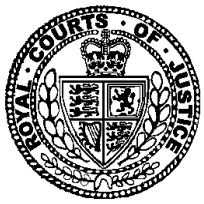

Neutral Citation Number: [2023] EWHC 3016 (Ch)

Case No: PT-2023-BRS-000001

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 29 November 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

Between :

(1) JENNY PIERCE	**Claimants**
(2) REBECCA PARKMAN	
- and -	
(1) PAUL BARTON	**Defendants**
(2) WARREN DAVID BARTON (by his litigation friend JAVIER LOVELL)	

- -
- -

John Dickinson (instructed by **Wards LLP**) for the **Claimants**
Cheryl Jones (instructed by **John Hodge Solicitors**) for the **First Defendant**
The Second Defendant did not appear and was not represented

Hearing dates: 7 September 2023

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

……

This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 29 November 2023.

HHJ Paul Matthews :

Introduction

1. This is my judgment following the trial of a claim under CPR Part 8 by the personal representatives of the estate of the late Malcolm Barton, in which the claimant sought the directions of the court in connection with the administration of the estate. At the conclusion of the trial I announced that I was satisfied that the construction contended for by the first defendant of the clause in issue of the testator's will was the correct one, but that I would give my reasons for that conclusion subsequently in writing. That meant that the claimants would have what they needed in order to administer the estate of the deceased. I also said that I would take that opportunity to give my views on a further matter concerning limitation which had also been argued before me, but the result of which could not affect the construction issue. This judgment contains the reasons for my decision on construction, and my decision on the limitation issue. I am sorry for the delay in completing this judgment, caused by pressure of work.

The claim

2. The claim form was issued on 4 January 2023, and sought the following relief:

> "1. An order that Javier Lovell of [address] be appointed as the litigation friend for Warren David Barton, the Second Defendant.
>
> 2. A direction from the Court to the Claimants as the Executrices of the Estate of Malcolm Barton ('the Deceased') as to whether or not they should issue court proceedings for:
>
> > a. A declaration as to whether or not the Legal Charge dated 17 November 2006 ('the Legal Charge') between Malcolm Barton ('the Deceased') and Elizabeth Barton as lender and the First Defendant as borrower to charge the property Flat 2, 35 Upper Church Road, Weston-super-Mare BS23 2DX ('the Property') with payment of £87,727.52 is extinguished by the operation of sections 15 and 17 of the Limitation Act 1980. And/or
> >
> > b. A declaration as to whether or not there is any contract of loan under which the First Defendant owes the Deceased the £87,727.52 sum in the Legal Charge and if so whether a claim for any sum due under the contract of loan is statute barred under section 20 of the Limitation Act 1980 or otherwise. And/or
> >
> > c. A construction summons as to the meaning and effect of clause 5 of the Will of the Deceased dated 2 November 2015 as to whether or not either (1) clause 5 is of no effect or (2) clause 5 operates so as to release the Legal Charge.
> >
> > d. A direction from the Court that the Claimants are to have their costs of issuing and conducting such proceedings in any event and on an indemnity basis and regardless of the outcome

e. A direction from the Court as to whether any other parties are to have their costs of issuing conducting such proceedings in any event and on an indemnity basis and regardless of the outcome.

3. A direction from the Court as to whether any party is to issue a claim for rectification of clause 5 of the Will by a set date and in default of the same is to be barred from bringing any such claim or raising such a claim as a defence in any possession claim or other proceedings.

4. A direction from the court in relation to any proceedings directed to be issued by the claimants under paragraph 2 above or by any party under paragraph 3 above, as to whether following the issue of proceedings either (1) the Claimant should remain neutral in the proceedings and allow the First Defendant and the Second Defendant to pursue or defend their respective positions or (2) the Claimant should assist the court by arguing the First Defendant's position by way of a representation order under CPR 19.7A or otherwise; or (3) the Claimant should take some other role in the proceedings.

5. A direction from the Court to the Claimants as the Executrices of the Estate of Malcolm Barton as to what if any steps they are to take to seek to recover the Legal Charge sum of £87,727.52 for the Estate of the Deceased against the Flat and/or from the First Defendant.

6. Further or other relief.

7. That provision may be made for the costs of this application."

3. The claim is supported by the witness statement dated 21 December 2022 of the first claimant, Jenny Pierce. Solicitors for the first defendant filed an acknowledgement of service indicating an intention to defend the claim, and seeking alternative remedies. The first defendant himself filed a witness statement on 8 February 2023. He also filed a second witness statement dated 31 August 2023. The second defendant being a minor, a certificate of suitability of Javier Lovell to act as a litigation friend for him was filed, and Mr Lovell has communicated with the other parties, but has not taken any formal part in the proceedings. Both the claimants and the first defendant have filed hearsay notices to rely on their filed evidence without calling the witnesses to give live evidence.

4. The matter came before me for directions on 10 August 2023, when I dealt with the question of the appointment of the second defendant's litigation friend, but adjourned the rest over to a later hearing. In the meantime, on 25 August 2023 the first defendant issued a further claim form seeking rectification of his late father's will. This was supported by a witness statement of his solicitor Naomi Drew, which exhibited the first defendant's evidence in this claim. The first defendant seeks the consolidation of the two claims to be dealt with together.

Background

5. The background of the matter is as follows. Malcolm Barton was born on 15 August 1945. He was married to Elizabeth Barton, who died in April 2011. They had one son, Paul, who is the first defendant. Paul in turn has had one son, Warren, the second

defendant, who was born in about 2009, and who is still therefore a minor. After his wife's death in 2011, Malcolm Barton decided that he would make his will, and contacted Wards, solicitors, to do so. At a meeting on 15 June 2011, he told them that he owned his own home in Weston-super-Mare, mortgage free. He and his late wife had also bought a flat for his son Paul to live in. This had been registered in Paul's name, but with a charge in favour of them for the purchase price of £87,727.52. The evidence was that they had done this because Paul had issues with alcohol and substance abuse, and they wanted to prevent their son from either selling or mortgaging the property to raise funds for these purposes. At this time Warren was about two years old, and Malcolm Barton was his principal carer.

6. The relevant part of the attendance note made by the solicitor from Wards who took Mr Barton's instructions reads as follows:

> "I then asked Mr Barton how his assets should be divided in his will. Mr Barton instructed me that he would like his home, 101 Silverberry Rd, to go to Warren at age 21 and he would like to relieve the charge on the flat his son is living in. Mr Barton explained that if Warren is under 21 at the time of his death he would like 101 Silverberry Rd to be let in the income paid to his son Paul until Warren reaches 21. I advised that this is quite complex, but I will look into how it can be done if he so wishes. Mr Barton said that he would consider it and let me know how the property should be dealt with. I asked Mr Barton how his cash assets should be divided. He instructed me that two thirds should go to Warren and the remaining one third to Paul."

7. Following this meeting a will was drafted for Mr Barton, and signed on 25 July 2011. This will appointed the partners in Wards as the executors. Clause 5 dealt with specific bequests. It read as follows:

> "a. I give to my son Paul Barton of Flat 2, 35 Upper Church Road, Weston-super-Mare North Somerset BS23 2DX free of all taxes Flat 2, 35 Upper Church Road, Weston-super-Mare North Somerset BS23 2DX and if this gift fails the provisions as set out in the following subparagraph shall apply.
>
> b. By substitution I give the above give to my grandson Warren David Burton subject to his surviving me and attaining 21 years of age. "

8. Malcolm Barton subsequently wished to make some changes to his will, and on 2 November 2015 he made what proved to be his last will, again with Wards. Clause 5 of the new will was, however, exactly the same as in the first one. At the time of both wills Malcolm Barton was the sole surviving registered proprietor of the charge on the flat but not the proprietor of the lease of the flat, which was registered in the name of his son Paul. Malcolm Barton died on 12 May 2019. Probate was obtained by the claimants as two partners in Wards, on 10 January 2020. The net value of his estate for probate was £283,000, which included the charge on Paul's flat with an apparent value of £88,000.

Clause 5a

9. The single problem which has led to these proceedings is the effect of clause 5a of the will. On the face of it, that subclause gives the flat to Paul, but Paul is (and was)

already the registered proprietor of the leasehold interest. On the other hand, Malcolm Barton was the registered proprietor of the *charge* over the flat. Three questions were debated before me at the hearing. The first was whether the legal charge on the flat had ceased to have any effect, because of the provisions of the Limitation Act 1980. The second question was the true construction of clause 5a of the will. In the event that the construction issue was decided against the first defendant, the third question was that of possible rectification of that subclause.

10. The first defendant's position was that his late father had intended by his will to extinguish the charge and debt on the flat and leave him with an unencumbered property. So, he said that the charge was no longer operative, and/or the clause 5a gave him the benefit of the charge, or (if it did not) the clause should be rectified so as to do so. The second defendant, by his litigation friend, as expressed in recent correspondence and on the telephone with the first defendant's solicitors, did not oppose that position. Indeed, he expressed the view that

> "it's always been the understanding since moving to Weston with Malcolm and Elizabeth Barton that the bungalow would always go to Warren Barton and the flat at upper church road Weston would always go to there son Paul."

11. The claimants' position was neutral, although they accepted that it was Wards' error in the drafting of the will that led to the litigation. Indeed, that firm had therefore given an indemnity as to reasonable costs to both defendants and to the estate of Malcolm Barton, in relation to both the original claim and the claim for rectification. However, in light of the absence of participation of the Second Defendant and his litigation friend in the proceedings, counsel for the claimants helpfully made useful submissions and brought relevant authorities to my attention so that I could be satisfied that the process was not unfair to the Second Defendant.

Construction

Modern authority

12. On the question of construction of the will, I was referred to the judgment of Lord Neuberger (with whom all the other members of the court agreed) in the decision of the Supreme Court in *Marley v Rawlings* [2015] AC 129. That was a case in which, owing to an oversight on the part of their solicitor, a husband and a wife each executed the draft will which had been prepared for the other. The question which arose was whether the will of the husband, who died after his wife, was valid. The court decided the case on the basis of rectification, rather than interpretation or construction, but Lord Neuberger made some important comments on the interpretation of wills.

13. He said this:

> "17. Until relatively recently, there were no statutory provisions relating to the proper approach to the interpretation of wills. The interpretation of wills was a matter for the courts, who, as is so often the way, tended (at least until very recently) to approach the issue detached from, and potentially differently from, the approach adopted to the interpretation of other documents.

18. During the past forty years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with *Prenn v Simmonds* [1971] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

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. In this connection, see *Prenn* at 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, per Lord Wilberforce, *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in *Rainy Sky*, per Lord Clarke at paras 21-30.

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'.

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.

22. Another example of a unilateral document which is interpreted in the same way as a contract is a patent – see the approach adopted by Lord Diplock in *Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183, 243, cited with approval, expanded, and applied in *Kirin-Amgen* at paras 27-32 by Lord Hoffmann. A notice and a patent are both documents intended by its originator to convey information, and so, too, is a will.

23. In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see eg *Theobald on Wills*, 17th edition, chapter 15 and the recent supplement supports such an approach as indicated in *RSPCA v Shoup* [2011] 1 WLR 980 at paras 22 and 31). Indeed, the well known suggestion of James LJ in *Boyes v Cook* (1880)

> 14 Ch D 53, 56, that, when interpreting a will, the court should 'place [itself] in [the testator's] arm-chair', is consistent with the approach of interpretation by reference to the factual context.
>
> 24. However, there is now a highly relevant statutory provision relating to the interpretation of wills, namely section 21 of the 1982 Act ('section 21'). Section 21 is headed 'Interpretation of wills – general rules as to evidence', and is in the following terms:
>
> > '(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.'
>
> 25. In my view, section 21(1) confirms that a will should be interpreted in the same way as a contract, a notice or a patent, namely as summarised in para 19 above. In particular, section 21(1)(c) shows that 'evidence' is admissible when construing a will, and that that includes the 'surrounding circumstances'. However, section 21(2) goes rather further. It indicates that, if one or more of the three requirements set out in section 21(1) is satisfied, then direct evidence of the testator's intention is admissible, in order to interpret the will in question.
>
> 26. Accordingly, as I see it, save where section 21(1) applies, a will is to be interpreted in the same way as any other document, but, in addition, in relation to a will, or a provision in a will, to which section 21(1) applies, it is possible to assist its interpretation by reference to evidence of the testator's actual intention (eg by reference to what he told the drafter of the will, or another person, or by what was in any notes he made or earlier drafts of the will which he may have approved or caused to be prepared)."

Older authority

14. This undoubtedly represents the modern approach to the construction of wills. But there are also earlier cases dealing specifically with the construction of gifts like this which I should mention, and which should be taken into account. The earliest such case that I was referred to is *Woodhouse v Meredith* (1816) 1 Mer 450, a decision of Sir William Grant MR. In that case the testator's will contained a devise of "all the testator's freeholder, copyhold, and leasehold messuages, farms, lands and tenements, whatsoever, and wheresoever, in the county of Hereford, and in the town of Kensington" [*ie* now in West London]. At the time of making the will, and at the time of his death, the testator had considerable freehold and leasehold estates in the county

of Hereford, but was also mortgagee in possession of certain houses and premises in Kensington. The court decided that the mortgages passed under this devise, not under a devise of the residuary estate.

15. Sir William Grant MR said (at 457):

> "It is admitted that the testator had no leasehold property, either at Kensington, or any where else in the county of Middlesex, unless these mortgaged properties are to be so considered; and it is obvious, from the nature of the limitations and provisions of the Will, that, if they are at all to pass, it is the absolute interest in them, and not the mere legal estate, that is to be considered as being disposed of. It seems very clear that the testator conceived that there was some property in the town of Kensington which he might dispose of as his own; since it is, otherwise, impossible to account for his specifying that particular place."

16. Later, he said (at 458):

> "Here … the description of 'leasehold messuages, &c,' is applicable to the mortgaged premises; and the residuary clause has other subjects on which it may operate, while, if this property is held to be included in it, there is nothing to answer some of the words of local description used in the form of clauses."

17. In the later case of *Re Lowman* [1895] 2 Ch 348, the Court of Appeal dealt with a case in which the testator had devised to trustees "all the freehold messuages, lands, tenements, and hereditaments situate in the several parishes of Crewkerne and Wayford, in the county of Somerset" which he was "seised or possessed of under or by virtue of the settlement made on the marriage of" his late niece, MF Richards. In fact, at the date of the will and at the time of his death, the testator had land at Axe, in Dorset, but no lands in either Crewkerne or Wayford. However, under the marriage settlement of his late niece he was absolutely entitled to half of *the proceeds of sale of* some lands in Crewkerne and Wayford, which were subject to an absolute trust for sale. At first instance, it was held that the testator's share of the proceeds of sale passed under a residuary request, and not under the specific devise of the lands. The Court of Appeal reversed this decision.

18. Lindley LJ said (at 354):

> "The unmistakable reference to the lands as those comprised in the settlement made on the marriage of his niece, Mrs. Richards, shews a clear intention to dispose of the property to which he was entitled under the trusts of that instrument, and, although he mistook the nature of his interest in that property, a gift of it as land, instead of as money arising from its sale, does not prevent his interest in it from passing to the person whom he clearly intended should take what he was himself entitled to under the settlement, to which he pointedly refers. What, after all, is a devise of land ? It is only a devise of such estate or interest as the devisor has in the land, and prima facie whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to shew that the testator had that particular land in his mind, and if there is nothing else to answer the description."

Lopes LJ (at 359) and Kay LJ (at 361) said words to the same effect.

19. A further case, closer on the facts to the present, was *Re Carter* [1900] 1 Ch 801, a decision of Cozens-Hardy J. By a codicil to her will, the testatrix purported to "devise … my two houses in stable in George Street, Thornaby-on-Tees, to my friend, James Dodds, of Stockton-on-Tees, in fee simple". Both at the time of the codicil and at the time of her death the testatrix was mortgagee in possession of these properties, rather than owner in fee simple. The question was whether Mr Dodds (the plaintiff in the action) became entitled to the mortgage debts or whether they fell into the residue of the estate. The judge decided for the former.

20. He said (at 802-03):

> "In my opinion the plaintiff is entitled. The testatrix was in possession of this property, and the devise was intended to pass and sufficed to pass such interest as she had, which was not that of an owner in fee, but was that of a mortgagee. This seems to me to be consistent with the decisions of Sir W. Grant in *Woodhouse* v. *Meredith* (1), and of Stuart V.-C. in *Burdus* v. *Dixon* (2), and of the Court of Appeal in *In re Lowman.* (3) In the last case Lindley L.J. (8) uses language which is singularly appropriate to the present case: 'What, after all, is a devise of land? It is only a devise of such estate or interest as the devisor has in the land, and prima facie whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to shew that the testator had that particular land in his mind, and if there is nothing else to answer the description'."

21. However, the judge went on to deal with (and dismiss) an objection based on the earlier decision of the Court of Appeal in *Re Clowes* [1893] 1 Ch 214. That was a case in which the testator, at the time he made a codicil to his will, was absolutely entitled to a freehold estate, which by that codicil he devised to a Mr Hudson. Thereafter, he sold and conveyed that estate to a purchaser, who reconveyed it to him by way of mortgage for securing part of the purchase money, which remained outstanding on that security. The testator never went into possession of the mortgaged property before he died. Mr Hudson claimed that the benefit of both the mortgage and the mortgage debt passed to him under the devise. At first instance the judge held that he was right. The Court of Appeal reversed this decision.

22. Lindley LJ (with whom Bowen and AL Smith LJJ agreed) said (at 217):

> "Suppose that when the testator made the codicil containing this devise he had not been, as he was, seised in fee as absolute owner, but had only been mortgagee, could any one say, leaving out for the present any question of the effect of the *Conveyancing Act,* 1881, that the mortgage-money would have passed under the devise ? I should say, No; notwithstanding the case of *Woodhouse* v. *Meredith* (1), which has been relied on by the Respondent. If a testator specifically devises a particular estate, which is only a mortgage estate, and not the money charged on it, the devisee is only a trustee for the persons entitled to the money; but in the case cited the testator had subjected the estate devised to special limitations in the same way as his absolute property; and the Master of the Rolls says (2): 'It is admitted that the testator had no leasehold property, either at *Kensington,* or anywhere else in the county of *Middlesex,* unless these mortgaged premises are to be so considered ; and it is obvious, from the nature of the limitations and provisions in the will, that, if they at all pass, it is

> the absolute interest in them, and not the mere legal estate, that is to be considered as being disposed of.' It would be ridiculous to say that in that case the testator was only intending to pass the legal estate."

23. In that passage, Lindley LJ was pointing out the distinction between a gift of the *interest in land* itself, and a gift of the *debt* which the interest in land secured. The general rule of construction at that time was that a gift of the interest in land (realty) did not also give the debt (personalty), but that there might be circumstances in the case which showed the intention of the testator to give not only the interest in land but *also* the debt. In *Woodhouse v Meredith*, it was the nature of the trusts and other limitations imposed by the testator on what he was giving that made it "ridiculous" to suppose that he was giving only the interest in land without the benefit of the debt.

24. The respondent also argued that, if the debt did not pass, then nothing at all passed under the devise, and "it was a fundamental rule, that if possible some meaning should be given to every clause in a will". As to that, Lindley LJ said (at 218):

> "That argument might have some force if the testator had made the codicil when he was mortgagee; but that was not so, and the contention cannot prevail".

In other words, when the testator made his will, he did own the estate, and not just a mortgage. So his intention was to give the estate, not a mere mortgage. In the present case, of course, when Malcolm Barton made his will, he was the owner of only the mortgage of the lease. He had never been the owner of the lease itself.

25. In *Re Carter*, Cozens-Hardy J dealt with *Re Clowes* in this way (at 803):

> "It will be observed that the testator was not mortgagee in possession, and the observations of the Master of the Rolls must be read with reference to the facts of that case. The position of a mortgagee in possession is peculiar. The tenants are his tenants, and he is their landlord. He treats himself as owner, and unless and until redeemed he naturally regards himself as owner. I cannot doubt that Mrs. Carter intended to give to the plaintiff all her interest in this property the rents and profits of which were being received by her, and there is no rigid rule of law which precludes me from giving effect to this intention."

26. By his reference in that passage to "the Master of the Rolls", the judge meant Lindley LJ, who at the time of the decision in *Re Clowes* was simply a Lord Justice of Appeal, but who, by the time of the decision in *Re Carter*, had indeed become the Master of the Rolls (though shortly thereafter he became a Lord of Appeal in Ordinary). At all events, in *Re Carter* the judge relied on the fact that the testatrix was, and knew that she was, mortgagee in possession, who was in the position of, and regarded herself as, the owner, so as to be able to construe the devise of the properties as including the mortgage debt. As he said, this was not a question of a rule of law, but a matter of construction.

27. Lastly, there is the decision of Danckwerts J in *Re Lory's Will Trusts* [1950] 1 All ER 349. In that case, the testator made a gift of "my St Keverne land" in Cornwall. The testator owned two farms in the parish of St Keverne, but he also owned rentcharges and a one quarter share in each of three other rentcharges issuing out of land in the

same parish. The question was whether the rentcharges passed under the same gift as the farms. The judge said (at 351D):

> "as a matter of ordinary legal language, it is clear that corporeal hereditaments, such as farms, are land. It is equally well established that incorporeal hereditaments, such as rentcharges, are also land and real property, and I see no reason why in this case I should cut down the meaning of 'land' – 'my St Keverne land' – so as to exclude any land of any nature which the testator had in that particular parish."

28. It is interesting to note that, in this case, the gift could have been given meaning without extending to the rentcharges, because there were also two farms. This contrasts with the statement made by Lindley LJ in *Re Lowman* [1895] 2 Ch 348, 354, where he had said that

> "whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to shew that the testator had that particular land in his mind, and *if there is nothing else to answer the description*" (emphasis supplied).

The decision in *Re Lory's Will Trusts* seems to me to represent a more realistic approach to the construction of wills in modern times, not trying to be too prescriptive in advance, but taking the will as a whole and setting it in the context in which the testator made it.

Discussion

29. The present case is one which concerns the lease of a flat, and a charge on that lease securing repayment of the purchase price. Strictly speaking, the lease is not realty at all, but a chattel real, a special kind of personalty. There is accordingly less reason to distinguish between a gift of the lease and a gift of a secured debt (which is also personalty). Malcolm Barton never was the owner of the lease of the flat, which was conveyed directly to Paul. Clause 5a is not on the face of it ambiguous. However, in the light of surrounding circumstances (not including evidence of the testator's intention), clause 5a *is* indeed ambiguous, and thus falls within s 21(1)(c) of the Administration of Justice Act 1982. Does it really purport to give the lease of the flat to Paul when Paul already owns it, or does it mean to give merely the *charge* (and secured debt) over the lease, which the testator did in fact own and was free to give?

30. That ambiguity means that "extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation" (under s 21(2) of the 1982 Act). Although Malcolm Barton paid the purchase price of the flat, there is no question of any (presumed) resulting trust, as the evidence was one of advancement for Paul, and even had there been no such evidence the presumption of advancement would not have been rebutted. Mr and Mrs Barton reserved to themselves a charge over the lease for the purchase price in order to protect Paul by making it in effect unmortgageable and unsaleable for the purposes of raising money which Paul could misuse.

31. Then, the evidence of the attendance note made by the solicitor taking instructions for the making of the will is indeed that Malcolm Barton wished to release that charge

(and the debt) on his own death. To construe the gift in clause 5a as a gift *of the charge and debt over the flat* to Paul achieves this object, whereas a purported gift *of the lease of the flat* would be ineffective, and (subject to any other arguments, for example concerned with limitation) leave Paul in a precarious position.

Conclusion

32. As a matter of construction, therefore, in my judgment, by this clause, Malcolm Barton intended to give the charge and debt to Paul, so that after Malcolm's own death Paul would have the absolute unencumbered ownership of the lease of the flat.

33. I add that, even if s 21 did not apply to this case, I would still have reached the same conclusion. I would have done this by ignoring extrinsic evidence of the testator's own intention, and instead looking at the words used in clause 5a, "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" (*Marley v Rawlings*, at [19]).

34. In particular, the words used to give in the will are apt to include both the charge and the debt in this context, where Malcolm Barton knew he had only a charge and that his son was the registered proprietor of the lease of the flat. It would make no sense to try to give a lease he did not own to the person who did own it. But it would make perfect sense to give the benefit of a charge and debt on the lease to the owner of the lease itself. That would advantage the owner, who was his only son, and he had provided separately for his grandson.

Limitation

Relevant facts

35. I turn now to consider the issues concerned with limitation. The legal charge was made on Form CH1 alone, without the benefit of any other document. The form has evidently not been very carefully completed, as it contains obvious mistakes. It states that it was made on 19 November 2006. It identifies the "lender" as "Malcolm Barton and Elizabeth Barton", and the "Borrower for entry on the register" as "Paul Barton". It is signed by all three of these persons. In box 8 ("Additional provisions") the following is stated:

> "The borrower acknowledges that the property stands charged with the payment of £87,727.52 capital only and that there is no interest payable on this capital sum and no interest secured by the charge".

36. There is no evidence of any other acknowledgment of either the charge or any debt secured by the charge. There is no evidence of any demand either for payment or for possession during Malcolm Barton's lifetime. Indeed, the first such demand appears to have been made by the claimants as personal representatives by letter dated 15 November 2019 and addressed to the first defendant at the property. This letter enclosed a copy of the will of 2 November 2015, and commented that the gift in clause 5a failed because the flat already belonged legally to him (the first defendant). It then says this:

> "If the estate is administered in accordance with the will the £87,727.52 needs to be repaid to the estate. You would need to repay £58,485.02. This is because two thirds of the assets in the estate are left to Warren David Barton (Warren) and one third to you after the gift of the property at 101 Silverberry Rd to Warren."

The letter concluded by advising the first defendant to take independent legal advice.

37. It will be noted that the letter of 15 November 2019, if it makes a demand for payment at all, makes it only obliquely, and certainly makes no demand for possession. Moreover, it comes just over 13 years after the charge was entered into in November 2006, which contains an acknowledgement by the first defendant of the existence of the charge. In fact, a further letter was sent dated 9 June 2020 on behalf of the claimants to Paul, referring to the earlier letter of 15 November 2019. It says of that letter:

> "It sets out in detail that the will, as it stands, requires you to repay £58,405.02 to the estate. You were advised to take independent advice."

It is not strictly accurate to say that *the will* (even "as it stands") requires Paul to pay money to the estate. If there is a liability to pay, it is because there is a debt secured by the charge. What I understand the writer to mean is that, on his view, the will does not extinguish the debt. But nothing turns on that.

Question for the court

38. On these facts, the question for the court is what effect (if any) the provisions of the Limitation Act 1980 have on the rights created or secured by the charge itself. This question breaks down into two parts. The first is what effect the 1980 Act has on any claim to the money sum. The second is what effect that Act has on any claim to possession by virtue of the charge.

Law

39. The Limitation Act 1980 relevantly provides as follows:

> "5. An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.
>
> 6. (1) Subject to subsection (3) below, section 5 of this Act shall not bar the right of action on a contract of loan to which this section applies.
>
> (2) This section applies to any contract of loan which—
>
> (a) does not provide for repayment of the debt on or before a fixed or determinable date; and
>
> (b) does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;

except where in connection with taking the loan the debtor enters into any collateral obligation to pay the amount of the debt or any part of it (as, for example, by delivering a promissory note as security for the debt) on terms which would exclude the application of this section to the contract of loan if they applied directly to repayment of the debt.

(3) Where a demand in writing for repayment of the debt under a contract of loan to which this section applies is made by or on behalf of the creditor (or, where there are joint creditors, by or on behalf of any one of them) section 5 of this Act shall thereupon apply as if the cause of action to recover the debt had accrued on the date on which the demand was made.

[…]

15. (1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

[…]

(6) Part I of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.

[…]

17. Subject to—

(a) section 18 of this Act; **…**

(b) […]

at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

[…]

20. (1) No action shall be brought to recover—

(a) any principal sum of money secured by a mortgage or other charge on property (whether real or personal); or

(b) proceeds of the sale of land;

after the expiration of twelve years from the date on which the right to receive the money accrued.

38. (1) In this Act, unless the context otherwise requires—

[…]

> "land" includes corporeal hereditaments, tithes and … any legal or equitable estate or interest therein … but except as provided above in this definition does not include any incorporeal hereditament;
>
> […]
>
> (7) References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of […] tithes, to distrain for arrears of […] tithe, and references to the bringing of such an action shall include references to the making of such an entry or distress."

40. Some points of mortgage law are well established by authority. For example, the mortgagee's right to possession of the mortgaged property arises as soon as the mortgage is made (*Four Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch. 317, 320), unless by the terms of the mortgage the right to possession depends upon the mortgagor's prior default (*Wilkinson v Hall* (1837) 3 Bing NC 508). The latter position is not that which obtains in this case. Accordingly, Mr and Mrs Barton's right to possession of the flat accrued on 12 November 2006, when the charge was executed by the first defendant. That is the date from which time is measured under section 15 of the 1980 Act, *if* the first defendant is to be treated as in possession adverse to that of the chargee.

41. As to that, I was referred to the decision of Richard Arnold QC, sitting as a deputy judge of the High Court, Chancery Division, in *Ashe v National Westminster Bank* [2007] 2 P & CR 27. In this case, a husband and wife in 1989 created a charge over the (leasehold) home in favour of the defendant bank, to secure borrowing facilities. It was in fact a second legal charge. In January 1992, the bank demanded the balance due under the facilities, and a repayment schedule was agreed. In June 1992 the bank made formal demand for the balance due. In 1993 the husband was adjudged bankrupt. The bank wrote again in 1994, 1999, and 2001, making demand. The husband replied to the 1999 demand, acknowledging receipt. The wife was taken seriously ill in 2001, and their solicitors wrote to the bank asking for enforcement to be paused. The bank took no further action at that time. In October 2004 the claimant was appointed the husband's trustee in bankruptcy.

42. In January 2006 the bank once more wrote to the husband and wife, stating that it required full repayment. The claimant responded, maintaining that the bank's claim was statute barred, and issued a claim for a declaration to that effect. The claimant's argument was that the bank's right of action had accrued either in January or in June 1992 when the bank demanded repayment. This was more than 12 years previously. Accordingly (the argument ran), the right of action was barred by section 15, and the charge had been extinguished by section 17. The bank argued that its right of action had not yet accrued. It said that the date of accrual was determined by paragraph 8 of Part 1 of Schedule 1, under which time did not run unless the occupier of land was in adverse possession, and the husband and wife were not in such adverse possession. Even if that were wrong, the bank said that the husband had acknowledged the bank's title in his letter in 1999, as did his solicitors in their letter in 2001. However, the judge agreed with the claimant, and made the declaration sought.

43. On the first issue, the judge referred to the caselaw in detail, and held that a claim by a mortgagee did not fall within paragraph 8 of Part 1 of Schedule 1, but that, if he was

wrong and it did, then for this purpose the mortgagors *were* in "adverse possession" within the meaning of that paragraph. On the second issue the judge held that neither the letter of 27 April 2001 nor the letter of 25 September 1999 amounted on its facts to an acknowledgement of the mortgage for the purposes of section 29 of the 1980 Act.

44. The matter was then taken to the Court of Appeal, which dismissed the bank's appeal: [2008] 1 WLR 710. However, the court disagreed with the view of the judge below that the claim by a mortgagee did not fall within paragraph 8 of Part 1 of Schedule 1 to the 1980 Act. Indeed, the borrowers in this case were in ordinary possession of the property, which was exclusive, and therefore *prima facie* adverse to the bank. The bank had *a right to* possession, but was not, and had never been, *in* possession. Moreover, paragraph 3 of that Schedule also applied in this case. The bank claimed to recover the property from the borrowers by virtue of an estate or interest in possession assured to it by the charge, at the date of which the chargors were in possession and the bank was not. The bank's right of action was therefore treated as having first accrued when the charge took effect, in 1989. The judge was accordingly right to grant the declaration that the bank's legal charge was extinguished by reason of the operation of sections 15 and 17 of the 1980 Act.

Discussion

45. Limitation of actions generally bars *remedies*, and does not normally extinguish *rights*. It should therefore follow that the mere fact that it is no longer possible, because of limitation, to sue for a debt should not without more mean that the rights of possession, foreclosure and so on attaching to a charge securing such a debt cease to be exercisable. This question was touched on obliquely in the same case, where Mummery LJ (with whom Hughes LJ and David Richards J agreed) said:

> "97. This decision of Buckley J [in *Cotterrell v Price*] reported at [1960] 1 WLR 1097 and a passage in his judgment at page 1102 has been treated by some as authority for the proposition that once the mortgagee's right to recover the principal sum is statute barred, he loses his status as a mortgagee and 'He can no longer sue for possession or for foreclosure, nor can he redeem a prior mortgage.' See Cheshire & Burn's Modern Law of Real Property (17th Ed) at page 764. I can see the force of this if there is no longer any enforceable debt to be secured.
>
> 98. Mr Driscoll did not rely on **Cotterell v. Price** to support a submission that the Bank's right to possession was statute barred in consequence of its concession that its right to sue for the mortgage debt was statute barred. As he pointed out it was conceded by counsel in that case that the mortgagee's remedies by action against the mortgagor under the mortgage were statute barred: see page 1100. Basing himself on that concession Buckley J concluded that the mortgagee could no longer sue for possession as his estate had come to an end and he lost his status as a mortgagee. In view of the concession there was no need for the judge to address the points arising under the Limitation Act. I do not think that **Cotterill v Price** is authority for the proposition that the right to possession is statute barred simply because the right to recover the principal debt is statute barred."

46. It is only when section 17 applies that the charge is extinguished. The right to recover land for the purposes of the Limitation Act includes the right to enter into possession

of it: see section 38(7). Therefore the chargee's right of possession under the charge *can* be extinguished in this way. The question is what happened in this case.

47. In my judgment, in the present sections 5 and 6 of the 1980 Act are irrelevant. They do not apply because there was no contract of loan between the first defendant and his parents. On the material before me, the first defendant did not agree to borrow any money from them. But the lease bought in his name was charged with the repayment of the purchase price. The position, so far as he was concerned, was similar to that which would obtain if the first defendant put up his flat as security for a loan to a third party. He would have no personal liability for the loan, but the lease would still be security for the repayment of a debt.

48. On the other hand, section 20 of the 1980 Act *does* apply. No action may be brought to recover the principal sum of money secured by a charge after the expiration of 12 years from the date on which the right to receive the money accrued. That 12-year period expired in November 2018, and the first (oblique) demand was made only in November 2019, some months after Malcolm Barton had died. The debt itself, even though not a personal liability of the first defendant, was however not thereby extinguished. Although it cannot be *sued for*, it still has other legal effects. For example, if the first defendant were to become bankrupt, the debt would still be secured on the lease, and the chargee could still take possession of the property, and the lease could be sold by the chargee in order to pay the debt.

49. But that is not the whole story. Section 17 of the 1980 Act *also* applies in the present case. Because the chargee's right to possession accrued on the date of the mortgage, and more than 12 years has elapsed since then, without any attempt (or even demand) by the chargee to take possession, or any acknowledgement by the first defendant of the chargee's right to possession, the mortgage estate has been *extinguished* by the adverse possession of the first defendant, in accordance with the decision of the Court of Appeal in *Ashe v National Westminster Bank*, discussed above.

Conclusion

50. In effect, therefore, even if by a process of construction the gift in Malcolm Barton's will to his son, the first defendant, had not taken effect as set out in the first part of this judgment, it would no longer be possible for his estate to claim repayment of the purchase price (because statute barred), or to take possession of the property in order to sell it to repay that purchase price (because the charge was extinguished). The practical result, accordingly, would be the same.