Privy Council Appeal No 21 of 2007

(1) Jean Claude Sammut
(2) Winston Sammut
(3) Pamela Gleeson
(4) Arlette Waitzer

Appellants

v.

(1) Vincent Manzi Jr.
(2) Gregory Cotiss
as trustees of the Estate of Raymond Adams
(3) Robert Adams
(4) Ruby Adams

Respondents

FROM

THE COURT OF APPEAL OF

THE BAHAMAS

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

Delivered the 4th December 2008

Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Hope of Craighead
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell

[2008] UKPC 58

*[Delivered by **Lord Phillips of Worth Matravers**]*

Introduction

1. On 29 February 2004 Raymond Adams ("the testator") died in the Bahamas, aged 73. He died a very wealthy man; his executors estimated the value of his estate at US $30 million. This appeal raises an issue as to the construction of the will that he made, less than a year before his death, on 18 June 2003. The will was admitted to probate in the Bahamas Probate Registry on 27 July 2004. The dispute relates to Clause 6(ii) of the will, but it is helpful to set out Clauses 6 and 7 in their entirety, so that the provisions in issue can be considered in their context:

> 6. **I HEREBY GIVE DEVISE AND BEQUEATH** all of my real and personal property whatsoever and wheresoever situate (hereinafter referred to as "my Estate") to the following persons in the following shares:
>
> (i) The first share representing Fifty percent (50%) of my Estate to my son, Robert Adams (hereinafter called "Robert"), of the Town of Vaughan in the Province of Ontario in Canada, as to the realty in fee simple and as to the personalty absolutely. If Robert shall predecease me or fail to survive me for a period of Fourteen (14) days, the share to which he is entitled shall be paid to his issue (which, as at the date of this my Last Will and Testament, consists solely of my granddaughter, Michelle Adams) and, if there shall be more than one of such issue, then among all of such issue in equal shares per stirpes.
>
> (ii) The second share representing Twenty-Five percent (25%) of my Estate to:
>
> a. my cousins Arlette Weitzer (hereinafter called "Arlette") of the State of Victoria in Australia, Pamela Gleeson (hereinafter called "Pamela") also of the said State of Victoria, Winston Sammut (hereinafter called "Winston") of the State of New South Wales also in Australia and Jean Claude Sammut (hereinafter called "Jean Claude") also of the said State of New South Wales; and

b. my ex-spouse Ruby Adams (hereinafter called "Ruby") now of Woodbridge in the Province of Ontario in Canada,

in equal shares as to the realty in fee simple and as to the personalty absolutely. If any of Arlette, Pamela, Winston, Jean Claude and/or Ruby shall predecease me or shall fail to survive me for a period of Fourteen (14) days, the share to which that individual is entitled shall be paid, transferred or applied to the living heirs of the deceased individual (and, if there shall be more than one such living heir, then among all of such living heirs in equal shares, per stirpes). If the deceased individual shall leave no issue surviving him or her, the share of that deceased individual shall be paid, transferred or applied to the surviving beneficiaries named in this sub-clause 6(ii) in equal shares and, if there shall be more than one such surviving beneficiary, then among all such surviving beneficiaries in equal shares per stirpes;

(iii) The third share representing Five percent (5%) of my Estate to my friend, Dr Bert Manning (hereinafter called "Dr. Manning"), of the Town of Brampton in the Province of Ontario in Canada, as to the realty in fee simple and as to the personalty absolutely. If Dr. Manning shall predecease me or fail to survive me for Fourteen (14) days, the share to which he is entitled shall be paid to his living heirs (and, if there shall be more than one such living heir, then among all of such living heirs in equal shares, per stirpes);

(iv) The fourth share representing Five percent (5%) of my Estate to my friend and Co-Executor Vincent C. Manzi, Jr (hereinafter called "Vincent"), of the Town of West Newbury in the State of Massachusetts, as to the realty in fee simple and as to the personalty absolutely. If Vincent shall predecease me or fail to survive me for Fourteen (14) days, the share to which he is entitled shall be paid to his living heirs (and, if there shall be more than one such living heir, then among all of such living heirs in equal shares, per stirpes); and

(v) The fifth and final share representing Fifteen percent (15%) of my Estate to my friend, Dr Tyrone David (hereinafter called "Dr. David"), of the City of Toronto in the Province of Ontario in Cananda, as to the realty in fee simple and as to the personalty absolutely. If Dr. David shall predecease me or fail to survive me for Fourteen (14) days, the share to which he is entitled shall be paid to his living heirs (and, if there shall be more than one such living heir, then among all of such living heirs in equal shares, per stirpes).

7. **I HEREBY DIRECT** that if any beneficiary named under the provisions of Clause 6 of this my Last Will and Testament shall challenge the same or any of the gifts made hereunder, the gift to that individual shall lapse and shall be paid, transferred or applied to the person or persons entitled in default of the individual challenging this my Last Will and Testament and if there shall be no such person entitled in default, then to the remaining beneficiaries (and, if there shall be more than one such remaining beneficiary, then among all of such remaining beneficiaries in equal shares per stirpes).

2. The appellants are the four beneficiaries named in clause 6(ii)(a) ("the cousins") . They are the testator's first cousins, being the children of two sisters of his mother. The first and second respondents are the executors of the will. The third respondent is Mr Adams' only child, his son Robert, who is the beneficiary named in clause 6(i). The fourth respondent is the testator's ex-wife ("Ruby"), the beneficiary named in clause 6(ii)(b). She is Robert's mother. She was divorced from the testator in 1989, at which time he entered into a settlement agreement with her under which he paid her approximately US $5 million and transferred to her realty and other assets.

3. The issue of construction, raised initially on an Originating Summons, relates to the manner in which the second share of 25% of the testator's estate falls to be apportioned between the five beneficiaries named in clause 6(ii). Does it fall to be apportioned in equal shares between all five beneficiaries, so that each takes 5%, or does it fall to be apportioned into two equal portions, one to be shared by the four cousins and the other to be received by Ruby, so that each cousin receives 3.125% and Ruby receives 12.5%?

The approach to construction

4. The starting point when construing any will is to attempt to deduce the intention of the testator by giving the words of the will the meaning that they naturally bear, having regard to the contents of the will as a whole. Sometimes it is legitimate to have regard to extrinsic evidence in order to show that words used had a special meaning to the testator, but it has not been suggested that this is such a case.

5. Extrinsic evidence of the testator's intention may also be admissible to resolve uncertainty or ambiguity. On 10 November 2004 Mr Manzi, the first respondent, wrote to Mr Jean Claude Sammut, one of the cousins, notifying him that he had a beneficial interest in "five percent (5%) of the residuary estate". Mr Holbech, for the appellants, submitted that this was admissible extrinsic evidence of the testator's intention. Their Lordships do not consider that any significance can be attached to the terms of that letter. There is nothing to suggest that they represented anything more than Mr Manzi's own understanding of the true construction of clause 6(ii).

6. There were placed before their Lordships no less than 17 decided cases, some of which involved decisions on wording that bore some similarity with that used in the present case. Little assistance in construing a will is likely to be gained by consideration of how other judges have interpreted similar wording in other cases. Counsel rightly recognised that the starting point must be to look at the natural meaning of the wording of the will to be construed without reference to other decisions or to prima facie principles of construction.

The decisions below

7. The decision at first instance was delivered by Sir Burton Hall CJ on 14 December 2005. His judgment reproduced the will in its original formatting, an example which has been adopted by their Lordships. The Chief Justice remarked that the will appeared to have been prepared by means of a modern word-processor computer program and commented that he considered it important to note how the will had been formatted. Mr Bompas QC, for the respondents, supported this approach and placed before us the decision of the House of Lords in *Houston v Burns* [1918] AC 337 to demonstrate that it was appropriate. In that case their Lordships attached significance to the punctuation of the will when construing it. Lord Shaw of Dumferline remarked at p. 348:

> "Punctuation is a rational part of English composition, and is sometimes significantly employed. I see no reason for depriving legal documents of such significance as attaches to punctuation in other writings."

8. That case concerned a will that was written in 1894, no doubt in manuscript. Their Lordships would not consider it safe in this case to attach significance to the formatting achieved by a word processor that may well have been operated by a secretary. More pertinently they have not been able to derive significance from the precise lay-out of the words used nor, despite Mr Bompas' invitation, from the use of a semi-colon in the last line of clause 6(ii)(a).

9. The Chief Justice also attached significance to the subdivision of clause 6(ii) into paragraphs "a" and "b". His conclusion appears in the following passages of his judgment:

> "12. I find instructive the approach taken by Harman J in *Parker v Knight*, (the headnote of which reads:
>
> 'By her will the testatrix disposed of her estate in the following terms: "I leave to my sister M B P half of my estate - £100 to E P; the remainder to be divided equally between my youngest sister M, and my niece I and her children." The testatrix left surviving her three sisters, the said M B P and M, and one other, whose only child was the niece I.
>
> *Held*, that the prima facie rule of construction whereby the division would be per capita was easily displaced and in the present case there were sufficient circumstances and context to displace it. The sister M was entitled to a one half share of the residuary estate, and the niece and her children to the other half share. The reconciling principle to be gathered from the authorities was that cases of stirpital distribution were cases of family distribution, and cases of capital distribution were cases not of family distribution.)'
> At 439 to 440:
>
> 'The right way to approach the question is to read the will first without reference to authorities; and then to see whether the conclusion at which one has arrived is in any way affected by the authorities.'
>
> 13. In this case, I am of the view that the manner in which clause 6(ii) was drawn was intended to distribute the 25 percent of the estate between the cousins as one class distinct

> from Ruby. It was a distribution per stirpes and not per capita and Ruby, therefore, is entitled to 12½ percent of the estate, not 5 percent."

10. The Court of Appeal, in their judgment delivered on 22 February 2007, also referred to *Parker v Knight* [1948] Ch 437. They upheld the Chief Justice for the following reasons:

> "16. Upon reading the will it seemed to us that it was not the intention of the testator that his ex-spouse, Ruby Adams, and his cousins listed in clause 6 (ii) (a) should share the twenty five percent (25%) of the estate equally, that is to say each to take five percent (5%) of the estate. This was manifested by the fact that he placed her in clause 6 (ii) (b) on her own separately from his cousins. 17. We would also add that in the list of names five lines from the bottom of page 3 of the will, Ruby Adams' name was preceded not by "and" but by "and/or."
>
> 18. It seemed to us that the above evidence operated to tilt the scale in favour of a per stirpes distribution as opposed to a per capita distribution."

11. The judgments of the Chief Justice and of the Court of Appeal were based essentially on their conclusions of the natural meaning of clause 6(ii). Each court commended the approach of considering the wording of the will without initial reference to authority. Their Lordships have adopted that approach, but for the following reasons it has led them to a different conclusion from that reached by the courts below.

First impression

12. The first impression made by the wording of clause 6(ii) on each of their Lordships was the same. The provision "I HEREBY GIVE DEVISE AND BEQUEATH all of my real and personal property …to the following persons in the following shares" followed by the individual five names in clause 6(ii) followed by "in equal shares as to the realty in fee simple and as to the personalty absolutely" conveyed to their Lordships the natural meaning that each of those five persons was to receive an equal share. The fact that the letters 'a' and 'b' had been used to distinguish between those of the five who were cousins and Ruby did not, as a matter of impression, suggest to them that the words "in equal shares" required the 25% share to be divided into only two equal parts, one to be shared between the four cousins and the other to go to Ruby.

The form of clause 6

13. Their Lordships' first impression was strongly supported, and perhaps in part created, by the form of clause 6 when taken as a whole. The section divides the estate into five shares, each being 5% or a multiple of 5%. Clause 6(ii) provides for a share of 25% to be shared between 5 persons. This of itself suggests that each of them is to take a share of 5%. Had the testator wished Ruby to take a share so much greater than that of each of the four cousins, the obvious way of achieving this would have been to bequeath her share to her by a separate sub-clause.

14. If one poses the question of asking why Ruby was placed in the same group as the four cousins, the obvious answer would seem to be that the testator wished all five in that group to be treated in the same way. The only other possible explanation is that the testator was concerned that the disposition of the whole of the 25% share should remain within the group in the event that one or more of the named beneficiaries should predecease him without issue. For reasons given below that explanation is extremely unlikely.

15. Contrary to the view of the Court of Appeal, their Lordships do not attach significance to the words "and/or" where these are used in clause 6(ii). They do no more than give the phrase in which they appear the following meaning: "if Arlette and/or Pamela and/or Winston and/or Jean Claude and/or Ruby shall predecease me…"

Consistency

16. Their Lordships consider that if clause 6(ii) is construed so that each of the five named beneficiaries receives an equal 5% share, consistency is achieved throughout the whole of that sub-clause. To explain this conclusion it is necessary to resolve an issue between counsel as to the meaning of the last, rather lengthy, sentence of clause 6(ii):

> "If the deceased individual shall leave no issue surviving him or her the share of that deceased individual shall be paid, transferred or applied to the surviving beneficiaries named in this sub-clause 6(ii) in equal shares and, if there shall be more than one such surviving beneficiary, then among all such surviving beneficiaries in equal shares per stirpes."

17. Mr Holbech submitted that the effect of this provision was clear. If one or more of the five named beneficiaries predeceased the testator without issue, the share of that beneficiary/those beneficiaries fell to be shared equally among the remainder. The words 'per stirpes' had been

inappropriately added.

18. Mr Bompas submitted that an effective meaning could and should be given to the words 'per stirpes'. This was as follows. If one or more of the cousins died without issue that person or persons' share was to be divided into two equal parts, one part to be shared between the surviving cousins and the other part to go to Ruby.

19. Their Lordships have no hesitation in preferring the submission of Mr Holbech. In the first place, Mr Bompas' submission does not accommodate the possibility that Ruby might be the person to predecease the testator. In the second place, and more significantly, Mr Bompas' submission is at odds with what appears to be the obvious and natural meaning of the words used, ignoring the superfluous 'per stirpes'.

20. Their Lordships consider that the latter parts of clause 6(ii) are likely to have been inserted by the draftsman of the will because it is normal to include such provisions rather than because the testator had particular concerns about the contingencies that they addressed. The will was made less than a year before the testator died aged 73. It is remarkable that the will makes provision for the contingency that Ruby might predecease the testator without issue, but makes no similar provision in the case of her son Robert, who was bequeathed a 50% share of the estate. Yet Ruby could not die without issue unless Robert had already done the same. All of this gives the lie to any suggestion that the reason for grouping the four cousins and Ruby together was concern as to how their shares should be distributed should one or more pre-decease the testator without issue.

21. For these reasons and for the further reasons given by Lord Hope of Craighead, their Lordships will humbly advise Her Majesty that this appeal should be allowed and that clause 6(ii) of the will should be construed so as to demise to each of Arlette Weitzer, Pamela Gleeson, Winston Sammut, Jean Claude Sammut and Ruby Adams an equal share, being 5%, of the testator's estate. Third and fourth respondents to pay the appellants' costs before the Board and the Court of Appeal

CONCURRING OPINION BY LORD HOPE OF CRAIGHEAD

22. I agree that clause 6(ii) of the will should be construed so as to demise to each of the five persons named in that clause an equal share of the portion of the testator's estate that it refers to. But I wish to set out my own reasons to explain why I have reached that opinion as it seemed to me that the way the case was argued has raised some points of general interest and importance.

23. In my opinion the testator's intention that this portion of his estate should be divided between these five named persons equally is indicated, first, by the fact that the words "in equal shares" appear after the two sub-paragraphs in which those who are to participate in it are identified and, second, by the fact that the gift over to surviving beneficiaries which appears at the end of clause 6(ii) is to the survivors of those named in that sub-clause equally.

24. As to the first point, the effect of placing the words "in equal shares" after all the beneficiaries have been identified by name can be demonstrated by reducing this part of the will to the following formula: "to (a, b, c and d plus e) equally". In other words, the phrase "in equal shares" qualifies the whole of this part of the bequest. Ruby is to take the same equal share of this portion of the estate as each of the cousins who have been named in the first sub-paragraph. As to the second, the gift over in the event of one of the beneficiaries predeceasing the testator without leaving issue is to "the surviving beneficiaries named in this sub-clause 6(ii)". The four cousins and Ruby are included together in this clause, which makes no distinction between them. All the survivors are to share equally in the share that would have been taken by the deceased individual. It is, of course, just possible that the testator intended a different scheme of division to be adopted in the event contemplated. But the more natural interpretation of the words used is that he was following the same basic scheme as that set out in the opening part of the clause. On that view, the gift over supports the clear indication given at the outset by the introduction of the words "in equal shares" into the bequest after all the named beneficiaries have been identified.

25. More troublesome is a misunderstanding of the phrase per stirpes which appears in the judgments below, was repeated in the course of the argument before the Board and may account for the fact that the phrase has been misused at the end of clause 3(ii). The Latin word stirps can be translated as meaning "stock", as Williams on Will, 9th ed (2008), para 87.1 explains. But this is not an expression that is likely to occur to a testator today when he is telling his lawyer how he wishes his estate to be distributed. It is more helpful to use the alternative meaning that Williams on Wills, 9th ed, 87.1 gives to it, which is "family." In modern usage the phrase as a whole can be taken to mean "by family."

26. But that meaning still begs the question how the gift is to be distributed among the members of the family. Mr Bompas QC submitted that a gift per stirpes requires the bequest to be distributed among all the living members of each family, so that children share in it as well as their parent if he or she is still alive. That is a misconception. As Williams on

Wills, para 87.3 points out, a characteristic of distribution per stirpes is that remote descendants do not take in competition with a living immediate ancestor of their own who takes under the gift: see also Halsbury's Laws of England, (4th ed, Reissue 2005), vol 50, Wills, para 682.

27. There is ample authority for this proposition. In *Gibson v Fisher* (1867) LR 5 Eq 51, it was common ground that this was how the phrase was to be interpreted. Sir Roundell Palmer QC is recorded at p 54 as submitting that you must look to the heads of each line and take the head in preference to the descendants. Mr Baggallay QC is recorded at p 55 as saying that he supported the contention that the children of a living parent cannot take concurrently with the parent. A direction to this effect was included in the court's declaration at p 59. In *Ralph v Carrick* (1879) 11 Ch D 873, 884 James LJ said that the effect of a direction that the descendants were to take their parent's share was that they took per stirpes and not per capita, "so that the children do not take concurrently with their parents". In *Re Rawlinson, Hill v Withall* [1909] 2 Ch 36, 38 Joyce J said:

> "Where property is bequeathed simply to the issue or to the descendants in equal shares per stirpes it is quite settled, as is mentioned by James LJ in *Ralph v Carrick*, where, it being held that the effect of the will was to give the residue to descendants per stirpes and not per capita, his Lordships adds, 'so that children do not take concurrently with their parents.'"

28. This characteristic of the phrase was well described by Professor Candlish Henderson in his book on Vesting, 2nd ed, p 221, where he explained that, where the division among issue was per stirpes, the provision in favour of issue was to be construed as meaning that the issue should be substituted for their parent in the event of his predeceasing and should take the share which would have been his had he survived. That is a Scots textbook, but in my opinion the law of Scotland is the same on this point as the law of England. The effect of the phrase can be demonstrated by a simple example. The testator has two children, both of whom also have two children. One of his children predeceases, survived by his two children. A distribution of the residue per stirpes will give an equal share to each family. The surviving child will take the whole of his family's share. The children of the predeceasing child will take that family's share equally between them.

29. In the Supreme Court Hall CJ said in para 13 of his judgment that

he was of the view that the distribution was between the cousins as one class distinct from Ruby, and that this was a distribution per stirpes. The Court of Appeal expressed the same opinion when they said in para 18 of their judgment that the evidence tilted the scale in favour of a per stirpes distribution as opposed to a per capita distribution. I do not think, with respect, that this was an apt use of the phrase per stirpes in this context. Correctly used, the phrase enables a gift to a person who predeceases the testator to be distributed among the person's descendants, if any, so that it is kept within that person's family. Where the gift is to a number of persons all of whom are named, the addition of the words per stirpes tells one nothing about how the gift is to be divided between those individuals if they all survive. The general rule is that the gift will be divided between them equally. The addition of the words per stirpes may be taken to indicate that there is to be a gift over to their heirs or their issue if one or more of them predecease the testator. But this will usually be done by adding an express direction to this effect, as was done in this case.

30. It follows that I would not attach any significance to the fact that the words per stirpes were not added after the words "in equal shares". In my opinion it would have been pointless to add those words to this part of the bequest, as it was dealing with named individuals and was leaving over until later what was to happen if any of them predeceased the testator. The phrase is correctly used elsewhere in clause 6(ii), where it qualifies a gift over to heirs or to issue. This makes it clear that the gift over is to each family equally, the issue of each parent who predeceases taking the share which the parent would have taken had he survived. The use of the expression at the end of clause 6(ii) is puzzling, as the distribution that this final gift over contemplates is to the surviving beneficiaries "named in this sub-clause (ii) in equal shares." It adds nothing, as this is a gift to named individuals in equal shares and then only if they survive the testator. The effect, if any, of its inclusion is however, in the events that have happened, immaterial.

31. The Chief Justice's description of the gift in clause 6(ii)(a) as a gift between the cousins as one class as distinct from Ruby does, I think, accurately direct attention to where the true issue in this case lies. But a class gift, properly so called, is one where the beneficiaries are called not by name but by a general description such as a term of relationship: see *Kingsbury v Walter* [1901] AC 187, 192 per Lord Davey. The fact that some of the individuals are named does not deprive the gift of its characteristic as a class gift. The question is, as Lord Macnaghten indicated at p 191, whether this is a gift to the body as a whole. That would have the result that, if one of its members dies during the testator's lifetime, the survivors within the class will take the gift between them to

the exclusion of everyone else.

32. Had it not been for the addition of the words "in equal shares" after all the beneficiaries had been named, including Ruby, there would have been something to be said for treating the gift in clause 6(ii)(a) as a gift to the cousins as a class, indicating that the intention was to benefit that body as a whole and not its constituent members individually. That would have resulted in the cousins as a class taking one equal share and Ruby taking the other. However the fact that all the individuals are named here tends to suggest that the gift was to them as individuals and not to them as members of a class. And in my opinion its interpretation as a class gift is defeated conclusively by the addition of the words "in equal shares" after the beneficiaries have all been named and by the re-appearance in the final gift over of an intention that, if one of the named beneficiaries predeceased the testator without issue, the surviving beneficiaries named in clause 6(ii) were to share equally in the deceased's share of this portion of the estate. The fact that Ruby, if she survived, was to share equally with the cousins under this gift confirms that the primary gift was to each of the persons named in clause 6(ii) as individuals.