Neutral Citation Number: [2021] EWHC 2315 (Ch)

Case No: PT 2020 000561

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building
7 Rolls Buildings, London. EC4A 1NL

Date: 17/08/2021

Before :

MASTER SHUMAN

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Between :

ROYAL COMMONWEALTH SOCIETY FOR THE BLIND (also known as Sightsavers International, registered charity number 207544)	**Claimant**
- and -	
(1) JOHN WAYLAND BEASANT (in his personal cacpity and as Personal Representative of the estate of Audrey Thelma Arkell deceased)	**Defendants**
(2) BENJAMIN HOW DAVIES (as Personal Representative of the estate of Audrey Thelma Arkell deceased)	

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Mark Baxter (instructed by **Withers LLP**) for the **Claimant**
Christopher Jones (instructed by **Risdon Hosegood**) for the **First Defendant**
The Second Defendant did not attend and was not represented

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by e-mail and release to BAILII. The date and time for hand-down is deemed to be at 10:00am on 17 August 2021.

MASTER SHUMAN :

1. This is a will construction claim brought by the claimant arising out of the will of Audrey Thelma Anita Arkell (the deceased) executed on 27 June 2016 (the will). The deceased died on 17 August 2017.

2. The deceased's estate has a net probate value before inheritance tax of £3,127,174.

3. The claimant is one of 21 residuary beneficiaries, all of whom are described in the will as charities. By an order dated 21 December 2020 the claimant was appointed, pursuant to CPR 19.6, to represent all of the residuary beneficiaries.

4. The defendants are the executors and trustees under the will. In addition, the first defendant is the named beneficiary of legacies and a specific devise.

5. The second defendant is a solicitor at Alletsons Solicitors, the firm (Alletsons) who drafted the will.

6. Probate was issued out of the Winchester District Probate Registry to the Defendants on 1 August 2019, with power reserved to Neil Gordon Keen.

7. The issue concerns clause 4 of the will and a gift to the first defendant. If the claimant is right in its construction, no sum is due to the first defendant. The first defendant argues that the sum due to him is £325,000. This was also the second defendant's position pre-issue and until after he filed his acknowledgment of service.

<u>The claim and procedural background</u>

8. The claim was brought by Part 8 claim form issued on 24 July 2020. It is supported by a witness statement dated 24 July 2020, made by Anthony Hewitt, a solicitor and partner at Withers LLP.

9. The first defendant has not filed an acknowledgment of service but contests the claim. He relies on the evidence of Goran Vučićević, a chartered legal executive and director in Alletsons who took the will instructions and drafted the will.

10. The second defendant filed an acknowledgment of service dated 12 August 2020 contesting the claim. However, he has not attended the hearing, either personally or through solicitors, although Kennedys solicitors (instructed by Alletsons) have had a representative observe the hearings and engaged in correspondence with Withers, the claimant's solicitors.

11. On 30 September 2020 Deputy Master Hansen made an order on the papers in standard Chancery CH44 form. It required both defendants to file evidence within 14 days of service of the order on them and in default they are not entitled to rely on evidence at the disposal hearing without the permission of the court. That time was extended as the first defendant had an intervening hospital admission. He instructed Risdon Hosegood solicitors to act for him and they filed a notice of acting dated 18 November 2020.

12. The disposal hearing was listed for 21 December 2020. By letter dated 27 November 2020 Risdon Hosegood informed the court that they would not be filing any evidence on behalf of the first defendant but would rely on the witness statement of Mr Vučićević

dated 24 November 2020. On 8 December 2020 Kennedys sent a copy of this witness statement to Withers saying that Risdon Hosegood would file it. However the witness statement did not have a statement of truth and failed to confirm the process by which it had been prepared; CPR PD 32 para 18.1(5).

13. A signed witness statement was served the day before the disposal hearing. The order on 21 December 2020 identified the 3 issues for determination and relisted the disposal hearing:

(1) The admissibility of the revised witness statement of Mr Vučićević (which was to be filed and served by 6 January 2021 and to comply with the CPR, and any of the earlier iterations.)

(2) Whether the first defendant should be granted relief from sanctions to rely on Mr Vučićević's witness statement; the first defendant having made an application by notice dated 17 December 2020.

(3) The true construction of clause 4 of the will.

14. On 6 January 2021 the first defendant served a witness statement from Mr Vučićević dated 23 December 2020. That version made material amendments to the previous iteration, including seeking to introduce two new exhibits and delete an entire paragraph.

15. Mr Jones, counsel for the first defendant, took a pragmatic view at the disposal hearing before me and accepted that the previous iteration of the witness statement was the relevant one. I have already given judgment in respect of the first two issues; whilst I would have granted relief from sanction I refused to admit Mr Vučićević's witness statement in evidence, it not satisfying either gateway (b) or (c) under section 21 of the Administration of Justice Act 1982.

THE CONSTRUCTION ISSUE

The Law

16. Viscount Simon LC said in Perrin v Morgan [1943] AC 399 at 406,

> "The fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made the will, but what the written word he uses mean in the particular case – what are the 'expressed intentions' of the testator."

17. Wills are construed in the same way as any other document. This was confirmed by the Supreme Court in Marley v Rawlings [2014] UKSC 2. Lord Neuberger at paragraphs 19 to 22 set out the task for the court when construing a document,

> "19. When interpreting a contract, 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. …
>
> 20. When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context. As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, para 64, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum".
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> 21. Of course, a contract is agreed between a number of parties, whereas a will is made by a single party. However, that distinction is an unconvincing reason for adopting a different approach in principle to interpretation of wills: it is merely one of the contextual circumstances which has to be borne in mind when interpreting the document concerned. Thus, the court takes the same approach to interpretation of unilateral notices as it takes to interpretation of contracts – see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 , per Lord Steyn at 770C-771D, and Lord Hoffmann at 779H- 780F".

18. This approach had previously been confirmed by the Court of Appeal in RSPCA v Sharp [2010] EWCA Civ 1474; cited with approval in Marley v Rawlings. A case also concerning the construction of a legacy in a will.

19. In RSPCA v Sharp the testator's will provided that,

> "3. I give the amount which at my death equals the maximum which I can give to them by this my will without inheritance tax becoming payable in respect of this gift: (a) as to seventy-eight percent (78%) to the said Norman James Sharp and Patricia Daphne Sharp as shall survive me and if more than one in equal shares absolutely (b) as to twenty-two percent (22%) to John Edward Mason of 4, Jervis Avenue Freezywater EN36LT absolutely

> 4. I give my property situate and known as 39, Malvern Road Gosport in Hampshire PO12 3LH to the said Norman James Sharp and Patricia Daphne Sharp as shall survive me and if more than one jointly and equally absolutely and I direct that the inheritance tax (if any) payable on my death in respect of the property and all costs of the registration of the said Norman James Sharp and Patricia Daphne Sharp as proprietors thereof shall be payable out of my residuary estate."

20. The executors contended that clause 3 properly construed amounted to a gift of £300,000, that being the prevailing nil rate band for inheritance tax purposes. The RSPCA, who was entitled to the residuary estate, argued that the gift should only be £131,000, amounting to the balance of the nil rate band after the value of property passing under clause 4 was taken into account. The Judge considered that the RSPCA's construction had over complicated the will and that the testator had two categories of people in mind, his friends and brother and separately the charity. He accepted the executors' argument and reiterated that the testator had contemplated that inheritance tax (IHT) would be payable but not on the pecuniary legacy.

21. The Court of Appeal allowed the appeal: Patten LJ and Lord Neuberger giving substantive judgments. At paragraph 15, Patten LJ identified that the difference between the parties turned on whether the testator intended to make a tax-efficient disposition of his estate. Patten LJ at paragraphs 20 to 22 looked at how to approach the construction of the will,

> "20. We have therefore to examine the language of the will in its context taking into account the will as a whole; any relevant background circumstances which inform the meaning of the words used; and giving to those words their ordinary meaning unless they are obviously used in some special or technical sense.
>
> 21. The divide in this case centres on whether the Testator intended to make a will which excluded IHT unless the Property exceeded the nil rate band in value. In this event the pecuniary legacies under clause 3 would also be eliminated. The judge largely rejected this construction on the will because he considered it incredible (as he put it) to assume that the Testator would have intended to reduce or eliminate the gifts of money to his brother and to the Sharps in the event that the combined value of the non-exempt transfers should exceed the amount of the nil rate band. But, in the absence of any extrinsic evidence about the Testator or his wishes, this is largely speculation. We know nothing about his brother's financial circumstances; the Testator's degree of commitment to the RSPCA; or the strength of his desire to avoid any charge to IHT on his assets. It is perfectly possible that the second and third of these elements outweighed any perceived risk that the clause 3 legacies would be reduced to nil.

> 22. For these reasons it is dangerous to approach the assessment of the Testator's intentions other than through the language of his will. The first relevant consideration in my view is that the will was professionally drafted by a solicitor who has to be assumed to be competent. Although solicitors do obviously make mistakes, there needs to be something in the language of the document or its admissible background to justify that inference. More importantly, those factors must be such as to permit the court to give the words actually used a meaning which is not strictly in accordance with the usual rules of grammar or vocabulary: see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896."

22. No extrinsic evidence was admissible in that case and no claim for rectification was made. The court was therefore left to examine the language of the will in its context both as to the will as a whole and placing it into the relevant background circumstances. Patten LJ reiterated that it was dangerous to approach the testator's intentions other than through the language of the will. The Judge had fallen into error by speculating that the testator would not have wished to reduce the amounts to be paid to his brother and the Sharps. To accept the executors' argument would be to redraft clause 3.

23. The importance of both text and context to the process of construction is usefully summarised by Lord Hodge in Wood v Capita Insurance Services [2017] UKSC 24 and is uncontroversial. The Supreme Court was concerned with construing an indemnity clause in a share purchase agreement, but this is of general application. At paragraph 13, Lord Hodge said,

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer

> or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process … assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

24. IHT is charged on the deceased's estate on the basis of a chargeable transfer deemed to take place immediately before death; Inheritance Tax Act 1984 (the IHTA 1984), sections 1 to 4. The rates of IHT are set out in section 7 and schedule 1 to the IHTA 1984. IHT is charged at the rate of 40% on the chargeable value of the estate above the nil rate band, which is £325,000. Certain transfers are exempt by the nature of the recipient beneficiary, for example a spouse or civil partner or a registered charity, or by the nature of the asset.

Construction

25. The will was professionally drawn up by Mr Vučićević, a chartered legal executive and director in Alletsons. The execution of the will took place before him; he attested the deceased's signature together with a secretary. It can be assumed that he was competent in drawing up the will. Mr Jones' skeleton argument refers to the fact that Mr Vučićević had acted for the deceased in connection with codicils to an earlier will.

26. The will appoints a partner in Alletsons to act as executor together with the first defendant, the deceased's friend, and a third person, who did not join in taking out the grant.

27. Turning to the clause in question, clause 4 provides a legacy to the first defendant as follows,

> "4. I GIVE the Nil-Rate Sum to my Trustees on trust for my said friend JOHN WAYLAND BEASANT
>
> 4.1 In this clause 'the Nil-Rate Sum' means the largest sum of cash which could be given on the trusts of this clause without any inheritance tax becoming due in respect of the transfer of the value of my estate which I am deemed to make immediately before my death"

28. In contrast to the wording of clause 4, the gifts that follow are expressed to be made free of inheritance tax. Clause 5 provides for a specific devise to the first defendant of the deceased's property known as Apartment 1, 10 Castle Street, Bridgwater, Somerset TA6 3DB, which was also expressed to be gifted free of any mortgage or charge thereon. It also provided for future events by including the phrase, "or such property as may be my only or main residence at my death". The probate value of the flat is £240,000. By clause 6, the deceased gifted all her shares in Imperial Tobacco Group plc, now Imperial Brands plc, to the first defendant. Again there was provision for future events affecting those shares, such as amalgamation, reconstruction,

rearrangement of capital or sale of the company's business or demerger. The probate value of the shares is £218,256.63. By clause 7 the deceased gifted all of her personal chattels to the first defendant. These have a probate value of £1,390.

29. Clause 8 of the will gifts various pecuniary legacies to 6 identified people, these total £45,000 and are all expressed to be free of tax. Neither the first defendant nor the pecuniary legatees are exempt from IHT. Given the size of the estate these are relatively modest gifts.

30. The remainder of the deceased's estate, per clause 9 of the will, was given, after payment of debts, funeral and testamentary expenses and IHT, to the deceased's trustees to be retained or sold and divided and held equally between the 21 named charities. HMRC wrote to Alletsons on 28 October 2019 confirming that Hillside Animal Sanctuary was not an approved charity for tax purposes. So only 20 of the residuary beneficiaries are exempt from inheritance tax because of their charitable status.

31. The nil-rate band at the date of the deceased's death was £325,000

32. The claimant contends that clause 4 means the sum due under clause 4 is the sum left, if any, after deduction of the value of all other legacies of the will on which IHT is charged at the nil-rate. As the value of the other legacies and devise exceed the nil-rate limit, there is no sum payable to the first defendant under clause 4.

33. The first defendant contends that clause 4 is construed so that there is a tax-free gift of an amount of the nil-rate limit in force at the deceased's death, without reference to the other gifts of the will. So the sum of £325,000 should be paid to the first defendant.

34. The first defendant has not brought a claim seeking to rectify the will; his argument rests on construction alone.

35. Wills by their nature are ambulatory and furthermore the estate may change during a testator's lifetime; a testator may dispose of, acquire or restructure their assets. This may well impact on the assets available for distribution on death and the incidence of IHT. The language of the will clearly demonstrates an understanding of IHT and how it would work in respect of the deceased's estate.

36. As to clause 4, Mr Baxter points out that this is strikingly similar to the clause in issue in RSPCA v Sharp. The differences being a matter of form rather than substance. Mr Jones suggests that clause 4 specifically refers to the nil rate band and calculates a ceiling for the gift without the need to look at the tax consequences of the will, in contrast to the position in RSPCA v Sharp. He took me to the wording of the clause itself to show the difference in the language used.

37. As Theobald on Wills, 18th Ed, observes at paragraph 13-001[1], the first rule of will construction is that every will is different. Whilst it is helpful to see how Lord Neuberger and Patten LJ approached the task of construing the will before them, I must construe the will that is before this court by reference to the clause in question, looking at the natural and ordinary meaning of the words used, its overall purpose, the other

[1] Paragraph 18-001 in the 19th Ed.

provisions in the will and the facts known to or assumed by the testator at the time and with common sense. I ignore subjective evidence of the deceased's intention. Both counsel accept that this is the task for the court.

38. Mr Jones's primary position is that I should simply disregard sub-clause 4.1; I am told it is unnecessary. He says that I should follow the approach in Re Huntley (Deceased) [2014] EWHC 547 (Ch) which construed the will by omitting clause 6.1.3.1, which refined the meaning of the nil rate sum. If I am not with him, he submits that there is no reference in sub-clause 4.1 to the other gifts under the will or exempt gifts, simply the largest sum of cash that can be paid to the first defendant. So all that sub-clause 4.1 does is to say what the nil rate band is at the deceased's death. On that analysis it seems strange that the amount of the pecuniary legacy to the first defendant is set by the amount of the nil rate band in force at the date of death but that it has no connection with the purpose of the nil rate band despite the language of the will demonstrating an appreciation of the incidence of IHT.

39. On Mr Baxter's construction the legacy under clause 4 could be reduced to nil, subject to whether the value of the estate passing to non-exempt beneficiaries exceeded the nil rate band, as has happened here. Mr Jones submits that it cannot have been the intention of the deceased to pass nothing to the first defendant under clause 4, otherwise why else include it. I consider that Mr Jones has fallen into the trap that Patten LJ warned of in RSPCA v Sharp; it is speculation on his part. He attempts to make good his submission by arguing in his skeleton argument that there is a presumption in will construction that a testator intends to benefit friends and family in priority to residuary beneficiaries, he relied on Halsbury's Laws of England, Wills, volume 102, paragraph 261[2]. That mischaracterises the point made by the editors. Indeed they emphasise that in the construction of a will the only guide is the testator's language. At best it supports the proposition that where the will is ambiguous, which does not arise here, relatives may be preferred over strangers.

40. Mr Jones also points to the deceased's desire to positively relieve the first defendant of the burden of IHT as expressed in clauses 5 to 7 of the will which he says is in keeping with the general presumption that specific gifts and pecuniary legacies take priority over residue. Mr Baxter submits that the fact that the deceased subordinated her intention for overall IHT efficiency to her preference for the first defendant to receive specific assets without IHT consequences does not undermine her clear intention in clause 4 to limit the sum passing to the first defendant by reference to the IHT position. I agree.

41. Mr Jones submits that 'sitting in the testator's armchair' as the deceased read her will, she knew what her taxable estate was and broadly its value and that the effect of clauses 5 and 6, given their known values, was to create a liability for tax so that clause 4 could not take effect unless the gifts fell below the nil rate band or the nil rate band amount was raised. It required 'mental gymnastics' for the construction contended for by the claimant as it was obvious that clause 4 would be 'doomed to fail'. I referred counsel in argument to clauses 5 and 6 of the will as an example of the will anticipating a change in the assets. Mr Jones considered that to suggest that clause 4 would ever operate was fanciful. I do not accept that argument. It was not inevitable that the sum passing under

[2] Volume 102, more generally Constructions of Wills, presumptions favouring relatives or persons having a claim on the testator, paragraphs 262-263.

clause 4 was nil; the deceased was aged 91 years when she died, 90 when she made the will. It was certainly possible that she might realise or restructure her assets, for example, if she needed care that could not be provided in her home. Had the gifts under clauses 5 and 6 failed the first defendant would have received an amount up to the value of the unutilised balance of the nil rate band. Viewed in this way the will took the opportunity to exclude IHT in the event that at the deceased's death she no longer retained the specific assets that she wished the first defendant to receive in specie.

42. I go back to the language of the will. If the deceased intended to gift the nil rate band to the first defendant the will could simply have said that. Mr Vučićević could easily have drawn up the will which gifted an amount to the first defendant equal to the nil rate band and expressed that to be free of IHT, as the gifts to the first defendant under clauses 5, 6 and 7 provided. There would have been no need to include the definition in sub-clause 4.1, and yet the will did include it. Moreover the sub-clause demonstrates an understanding of how IHT is chargeable, specifically referring to "without any inheritance tax becoming due" and "in respect of the transfer of the value of my estate which I am deemed to make immediately before my death". It also uses "could" in the past tense with a temporal function, "means the largest sum of cash which could be given". I do not accept that the wording in sub-clause 4.1 is superfluous or otiose. Clause 4 clearly contemplates that the 'nil rate sum' is to be calculated by reference to the operation of IHT across the whole of the deceased's estate and the order of the gifts in the will does not matter. The sum is limited to the amount left of the nil rate band, if any, before tax would become payable.

43. Mr Jones submits that it would be whimsical or harsh to construe clause 4 as contended for by the claimant. I do not accept that argument. It would do considerable violence to the language of the will to effectively read clause 4 as meaning a sum which equates to the nil rate band at the date of death of the deceased and to ignore sub-clause 4.1 in its entirety.

44. I therefore accept the claimant's construction of clause 4.