Malone v Russell and others (No 4/1967)

Court of Appeal, Civil Side
Sinclair P., Bourke and Hallinan, JJ.
26th June 1967

Will – Construction – Intention of the testator – Whether a devise to the sole use and possession of the beneficiary operates as a life interest – Whether a devise which makes reference to particular objects on the land limits area of land in the devise.

The testator, the owner of a tract of land comprising 4.05 acres, bequeathed to his children "to their sole use and to their possession that lot of land at a place known as Brooklyn, over with fruit trees together with all the houses buildings and improvements thereon." The trial judge ruled that the beneficiaries received an absolute interest in the entire tract of land. The adverse claimant appealed.

Held:
Dismissing the appeal:

(1) That in gathering the intention of the testator from the terms of the will as a whole the words therein should be construed so as to pass the absolute ownership of the whole tract of land to the devisees under the will without any limitation. *Coward v Larkman* (1889) 60 LT 1 distinguished.

(2) That the reference to certain objects on the land did not limit the area of land that should pass under the will but was only intended to emphasize that they were included in the devise.

Cases referred to in judgments:
Bovill, Re, Marshall & Duffin v Bovill [1957] NILR 58.
Coward Re, Coward v Larkman (1889) 60 LT 1, HL.
Egan, Re, Mills v Penton (1889) 1 Ch D 688.
McGonigle v McGonigle [1910] 1 IR 297.
Willis, Re, Spencer v Willis [1911] 2 Ch 563.

Cyril S. S. Fountain for the appellant.
Colin Callender for the respondents.

26th June 1967. The following judgments were delivered.

SINCLAIR, P.:
This appeal concerns the construction of the will of David Russell who died on 28th February 1903 and in particular the following clause:

> "I give devise and bequeath to my daughter Susan Ann Russell and my son William Alonzo Russell to their sole use, and to their possession that lot of land at a place known as Brooklyn, over with fruit trees together with all the houses outhouses buildings and improvements thereon And further that whatever maybe in and about the premises at the time of my decease either real or personal property, I give and bequeath to my two children above named."

The will is dated 18th October 1901. The testator was the owner of a tract of land comprising 4.05 acres known as "Brooklyn" as shown on a plan filed in the action.

Two questions arise in the appeal. First, did the devise to the two children of the testator of "that lot of land at a place known as Brooklyn, over with fruit trees together with all the houses outhouses buildings and improvements thereon" pass the absolute ownership to them or only a life interest? Second, was it a devise of the whole tract of land known as "Brooklyn" or only of that part of the tract defined or marked out by houses and fruit trees as occupied by the testator? The learned judge held that the testator made an absolute devise to the two children without limitation and that the intention of the testator was to devise the whole "Brooklyn" tract.

I shall deal first with the question whether the devise passed the absolute ownership of the land to the two children or only a life interest therein. At the outset I would express my agreement with the observation of the learned judge that the will "was obviously drawn by someone with a legalistic turn of mind and the complications in construing the document are due to the use of legal jargon and expressions scattered somewhat haphazardly throughout and thus making it difficult to ascertain the real intentions of the testator." As I have understood the submission of counsel for the appellant it is that the words "to their sole use and to their possession" are legal terms of art the legal effect of which was to pass only a life interest in the property and that that legal effect must be given to the words whatever the real intention of the testator may have been.

Counsel first referred us to section 28 of the Wills Act (cap 164) which reads:

> "Where any Real Estate shall be devised to any Person without any Words of Limitation, such 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 such Real Estate, unless a contrary Intention shall appear by the Will."

He also referred to, and relied on, rule XVII of the general rules of construction as formulated in *Jarman on Wills* (8th edn, 1951) vol 3, p 2070, as follows:

> "That, where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary."

Finally, he relied in the decision of the House of Lords, in *Re Coward, Coward v Larkman* (1889) 60 LT 1, in which it was held that a bequest of use and

occupation of certain real property passed only an estate for life.

Re Coward, Coward v Larkman was a majority decision on that particular point, Lord Watson and Lord Fitzgerald supporting that construction, and Lord Halsbury, LC, dissenting. The clause in question reads:

> "I also desire that my said wife shall have the free use and occupation of my said house called Elmsleigh aforesaid. I direct that an inventory of such furniture and effects may be made and kept therewith."

In the first place I would observe that, to my mind, the words used in the present case, "to their sole use and to their possession," are of wider import than the words "free use and occupation." "Possession" can connote ownership. In the second place, it is, I think, clear, that Lord Watson and Lord Fitzgerald did not construe the words "use and occupation" as terms of art, but came to their conclusion that the testator intended to give only an estate for life to the widow on a consideration of the terms of the will as a whole, there being indications in other parts of the will that that was the intention of the testator. Lord Fitzgerald said, for instance (at 5):

> "I am of opinion that the testator did not intend to give that property which he earlier describes as 'my own freehold private residence called Elmsleigh' to his widow absolutely. I desire to say that I express that opinion upon the peculiar context of the will only, and without intending to bind myself to any abstract propositions. The will is peculiar."

and later:

> "On the construction of this particular and peculiar will, and going no further, I concur in the judgment of the Court of Appeal."

I do not think, therefore, that this decision is authority for counsel's submission that the words "to their sole use, and to their possession" used in the present case must be construed as giving the two children only an estate for life. They must be construed in the context of the terms of the will as a whole.

Unlike the will which was being considered in *Re Coward, Coward v Larkman*, there are indications in the will in the present case that the testator intended to give "Brooklyn" to the two children absolutely without any limitation. Those indications are referred to by the learned judge in his judgment and I propose to consider only some of them. The testator dealt with the residue of his estate thus:

> "The residue of my estate, real or personal or mixed of which I shall die possessed, I give and bequeath to and to be equally divided between my children viz. David Russell William Alonzo Russell, Richard Carrigan Russell, George Cleophas Russell, Susan Ann Russell, and Joseph Newton Russell, to their use. And I also leave half share equal with my children to my two Grand Children namely Susan Eliza Jane Russell one half share and John Thomas Ezekiah Russell one half share to their use. But not to sell until they are at the age of twenty years."

If the same meaning is to be given to the words "to their use" in those clauses as is sought to be given to them in the clause relating to "Brooklyn", namely that they limit the devise to that of an estate for life, then there would be an intestacy as to the reversion of the residuary estate. It is most unlikely that that could have been the intention of the testator. Furthermore, the limitation imposed on the grandchildren in the second clause that they were not to sell until they reached the age of twenty years clearly indicates an absolute devise, subject only to that limitation. They could not sell unless they had an absolute interest. The general rule is that words occurring more than once in a will shall be presumed to be used always in the same sense unless a contrary intention appear by the context. In my view, a contrary intention does not appear in the clause relating to "Brooklyn." The addition of the words "and to their possession," far from limiting the absolute gift, was intended to emphasise the exclusive ownership that was being given to the two beneficiaries. I am therefore in agreement with the learned judge that the intention of the testator, gathered from the terms of the will as a whole, was to make an absolute devise of "Brooklyn" to Susan Ann Russell and William Alonzo Russell without any limitation.

I turn now to the other question raised in the appeal, namely whether it was the intention of the testator to devise the whole of the "Brooklyn" tract to Susan Ann Russell and William Alonzo Russell or only that part defined and marked out by houses and fruit trees as occupied by the testator. The learned judge gave cogent reasons for his conclusion that it was the intention of the testator to devise the whole of the "Brooklyn" tract comprising 4.05 acres. I am in complete agreement with those reasons and there is little that I can add to them. I cannot agree with the contention of counsel for the appellant that the use of the word "lot" connotes something less than the whole tract. If the testator intended to devise only a portion of "Brooklyn" it is, indeed, strange that when he devised only a part of the "Sturds Bay" tract he defined the boundaries. The relevant clause reads:

> "I give and bequeath to my son William Alonzo Russell a lot of land at Sturds Bay at the South end of Bay One hundred feet from the sea on the West by the sea running to the tract to the North one hundred feet bound by part of the same tract running from the tract on the north to the South end of the said Sturds Bay."

The land comprised within those boundaries is considerably less than the whole of the "Sturds Bay" tract. Even in the evidence the area comprising the fruit trees on "Brooklyn" was not defined. It is true that there was evidence

that the fruit trees were on the eastern portion of the land and that they extended some 150 to 200 feet westwards from the eastern boundary; but there was no indication of the boundaries to the north and south. I can find no good grounds for thinking that the testator intended to devise anything less than the whole of the "Brooklyn" tract. The words he used are clearly sufficient to comprise the whole tract and I think the reference to the fruit trees, houses etc. was intended only to emphasise that they were included in the devise.

I agree, therefore, with the conclusions of the learned judge and would dismiss the appeal with costs.

BOURKE, J.:
I agree. In construing the will so as to give effect to the testator's actual wishes I do not think that the word "possession" was intended to be used as a term of art; or that it should properly be accorded the limiting effect held to abide in the employment of the word "occupation" in the circumstances of *Re Coward, Coward v Larkman* (1889) 60 LT 1. The words "to their sole use and possession" do not appear to have occurred in any case previously adjudicated upon. No criticism has been levelled at the conclusion of the learned trial judge that they have sprung from that familiar source of danger to the correct expression of real intentions, the mind of the layman obfuscated by a smattering of legal terms of which the import is inadequately appreciated. Cunningham Smith, J. has referred in his judgment, with what is surely telling effect, to the definition of "possession" as given in Stroud's Dictionary. The exposition referred to is taken from the judgment of Stirling, J. in *Re Egan, Mills v Penton* (1889) 1 Ch D 688. In that case the testatrix, who died in 1892, by her will, dated in 1891, after making certain bequests of sums of stock, declared as follows: "Any money not mentioned in the aforesaid bequests that may be in my possession at my death after the payment of my debts funeral and testamentary expenses I give absolutely" to P. She then made certain specific gifts of chattels. At her death she was entitled to a reversionary interest in personalty which fell into possession in 1897. It was held that the reversionary interest passed under the bequest to P. It was contended for the next of kin that the court ought not to hold that the reversionary interests which were the subject matter of the application passed under this gift of "money." In his judgment Stirling, J. said (at 691):

> "Now, no doubt lawyers know the difference between an interest which is in possession and one which is in reversion; but the ordinary layman does not use the word 'possession' with reference to that distinction. The first meaning which is found for the word 'possession' in Johnson's Dictionary is this: 'The state of owning or having in one's hands or power property,' and that, with, in some cases, slight modifications has been repeated in every other dictionary which I have been able to consult. I think that the fine distinction between such words as 'possession', 'property' and 'ownership' is not one which would be present to the mind of a layman, and I do not think that the words 'in my possession' were used by the testatrix with reference to the distinction which lawyers draw between interests in possession and in reversion. I think the true view is that by this gift the testatrix intended to dispose of her whole personal estate which is not specifically given."

So, in the present case, I do not think that the word "possession" was used by the testator for the purpose of attaching a limitation to the rights over the property given under the will. I think that the intention was to pass on the full ownership, to give an absolute devise.

As to the submission that it was the testator's intention as disclosed by the will to pass some particular area of this small plot of 4.05 acres marked out by fruit trees and houses, I see no reason to attempt to analyse the terms of the testament further than has been done by Sinclair, P. I do, however, wish to refer to another case as further illustration of this, that courts will not tend towards giving a narrow or cheeseparing construction to words and expressions when they are such as to render necessary the endeavour to ascertain the true intention of a testator. In *Re Bovill, Marshall & Duffin v Bovill* [1957] NILR 58, there was a specific devise of "my farm on which I reside together with all stock, crop, farming implements, and household furniture." The testator owned at his death three holdings registered in three different folios pursuant to the Registration of Title (Ireland) Act 1891, all of which were worked together as one farm during his lifetime and on one of which was the dwelling-house in which he resided. The three holdings were contiguous except for a small portion of one which was separated from the rest of the land registered on the same folio, and some strips of bogland in an adjoining townland. The question was whether the gift of the "farm on which I reside" applied only to the holding on which the dwelling-house was situated or whether it carried the three holdings that had been worked as one farm.

It was held that the intention was to give all the holdings of land, reference being made to *McGonigle v McGonigle* [1910] IR 297, where two holdings passed under "farm", and *Re Willis, Spencer v Willis* [1911] 2 Ch 563, on the meaning of the words "on which I now reside."

HALLINAN, J.:
I concur.

Appeal dismissed.