

John A. Charles

Appellant

v.

Yvette Barzey

Respondent

FROM

THE COURT OF APPEAL OF DOMINICA

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 19th December 2002

Present at the hearing:-

Lord Hoffmann
Lord Browne-Wilkinson
Lord Hope of Craighead
Lord Scott of Foscote
Sir Philip Otton

[Delivered by Lord Hoffmann]

1. The question in this appeal is the meaning of a devise in the will dated 14 April 1980 of Iris Charles, who died at Elmshall, Dominica on 11 March 1986. At the time of her death she owned several properties. Two were in Cork Street, Roseau. One was No 9, where she was living at the time of her will. The other was No 18, which was a dwelling house together with what was described in her will as an "addition" consisting of a garage and storeroom. The access to these additional premises was directly from the street and they were used by her nephew John Charles as a storeroom for the purposes of the pharmaceutical business of a company controlled by him which occupied the premises next door. Both the house at No 18 and the garage and storeroom were registered in the Register of Titles in Dominica as a single lot and held under the same certificate of title.

2. She left No 9 Cork Street to John Charles absolutely. The devise of No 18 was in these words:

"I hereby give and bequeath to my niece, Mrs Yvette Barzey my house and lot at 18 Cork Street, Roseau, Dominica. The addition to the house where the garage and storeroom is located I give to my nephew Mr John A. Charles to be used by him as long as he wishes."

3. Mrs Barzey is the sister of Mr John Charles. She claimed that upon the true construction of the will, she took an unencumbered freehold interest in the whole registered title and that Mr John Charles took nothing. On 11 November 1998 she issued an originating summons in which she sought a declaration to this effect and an order that she be registered with an unencumbered title.

4. The application came before Einfeld J on 12 March 1999. He held that clause 4 meant that Mrs Barzey was to take the fee simple in No. 18 subject to a life interest in the garage and storeroom given to Mr Charles. Mrs Barzey appealed to the Court of Appeal, which on 13 September 1999 allowed the appeal. The Court gave a brief judgment:

"In this appeal we see no difference in facts between *Da Costa* [*Da Costa v Warburton* (1971) 17 WIR 334] and this case. The user of the garage and the storeroom is repugnant to the bequest to the appellant."

5. Mr Charles was entitled as of right to appeal against this decision to Her Majesty in Council but for reasons into which it is now unnecessary for their Lordships to enter, did not exercise this right in time. But on 5 July 2001 he was granted special leave to appeal and did so. He was represented before the Board by Mr Steinfeld QC and Mr Lenworth Johnson. Mrs Barzey was unfortunately not represented; she wrote to the Registrar saying that she could not afford to instruct counsel. Mr Steinfeld has however referred the Board to the authority upon which the Court of Appeal relied and their Lordships consider that all the points that might have

been made on Mrs Barzey's behalf have been put before them.

6. The interpretation of a will is in principle no different from that of any other communication. The question is what a reasonable person, possessed of all the background knowledge which the testatrix might reasonably have been expected to have, would have understood the testatrix to have meant by the words which she used. Furthermore, as Lord Greene MR said in *In re Potter's Will Trusts* [1944] Ch 70, 77:

"It is a fundamental rule in the interpretation of wills that effect must be given, so far as possible, to the words which the testator has used. It is equally fundamental that apparent inconsistencies must, so far as possible, be reconciled, and that it is only when reconciliation is impossible that a recalcitrant provision must be rejected. Even in that case, of two irreconcilable provisions, it is the later that prevails, but in the present case there is no need to have recourse to this rule of despair."

7. Their Lordships think, as did Einfeld J, that there cannot really be any doubt about what the testatrix meant. She intended Mrs Barzey to take No 18, subject to the right of Mr Charles to use the garage and storeroom for as long as he wished; an interest which the law will classify as a life interest: compare *Coward v Larkman* (1888) 60 LT 1 (HL). Admittedly she could have made it even clearer by using words like "Except that" before the second sentence of the devise. But that was obviously her intention. It is supported by the background, which was that the garage and storeroom had for many years been used in connection with the pharmacy next door and not with the house.

8. The arguments against giving effect to the evident intention of the testatrix are two. First, reliance was placed upon section 29 of the Wills Act (Laws of Dominica, C 9:01):

"Where any real estate is devised to any person without any words of limitation,

the devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in the real estate, unless a contrary intention appears by the will."

9. This provision, which reproduces section 28 of the English Wills Act 1837, reversed the old common law rule that in the absence of words of limitation (such as "and his heirs" or "in fee simple") a devise was construed as passing only a life interest. Today, the omission of words of limitation does not prevent the fee simple from passing unless the will shows a contrary intention.

10. But their Lordships consider that this provision has no relevance in the present case. There is no dispute that the gift of No 18 to Mrs Barzey was in fee simple. No one suggests that it was merely a life interest. The question is whether her fee simple was subject to a life interest in favour of Mr Charles. But on this question section 29 of the Dominican Wills Act has nothing to say, one way or the other. It says that the gift shall be presumed to be in fee simple but does not say whether it is to be in possession or remainder. That must be established from the other provisions of the will. The problem would have been exactly the same if the devise to Mrs Barzey had contained words of limitation, eg "I hereby give and bequeath to my niece Mrs Barzey *and her heirs*, my house etc." The question can only be answered by construing the devise as a whole.

11. The second argument relies upon the doctrine of repugnant conditions, as discussed by the Court of Appeal in *Da Costa v Warburton* (1971) 17 WIR 334. This doctrine is based upon the proposition that there are certain forms of disposition which the law will not allow. For example, a gift which might vest more than 21 years after the death of a life in being was void at common law because it was considered contrary to public policy to allow gifts to take effect at remote dates in the future. A provision for

the divesting of property on bankruptcy is void because contrary to the policy of the bankruptcy law. Then there are dispositions which the law of property simply cannot accommodate. There are a limited number of interests which can exist as interests in property and attempts to create interests unknown to the law are ineffectual. Thus a gift of land in fee simple subject to a condition that it shall not be alienated passes an unconditional fee simple. The condition is void because the law does not recognise such an interest as an inalienable fee simple. Another way of making the same point is to say that such a condition is repugnant to the nature of a fee simple.

12. These rules, of which many other examples could be given, are not rules of construction. They are substantive rules of public policy which prohibit certain kinds of dispositions or the imposition of certain kinds of conditions. In principle, the application of these rules of public policy comes after the question of construction. One first ascertains the intention of the testator and then decides whether it can be given effect. But nowadays the existence of the rules of public policy may influence the question of construction. If the testator's words can be construed in two different ways, one of which is valid and the other void, then unless the testator obviously did not intend to make the kind of gift which would be valid, the court will usually be inclined to construe his will in that sense. The theory of the old rule against perpetuities was that construction was "remorseless": one construed the will as if there was no rule against perpetuities and then, if the gift offended, held it void. See *Gray, The Rules Against Perpetuities* (4th ed 1962 para 629).

But that kind of construction is now out of date.

13. In *Da Costa's* case the testator appointed his wife Josephine his executrix and left her his house. So far, so good. That looked like a gift of the fee simple. But then further on he said "I direct my said Executor Josephine ... that in the event of her selling [the house] she must give to my grandchildren

by my daughter Thelma Kenny one quarter of the proceeds". And then he added "I direct that ... in the event of the decease of my wife ... Josephine ... before the property mentioned above is sold, the said property shall revert to my grandchildren".

14. This will made the intentions of the testator perfectly clear. He had said exactly what he wanted to happen if the property was (a) sold before Josephine's death or (b) remained unsold at her death. In the first case, she could keep 75% of the proceeds but had to give 25% to the grandchildren. In the second, the property went to the grandchildren. In either case, she could use and enjoy the property until it was sold or she died. The question was whether the law of property could give effect to such an intention.

15. The difficulty was that the provisions in favour of the grandchildren were inconsistent with Josephine taking the fee simple. If you have the fee simple and sell the property, you keep the proceeds for yourself. You do not have to give a quarter to someone else. Likewise, when you die, it passes to your estate, or under the old law, to your heirs. That is why the old words of limitation were "to X and his heirs". It does not automatically pass to someone else. The only way in which Josephine could have a fee simple was if the interests given to the grandchildren could be classified as lesser interests known to the law which could be carved out of the fee simple. But they obviously could not. The interest which the grandchildren were intended to take on Josephine's death was also a fee simple. But one could not have two fees simple of the same house. The disposition would work only if one went back to the will and said that, despite the Jamaican equivalent of section 29 of the Wills Act, the gift to the grandchildren showed that Josephine was really intended to take only a life interest, with remainder to the grandchildren. That would still leave a puzzle about how to classify the interests of Josephine and the grandchildren if she sold the property. A sale would give her the right to 75% of the

capital, instead of the income interest she would have had as a life tenant, and the grandchildren would have been immediately entitled to 25%, instead of it being subject to Josephine's life interest. One might be able to do that kind of thing by conferring powers under a trust but it did not look like any recognisable interest in real property.

16. The Court of Appeal said that the devise to Josephine was a gift of the fee simple and that the attempt to give interests to the grandchildren were void because they could not exist in law consistently with Josephine having the fee simple. It refused to construe the will as creating a trust because it said it could find no intention to do so.

17. Their Lordships do not think it profitable to express any view on whether *Da Costa's* case was rightly decided. It was a decision on a homemade will containing unusual dispositions. It may be that with more ingenuity the testator's intentions could have been accommodated within the concepts of the law of property. But their Lordships respectfully disagree with the Court of Appeal's opinion that it governs the present case. There is absolutely no difficulty about accommodating Iris Charles's intentions within ordinary property concepts. A gift of the fee simple in remainder, subject to a prior life interest in the whole or part of the property in favour of someone else, is an extremely common form of disposition. In their Lordships' opinion the Court of Appeal did not heed the warning of Smith JA in *Da Costa's* case (at p. 339):

"One has to be careful here of arguing in a circle. It seems to me that any direction in a will which has the effect of cutting down a prima facie fee simple estate created by section 23 [of the Jamaican Act, equivalent to section 29 of the Dominican Act] can properly be said to be repugnant to that estate. But such a direction is not necessarily void for repugnancy. Take a case where a testator says: 'I give my property at Billy Dunn to my wife'. This is followed by other bequests and devises. Then the will says: 'on the death of my wife my

property at Billy Dunn shall go to my son John and his heirs'. Surely, this last devise is repugnant to the prima facie fee simple created by section 23 in the wife's favour! But it nevertheless shows a contrary intention and the wife gets a life interest only ... In other words, it must first be established that an absolute interest has been created before the question of repugnant conditions can arise."

18. The present case is even simpler because the reconciliation of the two gifts does not require any revision of the prima facie fee simple given to Mrs Barzey. The gift of a life interest in part of the premises to Mr Charles merely shows that, in respect of that part of the property, her fee simple is to take effect in remainder. That is something which presents no difficulty linguistically, conceptually or as a matter of public policy. Their Lordships accordingly allow the appeal and restore the judgment of Einfeld J. As the proceedings were commenced by Mrs Barzey and it was she who appealed to the Court of Appeal, she must also pay the costs in the Court of Appeal and before their Lordships' Board.