No: 201703792 B2
IN THE COURT OF APPEAL
CRIMINAL DIVISION

[2019] EWCA Crim 1093

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 14 June 2019

B e f o r e:

LORD JUSTICE HICKINBOTTOM

MRS JUSTICE ANDREWS
and
HIS HONOUR JUDGE MAYO
THE RECORDER OF NORTHAMPTON

R E G I N A
v
GAVIN VASIOUOS BENOS

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Mr P Cross appeared on behalf of the **Appellant**

Mr G Pons appeared on behalf of the **Crown**

J U D G M E N T
(Draft for approval)

LORD JUSTICE HICKINBOTTOM: In 2014, the Appellant Gavin Benos lived with his mother Jean Harvey at 39 Seton Avenue, South Shields ("Seton Avenue").

The family had an interest in another property in South Shields at 167 St Vincent Street ("St Vincent Street"). The long leasehold of this property was acquired by the Appellant's grandmother Kathleen Wilson and her husband John Purvis as tenants in common on 15 December 1990. It was mortgaged to the Halifax Building Society.

Mrs Wilson died on 29 November 1997. In her will dated 8 February 1991 she appointed two of her children, Christopher Neil Wilson and Deborah Kay Wilson, as her executors. The residuary beneficiaries of her estate were her four children, namely the two executors together with Lesley Karen Roberts and Robin Lee Wilson.

Mr Purvis continued to live at the property until his death on 11 April 2014. In accordance with the terms of his will, also dated 8 February 1991, the same executors were appointed and the same beneficiaries were entitled to share the whole residual estate, including his half of St Vincent Street.

On 26 August 2014, two deeds were executed in respect of the respective estates of Mrs Wilson and her husband between the executors and the residuary beneficiaries. Each deed purported to vary the disposition made in the respective will as follows:

> "That the dispositions made by the Will shall be varied and the Will shall be read and construed as if the Testator had directed his/her share in [St Vincent Street] shall be given to Gavin Benos of 39 Seton Avenue ... absolutely on condition that he discharges the outstanding Halifax mortgage":

and the account number of that mortgage was then given. The deeds were silent as to what would happen in the event that the mortgage was not discharged. As at the date of the deeds, the mortgage was in the region of £14,500. The value of the property was thought to be about £72,000. The equity in the property was therefore about £57,500.

After the death of Mr Purvis, the mortgage payments continued to be paid, apparently by Deborah Kay Wilson; although it was unclear from where the money originated.

On 1 September 2014 (less than a week after the deeds were executed), the Appellant as landlord entered into a tenancy agreement with a Jonathon Bulman in respect of St Vincent Street for 12 months commencing on 8 September 2014. The Appellant registered himself with the local authority as the landlord. He collected the rent.

On 6 November 2014, police officers attended the Seton Avenue address, where they spoke with Mrs Harvey and discovered a cannabis farm in the upstairs bedroom which consisted of a commercial grow tent containing 38 cannabis plants with appropriate lights and timers. The same day, St Vincent Street was searched and a second cannabis farm discovered. This was spread over two downstairs bedrooms. The rear room was equipped with lights, ventilation and plant grow material with about 30 plants. The front bedroom had a commercial grow tent with lamps and a ventilation system and a further 20 less established plants. The estimated yield from the plants at St Vincent Street was two and a half kilograms of skunk cannabis with a street value of nearly £13,000.

The Appellant immediately admitted his involvement in the cultivation at both properties and was charged with two counts of production of cannabis, to which he pleaded guilty at South Tyneside Magistrates' Court on 10 February 2015. He absconded for a while; but on 18 June 2015 he was sentenced by His Honour Judge Earl at Newcastle-upon-Tyne Crown Court to 2 years' imprisonment concurrent for each of the drug offences and a timetable for confiscation proceedings was fixed.

The confiscation hearing was before Judge Earl on 26 June 2017. The Appellant's benefit from his criminal conduct was agreed at £43,344.01. In respect of his assets, it was agreed that the balance of his bank account (£5,213.34) was realisable. The only other potential asset

was any interest he had in St Vincent Street.

By section 6(5) of the Proceeds of Crime Act 2002, where the court decides that an offender has benefited from criminal conduct, it must determine "the recoverable amount" and make an order requiring him to pay that amount if, and to the extent that, it would not be disproportionate to require him to do so. Section 7 provides that “the recoverable amount” is an amount equal to the offender's benefit from the conduct concerned, except if he shows that “the available amount" is less than "the recoverable amount". Section 9 defines “the available amount” to include all free property held by the offender; and section 84(2) sets out rules which apply in relation to property, including "(a) properties held by a person if he holds an interest in it" and "(f) references to an interest in relation to land in England and Wales are to any legal estate or equitable interest or power".

It was rightly common ground that the legal ownership of the property remains with the executors. The only live issue at the confiscation hearing was whether the Appellant held an equitable interest in St Vincent Street in the circumstances we have described.

Judge Earl concluded that he did. The judge considered that there was some importance in the fact that the deeds referred to "discharge" rather than "redemption" of the mortgage. He held that the discharge of the mortgage was a condition precedent for the transfer of the property, but so long as the mortgage payments were being met, that condition was satisfied. One way or another, those payments had been met. Furthermore, the Appellant was exercising all of the rights of ownership of the property. He had entered into a lease as landlord and had collected and kept all of the rents. No-one else had, for example, paid for the maintenance of the property or exercised any right of ownership to it or claimed any beneficial ownership of it. The Appellant was thus the equitable owner of St Vincent Street; and the net value of that (excluding the amount of the charge) was "available" for

the purposes of the confiscation proceedings. It seems that this second ground for concluding that the Appellant was the beneficial owner of St Vincent Street was the main focus of the argument before the judge. In any event, having found that the Appellant had that equitable interest, the judge made an order in the full amount of the agreed benefit received, namely £43,344.01.

Mr Cross, for the Appellant, submits that the judge was wrong to conclude that the Appellant had any beneficial interest in the property. He submits that the "discharge" of the mortgage was a condition precedent of the transfer, and the Appellant has not "discharged" it. The mortgagee has no rights against him, only against the estate; and so, if St Vincent Street had been transferred to him by the deeds, he would be under no obligation to repay the mortgage. He would, in effect, obtain the property without the burden of the charge. That burden would remain on the estate. That, Mr Cross submitted, could not have been the intention of the parties to the deeds. The obvious intention was that the Appellant could have the property, but only contingent upon his clearing the existing mortgage by, for example, obtaining his own mortgage and redeeming the original charge. The Appellant thus obtained no benefit from the deed unless and until he had fully discharged the current mortgage. There was no evidence that he had made any of the mortgage payments or otherwise put money into the property. In those circumstances, he had no equitable interest in St Vincent Street at all.

However, we are unpersuaded by those submissions. In our view, the issue raised turns on the true construction of the deeds. The disposition is expressly in absolute terms: the property "shall be given to [the Appellant] *absolutely*" (emphasis added). In the absence of an express intention to the contrary, any transfer of land in a will is made subject to any charge over the property (see Re Neeld Deceased (1962) Ch 643; (1962) 2 WLR 1097).

Mr Cross submitted that the clause following made that disposition subject to a condition precedent that the building society mortgage was discharged. But it is well-established that something that is expressed as a "condition" of a transfer of real property may not in substance be intended to be a condition precedent. It often simply reflects that the property once transferred will be subject to some form of charge or other burden. For example, in Re Kirk Deceased (1882) 21 Ch D 431 an express condition in respect of the transfer of a property that the devisee should relinquish a debt due to him by the testator was found to be on its true construction not a condition precedent for the transfer but was intended rather to devise the property subject to a charge for the debt. Similarly, in Re Cowley (1885) 53 LT 494, there was a condition that the devisee pay certain sums of money, which was again construed not as a condition precedent which in default caused forfeiture but as a charge on the property.

In this case, we consider that it is clear that the intention of the deeds was not to create some sort of floating condition precedent which would cause forfeiture if and when, for example, a mortgage payment was missed, perhaps in many years' time; but rather to transfer St Vincent Street subject to the mortgage charge on the land. In that clause, the deeds express what would have been implied in any event, i.e. that the transfer of the property was subject to the existing charge. The deeds require the Appellant to discharge the mortgage and, if he fails to do so, then the charge on the property remains not only in the sum owed to the building society but also, in effect, as a charge in favour of the donors if and insofar as they are pursued and suffer any loss as a result.

We consider the issue one of straightforward construction of the deeds. The reference to what happened after the equitable transfer, for example the Appellant entering into a lease for the property with Mr Bulman and taking rent, is not relevant to the outcome of the issue;

although it comes as some comfort that since the date of the deeds the Appellant has at all times acted as the equitable owner of the property and the executors/beneficiaries have not suggested that he is anything other than the equitable owner. As Mr Pons, for the Crown, today submitted, those post-deed facts evidence the true position that the Appellant from the date of the deeds had the equitable interest in the property.

In the face of the written submissions of Mr Pons on the construction issue, which were powerful and with which we essentially agree, Mr Cross belatedly drew upon a new ground upon which he submitted the judge was wrong to find the deeds effective. He referred to section 142 of the Inheritance Tax Act 1984, which provides that, where a disposition under a will is disclaimed or varied by the beneficiaries within the period of two years after a person's death and the variation instrument contains a statement that they intend the section to apply, for inheritance tax purposes that disclaimer or variation shall be treated as having been effected by the deceased. The purported variation of Mrs Wilson's will was made later than 2 years after the death of Mrs Wilson; and the neither deed of variation stated that it was intended that section 142 applied. The deeds were therefore not effective as deeds of transfer under section 142; and they could not be construed as deeds of gift by the beneficiaries because, although they expressed an intention on the part of the executors and beneficiaries that St Vincent Street be gifted to the Appellant, they contain no words of transfer.

However, we do not consider that there is force in this ground either. Section 142 is part of the inheritance tax scheme, and it simply provides for certain tax effects if a variation of a will is made within two years and the requisite formalities are met. It does not prescribe how a variation of dispositions under a will may be made, and it certainly does not prescribe exclusively how they may be made. As the deeds were made before the affairs of the

estate had been settled and the estate closed, they acted to transfer the rights in the estate that the beneficiaries had insofar as St Vincent Street was concerned. That was not as a matter of law an interest in St Vincent Street itself – for example, the debts of the estate, including liability for any tax, may have been such that the property would have to be sold and the proceeds distributed – but section 142 did not prevent the executors and beneficiaries getting together to redirect the interests that the beneficiaries had at that time to the Appellant. In the deeds to which we have referred, that is what they did.

Before us, Mr Cross added a further submission. He submitted that the deeds, if they were indeed deeds of gift, were revocable; and consequently the Appellant had no interest for the purposes of the 2002 Act at the date of the order. However, as Mr Pons emphasised, the mechanics of the 2002 Act are to value interests at a particular point in time. At the date of the order with which we were concerned, the Appellant had the benefit of the deeds to which we have referred, and the right to call for the transfer of the legal estate to him. Consequently, as at that time, we are quite satisfied that he had an equitable interest and also that that interest was properly valued by the judge at £43,000-odd. Of course, it may be – as is so often the case in such proceedings as these – that the valuation put on that interest will not be recovered in full. When the time comes and steps are taken to realise the property so as to meet the order, if it turns out that the property then cannot be sold for some reason or that the value is not as high as assessed by the judge, then an application can be made on the basis of that charge of circumstances.

Similarly, again as emphasised by Mr Pons, if the estate or beneficiaries wish to make a claim in respect of this property – which so far they have not done – then it is open to them to take steps (e.g. under section 10A of the 2002 Act) to maintain that claim. That claim may, we accept, include steps to revoke the deed of gift. Of course, we make no observations

about the merits of any such claim.

For those reasons, which we accept are somewhat different from the reasons given by Judge Earl, we consider the judge was right to conclude that the Appellant was beneficial owner of St Vincent Street subject to the charge; and was right to include the value of that interest in the available assets for the purposes of the confiscation proceedings as he did. This appeal is consequently dismissed.

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