Neutral Citation Number: [2021] EWCA Civ 1564

Case No: A3/2021/0189

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST
His Honour Judge Cadwallader (sitting as a Judge of the High Court
PT-2016-MAN-000056

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 October 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE GREEN
and
LORD JUSTICE NUGEE

- -

Between :

CHRISTOPHER DAVID PARTINGTON (Executor of the Will of Nicholas Martin Rossiter)	**Claimant/ Respondent**
- and -	
OLGA ROSSITER	**Defendant/ Appellant**

- -
- -

Faisal Saifee and Tracy Bird (instructed by **Mergul Law**) for the **Appellant**

Elis Meredydd Gomer (instructed by **Slater Heelis Ltd**) for the **Respondent**

Hearing date : 21 October 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10am on Friday 29th October 2021.

Lord Justice Lewison:

Introduction

1. Mr Nicholas Rossiter died on 20 July 2018. At the date of his death he was domiciled in Russia, where Mrs Rossiter his widow lives, and where he had assets. Clause 1 of his will dated 13 June 2013 stated: "I confirm that this will only has effect in relation to my UK assets". At the date of his death Mr Rossiter was entitled to assets located in Jersey. Two questions arise: (a) is the devolution of the Jersey assets governed by the will? (b) if not, should the will be rectified in order that it is? HHJ Cadwallader decided that the will did deal with the Jersey assets; and, in the alternative, that it should be rectified to have that effect.

2. If the will did not deal with the Jersey assets, there will be a partial intestacy. The assumed consequence of that will be that Mrs Rossiter will inherit them. If it did (or is rectified to have that effect) then the Jersey assets will fall into residue to which Mr Rossiter's children are entitled.

3. Having heard argument from Mr Saifee on behalf of Mrs Rossiter, we announced our decision to dismiss the appeal. These are my reasons for joining in that decision.

The facts

4. The will was drawn by Mr David Bevan, a solicitor with Slater Heelis, following instructions from Mr Rossiter. On 11 June 2013 Mr Rossiter sent Mr Bevan a draft will which he had prepared himself. Clause 3 of that document said:

> "In my Will where the context so admits "my Estate" shall mean:
>
> (a) My property in the UK
>
> (b) Money and investments in the UK"

5. Clause 4 made provision for specific legacies. One related to a property in Cheshire; and another to the balance held in Mr Rossiter's name at a bank in St Helier, Jersey which was to be divided between his two children.

6. Mr Bevan replied on 11 June 2013. He said that the will would be straightforward and that "all your (UK) assets are to be shared equally" between the children. He added that "You do not need to refer to the various assets in your estate in the will". He also advised that:

> "If you own assets outside the UK you need a separate will in each of those countries and you should consult lawyers in that/those other countries to do that."

7. On the following day Mr Bevan annotated that advice "correct and this is already in progress". No will specifically dealing with the Jersey assets has ever been found.

8. As mentioned, clause 1 of the will as executed on 13 June 2013 stated: "I confirm that this will only has effect in relation to my UK assets". It did not make provision for specific legacies. Instead, having made provision for the appointment of executors and the payment of liabilities, clause 3 (b) divided the residue of the estate equally between Mr Rossiter's two children.

9. On 27 April 2018, however, Mr Rossiter got in touch with Slater Heelis again. He said that he had been checking his will and that something needed to be added. This time his draft read:

> "To divide my residual estate as flows.
>
> i. My estate, in the UK (incl Jersey), shall be divided [between my children]…
>
> ii. My estate outside the UK (incl Jersey) shall be left in its entirety to my wife …"

10. Unfortunately, these changes were not made before Mr Rossiter died.

The constitutional position of Jersey

11. Jersey (and the other Channel Islands) are the last vestiges of the ancient Duchy of Normandy which, following the Norman Conquest of 1066, was united with the English Crown. Although King John lost the mainland part of the Duchy, the islands remained in the hands of the English Crown. It has its own legislature, its own courts and its own legal system. The monarch continues to exercise jurisdiction over the islands as if she were Duke of Normandy.

12. Jersey is not, however, an independent state in international law. The UK government is responsible for its international relations and its defence. Nor was Jersey a member of the EU. This is explained more fully in *R (Barclay) v Lord Chancellor and Secretary of State for Justice (No 2)* [2014] UKSC 54, [2015] AC 276.

13. For the purposes of domestic legislation it is not part of the United Kingdom as defined by section 5 of and Schedule 1 to the Interpretation Act 1978 (which defines the United Kingdom as "Great Britain and Northern Ireland"); but it is one of the "British Islands" as there defined. Some provisions of that Act are applied to deeds and other instruments (see section 23 (3)); but section 5 is not one of them.

Is the meaning of United Kingdom immutable?

14. It is common ground that, in the will as executed, "UK" stands for "United Kingdom". The Oxford English Dictionary's entry reads thus:

> "United Kingdom n. (a) the kingdom of Great Britain, formed from the union of Scotland and England (see union n.[2] 3b(a)) (now historical); (b) (after the union of 1801) the kingdom of Great Britain and Ireland, or (after the formation of the Irish Free State in 1921) of Great Britain and Northern Ireland; abbreviated U.K. n. at U n.[1] Initialisms 1a."

15. These definitions have changed over the years, but none of them includes the Channel Islands. Nevertheless, as Steyn LJ put it in *Arbuthnott v Fagan* [1995] CLC 1396, 1402:

> "Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context."

16. Thus, despite the dictionary definition, there are contexts in which the United Kingdom has been held to encompass the Channel Islands. In *Stoneham v The Ocean, Railway, and General Accident Insurance Company* (1887) 19 QBD 237 an insurance policy covered "any bodily injury caused by any external accident, happening within the United Kingdom, or on the continent of Europe." The assured was accidentally drowned in Jersey. The Divisional Court held that the insurers were liable under the policy. Mathew J said at 239:

> "…the pleadings are, no doubt, somewhat irregular, but I think it is sufficiently apparent that the question which the parties intended to leave to the Court as a question of law is whether Jersey is, in popular language, a part of the United Kingdom. I have no hesitation in saying that it is: I can give no other answer to the question."

17. Agreeing, Cave J said at 240-41:

> "As to the first point, I think it is very clear that Jersey is within the United Kingdom within the meaning of the words of this policy. Some light is thrown on this question by one of the conditions indorsed on the policy: "This policy shall be void if the assured shall travel beyond the limits of Europe, or shall embark in any vessel with the intention of going beyond such limits." That provision means that the policy shall be in force in Europe, and Jersey is in Europe. In my judgment it is also within the United Kingdom."

18. Nugee LJ (then sitting as Nugee J) followed the lead of that case in *Royal Society v Robinson* [2015] EWHC 3442 (Ch), [2017] WTLR 299. In the latter case a will provided that it should extend "only to property of mine which is situated at my death in the United Kingdom". Both at the date of execution of his will and at the date of his death the testator had substantial off-shore assets. Nugee J said at [29], after referring to *Stoneham*:

> "The purpose which I am citing it for is that it occurred to Mr. Justice Matthew in 1887 that he had no hesitation in saying that Jersey was, in popular language, a part of the United Kingdom. It certainly leads me to conclude that it is possible that laymen might regard the United Kingdom as extending to include the Channel Islands and the Isle of Man and that, in the light of the surrounding circumstances, it is therefore entirely possible that that was what [the testator] meant when he referred to the Will extending only to property of his situated at his death in the United Kingdom."

19. Mr Saifee accepted that *Royal Society* was correctly decided; and I agree with him.

20. On the other side stands *Navigators and General Insurance Co Ltd v Ringrose* [1962] 1 WLR 173. That was another case of an insurance policy which insured a 16-foot catamaran "whilst within the United Kingdom, ashore or afloat or in transit by road or by rail." The craft was dismasted in mid-Channel en route to the Channel Islands about 28 miles south of Portland Bill, and was salved by an Italian steamer. The question was whether the insurers were liable. This court held that they were not. The insured's first argument was that the Channel Islands are part of the United Kingdom and that, since he was setting out from England to the Channel Islands, it was reasonable that he should be covered by the insurance policy for the whole of that journey between two places in the United Kingdom. It would, he said, be artificial to suggest that he was covered for a while when he left England and covered for a while before he arrived at the Channel Islands but was not covered in mid-Channel. Holroyde Pearce LJ rejected that argument. He referred to *Stoneham* and noted that it had been decided before the passing of the Interpretation Act 1889. He referred to the definition of "British Islands" in that Act (which is the same as that the 1978 Act) and said at 176:

> "The language of that subsection clearly shows that the Act does not include the Channel Islands in the United Kingdom. The fact that the Interpretation Act assigns a meaning to a word in Acts of Parliament does not necessarily mean that it has that meaning in commercial documents. Nevertheless, it is of some guidance in ascertaining their true construction."

21. Having referred to the constitutional position of the Channel Islands he continued:

> "There is no evidence in this case from which we can deduce that there is a special meaning by custom to be given to the words "United Kingdom" in commercial documents of this or any other nature. In my view, therefore, the Channel Islands cannot be said to be covered by the words of this policy, "within the United Kingdom.""

22. This judgment seems to me to have been founded on the basis of custom, rather on than a one-off interpretation to be given to the particular policy. Willmer LJ also summarised the insured's first argument that the Channel Islands were part of the United Kingdom; and said at 178:

> "I do not think, however, that that argument can prevail. For one thing I am far from satisfied that the Channel Islands do come within the United Kingdom. I do not refer again to the authorities to which Holroyd Pearce LJ has already referred; I am content to express my concurrence with the conclusions which my Lord has drawn therefrom."

23. His agreement with Holroyd Pearce LJ also suggests that he was thinking in terms of custom. Nevertheless, he also said:

> "I do not think it is necessary in this case to reach any final conclusion as to what exactly is embraced within the expression

> "within the United Kingdom, ashore or afloat." For myself, I think there is much to be said for the view that the expression covers the area over which Her Majesty claims jurisdiction."

24. This is, in my judgment, a much more equivocal position; not least because Her Majesty does claim jurisdiction over the Channel Islands. Davies LJ did not express any view about whether *Stoneham* was correct. But he took a broader view than Holroyde Pearce LJ. He said at 178-9:

> "Speaking for myself, I am unable to see that any assistance can be derived in this case from the provisions of the Interpretation Act, even if they could possibly be said to apply to a policy of insurance as opposed to a statute. Section 18 refers to the United Kingdom, the Channel Islands and the Isle of Man; and it is therefore argued that those three places are mutually exclusive. But I find it very difficult to believe that an insured yachtsman in the Isle of Man, if he had this policy issued to him, would not be covered by it as being afloat within the United Kingdom in the terms of the policy. The passage from Halsbury's Laws of England, to which we have been referred, is based on no other authority than the deduction made from the words in the Interpretation Act."

25. In the light of the restricted effect of section 23 (3) of the Interpretation Act 1978, I agree that no assistance can be gained from the statutory definition. I do not regard any of these cases as laying down the proposition that "the United Kingdom" as used in a private instrument can never include the Channel Islands; and there are two cases which held that, in the context of the particular instrument under consideration, it did.

The interpretation of wills

26. As Lord Hodge said in *Trump International Golf Club Scotland Ltd v Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85 at [33]:

> "There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. In particular, there has been a harmonisation of the interpretation of contracts, unilateral notices, patents and also testamentary documents."

27. The most recent authoritative exposition of the principles applicable to testamentary documents is that of the Supreme Court in *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129. Lord Neuberger said:

> "[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."

28. Mr Saifee stressed the first of Lord Neuberger's principles, namely the "natural and ordinary" meaning of the words; or, as he put it, the conventional meaning. That may, indeed, be the starting point, but it is not necessarily the finishing point. Lord Hoffmann explained in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 774:

> "We start with an assumption that people will use words and grammar in a conventional way but quite often it becomes obvious that, for one reason or another, they are not doing so and we adjust our interpretation of what they are saying accordingly."

29. It has long been a principle of the interpretation of contracts that if one realistic interpretation would result in the contract being invalid and another realistic interpretation would result in its being valid, the court should prefer the latter. That principle finds its parallel in relation to wills, in that the court will try to interpret a will so as to avoid intestacy, either in whole or in part. In *Re Harrison* (1885) 30 Ch D 390 Lord Esher MR said at 393-4:

> "There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,—that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule."

30. In the same case, Fry LJ said at 395:

> "… where there is a reasonable construction which results in a testacy, that construction must prevail rather than one which leads to an intestacy."

31. Williams on Wills puts the point broadly at [51.1]:

> "Where, however, the construction of the will is doubtful, the court acts on the presumption that the testator did not intend to die either totally or partly intestate, provided that on a fair and reasonable construction there is no ground for a contrary conclusion."

32. The principle was applied to a potential partial intestacy in *Barrett v Hammond* [2020] EWHC 3585 (Ch), [2021] WTLR 51. Although Mr Saifee accepted the existence of this principle of interpretation, he suggested that it could have no application where there would be a partial intestacy in any event; and the court should not attempt to minimise any possible intestacy. I disagree. The policy underlying the principle is, in my judgment, threefold. First, a court strives to give effect to the testator's intention and purpose as expressed in a will; and the purpose of a will is (at least generally) to dispose of all the testator's estate. Second, the rules of intestacy are to some extent arbitrary (to the extent that they may not represent the wishes of an individual testator, but are default rules for the population at large). Third, the testator's own dispositions promote legal certainty. I might add that there was no finding by the judge (nor any evidence that we have seen) which would in fact lead to the conclusion that there would be a partial intestacy in any event.

33. The principle I have described is a principle of *interpretation* of wills; that is to say part of the process of ascribing a meaning to the words that the testator has actually used.

34. There is, in addition, an important difference between the interpretation of a will and the interpretation of a contract, as Lord Neuberger observed in *Marley* at [26]. In the case of a contract, where two possible meanings are advanced, the court must choose between them without recourse to evidence of the subjective intention of the parties. That is not so in the case of wills (which are, of course, unilateral documents). Section 21 of the Administration of Justice Act 1982 provides:

> "(1) This section applies to a will— (a) in so far as any part of it is meaningless; (b) in so far as the language used in any part of it is ambiguous on the face of it; (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.
>
> (2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation."

35. The three cases described in section 21 (1) have been described as "gateways". The two types of ambiguity referred to in sections 21 (1) (b) and (c) respectively seem to follow the traditional division of ambiguities into patent ambiguities and latent ambiguities. But whereas at common law evidence of intention was admissible to explain the latter kind of ambiguity, it was not admissible to explain the former. Under section 21 extrinsic evidence (including direct evidence of the testator's intention) is admissible to explain either type of ambiguity. It is not clear whether "the surrounding circumstances" in section 21 (1) (c) refer to the surrounding circumstances either at the date of execution of the will, or at the date of the testator's death, or both. I need not resolve that puzzle, because it makes no difference on the facts of this case.

36. For this purpose, a will is ambiguous if it can bear two or more meanings: *Re Williams Decd* [1985] 1 WLR 905. If it can, then the court is not forced to choose between them without also looking at the testator's subjective intention.

Surrounding circumstances other than the testator's intention

37. The surrounding circumstances (or background) include anything that would be relevant to the way in which a reasonable reader would understand the will (except evidence of subjective intention). Those circumstances include, in my judgment, the nature and location of assets which the testator had at the date when he executed the will; and (possibly) those which he had at the date of his death. They are objective facts known to the testator (and, at the date of execution of the will, the drafter of the will). In this case, the testator had substantial assets in Jersey at both dates (although not the same ones).

38. The judge admitted evidence of the "understanding" of both the testator and the drafter. Mr Saifee submitted, with considerable force, that the judge was wrong to admit this evidence when deciding whether or not the will was ambiguous. I am inclined to think that, in that respect, Mr Saifee was right: see *Stena Line Ltd v Merchant Navy Ratings Pension Fund Trustees Ltd* [2010] EWHC 1805 (Ch), [2010] Pens LR 411 at [87] to [88]; and (on appeal) [2011] EWCA Civ 543, [2011] Pens LR 223 at [52]. In any event, I find the distinction between "understanding" and "intention" an elusive one; and I would prefer to rest my decision on objective facts.

39. The judge also said that the testator's family was partly in the UK and partly not; and that his assets were partly in the UK (in the broad sense) and partly in Russia. From that he inferred that the testator was "likely to have wanted to deal with the assets according to that broad distinction". The location of the testator's family and the location of his assets are, in my judgment, legitimate objective background facts which can be taken into account in ascribing meaning to the will.

40. Having regard to the unlikelihood that the testator intended to die wholly or partially intestate, his objective intention must have been to make a will which dealt with his assets in Jersey. No other candidate for such a will has been found, apart from the one in issue on this appeal.

41. The phrase "the United Kingdom" is *capable* of including the Channel Islands, as shown by *Stoneham* and *Royal Society*. Whether it does is a question of interpretation of the particular instrument in question. Since both an inclusive interpretation and an exclusive interpretation are possible (and it is unlikely that the testator intended to die partially intestate), the will is in my judgment ambiguous in the light of surrounding circumstances (excluding evidence of the testator's intention). Nugee J reached the same conclusion, for much the same reasons, in *Royal Society* at [28]. The will is ambiguous in that sense both at the date of execution of the will and also at the date of the testator's death.

42. It follows that direct evidence of the testator's intention is admissible.

The testator's intention

43. Mr Rossiter's intention is beyond doubt. In the draft that he himself prepared he said on the one hand that it was only to deal with his UK property but, on the other hand, he intended to make specific legacies of his Jersey assets. The two are only rationally reconcilable on the basis that Mr Rossiter intended "the UK" to include Jersey.

44. I can add to that that Mr Rossiter was advised to arrange for wills dealing with his assets in "other countries". He said that that was already in progress, although there is no evidence that he made any other will dealing with his Jersey assets. The only plausible inference is that he understood and intended that the will with which we are concerned did so.

45. That conclusion is reinforced by the testator's later communications with Slater Heelis in which he himself identified the possible gap in his will which he wished to plug.

46. In *Williams* Nicholls J explained:

> "So long as that meaning is one which the word or phrase read in its context is capable of bearing, then the court may conclude that, assisted by the extrinsic evidence, that is its correct construction."

47. Applying that approach, I conclude that where the will uses the abbreviation "UK" it includes Jersey.

48. On that basis the alternative claim to rectify the will does not arise.

Result

49. It was for these reasons that I joined in the decision to dismiss the appeal.

Lord Justice Green:

50. I agree.

Lord Justice Nugee:

51. I also agree.