

Case No: A2/2015/2599

Neutral Citation Number: [2017] EWCA Civ 2069

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Mr Justice Morgan
[2015] EWHC 1742 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2017

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION, SIR BRIAN LEVESON
LORD JUSTICE UNDERHILL
and
SIR COLIN RIMER

Between :

(1) JANE REBECCA ONG
(2) ALEXANDER ONG
(3) NICHOLAS ONG
(4) JORDANA ONG
- and -
ONG SIAUW PING

**Claimants/
Respondents**

**Defendant/
Appellant**

Robert Ham QC and Mark Warwick QC (instructed by Addleshaw Goddard LLP) for the
Appellant, Ong Siau Ping
Andrew Twigger QC and Oliver Hilton (instructed by Stephenson Harwood LLP) for the
Four Respondents

Hearing date: 7th November 2017

Judgment

Sir Colin Rimer :

Introduction

1. On 17 June 2015, following an eight day trial in the Chancery Division in February and March, Morgan J delivered a reserved judgment occupying 342 paragraphs. It dealt with many issues in a dispute between members of the Ong family. The claim related to a house at 39 Sheldon Avenue, London N6 ('the house') and its proceeds of sale. The four claimants (now respondents) had, amongst other things, sought a declaration that the house was the subject of a trust created by the late Lim Lie Hoa ('Madam Lim') in 1986.
2. The judge's order of 20 July 2015 occupied 12 pages. It is necessary only to say that paragraph 1 declared that Madam Lim had, until her death in 2009, held the house, its proceeds of sale and certain other rights relating to it upon the trusts declared in, and on the terms of, a settlement dated 14 December 1985 signed by her and by the defendant (now appellant), Ong Siau Ping (known as Ping), her son. Paragraph 2 declared that Ping was, and continued to be, a trustee of the house, its proceeds and other rights on the same trusts and terms. Paragraph 4 declared that the only trust of the house that ever existed was that declared in paragraph 1 and that the first claimant, Jane Ong, was not a beneficiary of it.
3. Ping had opposed the claim that the house was held upon either the declared or any trust. The judge refused him permission to appeal as also, on 27 November 2015, did Davis LJ on the papers. On 25 October 2016, however, upon a renewed application at an oral hearing, Patten and David Richards LJ gave permission. The only issues raised by the appeal are: (i) whether Madam Lim made a declaration of trust in respect of the house; and, if she did, (ii) whether it was 'manifested and proved' by the writing requirements of section 53(1)(b) of the Law of Property Act 1925. The disposal of the appeal involves the consideration of a series of documents created between December 1985 and July 1988, most of them in early 1986. There is no alternative but to tell the story and summarise the documents.

The Ong family and the story in outline

4. Madam Lim was married to Ong Seng King, an Indonesian businessman based in Singapore. They had three children: (i) Ong Siau Tjoan ('Tjoan'), born in 1957; (ii) Ping, born in 1959, the appellant; and (iii) Ong Keng Tong ('Elton'), born in 1975. Ong Seng King died in October 1974 and Madam Lim and her sister obtained a grant of letters of administration of his estate in January 1975. Tjoan later replaced the sister as such administratrix and became a co-administrator with Madam Lim of his father's estate. Madam Lim died on 8 August 2009, leaving a will dated 9 July 2009, which Ping proved as her executor in Singapore in May 2011 and in England in February 2015. He is the sole representative of her estate. At all material times Madam Lim lived in Singapore and was domiciled outside the United Kingdom.
5. In 1982, Tjoan married Jane Butler ('Jane'), the first claimant. They had three children: (i) Alexander, born in 1982, the second claimant; (ii) Nicholas, born in 1983, the third claimant; (iii) Jordana, born in 1985, the fourth claimant. Tjoan and Jane separated in 1986 and a decree nisi of divorce was granted in 1989. It has never been made absolute.

6. In December 1985, Madam Lim contracted to buy the house from Million Dollar Properties Ltd. Robert Gore & Co, solicitors ('RG'), acted for her on the purchase. Completion was in January 1986, when Tjoan, Jane and their three children moved into the house. Tjoan later moved out and later still Madam Lim sued Jane for possession. By February 2006, Jane and the children had all moved out. On 11 May 2006, Madam Lim sold the house for about £3.2m. Jane and her children claimed in the proceedings that Madam Lim had declared a trust of the house in about April 1986 and that, after the sale, the proceeds became held on the same trust.

The facts relating to the purchase of the house and the claimed trust

7. The judge explained the facts in paragraphs 13 to 57 of his judgment. The evidence included RG's file relating to the purchase of the house and the creation of the claimed trust. The judge heard oral evidence from: (i) Mr Hyde, the RG partner who handled the matter; (ii) Jane, the claimants' principal witness; and (iii) Ping. He said Mr Hyde's oral evidence added little to what could be derived from the documents. He was unimpressed by Jane's evidence, saying he had 'no real confidence that [her] most recent reconstruction of events is reliable as an accurate account of what actually occurred.' Ping could remember next to nothing of the circumstances in which he signed the trust deed but gave evidence of the occasion when he explained the effect of the draft deed to his mother. The judge said:

'19. My assessment is that my findings of fact in relation to the claim that there was a declaration of trust must be based primarily upon the contemporaneous documents and the inherent probabilities of the case together with any oral evidence which is not contentious. ...'

8. By 1985, Tjoan, Jane and Madam Lim were looking for a house that Madam Lim would buy and make available for occupation by Tjoan, Jane and their children. They found the house. On 13 December 1985, there was a 'subject to contract' agreement for its purchase by Madam Lim for £837,500 and contracts were then exchanged on 14 December. Madam Lim was to pay a £100,000 deposit. Completion was fixed for 6 January 1986.
9. Tjoan was with Madam Lim at RG's offices on 14 December when the exchange took place. Madam Lim had only a poor grasp of English and, for her benefit, Tjoan translated into Mandarin what Mr Hyde said, and he and his mother spoke together in Mandarin. It was understood by then that she was buying the house with her money but that it would be occupied by Tjoan, Jane and their children. There was no suggestion that they were to pay her anything for their occupation. It was also understood that there would be some sort of trust of the house dealing with the situation and there was a discussion on 14 December as to who would be the beneficiaries. It was clear they would include Tjoan and the children and that Elton (Madam Lim's youngest son) would also be a beneficiary: Madam Lim foresaw circumstances in which it would be appropriate for him to live in the house with Tjoan and the latter's family. It was also clear that Jane was not to be a beneficiary. The judge found (paragraph 24) that 'the precise terms of the trust as contemplated on 14 December 1985 were far from settled or clear.' Whilst Madam Lim's wishes as to the identity of the beneficiaries were clear, there was no real clarity as to the terms of the contemplated trust.

10. Madam Lim paid the £100,000 deposit on 23 December 1985, using money from a Jersey account in her name.

11. On 2 January 1986, Mr Hyde wrote to Madam Lim (in English) at her address in Singapore asking her to ensure that he had the funds necessary to enable him to complete the purchase on 6 January. His letter continued:

‘As far as the ownership of the property is concerned I have prepared a Transfer into your name as a holding measure.

Your instructions with regard to the beneficial ownership of the property were quite clear but since I have had an opportunity to consider the matter further my advice is that the property should be owned by a non-resident Trust in the Channel Islands and that at least one of the Trustees should be an independent professional.

My proposal is that you should transfer the property to Ping and Tjoan and one other person to hold the property as Trustees for Tjoan, Elton and the grand-children.

This will be effective to avoid both capital gains tax and capital transfer tax but the main advantage of there being a professional Trustee is to ensure continuity in the event of both Ping and Tjoan being involved in a fatal accident. In the absence of a professional Trustee this would give rise to considerable difficulty.

Please let me have your confirmation that you approve this proposal and if you do not find it acceptable then the only alternative would be for the property to be owned by Ping and Tjoan as Trustees for Tjoan, Elton and the grand-children in equal shares.’

12. The judge explained (paragraph 89) how Madam Lim dealt with correspondence written in English. She ran a small property business in Singapore and when she received documents in English she would ask someone in the office to translate them for her. If a reply was required, she would dictate one, it would be translated into English and she would sign it. Ping played no part in translating any of the key documents for her. The judge found that this ‘... explanation of how the letters were written would suggest that Madam Lim understood the basics of what was involved in a trust with beneficiaries.’

13. The purchase was completed on 6 January, when the house was transferred to Madam Lim against her payment of £737,500, the balance of the total price of £837,500. That payment also came from her Jersey account. Tjoan, Jane and their children moved into the house on the same day. The title was a registered one and on about 1 April Madam Lim was registered as its sole proprietor.

14. On 6 January, Madam Lim replied, in English, to Mr Hyde’s letter of 2 January, saying she preferred that ‘the ownership of [the house] be solely under my name only, and all matter regarding beneficiary shall follow my previous instructions given by me in London.’ Mr Hyde received her letter on 13 January and replied the next day, saying that the house had been transferred into her name, that he would complete the

registration as soon as possible and that during the following days he would ‘prepare a Trust Deed incorporating your original instructions.’

15. An internal RG note of 3 February advised Mr Hyde that, amongst other things, the creation of a settlement of the house by Madam Lim would give rise to a charge to capital transfer tax. The note was not copied to Madam Lim.
16. On 12 February, Mr Hyde wrote to Mr Coxe, of Buzzacott & Co, chartered accountants, asking for advice as to the proposed trust. He explained that Madam Lim’s intention was that the house was to be occupied by Tjoan, Jane and their three children and that ‘it should be held “for the benefit” of the occupiers and an additional child of hers.’ He continued:

‘She wishes to avoid capital transfer tax on the setting up of any trust to give effect to this wish and on her death and, if possible, capital gains tax on the sale of this property when the proceeds would perhaps be re-invested in another property to be occupied by the same persons.’

Mr Hyde wrote that this was an area in which he had no experience.

17. Mr Coxe wrote to Mr Hyde with his advice on 18 February. He said the best method of dealing with Madam Lim’s problem would have been to set up a foreign discretionary trust ‘on her children, their wives and issue which would have kept the house outside capital transfer tax and capital gains tax for good.’ The judge said this may have been the first suggestion that the property would be held by Madam Lim on a discretionary trust. Mr Coxe said that if, however, Madam Lim had already bought the house, and it could not be argued that she had bought it on behalf of the trustees of a settlement to be formed, he had two alternative suggestions, of which the first also involved setting up a foreign trust (it is unnecessary to refer to the second). Mr Hyde was attracted by the first alternative, which Mr Coxe had explained as follows:

‘... I would suggest that she sets up a foreign discretionary trust with a small sum, sells the property to the trust for a cheque payable in [an] account outside the UK and then draws a similar amount on another account outside the UK and puts that as additional funds into the settlement in order that they are reimbursed.

The disadvantage of this is that it attracts stamp duty and also she may not wish to have the costs associated with a non-resident discretionary trust.’

The judge said that ‘matters were not arranged precisely in accordance with Mr Coxe’s advice.’ Mr Hyde did not send a copy of the advice to Madam Lim.

18. On 18 February, Mr Hyde applied to HM Land Registry for the registration of the transfer of the house to Madam Lim.
19. On 25 February, Mr Hyde wrote again to Madam Lim, copying his letter to Jane. His letter was headed ‘39 Sheldon Avenue London N6’ (the significance of the letter headings will become apparent). His letter amounted to a re-construction of events as he might have wished they had happened rather than an account of them as they did. He wrote:

‘With regard to the trust which you wish to establish I am able to confirm that it is possible for you to retain legal ownership whilst at the same time avoiding both capital gains tax and capital transfer tax.

I had one major difficulty with your original instructions. A gift of the house (English property) would give rise to capital transfer tax. ...

I am pleased to say that having researched the matter further you can retain the property as trustee for the benefit of the family without giving rise to capital transfer tax on the setting up of the trust and without having to part with legal ownership and control of the property.

Because you gave instructions that the property was to be purchased for the trust this means that the moneys received by me were received as a gift from you into the trust fund.

Acting on your behalf (as trustee) I exchanged contracts, received the balance of the purchase money and subsequently completed the purchase of the property registering you as the owner.

The funds which you provided originated from a non-resident source, you are a non-resident trustee and the property is therefore exempt from capital transfer tax on your death.

The Trust Deed, copy enclosed herewith, is in standard form used for the establishment and management of non-resident trusts in Jersey.

Your name appears on page 1 as both the settlor, that is the person making the gift, and as the trustee, that is the officer or official who is responsible for the administration of the property for the benefit of the beneficiaries.

On page 25 of the Deed, in Schedule 1, the amount of your gift must be stated. I will leave you to specify what this should be.

On page 26, I have set out the full names of the beneficiaries. Do you wish your name to be added?

Schedule 3 on page 27 is supplied if you wish to make it clear that there are certain people whom you do not wish to benefit.

Schedule 4 on page 28 lists the people with power to appoint new and additional trustees. You are the only person with this power.

You may wish to consider adding one or more names but this is entirely a matter for your discretion.

If there are any questions which you have on the terms of this deed then I would be pleased to discuss them with you.

I would point out that the trust [was] established on Saturday 14th December and the Deed should be dated with that date. This means that your execution of the

contract and your purchase of the property was at all times as trustee for the benefit of the trust and not in your personal capacity. ...'

20. It is agreed that, contrary to Mr Hyde's views, no trust was established on 14 December 1985. All that happened then was Madam Lim's expression of an intention to establish a trust of the house for the benefit of five identified beneficiaries on terms to be decided. Until they were decided, and a trust was then created, no trust existed.
21. The judge said that the earliest draft of the trust deed in evidence was dated 27 February 1986. He explained that (and why) the inference was that the draft Mr Hyde sent Madam Lim with his letter of 25 February was probably an earlier draft not in evidence. If so, there was no evidence that she was ever sent the draft of 27 February and on 13 March he sent her a different draft. Save, however, in one respect the judge regarded it as likely that the draft sent on 25 February was essentially the same as that of 27 February.
22. The 27 February draft is a 29-page, single spaced document described as a settlement made on 14 December 1985 between Madam Lim as settlor and herself as trustee. The sole recital is that she, qua settlor, owned beneficially the property specified in Schedule 1 and wished to make an irrevocable settlement of it as therein contained. Schedule 1, on page 25, was headed 'The Initial Settled Property', described as 'The sum of [blank] pounds'. The draft nowhere referred to the house, either as settled property or at all.
23. Clause 1 contained an 'Interpretation' provision. It defined the 'beneficiaries' as the persons specified in Schedule 2, on page 26, and any persons who might be added to the list in exercise by the trustees of their power in that behalf. The named beneficiaries were Madam Lim, Tjoan, Elton and Tjoan's three children. Madam Lim had given no instructions that she was to be a beneficiary, Mr Hyde's covering letter asked her whether she wanted to be added to the page 26 list and so the judge inferred that in this (and probably only this) respect the draft he sent her was not identical to the draft of 27 February. The inference is that in the draft that she had Schedule 2 named only the two children and three grandchildren as beneficiaries.
24. The settlement's proper law was defined as the law of Jersey. The 'Trust Fund' was defined as: (i) the Schedule 1 property (which identified none, as it was blank); (ii) 'all monies investments or any other property paid or transferred by any person or persons to or placed under the control of and accepted by the Trustees as additions to the Trust Fund'; (iii) the money, investments or other property for the time being representing (i) and (ii); and (iii) the income of the trust fund that was accumulated and added to capital. A 'Trust Period' was defined.
25. By clause 2, Jersey law was again stated to be the proper law of the settlement but clause 12 contained a power to change it. Clause 3 contained a declaration of trust in respect of the trust fund on the terms and provisions of the deed and empowered the trustees at any time during the trust period to accept any assets of whatever nature as an accretion to the trust fund, following which they would hold such assets accordingly. Clause 4 provided for trust investments other than money to be held upon trust for sale. Clause 5 set out discretionary trusts relating to the income and capital of the trust fund, with a power of accumulation, a trust of capital and income for the beneficiaries living at the expiration of the trust period and an ultimate trust for

charity. Clauses 6 and 7 contained overriding powers of appointment and advancement in favour of the beneficiaries and there then followed a long list of administrative provisions and trustee powers.

26. Madam Lim replied to Mr Hyde's letter of 25 February on 3 March (her letter was headed 'Your Ref: 9: LIM011'). I shall set out her letter in full:

'Thank you for your letter dated 25-February-1986. First of all the amount of gift excluding the settlor shall be divided equally to all the beneficiaries, i.e. 20% each, and I would like to know whether I am suppose to fill in the amount myself overhere, or do you fill it in for me.

Secondly, other than those beneficiaries stated on page 26, no other names are to be added.

Thirdly, no other person is to be excluded from the benefit on page 27.

Fourthly, beside myself, I would like to appoint my son [Ping] as the new and additional trustee, and no other person.

When the property was purchased, I had given instruction that I, [Madam Lim] and my son [Ping] shall be the only two person in charge of the property regarding all matters. If the meaning of the word Settlor is the same as being in charge of the property, regarding all matters, then why only my name is stated in the document in page 1, and not together with my son, [Ping].

Lastly, please let me know whether the Settlement document which you have send to me is to be signed in front of a notary in Singapore, and also whether this document is to be send back to you.'

27. The first paragraph of her letter conveyed that Madam Lim had at best little understanding of the nature of the draft settlement, and in his reply of 13 March Mr Hyde provided a brief explanation of it. He said it was drawn as a discretionary settlement in order to be effective for tax purposes, and that to specify in it the shares she wished the five beneficiaries to enjoy would have adverse tax effects. He therefore advised against doing so. He said he understood 'that no more beneficiaries are to be added' and that Madam Lim did not intend to exclude anyone from the benefit of the trust. He noted that she wanted Ping to be an additional trustee: he said he had named her as the sole trustee as he had understood she had wanted 'sole ownership'. He advised that it was not necessary for her to execute the document before a notary; it would be sufficient if her signature was witnessed by someone not named in the document. He enclosed a fresh engrossment for execution, one including Ping as a trustee and a space for him to execute it. The only beneficiaries listed in Schedule 2 were the two children and three grandchildren. Mr Hyde explained that, when the settlement had been executed, Madam Lim could either keep it or return it to him. Finally, he said there was 'one last item which requires completion and that is schedule 1 on page 25. You will recall that you must here enter the amount of your original gift.'

28. On 14 March, RG wrote to HM Land Registry saying that 'our Clients' (plural) had instructed them that an additional trustee of the house should be added and asking for

the return of the transfer of it so that it could be amended to insert Ping's name as such trustee. On 18 March, HM Land Registry returned the transfer, asking for an application for the appropriate trustee restriction and for a certified copy of any existing trust deed. On 20 March, RG returned the transfer to HM Land Registry unamended, saying that 'our client's' (singular) instructions had changed and that the registration was to proceed in Madam Lim's name alone. There was no evidence relating to giving of these instructions or as to how the change in them came about.

29. On 1 April, Madam Lim replied to Mr Hyde's letter of 13 March. She wrote that she would 'retain the Trustee and Settlement file' and keep Mr Hyde informed of any changes 'in respect of the above matter if it is necessary'. The heading of her letter, and thus 'the above matter', was '39 Sheldon Avenue London NW6', ie the house. On 2 April, Mr Hyde wrote to her again, his letter being again headed '39 Sheldon Avenue, London N6', informing her that he had received the Land Certificate for the house showing her as the registered proprietor, asking for her instructions as to where it should be held and for her confirmation that 'the Trust Deed has been executed'.
30. On 14 April, Madam Lim replied by the following letter, one also headed '39 Sheldon Avenue London NW6'. She wrote:

'With regard to the Land Certificate of the above-named property, please be informed that I would appreciate your kind arrangement of temporary keeping the document in your office and I will collect it when I am in London.

In respect of the Trust Deed, I enclose herewith the photocopy which was executed for your retention.'

The enclosed document was a copy of a document in the form of the engrossment sent to her on 13 March, the original having apparently been signed by Madam Lim and Ping. Schedule 1, the 'initial settled property', was still blank. On the face of it, therefore, the signed document declared trusts in respect of nothing. It is accepted that the original document had been signed by Madam Lim and Ping but that it had not been executed under seal. The signing pre-dated the change in the law with regard to the execution of deeds introduced by the Law of Property (Miscellaneous Provisions) Act 1989 and the judge noted that, as signed, it was not therefore a deed although he would nevertheless refer to it as such, as shall I. He found that a copy of the document as executed was enclosed with the letter of 14 April.

31. The final letter I must refer to was written over two years later on 16 May 1988. It was from Madam Lim to Mr Gore of RG and was headed '39 Sheldon Avenue'. She wrote:

'I refer to the above matter.

I would like to cancel the trust dated 14th December 1985 created for the following beneficiaries [and she listed the five beneficiaries named in Schedule 2 to the deed].

Please note that the cancellation will take immediate effect upon receipt of this letter.

Your kind attention and prompt action to the above would be much appreciated.'

The judge's decision

32. The judge said he was asked to, and did, decide all questions by reference to English law. The claimants' assertion was that Madam Lim made an express declaration of a trust of the house on the terms of the deed she had signed no later than April 1986. If she did, a further question arose as to whether her declaration satisfied section 53(1)(b) of the Law of Property Act 1925, which reads:

'A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.'

33. The judge said that for an express declaration to be valid it had to be one that sufficiently identified the property the subject of the trust. The determination of whether a claimed settlor had made a sufficient declaration required an objective assessment of the words used and his conduct. He is to be presumed to intend the consequence of his words or actions. The facts were that it was Madam Lim's expressed wish that she should acquire the house in her name to provide a home for Tjoan, Jane and the children and that it would be held by her on the basis of a trust. On 14 December 1985, there was clarity as to the intended beneficiaries but not as to the terms of the trust. The terms became defined later, as expressed ultimately in the deed Madam Lim and Ping signed and of which she sent a copy to Mr Hyde with her letter of 14 April 1986. That letter was headed '39 Sheldon Avenue London NW6', it referred to the trust deed and to the fact that it had been executed. Clause 3 of the executed deed purported to declare a trust of 'the Trust Fund' on the terms set out in it.

34. The judge held that what had happened gave rise to a trust of the house. He said the case could be analysed in various ways, all leading to the conclusion that there was such a trust. He said:

'70. ... I consider that it can properly be said, reading the executed trust deed with the covering letter of 14 April 1986, that Madam Lim identified the house as the intended trust property and thereby declared a trust of that property. Further, it can properly be said that the trustees accepted the house as the Trust Fund.

71. I recognise that when he drafted the deed, Mr Hyde intended the house to become part of the Trust Fund in a different way. It may be that the expected way of adding the house to the Trust Fund would have been first to create a trust in relation to a modest sum of money and then to add the house to the Trust Fund by the trustees informally accepting that the house was subject to the trust. Alternatively, it may have been appropriate for the trust to be initially constituted in relation to the sum of £837,500 and then for that sum to be invested in the purchase of the house which would then be held on the terms of the trust. Mr Hyde did not adequately explain to Madam Lim how schedule 1 to the deed ought to be completed by her and she did not understand what was expected of her in that respect. Nonetheless, I consider, viewing the matter objectively, that Madam Lim expressed an intention to hold the house on the terms of the trust deed so that it can be said that she made an express declaration of a trust of the house or that

the trustees accepted the house on the terms of the trust deed. The only alternative interpretation of Madam Lim's words and conduct is to say that she executed the deed but with the intention that the deed would be of no effect, by reason of the fact that she had not completed Schedule 1, or at any rate of no effect unless and until she subsequently took some further step such as identifying the sum which was to be included in Schedule 1. I consider that when she executed the deed she intended to create an effective trust of some trust property rather than not create a trust at all; in the absence of alternative trust property being specified in Schedule 1 to the deed, it is obvious that the intended trust property was the house and only the house.

72. The terms of the deed require the trust property to be accepted by the trustees. I will consider in due course whether Madam Lim was the sole trustee or whether she and Ping were the trustees. For the present, I will assume that the trustees were Madam Lim and Ping. I have held that Madam Lim expressly declared a trust of the house and/or accepted the house as being held on the terms of the Trust Fund. What is the position in relation to Ping, assuming he was also one of the trustees? On the evidence, it is clear that Ping did what he was asked to do by Madam Lim in relation to this trust. He left the question of the terms of the trust and the identification of the trust property to her. Accordingly, if it were necessary so to hold, I would hold that, by acting through and in accordance with the wishes of Madam Lim, Ping accepted the house as the Trust Fund within the meaning of the deed.'

35. The judge turned to whether the writing requirements of section 53(1)(b) were satisfied. He said (paragraph 76) that the letter of 14 April 1986 was signed by Madam Lim and that she 'was able to declare the suggested trust ... as she was the sole owner of the house.' The letter referred to an enclosed copy of 'the Trust Deed'. The judge said the deed could be identified by extrinsic evidence, which proved that the enclosed copy was of the original deed executed by Madam Lim and Ping. He held that the trust Madam Lim had declared was manifested and proved by the letter of 14 April 1986 taken together with the executed trust deed.

36. The judge then said the same result could be achieved by starting with Madam Lim's letter of 16 May 1988. He said:

'76. ... This letter is signed by Madam Lim and it refers to the house and to a trust dated 14 December 1985. The court can admit evidence to identify the trust dated 14 December 1985, referred to in the letter, as the trust deed executed by Madam Lim and Ping. Although the letter of 16 May 1988 stated that Madam Lim would like to cancel the trust, this statement recognised that the trust existed at the date of the letter and prior to the proposed cancellation.'

37. The judge's overall conclusion (paragraph 77) was that:

'... prior to or on the 14 April 1986, Madam Lim declared a trust of the house on the terms of the deed of trust executed by her and by Ping and/or those trustees accepted the house as held on the terms of the trust deed.'

38. There may be some internal inconsistency in the judge's reasoning. In paragraph 70, he said it was only by the executed trust deed read with her letter of 14 April 1986

that Madam Lim declared a trust of the house. He recognised, however, that the trust deed may have been signed earlier than 14 April and, at the end of paragraph 71, he regarded the declaration of the trust of the house as made when Madam Lim signed the deed. In paragraph 77, he held that such trust was created either ‘prior to or on the 14 April 1986’.

The appeal to this court

39. Two questions arise: (i) was the judge correct to find that Madam Lim made a valid declaration of trust in respect of the house; if yes, (ii) was her declaration ‘manifested and proved’ by some writing signed by her sufficient to satisfy section 53(1)(b)? Unless the judge was right on both points, Ping’s appeal must be allowed.
40. There is no evidence that Madam Lim made any *oral* declaration of trust in respect of the house. The question is whether it is possible to infer from the documents that by signing the trust deed she was thereby evincing an intention to subject the house to its trusts. The submission of Mr Ham QC, for Ping, was that the answer to this turned entirely upon the interpretation of the two documents on which the judge focussed in paragraph 70, namely (i) the signed trust deed, and (ii) Madam Lim’s letter to RG of 14 April 1986. Mr Ham referred us to a familiar line of authorities, namely *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, *Chartbrook Ltd and another v. Persimmon Homes Ltd and another* [2009] 1 AC 1101 and *Arnold v. Britton and others* [2015] AC 1619, and submitted that the question came down to what a reasonable person, armed with all the background knowledge that would have been available to Madam Lim, would have understood the sense of the two documents to be. In particular, would such person have understood the deed and/or the letter of 14 April 1986 to mean that Madam Lim was declaring that she held the house on the trusts of the settlement?
41. Mr Ham invited a negative answer to that question. He said the starting point must be the wording of the settlement. The reasonable person, having read the settlement, would see that the only property over which it purported to declare any trusts was the sum of blank pounds in Schedule 1. He would be likely to think that, as Schedule 1 had not been completed, there had been a mistake in its drafting. If it were clear to him both that there was a mistake in its drafting *and* what correction ought to be made in order to cure it, it would be open to him to regard the settlement as notionally so corrected and to interpret it accordingly (see *East v. Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111, at 112, per Brightman LJ, with whose judgment Oliver and Lawton LJ agreed). But, said Mr Ham, there is no scope here for the operation of that principle. There is nothing elsewhere in the settlement to suggest that the house was, or was intended to be, subject to its trusts, nor does the letter of 14 April help. Whilst it enclosed a copy of the executed settlement and was headed ‘39 Sheldon Avenue London NW6’, ie the house, it did not suggest that the house was subject to the trusts created by the settlement.
42. If the deed and letter of 14 April 1986 are read and considered in isolation, I would be disposed to agree with Mr Ham. As for the letter, it was, on its face, answering a letter of 2 April 1986 and it dealt with two matters: one relating to the land certificate of ‘the above mentioned property’, the house; and the other explaining that it was enclosing a copy of the trust deed. If the reasonable person were presented simply with these two documents, I consider he would be left in real doubt as to whether the

house was, or was intended to be, subject to the trusts of the deed. At the very least, and before considering what property, if any, was subject to such trusts, he would want to see not just the letter of 2 April 1986 but also any prior correspondence with Mr Hyde leading up to the signing of the deed.

43. Mr Ham recognised this by accepting that, in the attempt to identify the subject matter of the deed and, in particular, whether it was or included the house, the reasonable person would be entitled to have regard to the background circumstances against which it came to be signed and thus to consider such prior correspondence, which would be likely to evidence the genesis and aim of the transaction in which Madam Lim ultimately engaged in April 1986. If that is taken into account, Mr Ham submitted, however, that it is apparent that Madam Lim could still not have intended to create a settlement of the house since for her to have done so would have triggered an immediate charge to capital transfer tax ('CTT') at the lifetime rate, a liability of over £200,000. His submission was that she had been advised of the CTT impact of creating a settlement of the house, she would not have wished to incur any such liability and she cannot be taken to have done anything that would have done so.
44. That submission was not advanced to the judge (Mr Ham did not appear below) and I consider that it anyway fails on the facts. With respect to Mr Hyde, he appears to have given Madam Lim poor advice in various respects in relation to the creation of a trust of the house. One was his failure to give her correct advice about the CTT consequences of creating such a trust. In this connection, he did not provide her with copies either of RG's internal note on the tax questions provided to him on 3 February 1986 or of Mr Coxe's advice (see paragraphs 15 and 17 above); and, for present purposes, the only correspondence to which the reasonable person can have regard is that passing between Mr Hyde and Madam Lim.
45. That correspondence opened with Mr Hyde's letter of 2 January 1986 which – wrongly – advised her that if she were to transfer the house to a non-resident Channel Island trust, she would avoid both capital gains tax ('CGT') and CTT. Madam Lim replied on 6 January 1986 raising no query over the tax advice and re-affirming that, whilst she still wanted to create a trust, she preferred that 'the ownership of [the house] be solely under my name only ...'.
46. The next relevant letter is Mr Hyde's letter of 25 February 1986 (see paragraph 19 above). He there advised that 'with regard to the trust which you wish to establish I am able to confirm that it is possible for you to retain legal ownership whilst at the same time avoiding both [CGT] and [CTT].' He advised that it would be possible for her to 'retain [the house] as trustee for the benefit of the family without giving rise to [CTT] on the setting up of the trust and without having to part with legal ownership and control of [the house].' He then gave advice to the effect that she had bought the house as a trustee by making a gift of its purchase price into a trust fund. He said nothing to indicate other than that she would face *no* liability to CTT in relation to the creation of such trust. Whilst, for reasons given at the end of paragraph 44 above, it is strictly irrelevant, on 25 February he also wrote to Jane advising her that 'the trust of [the house] for the benefit of the named beneficiaries does not give rise to a charge to [CTT] now or in the future on [Madam Lim's] death.'
47. The only other letter to which, for the purposes of Mr Ham's submission, I need refer is Mr Hyde's letter to Madam Lim of 13 March 1986. That advised her that the trust

had been drawn as a discretionary trust 'so that it is effective for tax purposes. If you specify in the document the shares which you wish the beneficiaries to enjoy then this will have adverse tax effects and I therefore advise that there should be no specification of the amount of their interest.'

48. It is, therefore, apparent that, contrary to Mr Ham's submission, Madam Lim could not have believed that the creation of a trust of the house on the terms of the settlement she executed would expose her to an immediate CTT liability. She was advised the opposite and there is no reason to assume other than that she accepted the advice as correct. There is, therefore, nothing in Mr Ham's tax submission pointing away from a determination by Madam Lim to subject the house to a trust. The correspondence shows that that was and remained the aim of the transaction upon which Mr Hyde was advising her.
49. In my view, once that submission is disposed of, Mr Ham's case runs into difficulties. He still, however, has the point that a consideration of the terms of the settlement as signed invites the inference that, by signing it, Madam Lim intended to create a settlement whose trusts bit on nothing, because, despite Mr Hyde's advice to her to complete Schedule 1, she had not done so. The question for the reasonable person tasked with determining what Madam Lim was up to when executing the settlement is whether: (i) she intended to create a settlement with elaborate trusts that applied to nothing, or (ii) she intended its trusts to apply to the house. No third alternative was suggested.
50. The reasonable person would, I consider, be reluctant to accept the first alternative, for obvious reasons. The correspondence shows that, from the outset on 14 December 1985, Madam Lim's objective was to subject the house that she that day contracted to buy to a trust for the benefit of two of her children and her three grandchildren; and her subsequent correspondence with Mr Hyde was all directed towards the creation of such a trust. The reasonable person would, therefore, instinctively be inclined to the conclusion that, although something appeared to have gone wrong with the drafting of the settlement that Madam Lim signed, the likelihood was that, when she executed it, she nevertheless did intend that the house was to be held by her on its trusts. In so concluding, he would in my view be fully justified. Madam Lim is to be taken as having understood, and accepted, the essence of the advice that Mr Hyde gave her. On that basis, the inference that she both intended the house to be held on the trusts of the settlement, and regarded it as so held, appears to me irresistible.
51. The seeds for such an inference were firmly sown by Mr Hyde's letter of 25 February 1986. That told Madam Lim that because on 14 December 1985 she had wanted to establish a trust of the house for the five beneficiaries, she thereby 'gave instructions that [the house] was to be purchased for the trust [and] this means that the moneys received by me were received as a gift from you into the trust fund.' The letter informed her that, in exchanging contracts for the purchase of the house, Mr Hyde had acted for her in her capacity 'as trustee' of the trust. As, he explained, she had used 'non-resident' money for the purchase, she was a 'non-resident trustee and the [house] is therefore exempt from [CTT] on your death.' After referring to, and explaining (inadequately) the trust deed he had drafted, he said that:

'... the trust [was] established on Saturday 14th December and the Deed should be dated with that date. This means that your execution of the contract and your

purchase of the [house] was at all times as trustee for the benefit of the trust and not in your personal capacity.’

52. Mr Hyde’s advice was wrong. No trust was created on 14 December 1985. Madam Lim did not provide the purchase price ‘as a gift ... into the trust fund’. She did not buy the house as a trustee, nor therefore did she buy it as ‘a non-resident trustee’. The most that happened on 14 December 1985 was that she had expressed an *intention* to create a trust of the house after she had bought it. She had by then identified the intended beneficiaries, but had not yet decided the terms of the trust, and no trust would have been created until she had done so. If and when she did so, and a trust was created by the execution of a settlement, the settlement would only date from its execution and could not be backdated to 14 December 1985.
53. One of equity’s so-called maxims is that ‘equity looks on that as done which ought to be done’, a principle whose application is perhaps most commonly met in the context of specifically enforceable contracts. It is not a principle that has any application to unenforceable expressions of intention. It may be that what underlay Mr Hyde’s thought processes was the notion that, provided Madam Lim had a firm intention on 14 December 1985 to subject the house to a trust, equity could and would regard any trust of the house she subsequently created as dating back to that day. If so, he was wrong.
54. There was, however, no evidence that Madam Lim realised that Mr Hyde’s advice was wrong. She is to be presumed as having taken it to be correct. She would, therefore, have read his letter of 25 February as conveying that: (i) she had been a trustee of the house from the moment she bought it; (ii) such trust dated from 14 December 1985, when she exchanged contracts to buy it; although (iii) it was still necessary to set out the terms of the trust in a formal written document; (iv) the draft discretionary settlement Mr Hyde had created and sent to her was the document that, when signed, would serve the required purpose; and (v) when signed, it would govern the trust created in respect of the house from as from 14 December 1985. That is what she must be taken to have understood up to the moment when she signed the deed; and the inference is that, when she signed it, she must have intended the house to become subject to the trusts of the deed. That was the objective of what she had set out to achieve as from the moment that she bought the house.
55. There still remains the question of how Madam Lim might have regarded the house as being subject to the trusts of that deed bearing in mind that, as I consider must also be assumed, she would have seen that the deed made no reference to it. As to that, I consider, however, that the reasonable person, having read the correspondence, would have no difficulty in understanding how she would have come to that view. At the outset, before obtaining Mr Coxe’s advice, Mr Hyde had written to Madam Lim on 2 January 1986 advising her that the house ‘should be owned by a non-resident Trust in the Channel Islands’ and that she ‘should transfer [the house] to Ping and Tjoan and one other [professional] person to hold [the house] as Trustees [for the beneficiaries].’ On 6 January 1986, however, Madam Lim responded with a firm ‘no’ to that suggestion, saying she still preferred ‘that the ownership of [the house] be solely under my name only.’ Later, on 25 February 1986, Mr Hyde gave her the further advice I have described, a letter in which he made no suggestion that she could not continue, following the signing of the discretionary settlement, to hold the house in her sole name. When later, on 3 March 1986, she wrote to Mr Hyde proposing that

Ping should be a co-trustee, Mr Hyde also made no responsive suggestion that the house would have to be transferred into the joint names of Madam Lim and Ping.

56. In these circumstances, Madam Lim would have continued to understand that she could retain the house in her own name and that it could and would still be held on the trusts of the deed when she signed it. Of additional, and material, significance in this context is that, whilst Mr Hyde must also be taken to have known the settlement made no reference to the house as being subject to its trusts, he at no point gave Madam Lim so much as a word of advice indicating that anything more needed to be done to subject the house to such trusts. I regard that omission as surprising. But I consider also that the reasonable man would not regard it as in the least remarkable that Madam Lim would, in turn, and given Mr Hyde's total silence on the matter, simply have assumed, understood and intended that the house would automatically become subject to the trusts of the deed when she signed it. The only asset she ever intended to subject to trusts for the five beneficiaries was the house, Mr Hyde knew that and had produced a document that, when signed, would, he explained, govern the trust of the house that Madam Lim had created on 14 December 1985. On what basis, therefore, could she have doubted that, when she signed the document, the house would and did become subject to its trusts? That is what the reasonable person would infer that, when she signed the deed, she both understood and intended.
57. What Madam Lim understood about the Schedule 1 reference to the initial trust fund being a sum of blank pounds is unclear. In his letter of 25 February 1986, Mr Hyde advised her that 'On page 25 of the Deed, in Schedule 1, the amount of your gift must be stated. I will leave you to specify what this should be.' That too was poor advice. He should have given a proper explanation of why it was necessary to refer to a sum of money, what sort of sum she might consider referring to, what she was then supposed to do with such sum and why Schedule 1 did not refer to the house. It looks, from the first paragraph of Madam Lim's letter in reply of 3 March 1986, as if she did not understand what Mr Hyde was saying with regard to Schedule 1, and that perhaps she thought it was a reference to the shares in which she wished the five beneficiaries to enjoy the house. Mr Hyde replied to her letter on 13 March, pointing out at the end that she still needed to 'enter the amount of your original gift' in Schedule 1, but again giving her no advice as to the sort of sum she might there insert. Madam Lim did not take the advice but signed the settlement with Schedule 1 uncompleted. The inference that the reasonable man would probably draw is that she was simply not interested in recording a trust of a gift of money in the deed. All she wanted, and intended, was to execute a deed that would, as she must have understood from all Mr Hyde had (and had not) said, result in the house becoming a trust asset.
58. In my view, therefore, if he were provided with the correspondence passing between Mr Hyde and Madam Lim up to and including the letter dated 14 April 1986, the reasonable person would have no hesitation in concluding from it that, when she signed the settlement, Madam Lim understood and intended that the house should thereupon become subject to its trusts. No doubt she made no express *oral* declaration of trust in such terms, nor was there any evidence that she uttered words to like effect. But the utterance of such words is not an essential pre-requisite to the creation of a trust by way of a declaration. In *Paul v. Constance* [1977] 1 WLR 527, at 531, Scarman LJ said that for there to be a clear declaration of trust 'means that there must be clear evidence from what is said *or done* of an intention to create a trust' (my

emphasis). Bridge and Cairns LJJ both agreed with his judgment, although Bridge LJ identified the requirements of a valid declaration of trust without reference to the declarer's conduct.

59. I therefore conclude that the reasonable person would be satisfied that Madam Lim's execution of the settlement in April 1986, read in light of the correspondence that had passed between her and Mr Hyde, evinced an intention by her to subject the house to the trusts of the settlement; and that she thereupon made a valid declaration of trust in respect of the house. The judge was correct so to hold.
60. Given the requirements of section 53(1)(b) of the 1925 Act, it remained for the claimants to show that such declaration was 'manifested and proved by some writing signed by some person who is able to declare such trust or by his will.' The only candidates for such writing were Madam Lim's letters of 14 April 1986 and/or 16 May 1988.
61. Mr Ham acknowledged that, were the court to be against Ping on whether there had been a valid declaration of trust, his submission that it was not 'manifested and proved' by sufficient writing was its weaker limb, and we had relatively little argument on this issue. The judge, in paragraph 76 (see paragraph 36 above), expressed the view that the letter of 14 April 1986 provided the required written proof: it enclosed a copy of the signed settlement and the heading of the letter referred to the house. The reservation I have about that, however, is that it might be said that the reference to the house in the letter heading could be explained as relating simply to Mr Hyde's question in his letter of 2 April 1986 about the land certificate. It did not necessarily also identify the house as being subject to the trusts of the settlement.
62. If, however, that reservation is justified, I consider that Madam Lim's later letter of 16 May 1988 anyway provided sufficient proof and manifestation for section 53(1)(b) purposes of the trust she had created. The judge (paragraph 76) also placed independent reliance on this letter. I agree with what he there said. The trust deed dated 14 December 1985 can be identified by extrinsic evidence. On its face, it created no trusts of anything. If Madam Lim had regarded that as all it did, a letter from Singapore to RG seeking to cancel it would not have been worth the candle. Her letter, however, expressly linked the house with the trust. What can she have thereby intended to acknowledge other than that the house was an asset of the trust?
63. I would dismiss Ping's appeal.

Lord Justice Underhill:

64. I agree.

Sir Brian Leveson, President of the Queen's Bench Division:

65. I also agree.