warke was as from 9 November 2004 held in trust for the benefit of the plaintiffs as the continuing and surviving partners of the firm then practising under the name of Fitzsimons, Kinney, Mallon, solicitors. Out of that or other resources they can discharge their obligations to the estate of the late Mrs Warke.